No. 19-224

In the Supreme Court of the United States

BRYAN JAMES STROTHER, SFC.,
California Army National Guard,

Petitioner,

v.

DAVID S. BALDWIN, Adjutant General,
State of California Army National Guard;
MIKE MCCORD, Pentagon Comptroller;
DEFENSE FINANCE AND ACCOUNTING SERVICES;
United States Department of Defense,

Respondents.

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

REPLY BRIEF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Bell 366 U.S. 393 *and Larionoff,* 431 U.S. 864 did not create a doctrine that accrued vested bonus monies are included within the meaning of future or regular pay.

II.

The *Feres doctrine* has usurped the Plain Language of the Federal Torts Claim Act and should be overturned.

III.

F.R.C.P 9 states malice, intent, knowledge, and other conditions of a person's mind can pled generally. They do not have to be pled with the same particularity as the circumstances which constitute fraud.

V.

Respondents were given fair notice of Petitioner's 42 U.S.C. §1983 14th Amendment "Property Interest" Claim.

IV.

This case is capable of repetition and evading judicial review if the lower court Opinions are allowed to stand.

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Note:
EFC-DktEntry references the 9th Circuit Docket:
No. 18-15244.

Respondents have book-ended their Response with two statements to which Petitioner takes profound exception:

1. Enlistment bonuses were improperly paid to soldiers. (Res. I).

And

2. [W]hether petitioner has stated a claim is of little practical importance to him or any other servicemember. (Res. 17)

Bonuses Were Accrued Property Not Improper Payments

Respondents claim the bonus monies in question were controlled by statutory language yet not once at any level of litigation have they cited or put forth knowledge of any statute to indicate exactly where the bonus monies came from.

Yet in spite of the above when signing their enlistment contracts affected soldiers, who in good-faith acted and relied upon the advice and counsel of their superiors, were held to a higher level of knowledge than their superiors[1] as Respondents noted waivers of recoupment were only given (Res. 3):

> unless the agency "makes an affirmative determination, by a preponderance of the evidence, that the member knew or

[1] 2005-2011 Adjutant General illegally took $155,000 in CAARNG funds. Only ordered to pay back $80,000. Held to a three year statute of limitations for recoupment. Ordinary soldiers held to a ten year SOL. Pet. 37, EFC-DktEntry: 18-2, 192.

reasonably should have known[2] that the member was ineligible.

Regardless of the presence or absence of statutory language signing an enlistment contract is the act of a civilian just as it is when a civilian first voluntarily joins a U.S. service branch, *Jackson v. Tate,* 648 F.3d 729, 735 (9th Cir. 2011).

The bonus monies in question vested at the decision point and were "earned upon commitment"[3] *Costello v. U.S.*, 587 F.2d 424, 427 (9th Cir. 1978). An enlistee's "change in status" *Bell v. U.S.*, 366 U.S. 393, 401 (1961) does not affect that which was earned as a civilian and which enticed enlistment in the first place. In fact if a contract was honorably fulfilled there never was a valid debt.

In essence Respondents are implying the court's decisions in *Bell* and *U.S. v. Larionoff*, 431 U.S. 864 (1977) created a *Bell-Larionoff doctrine,* that the meaning of future pay and regular pay extends to vested pay, pay that has already accrued. Such an extension does not exist. This assumption would stand on its head 150 plus years of Constitutional law (Pet. 17-20, (punishment may include the forfeiture of future, but not of accrued, pay, *Bell* at 401).

Bonus monies are vested entitlements not

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[2] Ironic use of key words. *Harlow v. Fitzgerald,* 457 U.S. 800, 808-13 (1982).

[3] After each solider took the oath of enlistment to "support and defend" the most important contract in the history of the United States: The U.S. Constitution.

statutory gratuities.[4] Recoupment is ongoing on many levels (Pet.36) this issue deserves to be resolved by this Court.

Petitioner's Claims Are of National Importance

In August 2017 part of Petitioner's claim was resolved (he did not get his full guarantee of student loan repayment, S.L.R.P.) The decision occurred out of the blue months after Petitioner first filed his case in the district court and was based upon the fact Petitioner had always acted in good faith (EFC-DktEntry: 18-3,105).

The refund (Res. 2) was simply a clear attempt to claim the matter was moot which Respondents asserted within a few weeks in a F.R.C.P. 12 motion to dismiss (EFC- DktEntry: 18-4, 73).

Shortly before Respondents filed their Rule 12 Motion Petitioner was approached about a stipulated dismissal with prejudice but declined and instead filed a Response (EFC-DktEntry: 18-3, 50). Petitioner did not want to abandon fellow service-members who still had the real threat[5] of recoupment hanging over them. "[O]ne does not have to await the consummation of

[4] *Grulke v. U.S.*, 228 Ct.Cl. 720, 721-722 (1981); *DeCrane v. U.S.*, 231 Ct. Cl. 951 (1982): enlistment contract enforceable . . . distinguish[ed] . . . rather than seeking pay afforded by statute but withheld, Grulke was actually claiming a right "for 'actual, compensatory, special and punitive damage,'for breach of contract."

[5] Respondent Baldwin:
"I have the authority to put people in jail"
California Guard Likely Faces a Battle to Recover Incentive Funds
https://www.sacbee.com/news/investigations/article2573395.html

threatened injury to obtain preventive relief " *Farmer v. Brennan* 511 U.S. 825, 827 (1994) and from the beginning Petitioner has sought declaratory relief, that he and other affected service-members could protect those who follow them; that "no one gets left behind" (EFC-DktEntry 18-2, 27), that this never happens again.

To support his Response Petitioner reached out to affected soldiers to see if any would submit affidavits detailing their recoupment hardships. One supporting affidavit (Robert Richmond's, Pet. 44a) found its way to the Los Angeles Times[6], leading to a weekend article which caused a national uproar.

Congress
Had Prior Knowledge Years Earlier

From both sides of the aisle U.S. Congress members went out of their way to voice their outrage over the recoupment on tv, radio, print, and the internet, although many had knowledge about this matter years before. Before the outcry, SFC. Robert Richmond personally wrote influential U.S. Senators John McCain and Diane Feinstien, (Petitioner's letters to Congressman EFC-DktEntry, 18-2, 65). On June 21, 2016, (four months after Petitioner filed this case) Senator McCain wrote to Richmond (EFC-DktEntry 18-2, 73).

> "Dear Robert: In response to my latest inquiry on your behalf, enclosed you will find the letter that I have received from

[6] http://www.latimes.com/nation/la-na-national-guard-bonus-20161020html.

> Defense Finance and Accounting Service. After reading the letter over, I think that you will find it to be self-explanatory. Should you have any further question regarding this situation, please do not hesitate to contact my office."

The self-explanatory letter told Robert Richmond he had to suffer recoupment.

Senator Feinstein twice wrote to Robert Richmond. The first letter on December 28, 2015 was rather generic, "I appreciate your bringing this to my attention," the second letter dated July 15, 2016, held in part (EFC-DktEntry 18-2, 78):

> "The California Army National Guard has already responded to your request and issued a decision on your case. My office cannot overturn the agency's decision or assist you with any appeal you might pursue. If you have further questions you may wish to contact the agency directly or seek legal advice from a knowledgeable attorney. With warmest personal regards."[7]

Three months later U.S. California Senators Diane Feinstein and Barbra Boxer released the following statement:

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[7] CAARNG informed Strother and Richmond they could speak to an attorney or chaplain. EFC-DktEntry: 18-2, 191, 200. Everyone recouped got this letter, the chaplain info is not a throwaway comment it is offered for only one reason (mental health), suicide. CAARNG knew recoupment could push people over the edge.

> "We were dismayed to learn . . . This is unfair and appalling and we request that you halt the collection of these bonuses immediately. . . It is outrageous to hold these service members and their families responsible for the illegal behavior of others." (EFC-DktEntry 18-2, 7, ER 99). October 24, 2016 letter to Sec. of Defense Ash Carter.

Senator Boxer was quoted[8] on the subject in 2010. Congress did not act earlier because a remedy was deemed too costly.[9]

As the Modesto Bee Editorial Board, noted:

> As much as many legislators want to treat this issue like a complete surprise that was resolved with stunningly quick reaction, it wasn't. . . . . it wasn't until late October – the stretch drive of the election campaign and after national headlines about soldiers and veterans being forced to give back the money – that lawmakers finally jumped on the issue...

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[8] http://www.military.com/daily-news/2016/10/25/congress-knew-2-years-efforts-take-back-veteran-bonuses.html 2. http://abcnews.go.com/Politics/california-national-guard-approached-congress-2014-bonuses/story?id=43046631
"These allegations are shocking and I support a swift and thorough investigation by federal officials." Boxer in 2010. http://www.sacbee.com/news/investigations/article2573113.html

[9] http://www.modbee.com/opinion/editorials/article118514643.html

> Elections tend to focus politicians' minds, apparently. 12/2/2016[10]

While Congress was concerned with self preservation Petitioner and other service-members are concerned about those who will follow them, the preservation of the mental health of fellow soldiers from stress that recoupment can and does have on the minds of U.S. Armed Forces personnel and the unfortunate realization that military suicides are at an all-time high (citations omitted, Pet. 38, n. 27).

Respondents chose to end their brief saying:

> "whether petitioner has stated a claim is of little practical importance to him or any other servicemember." Res. 17.[11]

No matter how small the relief Petitioner asserts U.S. service-members are entitled and owed "any effective relief" that can be asserted *West v. Sec'y of Dept. of Transp.,* 206 F.3d 920, 925 (9th Cir. 2000).

Petitioner asserts this matter is of great practical importance to all service-members (emphasis).

Feres Doctrine Review Is Properly Before the Court

Respondents assert that because the 9th Circuit did not mention *Feres v. U.S.* 340 U.S. 135 (1950) in its

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[10] http://www.modbee.com/opinion/editorials/article118514643.html

[11] Over 16,000 affected CAARNG troops deployed to Iraq or Afghanistan, returned home to face recoupment or the threat of recoupment.

decision that this Court cannot take up the *Feres doctrine* "incident to service"exception (Res. 9). Yet in the District Court the *doctrine* was at the heart of Respondent's Motion to dismiss. Furthermore Respondent's own question presented seeks to uphold the district court's opinion. The *Feres doctrine* defense is the U.S. Military's natural fall back go-to position in any service-member action sounding in tort. Any suggestion otherwise cannot be made in good faith. To assert *Feres doctrine* protection and withdraw the defense if it appears it could fail is simply a tactic to shield the *doctrine* saving it to fight another day while evading judicial review.

Petitioner has never wavered on his presentment of the need to overturn the *Feres doctrine* and it has been squarely and prominently presented at every level of review. The fact that the 9th Circuit failed to address the *doctrine* does not undercut its presentment before this Court, it simply adds to the many layers of doubt surrounding this unfortunate, unsettled *doctrine* which has far too long usurped the Plain Language of the Federal Torts Claim Act (F.T.C.A. 28 U.S.C. §2680,1a, see Pet 22-23,) leading to a host of absurd results *U.S. v. Missouri Pac. R.R.,* 278 U.S. 269, 278 (1929). At a bare minimum, it should be reconsidered" (J.Thomas, dissent denial of Petition Writ of Certiorari, *Lanus v. U.S.,* (2013) (EFC-DktEntry:18-3, 20).

The act of enlistment is the act of a civilian as was noted in *Jackson v. Tate,* 648 F.3d 729 (9th Cir. 2011). In *Costello v. U.S.*, 587 F.2d 424, 427 (9th Cir. en banc *1978)* it was noted that the contracts in *U.S. v. Larionoff,* 431 U.S. 864 (1977) were "earned upon commitment at the decision point" vested and accrued. If the 9th Circuit Opinion in this matter had been

published it would have conflicted[12] with both cases. Only a 9th Circuit en banc panel or this Court could overturn or alter those decisions. The 9th Circuit passed on this issue yet it is properly before this Court which as final arbitrator (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) Article VI, Sec 2.) is clearly the only appropriate authority to bring clarity, finality and/or overturn the *Feres doctrine*.

Any FTCA analysis brings into play the *Feres doctrine* they cannot be separated except by this Court yet Respondents contend that the *Feres doctrine* is not applicable while asserting the FTCA is applicable, both issues are continually woven throughout their Response. Clearly much confusion and conflict surrounds the *Feres doctrine* and regardless if this Court agrees that Petitioner's fraud claims (infra) are viable or not a *Feres doctrine* analysis is still within this Court's perview.

For all of the above reasoning and that within Petitioner's Petition reconsideration of the *Feres doctrine* is necessary.

Fraud

Respondents cite the 9th Circuit Opinion to assert "petitioner conceded at oral argument that he did not plead his claims with particularity with regard to Defendants Baldwin and McCord and petitioner does not explain why that concession should be set aside" Res.11. Petitioner's Petition directly addresses the above statement in the very first sentence in regard to the subject (Pet.25)

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[12] Respondents asserted "Petitioner identifies no decision of this Court or any other court of appeals that conflicts with the decision below." (Res. 12).

As Petitioner explained (Pet.25) litigants and Courts are not reading and following the Plain Language of the second sentence of F.R.C.P. 9(b)[13] which holds: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." As this Court has noted:

> Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that '[absent] a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.' *Escondido v. La Jolla*, 466 U.S. 765, 772 (1984).

Petitioner stands by his fraud argument in his Petition (Pet.25)[14]. Petitioner asserts he was only required to plead with particularity the circumstances constituting fraud to meet the pleading requirements and this was done (Pet.25-30). *Cafasso v. General Dynamics,* 637 F.3d 1047, 1054-1055 (9th Cir. 2011).

Furthermore Respondents themselves satisfied the pleading requirements of F.R.C.P. 9(b) by admitting mass fraud (Pet.15,30).

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[13] Add.1. Pet. 27 n 17.

[14] The Fraud claims are ancillary /pendent to the § 1983 due process and contract claims. Furthermore though not required to do so Petitioner did exhaust his Administrative remedies 28 U.S.C. § 1346 in regard to Fraud. Admin. Appeal Response, EFC-DktEntry: 18-4, 152, 159 -60. Petitioner asserted fraud, bait and switch by CAARNG.

Immunity Baldwin[15]

The United States can be substituted as the sole party defendant in common-law tort claims, pursuant to the Westfall Act, 28 U.S.C. § 2679(d), which requires such a substitution if certified that the named defendants were acting within the scope of their office and employment of the United States.

Westfall certification by the Attorney General, or a U.S. Attorney designee is prima facie evidence that the employee was acting within the scope of employment and is conclusive unless challenged. *Billings v. U. S.*, 57 F.3d 797, 800 (9th Cir.1995); *RMI Titanium v. Westinghouse*, 78 F.3d 1125, 1143 (6th Cir. 1996). The challenging party must disprove the certification by a preponderance of the evidence. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

Only Petitioner briefed immunity in an individual capacity before the 9th Circuit (EFC-DktEntry 30, 38). Respondents never sought Westfall certification ,and their attempt to claim Federal actor status for Respondent Baldwin was waived long ago (EFC-DktEntry 24. (hence no Addendum).

State Actor

Respondent Baldwin was appointed Adjutant General of the CAARNG by the Governor of California after his predecessor was removed by the Governor of California. Petitioner does not assert a challenge to battlefield or drill tactics, or deployment decisions.

"Although the National Guard has both state and

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[15] If Certiorari is granted Petitioner would be prepared to fully brief. Qualified immunity.

federal characteristics, see *Perpich v. United States Department of Defense,* 880 F.2d 11 (8th Cir.1989) (en banc), action by the National Guard of a particular state is considered state action within the meaning of the Fourteenth Amendment, and therefore suits alleging constitutional violations by the Guard and its personnel are brought under § 1983, rather than *Bivens." Watson v. Ark. Nat'l Guard*, 886 F.2d 1004, 1007 (8th Cir. 1989).

The genesis of all of the fraudulent actions that are alleged can be traced directly to "Operation Overdrive" (Pet. 3) which originated from the office of the Adjutant General of the CAARNG. It is the office being sued *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989).

Additionally Qualified immunity is not a given right."*Ashcroft v. al-Kidd*, 563 U.S. 740, 741 (2011) "fairly attributable" to the government. *Rendell-Baker v. Kohn,* 457 U.S. 830, 838,(1982). *Pearson v. Callahan,* 555 U.S. 223 (2009)

All Respondents are subject to claims seeking declaratory relief *Ex Parte Young*, 209 U.S. 123, 124 (1908) in this case the right to full accord and satisfaction to obtain and retain vested entitlement monies, ending unlawful recoupment tactics and overturning the *Feres doctrine*.

42 U.S.C. § 1983 and Due Process

Respondents to no avail sought exclusion of several supplemental attachments EFC-DktEntry: 18-4, 171-72. The Court must also consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor*, 551 U.S. 308, 322, (2007).

Respondents have had clear notice and

understanding of this issue from the very beginning of this matter as has any other party involved.

The §1983 Failure to Train DFAS Count was brought because of a breach in contract which resulted in the recoupment of vested entitlements "earned upon commitment" at the decision point and amounted to the taking of a property right. The District Court clearly understood Petitioner's position on the issue:

> "plaintiff did argue" he and his fellow CAARNG members have been deprived of a "property interest" without due process in violation of the Fourteenth Amendment." . . . Plaintiff's view, the "property interest" in question is a contractual right to receive "bonus monies" per the terms of their respective enlistment agreements. (Pet. 29a).

This remains a viable claim even if only nominal damages may be awarded (punitive damages are available to compensate for a Constitutional violation. *Smith v. Wade,* 461 U.S. 30 (1983)).

The availability of administrative mechanisms is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. *Rosado v. Wyman,* 397 U.S. 420 (1970) such an "alleged state remedy is nothing but a procedural morass offering no substantial hope of relief" and not required. J.Rutledge concurring in *Marino v. Ragen,* 332 U.S. 561,564 (1947).

CONCLUSION
REQUEST FOR RELIEF

History has shown this matter is capable of repetition yet evading judicial review. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of The Earth v. Laidlaw Envtl. Servs,* 528 U.S. 167, 189 (2000).

An actual case and controversy exists. Certiorari should be granted.

Dated: December 6, 2019
Respectfully submitted,

s/Daniel C. Willman
Daniel C. Willman
Attorney for Petitioner

APPENDIX

F.R.C.P. 9(b) Pleading Special Matters:
(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

28 U.S.C. § 2680
The provisions of this chapter and section 1346(b) of this title shall not apply to:
(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