

In The
Supreme Court of the United States

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JORGE ORTIZ, AS NEXT FRIEND
AND PARENT OF I.O., A MINOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF PROFESSORS ALEX STEIN
AND DOV FOX AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

—◆—
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QUESTIONS PRESENTED

1. When government negligence injures the child of an active-duty mother, does the Federal Tort Claims Act allow that child 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, 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?

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INTEREST OF *AMICI CURIAE*¹

Amici are law professors who teach and write in the areas of tort law, medical malpractice, health law, antidiscrimination law, and reproductive rights. Professor Alex Stein teaches and researches on torts, evidence, medical malpractice, and criminal law and procedure at the Benjamin N. Cardozo School of Law. Professor Dov Fox teaches and researches on health law, reproductive rights, antidiscrimination law, and criminal law and procedure at the University of San Diego School of Law.

Amici have an interest in ensuring that active-duty victims of reproductive malpractice, whether men or women, be entitled to equal rights to recover for negligent injuries to their civilian newborns, and believe that this case raises important questions about federal torts and sex discrimination. To that end, *amici* urge the Court to grant certiorari in this case and to hold that servicewomen and their civilian newborns can sue the United States under the Federal Tort Claims Act (FTCA) and recover compensation

¹ Pursuant to this Court's Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

upon proof of medical malpractice, injury, and causation.



SUMMARY OF ARGUMENT

Amici submit this brief to address the question whether the federal government is immune from liability under the FTCA for injuries that its agents negligently caused to an active-duty servicewoman's baby during childbirth. The correct answer to this question relies on the "genesis" doctrine this Court established in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). *Stencel Aero* expanded on the Court's holding in *Feres v. United States*, 340 U.S. 135 (1950), which granted the United States immunity against servicepersons' tort actions for injuries "incident to service." *Stencel Aero* extended *Feres* immunity to civilian suits that derive from intramilitary torts. It held that "the right of a third party to recover in an indemnity action against the United States . . . must be held limited by the rationale of *Feres* where the injured party is a serviceman." 431 U.S. at 674. "Under this test, if a nonserviceman's injury finds its 'genesis' in the injury suffered by a serviceman incident to service, then the *Feres* doctrine bars the non-serviceman's suit." *Minns v. United States*, 155 F.3d 445, 449 (4th Cir. 1998).

Amici respectfully submit that two propositions of law logically follow from the *Stencel Aero* decision:

First, when a civilian child’s cause of action can succeed only upon proof that his mother sustained a negligently inflicted injury incident to her military service, the child’s injury finds its “genesis” in his mother’s injury and *Feres* immunity should apply to block his suit.

Second, when applicable state law lets a civilian child sue independent of whether his mother did or did not sustain injury in her capacity as a serviceperson, the “genesis” of the child’s injury is separate from his mother’s injury and *Feres* immunity should not apply to bar his suit.

The Tenth Circuit deviated from these principles and accordingly erred in holding that *Stencel Aero* categorically prevents the child of a servicewoman from bringing suit against the United States for injuries inflicted *in utero* as a consequence of military medical malpractice. *Ortiz v. U.S. ex rel. Evans Army Community Hosp.*, 786 F.3d 817, 823-29, 831-33 (10th Cir. 2015). State law may give such a child his own cause of action that does not depend on whether military malpractice injured his mother, and that accordingly should not be subject to *Stencel Aero* immunity.

Amici submit that treating the birth-injury claims by children of active-duty military mothers differently than those of children of active-duty military fathers constitutes unconstitutional sex discrimination. This disparate treatment violates the children’s and their mothers’ entitlement to the same

legal remedies that the law affords to military fathers and their children. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). *Amici* further submit that this understanding of *Stencel Aero* secures the FTCA's implementation in a way that aligns with the goals of that Act. To interpret *Feres* immunity as extinguishing civilian suits whose viability does *not* depend on whether a serviceperson was injured incident to service would undercut the foundational principles of federal accountability under the FTCA.

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ARGUMENT

This case presents an important question of the interpretation of tort immunity doctrines involving military servicemen and servicewomen. The Tenth Circuit, by misinterpreting *Stencel Aero*, incorrectly decided that the “genesis test” precludes a civilian newborn’s suit for injuries occurring *in utero* as a consequence of military medical malpractice in the prenatal treatment of her military mother. This Court should grant certiorari and hold that the civilian children of servicewomen – no different from civilian children of servicemen – are entitled to sue the United States under the FTCA and recover compensation upon proof of medical malpractice, injury, and causation.

In *Feres*, this Court carved out an exception to government liability for military torts by making injuries incident to military service nonactionable.

Stencel Aero established the scope of that exception for civilians' suits against the government. It held that *Feres* cannot be circumvented by civilians' suits whose cause of action depends on the United States' liability for wrongs incurred within the military. The *Stencel Aero* Court explained that under *Feres*, "the military compensation scheme [set up by the Veterans' Benefits Act] provides an upper limit of liability for the Government as to service-connected injuries," and that a civilian's suit should be denied whenever it asks the court "to judicially admit at the back door that which has been legislatively turned away at the front door." 431 U.S. at 673 (citing *Laird v. Nelms*, 406 U.S. 797, 802 (1972)).

Stencel Aero's denial of "third-party indemnity . . . for essentially the same reasons that the direct action . . . is barred by *Feres*" restricted the immunity to civilian suits that ascribe to the government liability for an intramilitary tort against a serviceperson. *Id.* The civilian's suit will not be barred by *Feres* unless the civilian cause of action legally derives from the military cause of action – that is, unless the "nonserviceman's injury finds its 'genesis' in the injury suffered by a serviceman incident to service." *Minns*, 155 F.3d at 449. Absent such a genesis connection – whose nature must be legal rather than merely factual – the civilian's suit must be allowed to proceed to court, similarly to any other civilian action against the United States.

This "genesis" test turns on the *legal connection* between the underlying causes of action: the civilian

cause of action and the *Feres*-barred military cause of action. *Stencel Aero*, 431 U.S. at 674. When a civilian (here, the child) can bring suit under state law only when a related serviceperson (here, the child's mother) *herself* suffers wrongful mistreatment from the same defendant (the military), the same *Feres* immunity that bars the serviceperson's suit against the United States will block the civilian's action too. Letting the civilian proceed with his action under such circumstances would undermine the purpose of *Feres* immunity to deny a "cause of action dependent on local law for service-connected injuries or death due to negligence." 340 U.S. at 146. Conversely, when the civilian child's cause of action does not depend on whether his servicewoman mother was a victim of intramilitary tort, then *Feres* immunity will not apply.

Federal courts are divided over the meaning of *Stencel Aero* and the application of its "genesis" doctrine to cases such as this one, in which the injury in question is to a servicewoman's baby *in utero*. This split is well described in the petition for certiorari and in the decision below. *Amici* respectfully submit that the Tenth Circuit and minority of federal courts on whose decisions it relied fundamentally misinterpreted *Stencel Aero*.

These courts read *Stencel Aero* as adopting an injury-focused approach that forestalls any suit for a civilian injury originating – as a matter of fact – from a nonactionable "incident to service" injury to a serviceperson. *Ortiz*, 786 F.3d at 824; see *Ritchie v.*

United States, 733 F.3d 871, 875 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 2135 (2014); *Minns*, 155 F.3d at 449. Under that approach, the civilian child of a servicewoman cannot sue the government for injuries sustained *in utero* if they developed from his mother's injury that was incident to her military service. For example, when a servicewoman mother is forced, against her doctor's orders, to participate in physical training while pregnant, her child would not be able sue the United States for injuries that were incurred *in utero*. *Ritchie*, 733 F.3d at 876-78.

Amici submit that this approach is fundamentally mistaken. The injured child here has *an independent cause of action* under every conceivable state law. His entitlement to compensation does not derive from the harm suffered by his mother. Rather, it derives from the army's independent legal duty not to harm him as a civilian fetus.

This is the point the Fourth Circuit made well in *Romero v. United States*, 954 F.2d 223, 224-26 (4th Cir. 1992). *Romero* was a case in which the military doctors mistreated a pregnant servicewoman in light of her congenital cervical weakness; as a result, her child was born prematurely with cerebral palsy. The Fourth Circuit ruled that the injured civilian child could sue the United States for the following reason:

If the treatment had been administered, its sole purpose would have been directed at preventing injury to Joshua. The failure to place the sutures during the prenatal period and to cut them immediately preceding birth

was the direct cause of the injuries to Joshua, a civilian. Because the purpose of the treatment was to insure the health of a civilian, not a service member, *Feres* does not apply.

Id. at 225. This reasoning indicates that the civilian child's *independent* cause of action rendered *Feres* immunity inapplicable, allowing the child to exercise his right, pursuant to FTCA, to sue the government under applicable state law. Similar reasoning has been adopted by the Eighth and Eleventh Circuits. *See Mossow v. United States*, 987 F.2d 1365, 1369-70 (8th Cir. 1993); *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987).

Amici call for the adoption of the cause-of-action approach. When the civilian child of a servicewoman has an independent cause of action for *in utero* harm under state law, *Feres* immunity should not apply and the child should be allowed to sue under FTCA. This approach is consistent with *Feres*. Adjudicating such suits involves no second-guessing of military commands or disruption of military discipline. That the child has an independent cause of action under state law means that allowing him to prosecute it in no way distorts relations between members of the United States military and the federal government. Tort compensation is also the injured child's only redress: unlike injured veterans and their dependents, he is not entitled to benefits pursuant to the Veterans' Benefits Act.

When, by contrast, a child's entitlement to relief is conditional on recognition of government liability for the intramilitary wrong against her mother – the servicewoman – then *Feres* immunity should apply. For example, *Feres* immunity would preclude a suit filed by a child born with a severe birth defect as a result of his mother's decision to carry her pregnancy to term in reliance on her military doctors' negligent misdiagnosis or counseling. A child's suit could only succeed in a case like this when he establishes that his military mother was wronged by her military doctors. *Stencel Aero* prohibits such intramilitary torts from being used – even indirectly – as a ground for imposing liability and the attendant financial burden on the United States. Thus, the government's immunity under *Feres* consequently should stand.

Amici submit that this understanding of *Stencel Aero* is not only faithful to this important precedent, but is also necessary to protect pregnant servicewomen against unconstitutional sex discrimination. When a civilian spouse of a serviceman receives negligent prenatal care from military doctors and delivers an injured baby as a result of that malpractice, there is no question that *Feres* immunity does not apply and that the baby can sue the United States under the FTCA. When military medical malpractice injures the baby of a servicewoman, this baby should be equally able to obtain redress under the FTCA. A system that would single out the civilian children of servicewomen for adverse treatment discriminates against women who serve in the armed

forces. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (underscoring “the settled rule that the Fourteenth Amendment guarantees equal laws”). To interpret the FTCA as the Tenth Circuit did permits discrimination between these two classes of similarly situated victims of military malpractice and violates fundamental principles of equal protection.

Amici's proposed interpretation is the only one faithful to the text and purpose of the FTCA. Congress enacted the FTCA to waive the federal government's immunity from liability in tort, thereby making it accountable for damages caused by its agents “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. To implement this liability principle, Congress granted federal courts exclusive jurisdiction to adjudicate any action “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1).

Prohibiting a civilian suit like this one to proceed would override the FTCA's central precept that the federal government be accountable for tort injuries to civilians “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. The Tenth Circuit's conclusion to the

contrary cannot be reconciled with the text and purpose of the FTCA.

This Court should grant certiorari to correct the mistaken application of *Stencel Aero* by the decision below and its supporting circuit court rulings.



CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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November 17, 2015