

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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JOSEPH FERRARI,

*Petitioner,*

v.

UNITED STATES OF AMERICA AND ERIN FORD,

*Respondents.*

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**On Petition For 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. Is lying by a US employee to undermine the boss outside the scope of employment and therefore prevents US substitution into a suit for the liar and the granting of the liar the US's immunity from suit?
2. Should the Feres doctrine immunity be changed to exclude this protection for intentional, malicious liars, thus guaranteeing due process protections for victims of liars in their suits?
3. Are the federal courts bound by the decision of the highest level of review in the military, precluding an evidentiary hearing under Westfall and Feres?

## RELATED CASES

Kitsap County Superior Court, No.18-2-03027-18, *Ferrari v. Ford*. This case was dismissed for lack of personal jurisdiction over Erin Ford.

Washington State Court of Appeals Division II, No. 53764-8-II, *Ferrari v. Ford*. This case was the appeal of the Kitsap County Superior Court case, but it has been stayed pending the federal courts' reviews of the issues herein.

Superior Court of Connecticut, County of New London, No. KNL-CV19-6043255-S, *Ferrari v. Ford*. This state court matter was removed to US District Court of Connecticut.

United States District Court of Connecticut, 3:19-cv-01647-CSH, *Ferrari v. Ford*. This is a pending US District Court case that has been stayed pending the federal courts' reviews of the issues herein.

United States District Court for the Western District of Washington at Tacoma, c19-5996-RJB-TLF, *Ferrari v. US and Erin Ford*. 10/20/20 Order on Plaintiff's Motion for Relief from Judgment; 10/21/20 Order Granting US' Motions to Dismiss, and 10/21/20 Civil Judgment.

United States Court of Appeals for the Ninth Circuit, *Ferrari v. US and Erin Ford*, No. 20-36071 11/12/21 affirmed the US District Court decision. Rehearing en banc denied on 12/22/21 and mandate issued 12/30/21.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

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**OPINIONS BELOW**

The Ninth Circuit Court of Appeal's decision of 11/12/21 is unreported and reproduced at App. 1. The denial of Petitioner's rehearing en banc of 12/22/21 is reproduced at App. 13.

The opinions of the US District Court of Western District of Washington are unreported and reproduced at App. 9 10/20/20 Order on Plaintiff's Motion for Relief from Judgment; App. 4 10/21/20 Order Granting US' Motions to Dismiss; and App. 8 10/21/20 Civil Judgment.

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**JURISDICTION**

The date on which the United States Court of Appeals decided my case was 11/12/21.

A timely petition for rehearing was denied by the United States Court of Appeals on 12/22/21, and a copy of the order denying rehearing appears at App. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The basis for the underlying District Court subject-matter jurisdiction is the Westfall Act, 28 U.S.C. § 2679(d)(1), under which the United States certified that Erin Ford was an employee of the United States and was acting within the course and scope of her official duties at the time. The United States substituted itself as the Defendant. The Ninth Circuit Court of Appeals reviews appeals from the District Court.

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**CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

28 C.F.R. § 14.2(a) Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent,

executor, administrator, parent, guardian, or other representative.

28 U.S.C. § 2679(d)(1) Exclusiveness of remedy. . . .

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2680(h) Exceptions

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

(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.

#### United States Constitution Amendment V Due Process Constitutional Right

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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#### **STATEMENT OF THE CASE**

Erin Ford lied. Intentional, malicious lies to get her superior in the Navy fired. And she got away with it. As a US employee, she was immune from suit by claiming that vicious lies made at work make the US step into her shoes as the defendant under the Feres doctrine and because the US is immune the case must be dismissed. This is wrong and we ask the Court to correct this mistake of law.

The Navy has a zero-tolerance policy regarding fraternization between superiors and subordinates. OPNAVINST 5370.2C, Navy Fraternization Policy (6 January 2016), UCMJ Art. 92, 134. Lt. Erin Ford made a false allegation against her superior, Lt. Commander Ferrari that he hugged and kissed her at 2300 hours (11:00pm) on December 9, 2016. The Navy began court martial proceedings against him. Later, the Navy decided to take Ferrari to Non-Judicial Punishment (NJP), a simpler review and decision by his commander without a trial, in lieu of court martial by invoking the “vessel exception” rule in error and violated his constitutional right to reject NJP and get a full trial at court martial. The sole decider-NJP authority recommended Ferrari to proceed to a Board of Inquiry (BOI), which consisted of three senior Officers, to determine whether Ferrari committed the misconduct alleged by Erin Ford. At the BOI, a military tribunal, it was determined that Ferrari was credible and did not commit the alleged misconduct, i.e., that Erin Ford’s story was not credible. The Assistant Secretary of the Navy affirmed that decision. Ferrari exhausted his military review.

Ferrari filed a lawsuit against Erin Ford in Connecticut court alleging that she intentionally caused him emotional distress and to be demoted or discharged from the Navy (his main claim is not defamation/libel/slander and those claims can be waived at any time for the main claim of ruining career and emotional distress, if the state courts ever has a problem with those claims) in retaliation for him voting against

her on the three-person Board to not have her pass her submarine qualifications, calling her out for dereliction of duty for leaving her watch station, talking about masturbation at the officer's wardroom lunch table, crying while on watch as a senior watch official of a nuclear powered warship, and because after her Qualification Board Ferrari sent her home without going on another month long mission (rare opportunity because she could have gained more hours and experience not possible with her Georgia home submarine, which was under repairs for another year).

While Ferrari was out on that next mission without Ford, she reported the demoting and career ending allegation of a hug and kiss to her command in Georgia, who did not know of Ferrari's tough training and military code adherence reputation and his years of service, as she was on loan from the Georgia command just for that deployment to be trained by Ferrari and hopefully pass her submarine qualification and significant milestone of getting her "dolphins," making her eligible for promotion to command her own nuclear submarine, a great honor. Ferrari was clearly going to write up a very bad report about her to her Georgia command when he returned from the mission. However, Ford retaliated against Ferrari first. Due to the zero-tolerance policy and her false report against him, while out on the mission, Ferrari was un-ceremonially relieved of his command position while out on the mission and was escorted from the submarine into the custody of NCIS to his great embarrassment and irreparable damage to his career.

Erin Ford moved to Connecticut and the Washington State court ruled it did not have personal jurisdiction over her. Ferrari sued in Connecticut, but before the case got going, the US removed the case to the US District Court of Western District of WA and claimed the right to substitute for Ford and dismiss the case under the Feres doctrine and FTCA.

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## STANDARDS OF REVIEW

The court reviews de novo whether a government employee was acting within the scope of employment. See *Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006). Whether the District Court erred in substituting the United States for individual defendants is reviewed de novo. See *McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001). The question of the existence of a duty is a matter of law subject to de novo review. *USAir Inc. v. United States Dep't of Navy*, 14 F.3d 1410, 1412 (9th Cir. 1994).

Whether the Feres doctrine is applicable to the facts of a given case is a question of law reviewed de novo. *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013). A court's decision to dismiss an action pursuant to the Feres doctrine is also reviewed de novo. *Jackson v. Tate*, 648 F.3d 729, 732 (9th Cir. 2011).

Constitutional issues are reviewed de novo. *Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 971 (9th Cir. 2017).

Dismissals for lack of subject matter jurisdiction under Rule 12(b)(1) are reviewed de novo. *United States v. Kinetic Concepts Inc.*, 792 F.3d 1121 (9th Cir. 2015).

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## ARGUMENT

The US removed the case to the US District Court of Western District of WA and claimed the right to substitute for Ford and dismiss the case under the Feres doctrine and FTCA. These do not apply to immunize those who lie, as this is always outside of the scope of employment and therefore not covered by the FTCA and Feres. *Loehndorf v. United States*, CASE NO. C14-0106JLR, 2014 WL 2120 (W.D. Wash. Jul. 30, 2014).

In *Taite v. Morin*, 521 F.Supp.2d 141 (D.N.H. 2007), the court held:

The “principal question” in *Osborn*, parallels the principal question in the case at bar: “whether the United States Attorney validly certified that [Morin] ‘was acting within the scope of [her] employment . . . at the time of the conduct alleged in the complaint.’” . . . In *Osborn*, the Court concluded that the factual determination of whether or not the defendant employee was entitled to immunity under the FTCA must be decided by the District Court as early in the proceedings as possible.

.... By concluding that Morin volitionally caused the calendar to hit Taite, which took the act outside the scope of her employment,

the merits of plaintiffs underlying claim were necessarily resolved . . . [FOOTNOTE] 2.

[FOOTNOTE: ]2. It was undisputed that Morin's job responsibilities included stocking supplies, and the evidence showed that distributing calendars at the beginning of a new fiscal year was done as part of the regular performance of her job. Although the parties disputed whether Taite was hit by the calendar, after considering all the evidence, I concluded that she was struck with the calendar that Morin was distributing. The critical issue for purposes of reviewing the *scope-of-employment* certification, and determining whether or not the United States could be substituted for Morin as the defendant in this matter, *turned on whether Morin was acting negligently or intentionally* when the calendar hit Taite. If Morin had testified that she carelessly tossed the calendar into Taite's mailbox, which flew farther than expected and inadvertently hit Taite in the face, I would have found she negligently performed one of her job duties and would have upheld the U.S. Attorney's scope of employment certification. Instead, Morin insisted that she carefully placed the calendar into the mailbox, which, as explained thoroughly in my April 18, 2007 order, comported neither with other evidence nor with common sense. Because I found that Taite had been hit, and because Morin denied any carelessness or negligence, Taite professed the only plausible explanation as to how she was struck in the face, which was that Morin threw the calendar at her. *The scope of*

*Morin's employment, I found, did not include throwing a calendar at another employee.*

.... Based on the facts presented at the hearing, I concluded that defendant Morin had not acted within the scope of her employment when the complained of conduct occurred.

Similarly, here Ford's fictional reported lies about Ferrari put them outside the scope of employment and dissolve all issues of FTCA and Feres.

In *Broom v. Dudley*, 883 F.Supp. 1091 (E.D. Mich. 1995), the court ruled:

"In this case plaintiff alleges that defendant committed an assault and battery upon her. Plaintiff's evidence was weak because it limited to her own testimony. Defendant testified that he did not assault plaintiff. The Court finds that plaintiff has alleged sufficient facts to state a *prima facie* claim for assault and battery. Given the allegations of the complaint, in light of the evidence provided at the hearing, the government has failed to support its determination that defendant was acting within the scope of his employment if and when he committed the acts with which he is charged. If true, the conduct complained of was not in furtherance of a government purpose, nor was defendant acting within any authority granted to him by the government by virtue of his employment. Therefore, the scope certification made by the government is not supported by the facts of the case viewed in the light most favorable to the plaintiff.

Accordingly, such certification is rejected by the Court.”

Similarly, here Ford’s allegations are unsupported by anything other than her unsubstantiated story, but it is so full of crazy contradictions, such as she alleges after the hug and kiss she did not return to her berth on the submarine but instead spent the night in the wardroom just 50 feet from Lt. Commander Ferrari’s room on the barge. It just does not make sense under the circumstances and throws an incredible questioning light on the whole story.

The 9th Circuit Judges’ Memorandum dated 11/12/21 found:

“1. The District Court properly substituted the United States as the defendant in this case under the Westfall Act, 28 U.S.C. § 2679(d)(1). The District Court made specific findings to determine that Naval Lt. Ford was acting within the scope of her employment in reporting Ferrari’s alleged misconduct, and those findings of disputed fact were not clearly erroneous. See *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (reviewing the “relevant District Court’s findings of disputed fact for clear error”).”

With all due respect, this is error because the US District Court findings of fact were clearly erroneous because not one piece of evidence, other than Ford’s own unsubstantiated testimony at the evidentiary hearing (and even that was completely refuted by the cell phone evidence and many other witnesses for

Ferrari who testified about that night. Ford brought no witnesses to the hearing other than Captain Miranda, who corroborated Ferrari's timelines, ALL the evidence in the case based on personal knowledge refuted her story timelines and events.

The US District Court agreed that the question of her lie was the correct key to the US substitution for her and immunity from suit and the court held an evidentiary hearing on the question of whether or not she lied. Despite all the witnesses besides Ford disproving the truth of her alleged story, date, and time, and despite the undisputed alibi evidence that directly disproves her lie, the US District Court ruled that the judge just believed her.

The District Court DID NOT weigh the evidence to determine credibility (which was already determined by a military tribunal, see below). The District Court provided no analysis of Ferrari's credibility. The District Court changed the bar with each piece of evidence that proved Erin Ford lied; the District Court flat out ignored evidence that directly contradicted Erin Ford's sworn statements and testimony to arrive at a predetermined outcome. In *Loehndorf v. Williams*, No. 2:2014cv00106 (W.D. Wash. 2014), the District Court provided a very detailed analysis of the facts, weighing each party's credibility. Not so in this case. EVERYTHING she has said about December 9, 2016, has been proven false and the District Court has ignored the facts. IMPORTANTLY, the District Court ignored and did not specifically address the undisputed electronic evidence that verified that Ferrari could not

possibly have done the kiss and hug, as at all relevant times alleged by Ford he was in back and forth text chats with his wife per the undisputed evidence. The US District judge just ruled that essentially facts and alibi evidence corroborated by many witnesses and electronic evidence do not matter.

**“Victims” FREQUENTLY fabricate their allegations.**

False reports of sexual assault do happen. We understand that the court wants to believe a person never ever fabricates being sexually assaulted. Many wanted to believe the allegations of the women alleging sexual improprieties against Joe Biden, Brett Kavanaugh, Clarence Thomas, etc. The Center for Military Readiness (CMR) published their findings with regards to unfounded sex assault allegations on 8/27/19 entitled “Unfounded Sex Assault Charges Trending Up in DoD Reports.” See Exhibit A to Plaintiff’s declaration dated 11/5/20 (Dkt 93). In their study the CMR found that from FY 2009 through FY 2018, unsubstantiated reports in completed cases more than doubled, from 13% to 28%. The fact that 3-in-4 cases are substantiated and punished accordingly should not diminish concerns for the 1-in-4 innocent persons who are falsely accused.

The 9th Circuit Judges’ Memorandum dated 11/12/21 found:

“2. The District Court properly dismissed this case under the Feres doctrine. See *Feres v. United States*, 340 U.S. 135 (1950). Under the

Feres doctrine, “members of the armed services [cannot] sue the government for injuries that arise out of or are in the course of activity incident to service.” *Stauber v. Cline*, 837 F.2d 395, 397 (9th Cir. 1988) (quotation and citation omitted). The District Court concluded that Ferrari’s claims were incident to his service as an active-duty military member and dismissed the case for lack of subject matter jurisdiction under Feres. See *Stauber*, 837 F.2d at 400. Ferrari did not appeal the District Court’s dismissal for lack of subject matter jurisdiction under Feres in his opening brief. “[A]rguments not raised by a party in Case: 20-36071, 11/12/2021, ID: 12285213, DktEntry: 44-1, Page 2 of 3 3 its opening brief are deemed waived.” *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); see also *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999).”

Ferrari’s claim that Erin Ford lied, and therefore the US cannot substitute in, makes Feres irrelevant. The entire case is over the applicability of FTCA and Feres and Ferrari cogently argued below and herein that if Ford lied it is outside scope of employment and the case goes forward. This was the point of the appeal to the 9th Circuit and the concept is certainly not waived in Ferrari’s opening brief. This was what the whole issue was about—that the case was dismissed by the US District Court contrary to the law and the entire decision went up on appeal and no issues excluded.

The 9th Circuit Judges' Memorandum dated 11/12/21 found:

“3. The Federal Tort Claims Act (FTCA) also bars the relief that Ferrari seeks. Ferrari seeks damages arising from the slander and libel that Ford allegedly committed in reporting Ferrari’s alleged misconduct to naval officers. But the FTCA explicitly provides that the statutory waiver of federal sovereign immunity “shall not apply to . . . [a]ny claim arising out of . . . libel [or] slander.” 28 U.S.C. § 2680(h).”

First, the FTCA and its immunity does not apply to this case because Ford lied, taking this out of the scope of employment, and therefore outside the protections of the FTCA and any waiver of US immunity for libel and slander. The US is just plain gone from the case and so is the FTCA. Second, Ferrari has several claims in the state court suit, which has not even been answered yet and is open to amendment of claims and his main claim is not defamation and that can be waived at any time in favor of the main claim of ruining career and emotional distress.

The 9th Circuit Judges' Memorandum dated 11/12/21 found:

“4. Ferrari’s failure to administratively exhaust his claims operates as another bar to judicial review of his claims. Under the FTCA, “[a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have

first presented the claim to the appropriate Federal agency.” Id. § 2675(a). Ferrari does not dispute that he failed to make his defamation claim to the Navy, as was required before he could bring suit against the United States in District Court. See 28 C.F.R. § 14.2(a); *Wiseman v. United States*, 976 F.2d 604, 605 (9th Cir. 1992).”

This is not correct, Ferrari did NOT bring a FTCA suit against the US (and certainly the court is factually incorrect in ruling “Ferrari does not dispute that failed to make is defamation claim to the Navy” before bringing suit against the US in District Court because he never did and never admitted to having to do it) and therefore never had to exhaust administrative remedies under FTCA. The US brought a FTCA suit and failed to exhaust administrative remedies before doing so. In any case, Ford lied and it was outside of scope of employment, so FTCA does not control anyway. Ferrari exhausted all administrative avenues offered by the Navy by taking it all the way up to the Assistant secretary of the Navy. There IS NO avenue for Ferrari to hold Erin Ford accountable within the Navy.

The District Court did not have the authority to review and undermine a decision made by a military tribunal.

The District Court determined that Ferrari was not credible, and the 9th Circuit Judges’ Memorandum dated 11/12/21 affirmed that decision. This is the exact opposite of the finding that the highest Military Tribunal determined. Legal precedence dictates that civilian

courts DO NOT have the authority to review and overturn military tribunal decisions except for very specific circumstances not applicable here.

“[W]hen substantial evidence supports the board’s action, and when that action is reasonable in light of all the evidence presented, the court will not disturb the result.” *Pope v. United States*, 16 Cl. Ct. 637, 641 (1989).

A Military Tribunal found Ferrari to be credible and that he did not commit the misconduct alleged by Ford and that decision was reviewed and upheld by the Assistant Secretary of the Navy. The District Court and the 9th Circuit Judges’ Memorandum dated 11/12/21 ignored this finding.

“ . . . when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence.” *Whelchel v. McDonald*, 340 U.S. 122 (1950).

During the 9-8-20 Evidentiary Hearing the District Court reviewed the same evidence that was presented at the military tribunal. The District Court was required to dismiss the Government’s motion for substitution and allow the lawsuit to proceed against Ford rather than reevaluate the evidence. The District Court allowed the Government to re-litigate and review a binding decision by a military tribunal. This action calls into question decisions by the Supreme Court and many other courts’ decisions detailed below. The

District Court found Ferrari not to be credible in direct conflict to the military tribunal's decision.

" . . . and that courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence." *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (citations omitted).

THE US SUPREME COURT HAS RULED THAT MILITARY TRIBUNAL DECISIONS ARE NOT TO BE REVIEWED BY NON-MILITARY COURTS EXCEPT FOR VERY LIMITED SITUATIONS NOT APPLICABLE HERE.

As the court ruled in *Burns v. Wilson*, 346 U.S. 137 (1953):

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. [Footnote 2] This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must therefore be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. [Footnote 3] The Framers expressly entrusted that task to Congress.

Indeed, Congress has taken great care both to define the rights of those subject to military law and provide a complete system of review

within the military system to secure those rights.

.... Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense. *[Footnote 6]* The revised Articles, and their successor—the new Code—also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services. *[Footnote 7]* And, finally, Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial, may attack collaterally the judgment under which he stands convicted. *[Footnote 8]*

The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are “final” and “binding”

upon all courts. [Footnote 9] We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. *Gusik v. Schilder*, 340 U.S. 128 (1950). But these provisions do mean that, when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence. *Whelchel v. McDonald*, 340 U.S. 122 (1950).

[These many footnote cases removed for word count.]

HERE, THE DISTRICT COURT ERRED IGNORING THE HIGHEST MILITARY RULING MEETING DUE PROCESS RIGHTS (BOI) AND SUPPORTING FERRARI'S PRIMA FACIE BURDEN, AND THEN AFTER NO EVIDENCE OF TRUTHFULNESS PRESENTED BY THE US, THE CERTIFICATION AND SUBSTITUTION OF THE US SHOULD HAVE BEEN DENIED WITHOUT FURTHER EVIDENTIARY HEARING.

The US Navy Board of Inquiry Report decision dated 8-7-2018, 3-ER-515, found that Ferrari was credible, and the preponderance of evidence did NOT support an allegation of misconduct for failure to obey an order or regulation, did not support an allegation of misconduct for abusive sexual contact, and did not support an allegation of misconduct for an allegation of conduct unbecoming an officer and a gentleman. This is the final decision of the US Navy on these issues,

having not been challenged or appealed by the US or Ford or her lawyers. This is precedent binding upon the US District Court precluding the evidentiary hearing ordered here. It satisfied the burden of showing upon the preponderance of evidence that Lieutenant Erin Ford acted outside of her scope of Federal employment in making the subject allegations against Plaintiff. Therefore, the basis for the certification for substitution for her by the United States is inadequate and the United States was required to be dismissed.

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### **REASONS FOR GRANTING THE PETITION**

The Court should grant the Petition for Writ of Certiorari for all four of the following reasons:

- I. Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions;
- II. The proceeding involves a question of exceptional importance, impacting all US employees looking to precedent about the issues;
- III. The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity;
- IV. The Court should clarify that federal courts are bound by the decision of the highest level of review in the military for military-related suits, precluding an evidentiary hearing under Westfall and Feres. To clog

up federal courts with reviews of prior, highest military decisions is unnecessary and undermines military justice.

The United States Supreme Court should review the *Feres* doctrine as it is affected by a defendant US employee lying, taking the actions outside the scope of employment and therefore outside the FTCA government immunity used to trigger allowing the US to substitute into suits and then get dismissal based on US immunity from suit. This is of great national importance affecting millions of government workers and many thousands of suits across the county. Discussed herein, Loehndorf (D. WA), Taite (D.N.H.), Broom (E.D. Mich.) all support that lying is outside of scope of employment and prevents US substitution for the liar, yet there are many more cases holding that a federal employee can lie about something normally in their scope of employment and they end up immune from suit by *Feres*. The court needs to clarify that *Feres* does not come into play until after the evidentiary hearing on scope of employment under the FTCA and *Feres* is made irrelevant for workers doing things outside their scope of employment and does not immunize them. The argument that *Feres* immunizes all US employees from suit is just dead wrong as no case says this precludes the FTCA scope of employment evidentiary hearing and instead every court has held off a *Feres* determination until after the evidentiary FTCA scope of employment hearing for the very reason that whether in or out of scope of employment determines everything and out of scope precludes application of

Feres and allows a suit to go forward against the US employee. As it should here.

Furthermore, the US District Court and Ninth Circuit Court of Appeals erred and did not follow the highest military court decision already determining Ford's lie and instead ordered a civilian court evidentiary hearing, which ruled absolutely erroneously regarding the most important facts proving Erin Ford's lie.<sup>1</sup> This is contrary to many court rulings, including

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<sup>1</sup> The District Court at App. 11 ruled:

Although Plaintiff has argued about the importance of timelines through this case, the Court has not felt that specific timelines were important. When Lieutenant Ward [sic, Ford] first testified about when the events occurred on 9 December 2016, the court marked, in his notes, "2300 +/-, meaning about 2300 [fnt 1 stated "Apparently no transcript of the hearing or the Court's ruling has been ordered, so the Court relied on his memory and his notes in recounting events of the hearing." **NOTE: This is absolutely incorrect. Of course, the entire hearing transcript was transcribed and was cited for all of these points in the briefings to the Judge.** Lieutenant Ward [sic, Ford] also testified that she checked her watch around 2300, before going to Plaintiffs quarters. Later in her testimony, she testified that her recollection was that the events occurred over 15 minutes between 2300 and 2330. The Court was not then, and is not now, convinced that those specific times actually reflected when the events occurred. It could well have been shortly after 2330. That view of the evidence is reflected in the Court's opinion when he referred to the events as "occurring during a late night," without any finding as to exact hours. That view is also reflected in the Court's oral finding that the fact differences in witnesses' recall of details and in Lieutenant Ward's [sic, Ford's] report were within normal expectations at trial.

The District Court just plain erred about the cell phone alibi evidence and the Ninth circuit erred in reviewing the evidence. It shows none of the LT Ford's story could have happened after 2239

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12/9/16 and before the **next day 12/10/16 at 0008 AM**. From Ferrari's motion for new trial and relief dated 11-17-20, 2-ER-76-103:

LT Ford has always been consistent in her fabricated story that the kiss occurred between 2300 and 2330, just like the court stated above. Yet now, the court stated in the 10/20/20 Order (Dkt 88), on page 3 line 12 "**the events at issue occurred after 2332.**" This finding is NOT consistent with LT Ford's own testimony and prior statements in evidence. She has had multiple opportunities to change her story, yet she has not. **The court is admitting that it does not believe LT Ford when she has always maintained that the alleged kiss occurred between 2300 and 2330 on 12/9/16.** The Court has taken it upon itself to change LT Ford's testimony to a time "shortly after 2330" to arrive at a desired outcome that LT Ford's story is credible more than LCDR Ferrari's complete denial that it ever happened on the alleged late night of 12/9/16 or ever.

The court is mistaken in its conclusion and this is contrary to the clear alibi evidence of the chat chain between LCDR Ferrari and his **wife beginning at 2239 and not ending at 2332, but going all the way to the next day 12/10/16 at 0008 AM**. See Exhibit 3 to the Declaration of Richard Schenkar. This chatting provides a complete alibi for LCDR Ferrari for the entire time LT Ford claimed to have been kissed, and also covers the time of the Court's change of LT Ford's "testimony" to the Court's that it occurred "**shortly after 2332**". The Court desires to defend LT Ford by stating that the alleged kiss occurred "shortly after 2330", but that is impossible, as LCDR Ferrari was exchanging texts through the entire 2300 hour and after midnight. The chatting continued on for **long after 2330** until after midnight into the next day, 0008 12/10/16. Between 22:51 PM Guam time (4:51 AM PST) and 00:08 AM Guam time (6:08 AM PST) the longest gap of time between a sent text between LCDR Ferrari and his wife is 9 minutes between 22:51 and 23:01 (12/9/16 Guam time) and the average length and majority gaps of the many texts in the chat chain is only 3 minutes long.

Note, that the gap time includes the writer being occupied by reading the prior text and thinking about it, and then writing a response, so a few minutes between chats is still mostly continuously occupied attention of the texters precluding a counseling session of 15 minutes during all this texting. Importantly, LT

those of the US Supreme Court, and this Court should recognize the military court and remand for determination of damages.

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## CONCLUSION

The petition for a writ of certiorari should be granted for review of this matter of great significance to the jurisprudence of this area and the millions of US employees affected and the Court should award attorney fees and costs to Petitioner.

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Respectfully submitted, dated March 22, 2022.

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Ford testified that in her story during the counseling between 2300 and 2330 he was gesturing with his hands more than his usual and she never mentions LCDR Ferrari ever having a cellphone in his hands or that he had to pause the counseling to read and respond to the many texts messages from his wife from 2300 until after midnight. Clearly, the continuous chat chain back and forth proves the counseling never occurred on 12/9/16 at least 22:51 – 12/10/16 00:08 Guam Time.

Cellphone evidence is credible evidence and timelines do matter and both these can refute a person's "story" and they are not to be wished away by a trier of fact because of some idea that time does not matter and the allegation could have happened long before or long after the time sworn to multiple times by an accuser. Not one person corroborated any of LT Ford's story based on personal knowledge.