No. _____

In The

Supreme Court of the United States

JOSHUA E. FRANKEL,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fourth Circuit erred in applying an unduly restrictive "situs and status test" for the determination of whether the acts at issue were "incident to service" which test is far beyond the established policy reasons underlying the so called *Feres* doctrine.

Whether there is a conflict between District Courts and Courts of Appeal in the United States regarding the application of the "incident to service" test which requires guidance from this Court to not only avoid inconsistent results but ultimately to prevent a significant departure from Congress' original intent in enacting 28 U.S.C. §2674 and its waiver of sovereign immunity implicating a concern for separation of powers.

Whether the Fourth Circuit, in affirming the District Court's dismissal of the Plaintiff's uninsured motorist claim based upon *Feres* immunity, misapplied Section 38.2-2206 of the Code of Virginia, as made and provided, which would have allowed a judgment against an "Immune Defendant."

PARTIES TO THE PROCEEDING

Petitioner Joshua E. Frankel, was Plaintiff-Appellant below and was active duty with the United States Navy at the time of the accident.

Respondent is the United States of America, which was Defendant-Appellee below.

Additional party to this litigation is Government Employees Insurance Company, as Intervenor, which issued a first party contract of insurance to Petitioner which contained an uninsured motorist provision.

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STATUTES AND RULES

Joshua Frankel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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The April 14, 2020 opinion of the U.S. Court of Appeals for the Fourth Circuit is unpublished (Pet. App. 1). The order of the United State District Court for the Eastern District of Virginia dismissing Petitioner's case, dated January 8, 2019 (Pet. App. A18) is unreported.

JURISDICTION

The Court has jurisdiction because Petitioner seeks review of a final order of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254 and Rules 12 and 13 of the *Rules of the Supreme Court of the United States* and the petition is timely filed within 90 days of the April 14, 2020 Circuit Court decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S. Code § 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.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter [28 USCS §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter [28 USCS §§ 2671 et seq.].

28 U.S. Code § 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]

(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 provision, 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.

Code of Virginia § 38.2-2206

A. Except as provided in subsection J, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as

damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section:

"Bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H, means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the

policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer. A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or

endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense available to the insurer to the action brought by the insured, which shall proceed against the named defendant although any judgment obtained against an immune defendant shall be entered in the name of "Immune Defendant" and shall be enforceable against the insurer and any other nonimmune defendant as though it were entered in the actual name of the named immune defendant. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

STATEMENT OF THE CASE

1. Facts

On March 31, 2015, Petitioner was injured as he was walking on a crosswalk within Naval Station Norfolk, a military base in Norfolk, Virginia. At that time and place, he was struck by a vehicle negligently operated by Javen Evonne Davis. Both Frankel and Davis were on active duty at the time. Davis was operating her personal vehicle on an errand to obtain a dessert for a planned event at her command, the U.S.S. Nitze (DDG-94). Ms. Davis had full discretion as to the route she was going to take, where and when she would purchase it, and she was going to utilize her own money but would later on be reimbursed. She was not on duty. Petitioner was walking to the gym on the base and had not yet assumed his duties for the day but was going to engage in physical exercise. He was not in uniform. As a consequence of the collision between Davis' automobile and Frankel, she was charged with reckless driving by civilian base police. She appeared in United States Magistrate's Court and was found guilty of reckless driving. It is important to note that this was a civilian court which handles all of the traffic offenses which occur on Naval Base Norfolk and the military did not discipline Ms. Davis, as is routine in military matters, and did not conduct an internal JAGMAN investigation and simply deferred to civilian authority. The decision to purchase cake for a

birthday party is not being questioned. The record does not support, other than the purchasing of cake for a birthday party on the ship, ANY military nexus to this purely personal injury tort. The record is devoid of any suggestion that military orders were questioned or implicated, or that the orderly functions of the United States Navy would be impaired or impeded by the happening of the event.

What is particularly compelling about the instant case is that its factual content defeats the most consistent rationales for the application of the so-called *Feres* doctrine. Petitioner Frankel, who sustained injuries in the case which did not prevent him from continuing on active duty, maintained a first party policy of insurance which had an uninsured motorist endorsement consistent with the application of Virginia law. An unfortunate consequence of the application of *Feres* immunity to the United States was his inability to recover under his own first party contract because, also pursuant to Virginia law, "judgment" could not be obtained against the United States in its own name even though pursuant to the Virginia statute at issue, the entity "immune" defendant could be substituted for the United States or the immune driver Davis. The Courts below have held that Frankel can obtain no remedy for serious injuries either from the United States or his own insurance carrier. The *Feres* bar had the effect in this case of cancelling a

critical provision of a private first party contract of insurance which had absolutely no nexus to military discipline or authority.

Factually, the happening of this accident is indistinct from an everyday automobile tort with the exception of the status of the participants and the location.

2. Procedural History

Petitioner was an active duty member of the Navy at the time of the filing of the initial complaint.

Plaintiff Joshua E. Frankel filed the original complaint in the United States District Court for the Eastern District of Virginia, Norfolk Division (the "District Court") on February 23, 2018.

Judge Mark S. Davis presided over the case. The District Court had subject matter jurisdiction over Count I of the Complaint pursuant to 28 U.S.C. § 1346(b)(1), as it is a claim against the United States for money damages for personal injuries caused by the negligent or wrongful act or omission of an employee of the United States. The District Court exercised supplemental jurisdiction over Count II of Plaintiff's Complaint, which seeks money damages from Plaintiff's Uninsured/Underinsured Motorist Insurance provider pursuant to Virginia Code § 38.2-2206 for personal injuries sustained arising

out of the same motor vehicle accident, pursuant 28 U.S.C. § 1367.

On May 4, 2018, the Defendant, the United States, filed a motion to dismiss the Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiff responded to Defendant's motion, and Defendant filed a reply.

The District Court's Final Order was entered on January 8, 2019, and the Plaintiff filed his Notice of Appeal to the Fourth Circuit Court of Appeals (the "Fourth Circuit") on January 28, 2019. The Plaintiff challenged the District Court's opinion on the grounds that the court erred in deciding the Plaintiff's claims on the Motion to Dismiss for Lack of Subject Matter Jurdisdiction because material facts relevant to the application of the *Feres* Doctrine were in dispute. Plaintiff also challenged the District Court's opinion on the grounds that it erred in granting the United States' Motion to Dismiss on the basis that the *Feres* doctrine barred the Plaintiff's claims. Plaintiff also challeged the District Court's opinion on the grounds that the District Court erred in holding that the Plaintiff could not maintain an action to recover under his uninsured/underinsured motorist coverage.

The Fourth Circuit affirmed the decision and findings by the District Court.

REASONS FOR GRANTING THE PETITION

1. **Review by this Court is necessary to fully and finally set forth a true "incident to service" test, so that it may reconcile actual conflicts in various courts of the United States that have resulted in years of inconsistent results as service members seek redress for those classifications of torts that do not implicate second guessing military discipline or judgment.**

    a. The extent to which the original policy reasons set forth by the *Feres* court have been broadened by disparate applications of the "incident to service test" by federal courts has created a significant separation of powers concern.

This Court both in *Feres v. United States*, 340 U.S. 135 (1950) and in *United States v. Shearer,* 473 U.S. 52, 58 (1985) stated that "*Feres* seems best explained by the military discipline rationale and further stated the core principle underlying the rationale for its holding in *Feres*,

> 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.

In fact, a critical limitation to the *Feres* court's holding that the Federal Tort Claims Act did not waive sovereign immunity from actions arising from the tortious conduct of U.S. military personnel causing injuries to other military personnel engaged in non-combat activities, was refined in *Shearer*, *supra*, there the Court stated unequivocally that the KEY inquiry in determining whether an injury was sustained "incident to service" is whether the suit requires the civilian court to second guess military decisions and whether the suit might impair essential military discipline. *Id*. at 57 (Emphasis ours).

In *United States v. Johnson*, 481 U.S. 681 (1987), this Court identified three principles underlying the *Feres* doctrine: 1) the "distinctively federal" nature of "the relationship between the Government and members of its armed forces," 2) the "generous statutory disability and death benefits" provided to military personnel and their families, and 3) the potential interference of "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 689-90 (citations omitted). This third factor is considered "the most persuasive justification for the *Feres* doctrine." *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (quoting *Dreier v. United States*, 106 F.3d 844, 849 (9th Cir. 1997), and stating that Ninth Circuit "cases have focused mainly on whether the serviceman's activities implicate that interest"); *see*

also Bon v. United States, 802 F.2d 1092, 1094 (9th Cir. 1986) ("[T]he determination of whether an activity is "incident to service" must focus on the potential impact of a civil action on military discipline.").

Most importantly, this Court in *Johnson* stated:

> This Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine.

Id. at 689-690

In struggling to divine what is truly "incident to service," district and appellate courts have engaged in various irreconcilable "tests" that clearly involve a separation of powers intrusion into the Congressional determination to waive sovereign immunity as plainly and clearly embodied in 28 U.S.C. §2674. In *Johnson*, *supra*, Justice Scalia observed in a lengthy dissent that the Federal Tort Claims Act ("FTCA") 28 U.S.C. §§1346(b), 2671-2680, renders the United States liable to *all* persons, including servicemen, without expressly precluding FTCA suits brought by servicemen. Indeed, in *Brooks v. United States*, 337 U.S. 49 (1949), suit was permitted by military personnel who had been injured in a collision with an Army truck while off duty. The Court expressly noted that Congress must have had servicemen in mind when it passed the FTCA but also noted that an attempt by a serviceman to recover for injuries suffered "incident to service" would present a different case. *Id*. at 52.

In an attempt to reconcile what Congress truly meant in harmonizing a waiver of sovereign immunity with its undeniable awareness of the circumstances under which a service member might seek relief, various policy rationales have been brought to bear including the inconsistencies that might result if local tort law governed the "distinctively federal relationship between the government and enlisted personnel" *Feres* at 142-144, the uniformity of federal benefits, *Feres* at 144, 145, and undue interference with military discipline, *United States v. Brown*, 348 U.S. 110, 112 (1954). In urging that *Feres* was "wrongly decided," Justice Scalia observed that Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U. S. C. § 2680(j); claims based upon performance of "discretionary" functions, § 2680(a); claims arising in foreign countries, § 2680(k); intentional torts, § 2680(h); and claims based upon the execution of a statute or regulation, § 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decision making was unlikely to be affected greatly.

In the wake of *Johnson, supra*, courts have pointed out that the guidance of this Court has been unclear as to how much weight should be accorded to each of the rationales which support the doctrine which has led to varied approaches by lower courts to determine whether injuries are "incident to service," often resulting in what as some see as nitpicking differences and incongruous results. *Dreier, supra*, at

852. For instance, the Fourth Circuit's rigid application of what is essentially a situs and status test, finding that a collision occurring on a military base with claimant on active duty militated in favor of a *Feres* application to bar suit. *Stewart v. United States*, 90 F.3d 102, 105 (4th. Cir. 1996), which was followed in the dismissal of Petitioner's claim, and is contrary to a more detailed test such as that in *Durant v. Neneman*, 884 F.2d 1350 (10th Cir. 1989) wherein the court held that despite the situs of the accident and the status of the members, in a case where the defendant, while in uniform and driving his personal vehicle, collided with the plaintiff as they were engaged with a military physical readiness exercise, suit could proceed, noting that

> In the cases rejecting liability of military commanders or persons exercising purely military functions, the courts have generally expressed concern for preserving the harmonious relationships within the military establishment. For the same reason, courts have been reluctant to entertain civil rights actions involving military personnel. *Miller v. Newbauer*, 862 F.2d 771 (9th Cir. 1988); *Bois v. Marsh*, 255 U.S. App. D.C. 248, 801 F.2d 462 (D.C.Cir. 1986); *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135, 86 L. Ed. 2d 694, 105 S. Ct. 2675 (1985). Thus, our evolving jurisprudence has created a zone of protection for military actors, immunizing actions and decisions

> which involved military authority from scrutiny by civilian courts. It is our conclusion, however, that this zone was never intended to protect the personal acts of an individual when those acts in no way implicate the function or authority of the military. We can find nothing that would dictate a contrary conclusion.

See Durant at 1353.

Durant and courts applying a similar yet distinct test from that applied in the Fourth Circuit have simply stated that while civilian courts have a legitimate concern for protecting the harmony of the military establishment to prevent an erosion of discipline or an environment where orders of the executive/military are second guessed by the judiciary, these policy concerns should not be extended to claims that arise outside of the military function. Engaging in non-military acts even on military installations or in uniform should not provide an environment where individual service persons acting negligently should avoid responsibility for their actions in court of appropriate jurisdiction. In *Bartholomew v. Burger King Corp.,* 21 F. Supp. 3d 1089 (2014), the district court denied the United States' motion to dismiss, focusing on the fact that plaintiff was off duty, and the non-military nature of the consumption of food on base, coupled with the fact that allowing the case to proceed would hardly underestimate the "obedience, unity, commitment and esprit de corps" necessary within the U.S. military, the most

compelling *Feres* factors did not require dismissal of the suit. Numerous courts have called into question the serious departure from the original policy rationales of *Feres*. Courts have also recognized that "[t]he viability and applicability of the *Feres* doctrine's various rationales is in doubt." *Snow v. USMC*, 2011 U.S. Dist. LEXIS 45380, 2011 WL 1599231, at *4 (E.D. Tex. 2011)(citing *Taber v. Maine*, 67 F.3d 1029, 1038-44 (2d Cir. 1995); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Costo v. United States*, 248 F.3d 863, 875 (9th Cir. 2001)("The articulated 'rational basis' for the *Feres* doctrine led in this case, as in many cases, to inconsistent results that have no relation to the original purpose of *Feres*."). Dismissing an action brought by the widow of a serviceman who was killed in a botched appendectomy at a military hospital, one district court characterized the doctrine as "unfair and irrational," and observed that the plaintiff was "limited to a fraction of the recovery she might have otherwise received." *Witt v. United States*, 2009 U.S. Dist. LEXIS 9451 at *6-7 (E.D. Cal. 2009).

Nothing about the automobile tort that was the subject of the action below has any military nexus but for the status of the actors and the fortuity that they were stationed in a naval base within the jurisdiction of the Fourth Circuit United States Court of Appeals as opposed to perhaps another judicial district that applies a test that is more in harmony with the objectives of *Feres*. The disparate results highlighted in the foregoing cases establish a lack of uniformity in the application of laws involving legal redress for service members injured

as the result of the acts of a fellow service member. This Court in *Johnson* noted that Congress, in enacting the FTCA, did not intend that state based tort law, which could vary widely, depending upon the random duty station of a service member, might create variations in recovery in tort for service members. In fact, the opposite result has obtained throughout the history of the application of *Feres* depending upon each court's sometimes inconsistent applications of their own "incident to service" test. A consequence of this is that service persons have been able to recover in one United States judicial district upon one set of facts, but would be unable to recover upon another set where again the situs of the duty station would be outside of their control. Further, Petitioner was on a crosswalk, walking to a gym, off duty, in civilian gym clothes, and the tortfeasor, though in the scope of employment, was herself off duty and engaged in an errand that would take place at an unspecified time, and for which she had complete discretion to not only use her personal vehicle, but where to go and when to do it. Nothing about Frankel's military service and nothing about the task that the tortfeasor who hit him was undergoing had any substantial connection to their military service. Importantly, the military had no interest in disciplining the tortfeasor or investigating the accident as part of its executive functions, it merely deferred to civilian authority and the treatment of the tortfeasor in federal magistrate's court was no different than any civilian who would receive a citation on the base. This establishes a complete lack of true military nexus despite the duty status of the parties to a routine automobile pedestrian tort.

The "military discipline" rationale is indeed the only remaining sensible basis upon which to bar a servicemember's claim arising out of the negligence of another servicemember. *See Johnson*, 749 F.2d at 1533 (quoting *Brown*, 348 U.S. at 112, 75 S. Ct. at 143) (stating that the "single most important and defensible, rationale for the *Feres* doctrine" is the potential adverse impact on military discipline and supervision if suits involving "negligent orders given or negligent acts committed in the course of military duty" were allowed.").

In *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987), the Eleventh Circuit upheld the application of *Brooks* over *Feres*. In *Pierce*, the plaintiff was an active-duty service member who received permission to leave the military base for an afternoon to take care of personal business. *Id.* at 350. While traveling on a public highway, his motorcycle collided with a vehicle driven by a naval recruiter. *Id.* at 351. The plaintiff was injured and filed suit under the FTCA. *Id.* In reversing the lower court's dismissal, the Eleventh Circuit held that *Feres* did not apply because the service member's activities were not "incident to service." *Id.* at 354. The Court reasoned as follows:

> the alleged negligence is not of the sort that would harm the disciplinary system if litigated. As the Supreme Court has indicated, "the negligence alleged in the operation of a vehicle . . . [would not] require Army Officers 'to testify in court as to each other's decisions and actions.'" *Shearer*, 105 S.

> Ct at 3044 (quoting *Stencel*, 431 U.S. at 673). The claims alleged would not involve "second-guessing military orders," *Stencel*, 431 U.S. at 673, as the evidence offered to establish the alleged negligence would not call into question the "management" of the military, *Shearer*, 473 U.S. 52, challenge "basic choices about the discipline, supervision, and control of the serviceman," *Shearer*, 105 S. Ct. at 3043, implicate any "professional military judgments," *Chappell*, 462 U.S. at 302, or cast doubt upon any "decision of command." *Shearer*, 105 S. Ct. at 3044. Thus, the litigation would not "upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function." *Johnson*, 749 F.2d at 1539.

Pierce, 813 F.2d at 354. Stripped of the purely military based underpinnings of the *Feres* doctrine, the logic employed by the Court in *Brooks* and *Pierce* is supported by the plain meaning of the FTCA, which renders the government liable for:

> … money damages…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). Nowhere in the FTCA does it state that a service member cannot recover under the statute.

2. The Fourth Circuit erred in affirming the District Court's dismissal of the Petitioner's Complaint, specifically that aspect of the Complaint that would have allowed recovery in accordance with his personal first party policy of insurance, which incorporated provisions mandated by Code of Virginia § 38.2-2206.

Even assuming arguendo that *Feres* was properly applied, this would simply allow for a proceeding against a defendant that was "uninsured" and for which Petitioner paid from his personal funds for a policy of insurance issued by a carrier which was unjustly enriched by reliance on a doctrine that has its roots in the preservation of the military discipline, not the cancellation of private contracts. The text of the relevant portion of 38.2-2206(F) of the Code of Virginia clearly sets forth a legislative intent that "immune defendants" would be substituted in the place of John Doe and recovery under a first party policy of insurance could nonetheless occur. A defendant known as "immune defendant" in place of the tortfeasor Davis would not

defeat sovereign immunity as such action would be against a nominal defendant.

In naming the tortfeasor as a nominal defendant, Frankel is not seeking to hold the tortfeasor or the United States *liable*. Indeed, Section 38.2-2206(F) *prevents* that from happening. It provides that the judgment "shall proceed against the named defendant *although any judgment obtained* against an immune defendant *shall be entered in the name of "Immune Defendant"* and shall be enforceable against the insurer and any other nonimmune defendant as though it were entered in the actual name of the named immune defendant. Va. Code Ann. § 38.2-2206(F). Thus, neither the United States nor Davis would ever be held *liable*, because the judgment would be entered in the name of Immune Defendant. This case would never proceed to judgment against the United States or Davis, but against an *unnamed person*. Therefore, the *Feres* doctrine would not be violated.

The District Court and the Fourth Circuit Court of Appeals based their decisions on the requirement under Section 38.2-2206(F) that the plaintiff obtain a judgment against the named defendant, which she can then seek to collect from her insurer. But any judgment obtained against an immune defendant shall be entered in the name of 'Immune Defendant.'" *Id.* The named defendant is *judgment-proof* under the statute. Neither the United States nor Davis would have been subjected to a judgment if the District Court had allowed the claim to go forward.

In dismissing Frankel's uninsured motorist claim, the District Court, affirmed by the Fourth Circuit, relied on its decisions in *Boggs-Wilkerson v. Anderson*, No. 2:10CV518, 2011 U.S. Dist. LEXIS 149994, (E.D. Va. Nov. 17, 2011), *adopted by* 2011 U.S. Dist. LEXIS 149798 (E.D. Va. Dec. 30, 2011). There, the plaintiff, an active duty service member, sued another active duty service member in state court for injuries arising out of an automobile accident near the Naval Station Norfolk in Norfolk, Virginia. The plaintiff did not name the United States as a party defendant in the state court suit. The plaintiff also sued both the tortfeasor and the United States in this district court pursuant to the FTCA. The United States removed the state court case to the District Court, the cases were consolidated, and plaintiff received leave to seek remand should the United States prevail on its argument that the claims against the United States were barred by the *Feres* doctrine. The United States moved to dismiss the FTCA claim, and the Court granted the motion on the basis that the United States was immune from suit. The plaintiff then moved for remand or, in the alternative, to have the Court retain jurisdiction and proceed to decide the state uninsured motorist claim. The District Court denied plaintiff's motion and dismissed his case.

The Magistrate in *Boggs-Wilkerson* interpreted Section 38.2-2206(F) to require that "the plaintiff must *obtain a judgment against the named defendant* which she can then seek to collect from her insurer." *Id.* at *6. Section 38.2-2206(F) contains no such language; it clearly provides that

the judgment in such cases is entered against an *unnamed party* referred to as "Immune Defendant." Although the case proceeds against the named defendant, he or she can never be held liable. As such, Section 38.2-2206(F), in essence, acts as an exception to the requirement that the plaintiff obtain a judgment against the uninsured defendant before seeking recovery from his UM insurance carrier. Once Frankel has established the legal liability of the "Immune Defendant," GEICO is contractually obligated to compensate him for his injuries. Thus, the Magistrate and the District Court's statements in their opinions in *Boggs-Wilkerson* that the dismissal against the United States in that case was necessary because Section 38.2-2206(F) "creates no exception to [the United States'] immunity from suit," are simply incorrect.

The lower courts' refusal to allow Frankel to pursue his uninsured motorist claim presents a classic illustration of the manifest injustice created by the *Feres* doctrine. The courts below stretched *Feres* beyond its breaking point and into the realm of the absurd. Even though neither the United States nor Davis would suffer any harm if Frankel were permitted to proceed, the lower courts compounded the injury of dismissal of Plaintiff's FTCA claim by blocking the only avenue of recovery he has left. That remaining avenue only existed because Frankel paid premiums for it to protect him in the event he was injured by an uninsured or immune defendant. The only beneficiary of the lower courts' decisions that Frankel cannot pursue a judgment pursuant to Section 38.2-2206(F) is GEICO. Because of that decision, GEICO will enjoy a windfall by escaping

any payment under the policy for which Frankel has dutifully paid his premiums.

The intent of the Virginia statute was clearly to provide a means for compensating innocent drivers who are injured by immune defendants – not simply those immune as a result of Virginia state law. By applying the *Feres* doctrine to block his recovery, the lower courts left Frankel with NO remedy under an insurance policy he purchased, and for which GEICO accepted premiums, to protect him in the event he was injured by an uninsured or immune driver.

CONCLUSION

The significant departures from the only sound basis for any limitation on the right of a service member to sue another service member pursuant to state tort law have created the very inconsistencies in applications of the law that *Feres* sought to avoid. Congress, in its waiver of sovereign immunity, set forth a significant number of exceptions to such waiver in the statutory framework quoted herein. Nowhere has Congress stated that in other circumstances, one military person cannot sue another. Courts have openly struggled with an "incident to service" test and have at times dismissed cases while openly criticizing the lack of guidance and the injustice created by that outcome. If *Feres* is itself not overruled in recognition of its collision with Congress' stated intent, at the least this Court should set forth a specific level of scrutiny of the facts of a particular incident with the SOLE view of determining under the totality of the circumstances whether exercising jurisdiction over such action

would necessarily involve judicial intrusion into purely military functions, discipline and mission. Routine incidents which but for the status and situs of their location would be easily disposed of pursuant to relevant state law without any mention of military status or connection should not be dismissed under what are increasingly strained applications of the *Feres* immunity. Judicially created immunities which arguably contravene Congressional intent should be strictly scrutinized and limited in application.

Wherefore, Petitioner prays that this Honorable Court grant Petitioner a writ of certiorari and afford him an opportunity for a decision on the merits on the important and compelling issues presented in the petition and which could potentially affect tens of thousands of service members who may not receive a remedy simply because they happened to be stationed in a judicial district that applies a more rigid "incident to service" test than another judicial district, which would provide a remedy for another service member upon an identical set of facts. Such circumstances should not stand.

Respectfully submitted,

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