2015

Brief Of The John Marshall Law School Veterans Legal Support Center & Clinic as Amici Curiae in Support of Petitioner, Ortiz v. United States of America (Supreme Court of the United States 2015) (No. 15-488)

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John Marshall Law School Veterans Legal Support Center & Clinic

No. 15-488

In The
Supreme Court of the United States

JORGE ORTIZ, as next friend
and Parent of I.O., a Minor,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE JOHN MARSHALL LAW SCHOOL VETERANS LEGAL SUPPORT CENTER & CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Federal Tort Claims Act's ("FTCA") allow children of active duty mothers to bring birth injury claims against the federal government as the Fourth, Eighth, and Eleventh Circuits have held, or should the *Feres* doctrine be expanded to bar a child's birth injury claim when government negligence injures the child of an active duty mother, as the Tenth Circuit has held?

2. Does treating birth injury claims of the children of active duty military mothers differently than the children of active duty military fathers constitute unconstitutional gender discrimination?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37 the undersigned submits this brief as *amicus curiae* in support of Petitioner Jorge Ortiz, as next friend and parent of I.O., a minor.[1]

The John Marshall Law School Veterans Legal Support Center & Clinic ("VLSC") has extensive experience working with veterans, servicemembers, and their families. In 2008, The John Marshall Law School established the Veterans Legal Support Center & Clinic as one of the first law school clinics in the nation dedicated to addressing the legal issues affecting veterans. A primary focus of the VLSC is assisting veterans with appeals before the United States Department of Veterans Affairs ("VA"). The VLSC also actively educates the legal community on the needs of National Guard and Reserve members, along with rural veterans – an underserved population.

Steven Berenson is a Professor of Law and the Director of the Thomas Jefferson Veterans Legal Assistance Clinic (the "Clinic"). The Clinic provides full service legal representation to homeless veterans

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amicus*'s intent to file this Brief. Pursuant to S. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

who are participating in the Veterans Village of San Diego recovery program. All of the Clinic's clients suffer from substance abuse problems, and many suffer from mental-health issues as well. The Clinic's work spans a broad range of legal issues including family law, disability benefits, consumer law, and offender re-entry. The Clinic has an interest in seeing that all veterans, particularly those with substance abuse and/or mental-health issues, receive fair treatment in our courts and receive all of the benefits and assistance that they are entitled to under the law.

Hugh McClean is a Visiting Professor and Director of the Bob Parsons Veterans Advocacy Clinic at the University of Baltimore School of Law. The Bob Parsons Veterans Advocacy Clinic represents veterans before courts and administrative agencies in diverse civil and veterans benefits matters. Students also engage in community education, legislative projects and other systemic efforts at law reform. Practice areas include disability compensation and pension claims, discharge upgrades, medical and physical evaluation boards, Servicemembers Civil Relief Act, fully developed claims, and veterans treatment courts.

Karon L. Rowden is an Adjunct Professor/Staff Attorney at the Texas A & M Family Law & Benefits Clinic – Veterans Project. The Veterans Project assists veterans compensation claims, family law issues for veterans and active duty military, wills and related documents, and other legal issues in order to help obtain or retain a right or benefit.

Antoinette Balta is the President and Co-Founder of the Veterans Legal Institute. The Veterans Legal Institute ("VLI") provides pro bono legal assistance to homeless, at risk, disabled, and low-income current and former service members to eradicate barriers to housing, healthcare, education, and employment and foster self-sufficiency. VLI also advocates on behalf of its clients by providing community education and policy advocacy in an effort to increase awareness, resources, and overall protections to current and former members of the United States military.

Individuals

Amicus, Patricia E. Roberts, as an individual, is a Clinical Professor of Law and Director of Clinical Programs and the Lewis B. Puller, Jr. Veterans Benefits Clinic at William & Mary Law School. The Puller Clinic assists veterans on a pro bono basis in disability compensation claims and discharge upgrades.

Amicus, Yelena Duterte, as an individual, is a Lecturer and Director of the Veterans Legal Clinic at Syracuse University College of Law.

Amicus, Kristine Huskey, as an individual, is an Assistant Clinical Professor and Director of the Veterans' Advocacy Law Clinic at the James E. Rogers College of Law at The University of Arizona.

Amicus, Katelyn Atwood, as an individual, is an attorney with the Vermont Veterans Legal Assistance Project, a program funded by the Vermont Bar Foundation.

Amicus, Matthew W. Randle, as an individual, is a Professor of Practice at the Veterans' Advocacy Law Clinic at the James E. Rogers College of Law at the University of Arizona. He is a veteran of the United States Army.

Amicus, Kimberly M. Adams, as an individual, is a Veterans Advocate at the Community Legal Aid Veterans Legal Team in Central Northeast Ohio. She is a veteran.

Amicus, Angela K. Drake, as an individual, Director and Instructor at The Veterans Clinic at the University of Missouri School of Law/Columbia.

Amicus, Christopher Pitts, as an individual, Equal Justice Works AmeriCorps Legal Fellow at Emory University School of Law's Volunteer Clinic for Veterans.

Amicus, Daniel Zene Crowe, as an individual, the Executive Director of Oregon Veterans Legal Services.

Amicus, Delio A. Calzolari, as an individual, the Associate Director of the Paul Simon Public Policy Institute at Southern Illinois University.

Amicus, Stacey-Rae Simcox, as an individual, an Associate Professor of Legal Skills and the Director of the Veterans Advocacy Clinic at Stetson University College of Law.

SUMMARY OF ARGUMENT

Since 1950, active duty military personnel who are injured incident to service have faced a complete bar to their possible Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) actions against the government due to this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). Due to a lack of textual support in the FTCA for the decision in *Feres*, the Court instead listed several policy rationales in support of their interpretation of the FTCA.[2] These policy considerations were restated in *Johnson v. United States*, 481 U.S. 681, 688 (1987), this Court's affirmance of the *Feres* doctrine. The *Johnson* majority found that the distinctively federal nature of the relationship between the military and the government, the existence of statutory death and disability benefits for servicemembers and the interest of maintaining military discipline were sufficient reasons to uphold the *Feres* doctrine.[3]

In discussing the second reason, the *Johnson* court stated that servicemembers are the recipients of "generous" death and disability benefits which are both "swift[ly] and efficient[ly]" delivered.[4] Congress has provided for servicemembers and veterans through both death benefits and service-connected disability benefits under the Veterans Benefits Act.

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[2] *See Feres v. United States*, 340 U.S. 135, 142-46 (1950).

[3] *Id.* at 688-91.

[4] *Id.* at 689-90.

However, the child of a service member is not entitled to Veterans Administration benefits for a service-connected disability because the infant is not a member of the military.

The third reason cited by the *Johnson* court, maintaining military discipline, is wholly inapplicable to a birth injury plaintiff. The infant is the injured party and an FTCA claim on behalf of the minor child is irrelevant to maintaining military discipline.

Further, the decision of the Tenth Circuit applies a "genesis test" to the child's birth injury claim that links the child's claim to the parent's military status in a derivative manner. The Tenth Circuit's derivative injury analysis places that court directly at odds with the decisions of three other Federal Circuits that have found the *Feres* doctrine inapplicable to birth injury claims.

The Tenth Circuit's use of the derivative "genesis test" links the child's right to recover for birth injury to the parent's military status. The effect of the "genesis test" is that a child of an active duty mother will never be able to recover for the negligence of a government physician, whereas the child of an active duty father has always been able to recover for a birth injury.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION PENALIZES INJURED CHILDREN OF WOMEN ON ACTIVE DUTY IN THE ARMED FORCES BY BARRING RECOVERY FOR BIRTH INJURIES BUT DOES NOT SIMILARLY PENALIZE CHILDREN OF MEN ON ACTIVE DUTY BY BARRING BIRTH INJURY CLAIMS OF THEIR CHILDREN.

Women are a significant percentage of the modern, volunteer military. Female military service began in large numbers during World War II – in non-combat roles in the Women's Army Corps ("WACS"), Women Accepted for Volunteer Emergency Service ("WAVES") and Women's Airforce Service Pilots ("WASPS").[5] Although initially relegated to service assignments during World War II, women gradually increased their roles in the Armed Forces. Women now occupy some of the highest ranking positions in the American military.[6]

In the modern, volunteer military, women are a significant part of the forces. Female servicemembers comprise approximately 15 percent of active duty,

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[5] http://www.nm.gmu.edu/courses/rr/s01/cw/students/leeann/historyandcollections/history/lrnmrewwii.html

[6] For example, Ann E. Dunwoody became the military's first four star general in 2008. In 2014, Michelle Howard became the Navy's first female four star officer when she was promoted to the rank of Admiral. http://www.cnn.com/2014/07/01/politics/first-woman-four-star-admiral/.

Reserve component and National Guard members of the Armed Forces.[7] Gender-biased exclusions were lifted in 2013 when the Secretary of Defense announced the lifting of the Combat Ban that prohibited women from serving in combat units like infantry, fighter pilots and artillery.[8] The process of integrating women into combat assignments is currently being implemented.[9]

A large number of women volunteer to serve their country. The lifting of the combat ban recognized the reality of the role of women in Iraq and Afghanistan – they fight, they die and they get injured.[10] They also get married and start families – something not contemplated when this Court decided *Feres*.[11] Indeed,

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[7] Approximately 200,000 women served in the Armed Forces in 2011, comprising over 14 percent of active duty personnel. Approximately 74,000 in the Army, 53,000 in the Navy, 62,000 in the Air Force and 14,000 in the Marine Corps. http://www.cnn.com/2013/01/24/us/military-women-glance/.

[8] In 2013, Secretary of Defense Leon Panetta announced the lifting of the combat ban for women. The full implementation is scheduled for January 2016. http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html.

[9] *Id.*

[10] 160 female American service members have died in Operation Iraqi Freedom and Operation Enduring Freedom. http://apps.washingtonpost.com/national/fallen/sexes/f/.

[11] Representative Tammy Duckworth and a group of friends who met while recovering at Walter Reed National Military Medical Center illustrate the role of women in combat. All of them are female amputees from injuries incurred during military service. They were featured in the media following the birth of their children or announcement of their pregnancies.

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pregnant women were not part of the Armed Forces in the 1950s.[12] *Feres*-era women in military service were required to delay or deny starting a family because they would be separated from the military for pregnancy and even for adopting a child.[13]

The Secretary of Defense's lifting of the combat ban removed a significant gender-based exclusion. Unlike the lifting of the combat ban, the Tenth Circuit's use of the "genesis test" is, at its core, a gender-based classification. The genesis test will never apply to birth injury claims by the child of a male member of the Armed Forces, but will always apply to a child of a female member of the Armed Forces.

This Court has not shied from reviewing decisions of the Armed Forces that place significant burdens on women and not on men. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court found prohibited gender-based discrimination where servicemen were allowed to claim their wives as dependents for housing and medical benefits, but servicewomen were required to prove that their husbands relied upon them for support. Under the Tenth Circuit's analysis, the female servicemember cannot avoid the potential

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www.nydailynews.com/life-style/group-amputee-female-u-s-veterans-mothers-article-1.1924578.

[12] Women now comprise approximately 15 percent of the Armed Forces. The lifting of the Combat Ban has eliminated one of the few remaining restrictions upon their service.

[13] *Ortiz v. United States*, No. 15-488, 2015 WL 6153087, at *3 (U.S. Oct. 13, 2015).

devastating effect of having a child injured at birth. The child of a female servicemember is simply unable to recover for a birth injury when the "genesis test" is applied.

The application of the Tenth Circuit's analysis will also lead to nonsensical results not contemplated by *Feres* and its progeny. For example, the Reserve Components and National Guard are a significant part of the Armed Forces and, like their active duty counterparts, women in the Reserve Component and National Guard give birth. In the instant matter, the female servicemember mother is active duty and therefore a full time member of the Armed Forces. If she were a member of the National Guard or Reserve, the Tenth Circuit's analysis would turn on whether she was called to active duty at the time of the birth. *Ortiz*, 2015 WL 6153087, at *2. This outcome was never contemplated by the *Feres* court and was not addressed by the Tenth Circuit.

The Tenth Circuit's use of the "genesis test" bars birth injury claims by the children of female servicemembers but does not bar similar claims by the children of male servicemembers. Under the Tenth Circuit analysis, this gender-based bar will never apply to birth injury claims by the child of a male member of the Armed Forces, but will always apply to a child of a female member of the Armed Forces.

II. THE TENTH CIRCUIT APPLICATION OF THE *FERES* DOCTRINE IS AT ODDS WITH OTHER CIRCUITS AND THE RESULT IS THREE ANALYTICAL FRAMEWORKS THAT LEAD TO DIFFERENT RESULTS ON THE SAME FACTS.

The Tenth Circuit's holding, that an FTCA birth injury claim on behalf of a child of a military mother is barred by the *Feres* doctrine, is directly at odds with decisions of the Fourth, Eighth and Eleventh Circuits and district courts in the First, Third and Seventh Circuits. The Tenth Circuit's decision is also emblematic of the illogical, unjust and, ultimately, confusing application of the *Feres* doctrine.

In reaching its decision, the Tenth Circuit, echoed the regret of the District Court, and also cited the criticism of *Feres* that "is at its zenith in a case like this one – where a civilian third-party child is injured during childbirth, and suffers permanent disabilities" while the "facts here exemplify the overbreadth of the doctrine." *Ortiz v. United States*, No. 15-488, 2015 WL 6153087, at *8 (U.S. Oct. 13, 2015).

This Court acknowledged the difficulty of applying *Feres*, when it said that the doctrine "cannot be reduced to a few bright-line rules." *United States v. Shearer*, 473 U.S. 52, 57 (1985). As noted by the Tenth Circuit in the instant decision, the lack of a clear analytical perspective for birth injury claims has produced little more than "confusion and lack of uniform standards." *Ortiz*, 2015 WL 6153087, at *11. Indeed, the lack of analytical guidance for application

of the *Feres* doctrine has reached its zenith in the instant matter – an FTCA claim where the injured party's claim is based upon birth injury.

Lower courts have pleaded for this Court to revisit the *Feres* doctrine. The lack of this Court's direction on the application of the *Feres* doctrine has led to confusion among the circuits. That confusion on the application of the *Feres* doctrine has resulted in three separate analyses being employed in birth injury cases. First, solely relying on the three *Feres* factors; second, a test that recognizes the independent claim of the injured child; and third, a "genesis test" that considers injury to the in utero child as inseparable from the injury to the servicemember mother.

A. The Tenth Circuit Application Of The "Genesis Test" Is At Odds With The Analysis Used By Other Circuits And Misapplies This Court's Decision In *Stencel Aero Engineering Corp. v. United States.*

In the instant matter, the Tenth Circuit applied the "genesis test," which inquires into "whether the civilian injury has its origin in an incident-to-service injury to a service member." *Ortiz*, 2015 WL 6153087, at *10. The "genesis test" was the analysis of this Court in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). In *Stencel*, this Court held that "the third party indemnity action in this case is unavailable for essentially the same reasons

that the direct action by [the servicemember] is barred by *Feres*." *Id.* at 673. Citing this reasoning, the Tenth Circuit held that an "injured child's in utero injuries are unmistakably derivative of an injury to her mother," thereby treating mother and child as one patient during labor. *Ortiz*, 2015 WL 6153087, at *10.

The *Stencel* decision involved a servicemember's negligence claim against the government and an equipment manufacturer. It analyzed the application of the *Feres* doctrine to a third party's indemnity action where the injured party was a servicemember. *Stencel* involved an indemnity action and did not involve a birth injury claim. Its rationale does not apply to a birth injury claim by the child of an active duty servicemember.

The Tenth Circuit erred when it applied the "genesis test" to the FTCA claim on behalf of I.O. and that decision is at odds with other Circuits.

1. The Fourth Circuit Specifically Rejected The "Genesis Test" Applied By The Tenth Circuit Finding That There Is No Federal Relationship Between A Servicemember's Child And The Government Warranting A Bar To A Birth Injury Claim

In *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992), the Fourth Circuit rejected the "genesis test" because it is for a "purely derivative injury – civilian injury that derives from a service-related injury to a

service person," and generally has been applied to "an injury to the service person with consequent genetic injury to offspring." *Romero v. United States*, 954 F.2d 223, 225-26 (4th Cir. 1992).

Although the Tenth Circuit adopts an analysis that equates injury to the servicemember mother during childbirth with injury to the in utero child, the *Romero* court found the "genesis test" did not apply because the newborn's "injury did not derive from any injury suffered by a service member, but was caused when the government breached an affirmative duty of care owed directly to [the child]." *Id.* at 226.

The *Romero* court found that *Feres* did not preclude an in utero claim because "the child has no federal relationship, has no other form of military compensation for the injuries, and, permitting the medical malpractice lawsuit, will not 'impair the discipline necessary for effective service' or 'second-guess a decision of the military necessary to the accomplishment of a military mission.'" *Id.* (citing *Johnson*, 481 U.S. at 689).

The Fourth Circuit's analysis of the *Feres* doctrine is directly at odds with the Tenth Circuit. This analytical confusion is due to the lack of direction from this Court.

2. The Eighth Circuit Rejected The "Genesis Test" And Found That The In Utero Child Had A Cause Of Action Regardless Of Whether The Mother Was A Servicemember

The Eighth Circuit reached a similar conclusion in another case involving a servicemember's child. In *Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993), the Eighth Circuit followed the analysis of the Fourth Circuit in *Romero*. In *Mossow*, both parents were servicemembers and their child was born with many serious medical conditions. The court held that the child's lawsuit for birth injuries was not barred by the *Feres* doctrine.

The *Mossow* court looked to the duty of care owed to the child and not to the military status of the mother, stating that "an infant suing a physician for birth injuries is a patient in his own right, the cause of action for injuries he sustained belongs to him, is separate from any cause of action the mother may have for negligent care, and is not derivative of the mother's claim for injuries." *Id.* at 1369 n.4 (citing *Bulala v. Boyd*, 389 S.E.2d 670, 675-76 (Va. 1990)). The court found that claims of civilian dependents are not barred when they have been injured by the actions of military personnel. *Id.* at 1368.

The Eighth Circuit's analysis of the *Feres* doctrine is directly at odds with the Tenth Circuit. This analytical confusion is due to the lack of direction from this court.

3. The Eleventh Circuit Rejected The Genesis Test And Found That The In Utero Child Had A Cause Of Action Regardless Of Whether The Mother Was A Servicemember Because The *Feres* Doctrine Was Inapplicable

In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), the court held that the *Feres* doctrine required that a servicemember was barred from suing under the FTCA for injuries she received as a result of negligent medical care. However, the *Del Rio* court also found that the three *Feres* policy rationales did not apply to the negligence claim of her child.

The *Del Rio* court applied the three *Feres* factors to the claim of the Del Rio's infant and first found that the child "hardly bears the relationship to government that a soldier on duty does." *Id.* at 286. Further, the court found that children are not eligible for the same statutory VA benefits as servicemembers. *Id.* Finally, holding military doctors liable for injury to a civilian does not result in courts second-guessing the military. *Id.*

The Eleventh Circuit's analysis of the *Feres* doctrine is directly at odds with the other Circuits. This analytical confusion is due to the lack of direction from this Court.

The decisions of the Fourth, Eighth and Eleventh Circuits are directly at odds with the Eleventh Circuit and the application of this Court's decision in

Feres and its progeny is clearly in need of this Court's direction.

CONCLUSION

The Tenth Circuit's decision applying the *Feres* doctrine to bar a birth injury suit for negligence, because the injury was derivative of an injury to the servicemember mother, has placed it at odds with decisions of three other Circuits and created a split among the Circuits on the application of the *Feres* doctrine. The Tenth Circuit's derivative injury analysis places a burden on the children of female servicemembers that it does not place on children of male servicemembers. Under the Tenth Circuit's analysis, a child of a civilian spouse of a servicemember will not be barred from a birth injury claim by *Feres* whereas the child of a servicemember mother will always be barred.

Respectfully submitted,

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