No. _____

In the
Supreme Court of the United States

CAROL V. CLENDENING,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

The questions presented are:

(1) Does *Feres v. United States,* 340 U.S. 135 (1950) apply to an unwitting Judge Advocate General Officer's toxic exposure not related to his service.

(2) Whether the Federal Tort Claims Act's discretionary function exception 28 U.S.C 2680(a) applies to the military's failure to notify and warn Camp Lejeune residents of their exposure to toxins pursuant to standing law.

PARTIES TO THE PROCEEDING

Carol V. Clendening, Plaintiff-Appellant in the court below and Petitioner here, is an individual.

The United States of America is the Respondent and Defendant-Appellee.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United State's Court of Appeals for the Fourth Circuit and the district court of the Eastern District of North Carolina:

- *Clendening v. U.S.*, No. 4:19-CV-00106-BR, order issued June 19, 2020.
- *Clendening v. U.S.*, 19 F.4th 421 (4th Cir. 2021), opinion issued November 30, 2021.

There are no other proceedings in State or Federal Court directly related to these proceedings under this Court's Rule 14(1)(b)(iii).

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This Court has not evaluated whether *Feres v. United States,* 340 U.S. 135 (1950) applies to a Judge Advocate General ("JAG") Officer's unknown toxic exposure at Camp Lejeune, North Carolina. *Feres* was adopted to interpret the Federal Tort Claims Act's ("FTCA") narrow bar to service members' claims that arise during "combat related activities" and "times of war." It is not and never has been a blanket immunity to service members' tort claims. There is nothing about Clendening's service as a lawyer in training at Camp Lejeune that was incident to or involved toxic exposure in furtherance of a military mission or purpose. *Feres* has never been so far extended to the basic need to breathe air and drink water when the exposure serves no military purpose.

The discretionary function exception to the Federal Tort Claims Act has never been used to excuse illegal conduct, most especially decades of illegal dumping and ongoing fraudulent concealment of chemical and nuclear waste at Camp Lejeune. Despite a law ordering the military to notify former base residents of their toxic exposure, the Fourth Circuit below held that military brass had discretion to do nothing at all. While many service members have paid the ultimate sacrifice exposed to the world's most noxious substances in service, when they sign up to die for their country, they do not sign up to be unknowingly exposed to illegal dumping and a post-service coverup. If this case is not the vehicle to move this Court to rein in *Feres*, save God's recruitment of those that save this Court.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit's opinion is reported at 19 F.4th 421 and reproduced at App.1. The district court for the Eastern District of North Carolina's unpublished order in 7:19-CV-137-BR is reproduced at App.29.

JURISDICTION

The Fourth Circuit issued its opinion affirming the District Court for the Eastern District of North Carolina on November 30, 2021. The Chief Justice, on February 23, 2022, extended the time to file any certiorari petition to and until April 29, 2022. This Court has jurisdiction under 28 U.S.C § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner brought the underlying action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq*., which states "[T]he United States shall be liable, . . . in the same manner and to the same extent as a private individual under like circumstances, ..." 28 U.S.C. § 2674. App.5-6.

Respondent moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction, arguing that Petitioners' complaint, accepting the allegation as true, is barred by the *Feres* doctrine. Respondent also moved for dismissal under the FTCA's discretionary function immunity exception. 28 U.S.C 2680(a). App.6.

STATEMENT OF THE CASE

A. *Feres* and its progeny

Prior to 1946, the doctrine of sovereign immunity reigned supreme in the United States under the notion that "the king can do no wrong." *Larson v. Domestic Foreign Corp.*, 337 U.S. 682, 695 (1949). Sovereign immunity barred all private citizens' civil tort lawsuits against the government.

In 1946, Congress limited the federal government's sovereign immunity from suit by enacting the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1346. The FTCA abolished the government's immunity by giving citizens the right to sue the government including its employees in federal court for tort injuries. *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting). The FTCA specifically defines an "employee of the Government" to include members of the U.S. military or naval forces and members of the National Guard. 28 U.S.C. § 2671.

Congress set forth exceptions to the government's liability under the FTCA. *See generally* 28 U.S.C. § 2680(a)-(f), (h)-(n). Section 2680(j) prevents any tort claim "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." Congress did not, however, bar service members from suing the government.

In 1949, this Court heard its first case addressing service members' claims under the FTCA. In *Brooks v. United States*, an army vehicle struck a civilian vehicle while traveling at night. 337 U.S. 49 (1949). Three men, two of whom were service members, occupied the

civilian vehicle. One service member died, and the other two occupants were injured. The government moved to dismiss plaintiffs' suit under the FTCA because of their status as members of the armed forces during the accident. This Court ruled for the plaintiffs, stating, "[We] are dealing with an accident which had nothing to do with [plaintiffs'] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."[1] *Id.* at 52. The Court further observed that the FTCA contained many exceptions, none of which exclusively bar a plaintiff's claim because of military status. *Id.* at 53.

The next year, *Feres v. United States* evaluated the death of an active-duty service member resulting from a fire in an army barracks. 340 U.S. 135 (1950). The *Feres* Court, while expressly not overruling *Brooks*, denied any relief under the FTCA, concluding that the government is not liable under the FTCA for injuries to service members when their "injuries arise out of or are in the course of activity incident to [military] service." *Id.* at 146. The Court identified two primary rationales[2] supporting its decision. First, the Court declared it

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[1] *Feres: The "Double-edged Sword"* Kaitlan Price, Dickinson Law Review Vol. 125, Issue 3.

[2] The Court described another rationale, which it has since abandoned: the absence of the parallel private liability required by the FTCA. *See Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955) ("we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance — the presence or absence of identical private activity.").

would not intrude in the distinctively federal relationship between members of the armed forces and the government. Second, the *Feres* Court noted existing legislation to compensate injured service members. *Id.* at 143-44.

Since *Feres* was decided, this Court has referenced it as a doctrine in less than a dozen cases. Most cases involve the service member's actual military activity with a stated purpose from ejection system malfunctions (*Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977)), a coast guard pilot's helicopter crash (*United States v. Johnson*, 481 U.S. 681 (1987)), and an army study involving the secret dosing of a service member (*United States v. Stanley*, 483 U.S. 669 (1987)).

Two cases including the most recent *Feres* matter denying certiori, *Doe v. United States*, 141 S. Ct. 1498 (2021) and *United States v. Shearer*, 473 U.S. 52 (1985), involve allegations of inadequate policies and procedures in place or a failure of a supervisory officer to protect service members from other service member's criminal conduct. *See United States v. Shearer*, 473 U.S. 52 (1985). In *Doe*, a West Point cadet was raped and sued the government claiming inadequate housing and inadequate safety policies and procedures. 141 S. Ct. 1498 In *Shearer,* the mother of a service member sued the military alleging a failure to protect her son from an assailant led to his death after her son was killed off base by another service member.

United States v. Johnson is the most recent opinion of this Court providing *Feres* guidance that is relevant to the issues presented here. A 5-4 Court decision

reaffirmed the *Feres* holding that service members are barred from bringing tort claims against the government when injuries arise out of an activity incident to service. 481 U.S. at 687-88. The Court maintained that *Feres* must only apply to matter that relate to service or have a service-related connection. *Id.* at 684-85. There was no dispute that Johnson's death in the performance of a Coast Guard rescue mission on the high seas was incident to service. *Id.* at 685-86. *Johnson* analyzed how compliance with the military's rules, demands, discipline, chain of command, and teachings is vital to building an effective and lasting armed force. *Id.* at 691. The Court, like in *Feres,* evaluated whether a legislative compensatory scheme was available to relieve service members. The *Johnson* Court held that where the legislature has provided benefits and compensation for service member injuries, the legislature has spoken to their relief. *Id.* at 689-90. Since then, the Court and lower courts have applied a near-complete bar of military FTCA suits under the *Feres* doctrine.

On December 20, 2019, Congress passed the National Defense Authorization Act ("NDAA"), SB 1790, 133 Stat 1198, permitting for the first-time service member's medical negligence claims. On March 3, 2022, the United States House of Representatives passed HR 3967 – The Honoring Our PACT Act which would provide relief, treatment, and benefits to Veterans that have suffered from toxic exposure during their service including those exposed to burn pits in Iraq and Afghanistan. Under the current version of the bill, Section 706 would also allow Camp Lejeune

contamination claims to proceed on the merits. The bill is currently before the United States Senate.

B. The Environmental Catastrophe at Camp Lejeune, North Carolina

The United States Navy and the United States Marine Corps have owned and operated North Carolina's Camp Lejeune as a Marine Corp base since 1941. CA.App.6. As part of constructing Camp Lejeune, the government built the Hadnot Point Fuel Farm, which consisted of above ground and underground fuel storage tanks with hundreds of thousands of gallons of leaded and unleaded gasoline, kerosene, and diesel fuel. *Id.*

Rather than pipe in water from local municipalities, the government built its own water supply facilities, including wells and water treatment plants throughout Camp Lejeune. CA.App.14. The water supply facilities collected water from deep-water wells which were treated, tested, and approved by the government. CA.App.16. The water was transported through pipes to residents throughout the base. CA.App.8. The Hadnot Point water supply well identified as HP-602 was about 1,200 feet northwest and downgradient of the Hadnot Point Fuel Farm. CA.App.19.

The deep-water wells from which the base sourced its water tapped into an underground aquifer heavily contaminated with toxic and hazardous materials from various sources, including the Hadnot Point Fuel Farm. CA.App.9. Overpumping of the base's water wells sucked in fuel and contaminants that had leaked from the fuel farm or that had been improperly disposed at

the landfill and the incinerator site and other contaminants into the deep aquifer. CA.App.9. The contaminated ground water leached toxic chemicals into the walls of the water supply wells serving the Hadnot Point water distribution system. *Id*. The drinking water flowed from the wells into the Hadnot Point Water Treatment Plant and, without being decontaminated or remediated, could flow to residences and businesses of military personnel and civilians living and working. *Id*.

In 1980, the government discovered that the fuel facilities' tanks and pipelines were insufficiently maintained and were deteriorating and that at least two tanks had leaking valves. CA.App.20. Recommendations were made to replace and install new piping, new tank valves and concrete valves for all storage tanks; and empty and clean the interiors of all underground storage tanks and inspect them for leaks.[3] The same year, a government contractor discovered that the government had disposed of radioactive strontium 90 (Sr-90) pellets and dead beagles just below the surface of the ground near where service members, including Clendening, lived and worked while stationed on base.[4] CA.App.9.

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[3] No one acted on these recommendations until 1989. CA.App.20. Just as alarmingly, the concerns identified in the report were not disclosed to any potential victims, including military personnel and their dependents, or the public. CA.App.20.

[4] *See also* Mike Magner *A Trust Betrayed* 2014; Robert O'Dowd *A Few Good Men, Too Many Chemicals*, 2019.

On April 9, 1981, the government conducted a case study to evaluate the toxicity of the radioactive exposure to the inhabitants and guests of Camp Lejeune. The analysis and report occurred before any notice or shutdown of the contaminated water systems. The report revealed elevated Sr-90, but the government did nothing to ensure that former, current and future personnel and civilians were not exposed to radioactive material or, if exposed, were provided treatment. CA.App.10.

Then, in 1984, tests performed by a Navy contractor revealed benzene at 380 parts per million in a Hadnot Point drinking well identified as HP-602. CA.App.21. HP-602 was shut down in December 1984. *Id.* The closure of HP-602 prompted a review of other wells on base, several of which were shut down. *Id.* By February 1985, operations at all recognized contaminated supply wells within the Hadnot Point Water Treatment Plant distribution network were terminated because volatile organic compounds ("VOC") were discovered throughout late 1984 and early 1985. CA.App.21.

A 1988 monitoring report described a 15-foot layer of fuel floating on top of the water table a few feet below the service of a fuel farm at the Hadnot Point Industrial Area. The same report found evidence of benzene in monitoring wells at levels as much as 29,000 parts per billion. This information was concealed from potential victims, including military personnel and dependents, or the public. *Id.*

Because of contamination findings, on November 4, 1989, Camp Lejeune was placed on the U.S.

Environmental Protection Agency's ("EPA") National Priorities List ("NPL"). *Id.* By 1991, all groundwater contaminant investigations and remediation activities at Camp Lejeune were placed under the oversight of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA") Programs. CA.App.21-22. Two years later, a review of environmental treatment options found that storage tanks containing fuel, cleaning solvents and other chemicals had been buried at sites across Camp Lejeune for years. CA.App.22.

In 2007, retired Marine master sergeant, Jerry Ensminger, discovered a 1981 document that described a radioactive dump site at Camp Lejeune that did not comply with federal law. CA.App.17. The waste included SR-90, a known cause of cancer, particularly leukemia. Master sergeant Ensminger's nine-year-old daughter, Janey, had died in 1985 of leukemia. It was not until 2014 that the government acknowledged it knew about the 1981 document, but the government continued to refuse to remediate, notify or treat potential victims, or take any other actions to address its radioactive dump site. *Id.* The death of young Janey Ensminger and the efforts of her father helped to create H.R.1742 – the Janey Ensminger Act – which established a presumption of service connection for illnesses associated with contaminants in the water supply at Camp Lejeune between the years 1957 and 1987.

In 2011, the government finally directed the Agency for Toxic Substances & Disease Registry (ATDSR") to

survey former Camp Lejeune employees' health conditions. CA.App.18. In 2014, the Center for Disease Control reported that Marines stationed at Camp Lejeune have a 68% higher risk of multiple myeloma. CA.App.18. In 2012, the ATSDR was granted access to a "secret" government database to continue its water modeling reports, but most of these documents are still being withheld from the public. CA.App.23.

Before 2012, the government publicly blamed a privately owned dry cleaner, ABS One Hour Cleaners, for the release of contaminants at Camp Lejeune. CA.App.23. Not until December 2012 did the ATSDR publish the conclusions of RCRA investigations of leaking above ground storage tanks and underground storage tanks, which occurred at approximately seventy locations throughout the Hadnot Point study area. CA.App.23. The 2012 ATSDR Report reveals that water within the Hadnot Point Water Treatment Plant service area was contaminated mostly with trichloroethylene ("TCE"), and Perchloroethylene ("PCE") and refined petroleum products, such as benzene, toluene, ethylbenzene, and xylenes ("BTEX"), and that significant contamination occurred in former Hadnot Point Fuel Farm and Building 1115. CA.App.24. The refueling facility, Building 1115, had seven underground tanks, installed as early as 1943 (and dug up fifty years later), that were about three hundred feet from Hadnot Point Well 602. Maximum benzene concentrations in samples taken from monitor wells at the Hadnot Point Fuel Farm and Building 1115 reached 43,000 micrograms per liter. CA.App.24.

In 2016, the Department of Veteran Affairs ("VA") adopted regulations that eight serious diseases, including Captain Gary Clendening's adult leukemia, were presumed to have been caused by exposure to contaminants at Camp Lejeune. CA.App.18. To this day, the government has not acknowledged nor taken any remedial action to address the hazardous levels of chemical weapons waste or radioactive material wrongfully disposed at Camp Lejeune. CA.App.23.

That same year, the VA estimated that of the 862,468 Marines and Reservists exposed at Camp Lejeune from 1953 until 1987, 378,125 will have died by 2018.[5]

C. Judge Advocate General Officer Clendening's Service and Death

Petitioner Carol Clendening is the widow of decedent Gary James Clendening, a retired Judge Advocate General ("JAG") officer with the United States Marine Corps. CA.App.31. Gary Clendening was respected for his hard work, quick thinking, and excellent command of the rules. CA.App.32. After his military service, he practiced law in his home state of Indiana as a defense trial attorney joining the esteem of the American College of Trial Lawyers. CA.App.32-33.

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[5] Economic Impact Analysis for RIN 2900-A66, Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune, August 26, 2016. http://s3.amazonaws.com/content.washingtonexaminer.biz/web-producers/VAestimatesDavis.pdf

For nineteen months from May 1970 to December 1971, Clendening lived at Camp Lejeune in an area served by the Hadnot Point water distribution system. He had no idea that the water supplied to him for drinking, cooking, and bathing was contaminated with toxic chemicals, nor did he know that he was constantly being exposed to radioactive waste, chemical weapon waste, solvents, benzene, and other carcinogens improperly disposed, buried, or spilled at Camp Lejeune. CA.App.5.

In 2007, Clendening was diagnosed with Waldenstrom macroglobulinemia, chronic lymphoblastic lymphoma, and eventually, adult leukemia. CA.App.17. After fighting and suffering for years, Clendening died on November 16, 2016 never notified or knowing what caused his cancer or benefiting from a compensation plan. CA.App.6,31. The government has since admitted through the Department of Veteran Affairs that Clendening's exposure while he lived and worked at Camp Lejeune caused his cancer and other illnesses. CA.App.17-18. Never was Clendening's service at Camp Lejeune incident to any published chemical or radioactive exposure survey, test, exercise, study or other military program. Instead, he volunteered to be and was succinctly a lawyer in the Marines.

D. Proceedings Below

In 2019, Gary's widow, Carol Clendening sued the United States of America, alleging fraudulent concealment, willful and wanton negligence, fraudulent publication of notice to the public, wrongful death due to water contamination, and wrongful death due to

direct exposure. CA.App.14. The government moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, arguing that the *Feres* doctrine barred Clendening's claims. CA.App.37.

The district court granted the government's motion to dismiss all claims, finding that all but one of Clendening's claims involved injuries incident to military service, and, thus, were barred by the *Feres* doctrine. The failure-to-warn claim, according to the district court, survived *Feres* but was barred by the FTCA's discretionary function exception clause. App.41-42.

Clendening appealed the district court's decision to the Fourth Circuit. The Circuit, admitting that the *Feres* doctrine test is "'broad and amorphous'" (quoting *Aikens v. Ingram*, 811 F.3d 643, 651 (4th Cir. 2016)) (internal citations omitted)) and observing both the rapid expansion of the doctrine in recent years and widespread criticism of the doctrine, the Fourth Circuit concluded that, "[w]ith one exception, Plaintiff's claims fall squarely within *Feres* purview." App.9. The court continued, "[t]he exposure cited as the cause of Clendening's death occurred in the course of his day-to-day, active-duty service while on base at Camp Lejeune. Clendening's injuries thus 'stem[med] from the relationship between [Clendening] and [his] service in the military.' Moreover, the military's provision of water and accommodations to its troops is clearly activity 'incident to service.'" *Id*. (quoting *Aikens*, 811 F.3d at 651) (internal citations omitted). The court observed that, despite the harshness of the doctrine, it is "bound by it" unless the Supreme Court overrules its

earlier decision. App.16. The Fourth Circuit also agreed with the district court that the FTCA's discretionary function exception barred Clendening's failure-to-warm claim. App.28.

REASONS FOR GRANTING THE PETITION

There was nothing about Captain Clendening's toxic exposure that relate to any military mission or the purpose of his service. "Incident to service" cannot simply be everything a service member endures while under commission, but, instead, it must have some relation to his service in the military. Breathing air and drinking water are not incident to service, they are the most basic incidences to sustaining life. This case provides the Court an opportunity to clarify the "incident to service" test and rein in several court's blanket application of governmental immunity. Granting certiorari would allow this Court to provide a logical, fair, and uniform framework, curing the ills of *Feres* and protecting our service members without unduly disrupting the maintenance of military discipline or "second-guessing" sensitive military decisions. Permitting service member claims that have no relation to any military benefit or any soldier's reasonable expectation of their commitment will only protect the future recruitment of the military and this Court's ultimate authority to address an ongoing injustice.

If the Court finds *Feres* applies here, the doctrine logically cannot stand and must be abrogated. Such a result would relinquish any Article III review of the military and threaten future military recruitment. The *Feres* Court expressly recognized there are exceptions

to barring all service member tort claims against the government.

I. There is nothing about Captain Clendening's toxic exposure that was "incident to service."

Much of the criticism of *Feres* stems from the lack of a clear definition of what exactly constitutes "incident to military service." Many lower courts have improperly applied *Feres* as a blanket bar of *all* service member FTCA suits, not just those injuries incurred "incident to military service."

A. The are no *Feres* factors or tests that apply to Clendening's claims.

Since its inception, *Feres* has been justified by several factors and tests to determine whether the injury was "incident to service" and its application is appropriate. From chain-of-command, the distinctly federal nature of the claims, to companion compensatory legislative schemes, there is not one relevant factor or test that would justify disqualifying Clendening's claims. In all cases invoking *Feres*, this Court has made clear that, "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." *Shearer*, 473 U.S. at 57.

The three premises underlying *Feres* are: (1) that Congress must not have intended state tort law to govern the "distinctively federal" relationship between the government and military members; (2) that Congress must not have intended to provide FTCA

claims to service members who have received or will receive veterans' benefits as compensation; and (3) "[t]he peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline[.]" *Johnson,* 481 U.S. 688-691; *Feres*, 340 U.S. at 140-43; *United States v. Brown,* 348 U.S. 110, 112 (1954).

The Circuits have adopted other tests and factors to determine whether *Feres* is applicable. In *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980), the Fifth Circuit put forth a three-part test. The court rejected the "active duty" or "but for" test,' and concluded that "[m]ore is needed for the activity to be incident to military service." *Id*. at 1011. This third prong examined the plaintiff's activities at the time of the injury, with particular focus on the closeness of the activity's relationship to military service or mission. *Id*. at 1013-15.

Prior to Johnson, this Court in *Shearer* further examined the impact on chain of command and the Court's effort not to interfere with military decision making holding the relevant inquiry in determining *Feres's* applicability to be "whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline," rather than the location of the incident. 473 U.S. at 57, 105. In *Shearer*, decedent was an off-duty Army private who was murdered by another serviceman recently released from prison while away from the base. The plaintiff sued, claiming that the Army's negligence led to her son's death. *Id.* In holding that *Feres* barred the lawsuit, the Court

reasoned that allowing such an action would lead to too much judicial involvement in military decision-making, since commanding officers would likely be compelled to testify about military rules, policies, and discipline. *Id.* at 58. The Court focused on how it did not want to encroach on negligent orders given or actions in the course of military duty.

In *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), the Eighth Circuit used a two-part test that considered all the factors identified in *Shearer*, but placed substantially greater weight on the effect of a service member's suit on military discipline. The court noted that "the preservation of military discipline is at the heart of the *Feres* doctrine." *Id.* at 368. The Eighth Circuit held that a service member's lawsuit arising from his witnessing of a "mock lynching" on a military base did not invoke *Feres*.

Without an *ad hoc* approach to service member's cases and an exception to *Feres* here, this Court will have tacitly accepted a complete bar to service member's tort claims. That is exactly the opposite of what this Court pronounced in *Shearer*. Ignoring the *ad hoc* approach to *Feres*, the Tenth Circuit held: "[a]s a result of the broad application of the incident to service test, the *Feres* doctrine has been applied consistently to bar *all* suits on behalf of service members against the Government based upon service-related injuries." *Ricks v. Nickels*, 295 F.3d 1124, 1128 (10th Cir. 2002) (emphasis in original). The Sixth Circuit has also commented on the expansion of the doctrine: "in recent years the [Supreme] Court has embarked on a course dedicated to broadening the

Feres doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military[.]" *Major v. United States*, 835 F.2d 641, 644 (6th Cir. 1987), *cert. denied*, 487 U.S. 1218, 108 (1988) (emphasis in original).

The "incident to service" test has slowly consumed claims never intended by Congress to be barred. Carefully crafted exceptions in FTCA account for the specific problems that may arise in allowing military members to sue the government. The FTCA bars liability for combatant activities of the military in a time of war. 28 U.S.C. § 2680(j). It also bars liability for a cause of action arising in a foreign country. 28 U.S.C. § 2680(k) The FTCA does not feature the phrase "incident to service" anywhere in its text, nor can it be said that the *Feres* opinion provides a practical methodology for determining whether an activity or injury is "incident to service." Thus, this Court can now provide a narrowed test for what qualifies as "incident to service."

"Incident" as an adjective is defined as "[d]ependent upon, subordinate to, arising out of, or otherwise connected with (something else, usl. of greater importance.". *Black's Law Dictionary* 765 (7th ed. 1999). The Circuits have recognized that "incident to service" is something more than simply being in the military.

Since this Court's decision in *Johnson*, lower courts have continued to find exceptions to *Feres*. The cases present facts, like those here, that highlight injuries so far removed from military command and any military

mission. In *Lutz v. Sec. of Air Force*, 944 F.2d 1477 (9th Cir. 1991), the Ninth Circuit held that the *Feres* doctrine did not bar a military officer's suit against subordinates who broke into her office, stole sensitive personal correspondence, and then distributed it in an effort to damage her reputation, declaring that these actions are "not 'incident to service.'" *Id*. at 1488. In so holding, the Court recognized that "not every action by one member of the armed services against another implicates military decision making, relates to the military mission, or is incident to service." *Id*. at 1484.

In an analogous case – *Elliott by and Through Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994) – the Eleventh Circuit held that the plaintiff's claim against the government for its alleged "maintenance of on-base housing, which resulted in the carbon monoxide poisoning of the service man on leave and his wife, was not barred by *Feres*, in part because "[p]roviding and maintaining single-family housing for military personnel does not involve the federal judiciary in sensitive military affairs" or questioning of military orders. In *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007), the Ninth Circuit held that *Feres* does not bar the claim of a service man who was injured when his car crashed into an unrepaired guardrail on his military base. The court noted that "the neglected damage to the guardrail in this case could just as easily have existed on a non-military road" and also recognized "[t]here was nothing distinctly military about the earlier car crash that created it, nor about the dangerous condition itself."). And finally, in *Bartholomew v. Burger King Corp.*, 21 F. Supp. 3d 1089, 1100 (D. Haw. 2014), a service

member sued an Army-owned Burger King franchise after he bit into a burger containing metal pieces. The court held that *Feres* does not apply because "eating a Burger King Triple Whopper (equally available to the military or general public) while at home on a sick day simply does not implicate military command or discipline." *Id.*

Clendening, unbeknownst to him, sustained his injury while he was simply breathing air, drinking water, and generally existing in Camp Lejeune for nineteen months to complete Officer and JAG training. Nothing about Clendening's service or mission as a JAG officer in the Marines involved toxic exposure. Clendening undisputedly was not engaged in radioactive, chemical, or weapon's testing. His injury was not the result of military training or combat, nor any military study or directive. He was harmed by no mechanism other than his daily consumption of water and air in the place where he bathed, ate, drank, and slept. Clendening did these things just as does any other human, including civilians, and other off-duty soldiers. *See Brooks*, 337 U.S. at 57 (an "injur[y] not caused by [his] service except in the sense that all human events depend upon what has already transpired.").

Concerns about military discipline and order are not implicated in this case—there is simply no connection between Clendening's unknowing constant and continuous exposure and the decisional or disciplinary interests protected by the *Feres* doctrine. The military, through the dismissal of all Camp Lejeune related complaints and the cover-up of what toxins exist,

leaves the decisional paradigm an ongoing mystery. The government has failed here to isolate what decision or tort it seeks to excuse.

The Fourth Circuit's application of the *Feres* doctrine to bar Petitioner's claims sets a dangerous precedent that service members who are exposed to toxic and radioactive waste outside the scope of their active-duty service will have no chance of recourse. More generally, an interpretation that bars any service member's lawsuit against the government does not compute with the express language of the FTCA. If either this Court or Congress had intended such a result, they could have issued such a wholesale bar.

"Where a plaintiff has engaged in an activity of a civilian nature, the 'incident to service' test is not satisfied and the *Feres* bar has not been applied." *O'Neill v. United States*, 140 F.3d 564, 565 (3d Cir. 1998) (Becker, CJ, dissenting). The main policy justification of the *Feres* doctrine is a concern about exposing the military's discipline and command decisions to judicial second-guessing. This Court can provide a framework for determining which injuries occurred "incident to service" which neither bars all claims across the board nor, unduly subjects the military's sensitive decisions and disciplinary structure to judicial second-guessing.

It is undisputed that Clendening's mission at Camp Lejeune did not ever involve exposure to radioactive and chemical waste. At the very least, given the inconsistent analyses applied by Circuits and lower courts and the failure of the doctrine to protect even those claims that cannot reasonably interfere with the

military order and discipline, the definition of what is "incident to service" is ripe for review and clarification by this Court.

B. Cases where contamination and exposure are incident to service.

Distinct from Clendening's service, sometimes soldiers are exposed or contaminated while in service undeniably incident to a military purpose and objective. Sometimes, those soldiers join the military not ever excepting to encounter the toxins, but they still must carry out orders to achieve a mission. Under those circumstances, *Feres* remains a logical bar to a service member's claim. *See Minns v. United States*, 155 F.3d 445, 448 (4th Cir. 1998) (service members administered experimental inoculations in anticipation of chemical warfare in Desert Storm); *Mass v. United States*, 94 F3d 291, 295 (7th Cir. 1996) (service member participated in the cleanup of a "broken arrow" or downed nuclear armed aircraft); *Laswell v. Brown*, 683 F.2d 261, 264 (8th Cir. 1982) (service member assisting with low-level ionizing radiation during nuclear weapons test); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982) (service member worked on "Manhattan Project"); *Kelly v. United States*, 512 F. Supp. 356 (E.D.Pa 1981) (service member exposed to thermonuclear radiation during military tests in south pacific); *Schnurman v. United States*, 490 F. Supp. 429 (E.D. Va. 1980) (service member exposed to mustard gas while testing anti-chemical warfare clothing); *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980) (service members exposed in combat and training).

Stanley v. CIA, 639 F.2d 1146 (5th Cir. 1981), is the only case with allegations that the government specifically withheld from the service member the extent of his exposure. 483 U.S. 669 (1987). *Stanley*, however, at least involved an actual governmental program to which the service member volunteered. *Id.* In *Stanley*, the government secretly administered lysergic acid diethylamide ("LSD") that caused the service member to suffer hallucinations, incoherence, and memory loss. *Id.* at 671. The Fifth Circuit applied the *Feres* doctrine finding the service members exposure was "incident to service." 639 F.2d 1146.

Ostensibly, any burn pit claims from Iraq and Afghanistan would also be barred because the soldiers were exposed "incident to service." Their injuries certainly are the product of "combat activities . . . during a time of war" that occurred "in a foreign country." 28 U.S.C §2680(j), (k). Congress's effort in H.R. 3976 – Honoring Our PACT Act to address these exposed veteran's is required because they are otherwise barred by the FTCA exception. Clendening's claims, however, do not relate to any military activity and are not incident to service. While Congress's efforts for the victims of Camp Lejeune are promising and appreciated, this Court does not need legislative action to permit Clendening's claims to proceed.

If the government wishes to acknowledge that it intentionally poisoned Marines and civilians at Camp Lejeune to study the effects or analyze the contamination, it could then establish that Clendening's exposure was incident to service. Because

that is not the case, the government is without immunity.

II. The discretionary function exception to the FTCA does not excuse either the illegal dumping at Camp Lejeune nor a campaign to conceal and not warn those exposed.

While the parties do not dispute Clendening's after-service failure-to-warn claims survive *Feres* analysis, the Fourth Circuit and the district court applied the FTCA discretionary function exception 28 U.S.C. 2680(a)[6] to bar Clendening's failure to warn claims.[7] The denial of Clendening's failure-to-warn claims are inconsistent with this Court discretionary function exception analysis.

Berkovitz v. United States, 486 U.S. 531 (U.S. 1988) is the seminal case to guide whether discretionary

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[6] 28 U.S.C. 2680(a) provides:

> 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.

[7] A lower court has applied the discretionary function exception to other Camp LeJeune water contamination claims prior to any *Feres* analysis holding the supply of water on base constitutes an act or omission of the government. *In re Camp Lejeune N.C. Water Contamination Litig.*, 263 F. Supp. 3rd 1318 (N.D. Ga. 2016). The government does not make the argument here.

function exception is applicable. The discretionary function does not apply to when a specific rule, regulation or policy governs the action and the complaint alleges a failure of the government to comply with the rule. *Id.* at 536. Thus, if the government or its employee are alleged to have violated a guiding rule, the discretionary function exception does not apply. *Id.* Even if a rule has not been violated, the second inquiry is whether the discretionary decision is one for which the FTCA intended to excuse. *Id.* at 537.

The Fourth Circuit undisputedly only applied the FTCA's discretionary function immunity exception to Petitioner's failure-to-warn claim, not her other claims. Like the *Feres* doctrine, the discretionary function exception seeks to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, (1984). But unlike the *Feres* doctrine, the discretionary function policy is balanced against the "broad and just purpose" of the FTCA to compensate victims of negligence in the conduct of governmental activities. *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955).

Clendening's failure-to-warn claims are not excused by military discretion because withholding notification to former residents *entirely* is not a decision for which discretion function exception was designed to shield. *See Washington v. Dep't of the Nary,* 446 F. Supp. 3d 20, 28 (E.D.N.C. 2020). The Fourth Circuit here acknowledged that "the Commandant of the Marine

Corps *shall* take appropriate actions . . . to *notify* former Camp Lejeune residents and employees who may have been exposed to drinking water . . .” App.23 *quoting* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §318(b)(1), 120 Stat. 2083 2143-44 (2006)(emphasis added). It further noted, that “the Secretary of the Navy *shall* make reasonable efforts to *identify and notify directly* individuals who were served by the system. . . .” App.23 *quoting* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §315(b), 122 Stat. 3, 56-57 (emphasis added). If this Court were to accept the lower court’s failure-to-warn claim analysis, there would remain no room to withhold the application of the discretionary function exception. The Fourth Circuit admitted that the military received direct orders by law to notify former residents of their toxic exposure. Ironically, it then found there remains discretion to withhold notifying veterans, or to do nothing at all. Essentially, the Fourth Circuit held the military had discretion to disobey an order.

The Defendant did not argue, and the lower courts did not conclude, that the discretionary function exception bars any of Petitioner’s claims other than her failure-to-warn claim and, therefore, the lower courts’ application of this exception, albeit wrong, presents no vehicle problem for this Court’s consideration of Petitioner’s arguments against the *Feres* doctrine.

Clendening has alleged the government failed to follow standing law throughout this action from the complaint’s allegations of the wrongful and illegal

disposal of chemical and nuclear waste, to briefing and argument at Eastern District of North Carolina and the Fourth Circuit that the government has failed to follow any of its regulations or orders to notify soldiers of known toxic and nuclear exposure. While the Fourth Circuit held some additional regulations cited at oral argument to be late (App.20 fn.9.), without any discovery and the military's continued refusal to disclose what happened at Camp Lejeune, the government has not permitted the discovery of facts to investigate what specific rules and regulations it should have followed.

This case is the ideal vehicle to rein in the reach of both the discretionary function exception and *Feres*. *Feres* as applied to Petitioner's claims was briefed and decided at every stage of the proceedings below. Because the case was decided on a motion to dismiss, the issue is cleanly presented. The allegations contained in Clendening's complaint at this stage are to be accepted as true. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). There is no challenge to the Petitioner's standing nor any other potential justiciability defect, nor is there any dispute that Petitioner preserved her arguments for appellate review.

Hearing this case would permit the Court to address the question in a common factual context— service members unwittingly exposed to contaminants in the places where they live and work not at all related to their service or mission – which is certain to arise again. Applying the *Feres* doctrine to bar cases like these, if not addressed now, will continue to fester each

time a case arises questioning adherence to toxic and nuclear protocol.

Service members knowingly accept certain risks when entering the military. This Court's intervention into only those cases involving decades of wrongdoing by the military must be available for whom else will hold it accountable. Accounting the military for its negligence or intentional wrongdoing *not related to its military objectives* will not undermine the chain-of-command, it will not interfere with military discipline, and it will not subject the military to judicial second-guessing. The doctrine must be narrowed to apply to only those circumstances that are incident or related to service.

III. If *Feres* applies to Clendening's claims, it must be abandoned.

Since its origin, the *Feres* doctrine has been the subject of fierce criticism. In *United States v. Johnson*, Justice Scalia for the dissent assailed the *Feres* doctrine as a creature not of legislative command or logical interpretation stating "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." 481 U.S. at 700. Justice Scalia addressed the three primary *Feres* factors considered by the majority dismantling each with their logical fallacy and lack of legislative written or historical support. *Id.*

Firstly, Justice Scalia scoffed at the notion that federal courts cannot apply state tort law to claims with proof that the Court currently allow such practice in federal prisoner suits against the government.

United States v. Muniz, 374 U.S. 150 (1963). Secondly, he focused on statutory compensation schemes that provide some relief to certain injured service members, that relief can be terminated if a service member does not fit the qualifications of the statute. He challenged the majority's contradictory rationale of disallowing dual recovery, pointing out the Court's history of allowing dual recovery under both the Veterans' Benefits Act and the FTCA in the past. *Id.* at 697. Justice Scalia noted that the FTCA only narrowly exempted the government from liability for "any claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, during time of war" (emphasis in original). *Id.* at 693.

Next, Justice Scalia addressed the majority's rationale of "protecting military discipline" writing: "[t]o the extent that reading the FTCA as it is written will require civilian courts to examine military decision making and thus influence military discipline, it is outlandish to consider that result 'outlandish'" *Id.* at 700. He continued, "[i]f [plaintiff's] helicopter had crashed into a civilian's home, the homeowner could have brought an FTCA suit that would have invaded the sanctity of military decisionmaking no less than [plaintiff's]." *Id.*

Finally, Justice Scalia reflected on the moral questionability of the doctrine, observing with Johnson's death that had it occurred while he flew a commercial, civilian plane, his family members could have challenged military decision making and recovered for losing their father and husband. Because, however, Johnson was not a civilian or a

federal prisoner but instead devoted his life to serving his country in the armed forces, he was without recourse. Justice Scalia wrote that the *Feres* Court had "no justification . . . to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered, that is a function for the same body that adopted it." *Id.* Highlighting the combatant activities exception of Section 2680(j), Justice Scalia observed "that Congress specifically considered, and provided what it thought needful for, the special requirements of the military," such that "[t]here was no proper basis for" the *Feres* Court "to supplement—i.e., revise—that congressional disposition." *Id.*

In *Daniel v. United States*, 139 S. Ct. 1713 (2019), the Court declined to hear the plaintiff's argument for overturning *Feres*. Justice Thomas, dissenting from the denial of review, discussed another recent case—*Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986 (2019)—in which two veterans developed cancer from asbestos exposure caused by the Navy's negligence. The manufacturer undisputedly delivered the equipment to the government without asbestos; the Navy added the asbestos to the equipment after delivery. Because the service members believed *Feres* a bar, they sued the manufacturers instead. "[T]he Supreme Court then twisted traditional tort principals to afford [plaintiffs] the possibility of relief" by allowing them to sue a party not even remotely responsible for the injury, creating both a legal fiction and an unfair result. Justice Thomas wrote that "denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our

jurisprudence as long as the court refuses to reconsider *Feres*." *Daniel*, 139 S. Ct. at 1714.

Most recently, Justice Thomas wrote in *Doe v. United States*, 141 S. Ct. 1498, 1499 (2021), it is critical for this Court to "clarify the scope of the immunity we have created. Without any statutory text to serve as a guide, lower courts are understandably confused about what counts as an injury 'incident' to military service." Justice Thomas noted that the FTCA renders the federal government liable to members of the military subject only to a "single military exception" involving "combatant activities." *Id*. Justice Thomas declared that the 70-year-old *Feres* precedent is "demonstrably wrong. . . ." *Id*.

Like Justices Scalia and Thomas, lower courts have been unusually unequivocal and enthusiastic in their criticisms of the doctrine. *See, e.g., Estate of McAllister*, 134 Cal. App. 349 (Cal. Ct. App. 1933); *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991); *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995); *Costo v. U.S.*, 248 F.3d 863 (9th Cir. 2001); *Ortiz v. United States*, No. 13-1500 (10th Cir. 2015); *Ritchie v. United States*, 733 F.3d 871 (9th Cir. 2013). For example, in *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983), after affirming the district court's dismissal of the plaintiffs' claims pursuant to *Feres*, wrote, "[w]e are forced once again to decide a case where we sense the injustice of the result but where nevertheless we have no legal authority, as an intermediate appellate court, to decide the case differently."

A year later, in *Heilman v. United States*, the Third Circuit remarked on *Feres's* "often harsh results" and

the expansion of the doctrine to a nearly complete bar of any negligence claim brought by a veteran. 731 F.2d 1104, 1112-13 (3d Cir. 1984). The court also expressed concern that one of *Feres's* justification*s*—the presence of an existing compensation scheme for injured service people—seems to have "broken down," causing injured parties to more frequently seek relief in the courts. *Id.* at 1112. The court wrote "if we are to fulfill the duty described by Lincoln and inscribed on the Veterans' Administration building of 'car[ing] for those who have borne the battle,' a system must be developed by which those who have suffered for their country can be compensated." *Id.* at 1113.

In *Taber v. Maine*, the Fifth Circuit wrote that *Feres's* jurisprudence constituted "a singular tangle of seemingly inconsistent rulings" that has "lurched toward incoherence." 67 F.3d at 1031. The court found discerning the doctrine's contours to be nearly impossible. *Taber* declared, "[w]e would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today." *Id.* The Ninth Circuit wrote in *Estate of McAllister*, "we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine" 942 F.2d 1473, 1480 (9th Cir. 1991) and in *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991) that "the notion of 'incident to service' is a repository of ambiguity[.]" And, in *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001), it wrote:

> we apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a

> conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes.

The Sixth Circuit Court of Appeals, in *Hale v. United States*, 416 F.2d 355, 358 (6th Cir. 1969), criticized *Feres's* "incident to service" test as "so lacking in precision that the mere fact that the plaintiff was in military service at the time of the accident can provide a logical basis for the government's arguing for exclusion of the person concerned on a post hoc, *ergo propter hoc* basis."

If the Court finds Clendening's claims are barred by the *Feres* doctrine, then it has outgrown any logical or predictable legal model for future cases. The doctrine is not a statutory restriction on the right-to-sue, but a court-imposed one. Article I, section 8, clause 14 of the Constitution gives Congress the power to govern the armed forces, but *Feres* conflicts with the express language of the FTCA, its rationales are shaky, and it sends a clear message to those already serving or may enlist. Consider potential recruits learning there is no recourse for family, friend, or community members that were wrongfully killed at Camp Lejeune. They can weigh joining to get their G.I. bill, serve their country, all for the potential cost of dying a painful and tragic death twenty years early for no purpose other than to protect the military's creation of what likely will be America's largest environmental catastrophe in its history.

The Supreme Court has overturned two-hundred and thirty-four of its own decisions. If this Court cannot rein in *Feres's* reach here, then "the better answer is to bid it farewell." *Doe*, 141 S. Ct. at 1499 (Thomas, J. dissenting). Given the ease with which its critics demolish the rationale on which the *Feres* rests, given how it has been used against unwitting military members, and given the threat it poses to our government's ability to recruit service members, this Court should abandon the *Feres* doctrine.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the Supreme Court grant the petition.

Respectfully submitted,

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