No. 99-2032

In the Supreme Court of the United States

ELLAK MOLNAR AND SOCORRO M. MOLNAR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether *Feres* v. *United States*, 340 U.S. 135 (1950), bars a Federal Tort Claims Act suit for alleged negligent medical treatment by the military that occurred when the claimant was on active military duty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported. The opinion of the district court (A4-A11) is unreported.

JURISDICTION

The opinion of the court of appeals was entered on March 23, 2000. The petition for a writ of certiorari was filed on June 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ellak Molnar (Mr. Molnar) enlisted in the United States Navy on May 19, 1992. He was

scheduled to be discharged four years later. Pet. App. A6. However, his period of active duty was subsequently extended until October 30, 1997. *Ibid.*

In September 1995, Mr. Molnar reported to the Great Lakes Naval Base. Pet. App. A23.[1] He was on active duty status at this time, *id.* at A6, received full military pay, and performed clerical duties at Great Lakes Naval Hospital. *Id.* at A23. While at Great Lakes, Mr. Molnar experienced shooting pains down his right leg and sought treatment at Great Lakes Naval Hospital. Pet. 3. Military medical personnel examined Mr. Molnar over the course of the next several months for that condition, and he eventually sought the opinion of a private physician, Dr. Ahmed Elghazawi. See Pet. App. A13. In a report dated January 9, 1996, Dr. Elghazawi diagnosed Mr. Molnar as suffering from a right L5-S1 herniated nucleus pulposus and recommended immediate surgery. Pet. 3; Pet. App. 5.

Military medical personnel continued to treat Mr. Molnar after that time, and in July 1996, the Navy sent him to the National Naval Medical Center (NNMC) in Bethesda, Maryland, for evaluation. He was diagnosed at Bethesda NNMC as having a right L5-S1 herniated nucleus pulposus, Pet. App. A14, and he underwent surgery for that condition at Bethesda NNMC on July 7, 1996. See *id.* at A2. Mr. Molnar remained on active duty until October 30, 1997, when he was placed on the temporary disability retired list and separated from the Navy. *Id.* at A2-A6.

2. In November 1997, Mr. Molnar filed an administrative claim with the Navy. Pet. App. A15. His

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[1] In May 1995, Mr. Molnar underwent medical treatment for a pilonidal cyst abscess. Pet. 2-3. As the petition notes, this abscess is "unrelated" to the "medical negligence" claims. Pet. 3.

administrative claim alleged that the Navy negligently delayed surgery on the herniated disc. As a result of the delay, Mr. Molnar claimed, he developed permanent nerve damage resulting in permanent bowel and bladder incontinence and back pain with radiculopathy. *Ibid.* The Navy denied petitioner's administrative claim under the *Feres* doctrine, *id.* at A6, which holds that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950).

3. Mr. Molnar then filed the complaint in this case seeking recovery under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. A2-A6. Petitioner Socorro Molnar (Ms. Molnar) also filed a claim for loss of her husband's services, consortium, and companionship based on the same allegations of negligence. *Id.* at A4. Shortly after the complaint was filed, the parties entered into a stipulation of uncontested facts. As part of that stipulation, the parties agreed that Mr. Molnar "was in the military at all times relevant to the claims alleged in the complaint." *Id.* at A6 (citation omitted).

The district court dismissed petitioners' action for lack of subject matter jurisdiction. Pet. App. A4. *Feres*, the court observed, preserves the United States's sovereign immunity in actions brought by servicemembers "where the injuries arise out of or are in the course of activity incident to service." *Id.* at A7 (citing *Feres*, 340 U.S. at 146). The district court also noted that both this Court and the Sixth Circuit have held that the military's medical treatment of an active duty servicemember is an "activity incident to service." *Id.* A7-A8 (citations omitted). Ms. Molnar's claim was

also dismissed because "a claim for loss of consortium in this context is derivative of a service member's injury in the course of activity incident to service and is barred by the *Feres* doctrine," *id.* at A11, and because she did not first file an administrative claim as required under 28 U.S.C. 2675(a). Pet. App. A11.[2]

The district court saw no reason to exempt petitioners' case from these well-established principles. While recognizing that the Fifth Circuit, in *Cortez* v. *United States*, 854 F.2d 723 (1988), did not apply *Feres* to bar a medical malpractice claim by a service member that arose while he was on temporary disability retirement leave (TDRL) status, the district court noted that Mr. Molnar was "not placed on TDRL status until after he received medical treatment from military personnel." Pet App. A9. Nor, the court observed, was Mr. Molnar like the claimant in *Harvey* v. *United States*, 884 F.2d 857 (5th Cir. 1989), who was "on the road to either separation or disability discharge;" the Navy treated Mr. Molnar with the expectation that when healed he would remain on military duty. Pet. App. A9-A10 (quoting *Harvey*, 884 F.2d at 860). As to the continuation of Mr. Molnar's active duty status beyond his original discharge date of May 19, 1996, the court followed Sixth Circuit precedent that "a service member's status as an active duty serviceperson is controlling." *Id.* at A10.

4. The court of appeals affirmed in an unpublished *per curiam* opinion. Pet. App. A1. The court of appeals was not persuaded "that the district court erred in finding that the plaintiff was on active duty at all times relevant to his malpractice claim and was therefore

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[2] Petitioners do not challenge this latter ground in their petition.

barred from bringing suit under the Federal Tort Claims Act." *Id.* at A3.

ARGUMENT

The decisions of the courts below dismissing petitioners' FTCA claims under the *Feres* doctrine are correct and do not conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. In *Feres*, 340 U.S. 135, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. See also *United States* v. *Johnson*, 481 U.S. 681 (1987) (reaffirming *Feres*). The application of *Feres* thus depends on whether the alleged injury resulted from an activity that was "incident to service." It is well-established that the military's medical treatment of an active duty servicemember is "incident to service." Two of the three cases consolidated for this Court's review in *Feres* involved claimants who, while on active duty, sustained injuries from the alleged negligence of military medical providers. See 340 U.S. at 136-138. Accordingly, the lower courts have routinely held that *Feres* bars medical malpractice suits that arose during a claimant's active duty.[3]

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[3] See, e.g., *Borden* v. *Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994); *Wake* v. *United States*, 89 F.3d (2d Cir. 1996); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United* States, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 28 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Selbe* v. *United States*, 130 F.3d 1265 (7th Cir. 1997); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Jackson* v. *United States*, 110 F.3d 1484 (9th Cir. 1997); *Quintana* v. *United States*, 997 F.2d 711 (10th Cir. 1993); *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988), cert. denied,

Petitioners do not question the *Feres* doctrine's validity or its general applicability to military medical malpractice cases. Rather, petitioners contend that *Feres* does not bar Mr. Molnar's claim because he was on limited duty and medical hold when his claims arose. As the district court noted, however, Mr. Molnar was on active duty from his enlistment in 1992 until he was granted temporary disability retirement leave on October 30, 1997. Pet. App. A6. Mr. Molnar stipulated that his claims arose during this time period. *Ibid.* "Limited duty" does not remove a serviceperson from active duty, but is a temporary status ordered when "the prognosis is that the member can be restored to full [military] duty" within a reasonable period of time, usually 24 months or less. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4C*: *Department of the Navy Disability Evaluation* para. 11 (Mar. 8, 1990) (*SECNAV 1850.4C*); *cf.* Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4D: Department of the Navy Disability Manual* § 1008(b) and (b)(1)(a) (1998) (*SECNAV 1850.4D)*.[4]

Contrary to petitioners' assertions, the courts of appeals agree that *Feres* bars medical malpractice claims brought by a serviceperson who, like Mr. Molnar, was on active duty and not effectively discharged when the injuries arose. Petitioners point out, see Pet. App. A6, that some circuits "view duty status as a continuum ranging from active duty to discharge." *Schoemer* v. *United States*, 59 F.3d 26, 29 (5th Cir. 1995). Those

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490 U.S. 1031 (1989); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983)

[4] The pertinent parts of the above instructions are reproduced in the Appendix, *infra*, 1a, 1a-3a.

circuits, however, still apply *Feres* when a claimant was at the "active duty" end of the continuum at the time the alleged medical malpractice occurred. The Fifth Circuit, for example, may apply *Feres* "if the serviceman's duty status falls somewhere in the middle of the continuum" between active duty and discharge, *id.* at 29, but "*require*[s] application of *Feres* to medical malpractice cases when the serviceman is on active duty at the time of the alleged malpractice." *Id.* at 29 n.2 (citations omitted).

The cases cited by petitioners, see Pet. 6-7, did not involve claims that arose when a servicemember was on active duty and not effectively discharged. Two involved service persons placed on TDRL—a status that the Fourth Circuit held to be in "sharp contrast" with active duty. *Bradley* v. *United States*, 161 F.3d 777, 781 (4th Cir. 1998) (*Feres* applies to service members on TDRL with regard to treatment of medical conditions arising out of pre-TDRL status). See also *Cortez*, 854 F.2d 723 (*Feres* does not prevent an action for injuries arising while member is on TDRL). But see *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988) (*Feres* applies to those on TDRL). Under TDRL status, a service person is "entitled to retirement pay, [is] not on active duty, and [is] not subject to being recalled to active duty." *Bradley*, 161 F.3d at 781. See also 10 U.S.C. 1202 (1994 & Supp. IV 1998).[5] The applicability of *Feres* to servicemembers on TDRL is not at issue in this case. Mr. Molnar was not removed

[5] If a person on TDRL remains unfit for duty for five years, the person is placed on permanent retirement status. If a person is found to be fit for duty within that five-year period, the person is given the option of reenlisting or losing the TDRL benefits. *Bradley*, 161 F.3d at 781.

from active duty and placed on TDRL status until October 30, 1997, which he stipulated was after his claims arose. See Pet. App. A6.

The other cases on which petitioners rely involved findings that the servicemember's status was "tantamount to discharge." *Harvey*, 884 F.2d at 860. In *Harvey*, the plaintiff was on medical hold for disability processing—"a processing point on the road to either separation or disability discharge." *Ibid.* The Fifth Circuit noted that plaintiff was initially denied entry into the military hospital where the alleged medical malpractice later occurred because he lacked military identification; only after the military issued him a permanent disability retirement identification was plaintiff allowed to enter. *Id.* at 858, 860-861. In *Adams* v. *United States*, 728 F.2d 736 (5th Cir. 1984), the serviceman had been court-martialed and sentenced to a bad conduct discharge for drug possession. He was not receiving Army pay, "was on a status described as 'indefinite excess leave,'" and had received a "Notice of Separation" from the Army, although he had failed to report to an army base for formal separation. *Id.* at 737-738. The serviceman then sought treatment at a government hospital, apparently being admitted on the basis of his expired military identification. *Id.* at 738. The Fifth Circuit held that *Feres* did not bar claims by the serviceman's survivors based on medical malpractice at the hospital because "the Army had discharged [the serviceman] to the full extent of its ability to do so." *Id.* at 739.

Mr. Molnar's status was not "tantamount to discharge." During the relevant time period he was receiving military pay and performing military duties

commensurate with his physical condition.[6] See Pet. App. A23. The district court noted another distinction between the "tantamount to discharge" cases and Mr. Molnar's situation. In *Adams* and *Harvey*, medical care was not provided with the intent of returning the servicemember to military service. See *Harvey*, 884 F.2d at 860 n.18; *Adams*, 728 F.2d at 741. In contrast, the Navy's care of Mr. Molnar was provided in anticipation that he would continue his full military duties within a reasonable period of time.[7] See *SECNAV*

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[6] The petition wrongly contends that Mr. Molnar was "absent from a military chain of command" during the relevant period, "whether you call it a medical hold, convalescent leave, or another title." Pet. 8. All members of the military are subject to the Uniform Code of Military Justice and the military chain of command while on active duty status (*Solorio* v. *United States*, 483 U.S. 435 (1987); see also *United States* v. *Imler*, 17 M.J. 1021 (N-M.C.M.R., 1984) (member of Navy was subject to court-martial for offenses committed while on medical hold because he was on active duty)), and Mr. Molnar was subject to direct orders when he reported to military medical facilities for treatment and when he carried out his assigned duties while on limited duty. See Pet. App. A23 (describing limited duty assignments).

Moreover, there is no record that Mr. Molnar was ever placed on "convalescent leave." Mr. Molnar has maintained throughout this suit that he was on medical hold and/or limited duty status during the relevant period. See C.A. App. 43.

[7] Petitioners also contend that the Sixth Circuit decision below conflicts with another decision by that court of appeals—*Fleming* v. *United States Postal Serv.*, 186 F.3d 697 (6th Cir. 1999). This misconstrues the rule that resulted in dismissal of petitioners' claims. It is not that *Feres* bars any tort action arising while a service member is on active military duty, but rather that a medical malpractice action alleging negligence by the military and arising when a service person is on active duty is necessarily an injury "incident to military service" because the medical treatment results from the claimant's "military relationship with the Govern-

1850.4C para. 11; App., *infra*, 1a; *SECNAV 1850.4D* § 1008(b); App., *infra*, 2a.

2. Petitioners also seek review of this case because some of the Navy's alleged negligence took place after the discharge date specified in Mr. Molnar's original enlistment agreement. Pet. App. 8. As noted above, his original discharge date was May 19, 1996, and his herniated disc surgery did not occur until July 7, 1996. As a result of an extension of his enlistment period, however, it is undisputed that Mr. Molnar was on active duty status, received military pay, performed military duties, and continued to seek military medical treatment throughout the period in which his claim arose. See pp. 2-4, *supra*.

Moreover, the extension was entirely proper. Navy regulations allow the Navy to extend a service member's contractual separation date for medical reasons with the servicemember's consent, Bureau of Naval Personnel, U.S. Dep't of the Navy, *Naval Military Personnel Manual* art. 1160-050 (July 2000).[8] Petitioners allege that in March, 1996, Mr. Molnar sent a

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ment," *Johnson*, 481 U.S. at 689. *Fleming* did not involve a claim alleging negligence by the military, but rather a claim alleging negligent driving by the U.S. Postal Service. A postal truck hit Fleming's car while Fleming was driving from his home in Louisville to get breakfast at McDonald's or Dairy Queen. *Fleming*, 186 F.3d at 698, 700. Fleming was stationed at Fort Knox, about a forty-five minute drive from his home in Louisville. *Id.* at 698. The court held that it was unable to "conclude, at this stage of the litigation, that plaintiff's injury arose during an activity incident to military service." *Id.* at 699. Yet even if *Fleming* were in tension with the decision in petitioners' case, it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[8] A copy of this regulation is reproduced in the Appendix, *infra*, 3a-4a.

"Dear Sir/Madam" letter requesting immediate approval for supplemental care at a private clinic and that he be allowed to leave the military as planned in his contract on May 19, 1996. See Pet. 8; Pet. App. A24. He does not, however, identify to whom he sent this letter, and his having sent the letter does not establish that in May he withheld consent from the Navy's decision to extend his enlistment. Shortly after sending the above letter, Mr. Molnar was scheduled to be examined by experts at the Bethesda NNMC. He reported to that facility voluntarily, and obtained the surgery for his herniated disc there in July 1996—almost two months after his original separation date. See p. 2, *supra*. These actions confirm that Mr. Molnar was not retained in the service beyond his original separation date without his consent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

1. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4C: Department of the Navy Disability Evaluation* para. 11 (Mar. 8, 1990), provides in pertinent part:

> 11. Processing Time Standards. * * * * *
>
> a. Medical Evaluations. * * * * *
>
> (1) Placement on Temporary Limited Duty (TLD) if the prognosis is that the member can be restored to full duty. The period of TLD shall be the number of months needed, applying generally accepted medical standards of practice, to correct the incapacity. The period of TLD shall not exceed 24 months. If the period of TLD is greater than 12 months, the MTF shall notify CHNAVPERS or CMC, as applicable. The period of TLD may not be extended or renewed except with the approval of the CHNAVPERS or CMC based on a medical evaluation that the additional months of TLD will be sufficient to restore the member to full duty. Upon completion of the authorized TLD, the member will be returned to duty or referred to the PEB.

2. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV INSTRUCTION 1850.4D: Department of the Navy Disability Evaluation Manual* § 1008(b) (Dec. 23, 1998), provides in pertinent part:

> **1008 Medical Board Evaluations And Temporary Limited Duty Processing Time Standards**

a. Medical Board Evaluations. A member may be removed from full military duty for up to 30 days of light duty for the purpose of evaluation or treatment of a medical condition. If the member is unable to return to full military duty at the end of 30 days of light duty, the member will be placed in MTF Medical Hold for up to 30 additional days, pending evaluation by a Medical Board for the purpose of placement on TLD or referral to the PEB.

b. Temporary Limited Duty (TLD). Members should be placed on TLD when the prognosis is that the member can be restored to full military duty within a reasonable period of time, usually 16 months or less. The period of TLD shall be the number of months needed to correct the incapacity, applying generally accepted medical standards of practice.

(1) U.S. Navy

(a) Active Duty. TLD periods shall not exceed 16 months. Extensions may be authorized by BUPERS (Pers-821) on a case-by-case basis. If TLD is originally granted for 8 months, and an extension or renewal is desired, the MTF shall submit the request to BUPERS (Pers-821). Any extension or renewal of TLD greater than 8 months must be approved by BUPERS (Pers-821) based on a medical evaluation that the additional months of TLD will be sufficient to restore the member to full duty. Upon completion of the authorized TLD, return the member to duty or refer to the PEB.

(b) Naval Reserve. There is no Temporary Limited Duty for members in a Ready Reserve Status.

3. Bureau of Naval Personnel, U.S. Dep't of the Navy, *Naval Military Personnel Manual* art. 1160-050 (July 2000), provides in pertinent part:

Voluntary or Involuntary Extension of Enlisted Personnel Beyond Expiration of Enlistment, Fulfillment of Service Obligation, or Expiration of Tour of Active Service

* * * * *

Extension for Medical Care

Members in the Regular Navy, Naval Reserve, and Fleet Reserve on active duty other than training duty of less than 30 days, who are in need of medical care or hospitalization as a result of disease or injury incident to the service and not due to their own misconduct, may be retained with their consent beyond the date of their normal expiration of active obligated service. Such consent shall be entered on the NAVPERS 1070/613, and signed by the member concerned. Tacit consent to retention may be assumed in cases of mental incompetency or physical incapacity where the member is unable affirmatively to indicate the member's desires, pending notification of and authorization for retention from the member's next of kin. Members retained for medical care or hospitaliza-

tion under this article may be retained until they have recovered to the extent that would enable them to meet the physical requirements for discharge and reenlistment or until it shall have been ascertained that the disease or injury is of a character that recovery to that extent is impossible. Members for whom tacit consent to retention is assumed ordinarily will not be retained in excess of 6 months beyond the date of their normal expiration of active obligated service. Further retention may be authorized in meritorious cases upon proper recommendation accompanied by the supporting facts.