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

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, does not waive the federal Government's sovereign immunity for injuries that "arise out of or are in the course of activity incident" to a person's active-duty status in the military. *Feres* v. *United States*, 340 U.S. 135, 146 (1950).

The questions presented are:

1. Whether the FTCA permits petitioner's claim for birth-related injury where the injury was caused by a service-connected injury to petitioner's mother, who received the medical treatment in question from the military as a benefit of her active-duty status.

2. If so, whether that interpretation of the FTCA amounts to unlawful gender discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is published at 786 F.3d 817. The order of the district court (Pet. App. 57a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2015. On July 27, 2015, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 12, 2015 (a legal holiday). The petition for a writ of certiorari was filed on October 13, 2015 (the next workday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 2009, Captain Heather Ortiz was admitted to the Evans Army Community Hospital, a

military hospital on the Fort Carson Army base, for a scheduled Caesarean section. At the time, Captain Ortiz was an active-duty service member with the United States Air Force, and she was admitted to the army hospital as a benefit of her military service. Captain Ortiz gave birth to a child, "I.O.," who was born with cerebral palsy. See Pet. App. 2a-4a.

2. Captain Ortiz's husband, Jorge Ortiz, filed this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, against the United States on I.O.'s behalf. Pet. App. 3a. The complaint alleges that, prior to Captain Ortiz's Caesarian section, a nurse gave her Zantac, which "is commonly used to prevent aspiration of gastric acid during labor or surgery." *Id.* at 4a. The complaint alleges that Captain Ortiz's hospital records indicated that she was allergic to Zantac; that after the drug was administered she suffered an allergic reaction; and that, to counteract the allergic reaction, a doctor ordered that she be administered a dose of Benadryl. *Ibid.* According to the complaint, the Benadryl caused Captain Ortiz's blood pressure to drop; that this resulted in inadequate blood flow to her uterus and placenta; and that as a result I.O. suffered brain trauma and developed cerebral palsy. *Ibid.* The complaint further maintains that hospital personnel could have prevented I.O.'s injuries by properly reviewing the fetal monitoring strips that recorded I.O.'s heart rate during labor. *Id.* at 4a-5a.

The district court dismissed the complaint. Pet. App. 57a-76a. The court explained that the FTCA does not waive the sovereign immunity of the United States for claims for injuries to a military service member that "arise out of or are in the course of activ-

ity incident to service." *Id.* at 63a (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)). The court further explained that it is well-settled that this barrier applies equally to suits brought by third parties, including civilians, where the claims "derive directly or indirectly from injuries to service members incident to military duty." *Id.* at 65a (citing *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977)). Applying those principles, the district court held that I.O. did not have a claim under the FTCA because a service-related injury to I.O.'s mother, Captain Ortiz—"an allergic reaction to Zantac"—"necessitated the administration of the drug that caused hypotension and resultant hypoxia in I.O." *Id.* at 70a. The court further concluded that petitioner's fetal monitoring claim also "necessarily derives from Captain Ortiz's service-related injury." *Id.* at 73a.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court held that "the injuries that I.O. sustained forming the basis of the complaint are derivative of the injuries to her mother, Captain Ortiz." *Id.* at 31a. Petitioner argued that Captain Ortiz did not sustain any injury that could have caused I.O.'s injury, but the court rejected that argument because it conflicted with the allegations in plaintiff's complaint and with the opinion of plaintiff's own expert. See *id.* at 31a-32a.

Judge Ebel concurred, Pet. App. 36a-54a, concluding that "I.O.'s in utero injuries necessarily derived from the military's immunized conduct toward a servicemember." Pet. App. 51a. In his view, "the military acts toward *both* mother and fetus whenever it provides obstetric medical care to *either* mother or fetus. *Id.* at 52a (citation omitted).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. More than 35 years ago, this Court held that the FTCA does not permit third-party claims that derive from a service member's service-related injury. See *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977); see also *Feres* v. *United States*, 340 U.S. 135, 146 (1950). The courts of appeals have faithfully applied that rule in a wide variety of factual contexts, including family members' claims for loss of a service-member's consortium; claims for injuries that arise out of a service-member's service-related exposure to radiation or toxic chemicals; and claims by children for injuries that have their genesis in a service-related injury to an active-duty mother or father. The court of appeals here correctly held that the FTCA similarly does not permit petitioner's claims on behalf of I.O., because the complaint alleges that those injuries were the result of injuries I.O.'s mother sustained at the hands of military personnel at a military hospital while the mother was on active duty.

Petitioner argues that the courts of appeals are in disagreement about the test that should govern whether the FTCA permits a child's claim, but the different outcomes of those cases are largely explained by their different facts. Moreover, this would be a poor vehicle for resolving any differences in approach because, as the court of appeals noted, petitioner would lose under any of those approaches. Petitioner also argues that *Feres*'s interpretation of the FTCA results in gender-based discrimination if the result is to bar an infant's birth-related claims, but

that question was neither presented nor passed upon below. And in any event, that argument lacks merit because the FTCA, as interpreted by *Feres* and its progeny, is gender-neutral.

1. a. In *Feres*, this Court held that the FTCA does not waive the United States' sovereign immunity for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. Since then, this Court has repeatedly reaffirmed *Feres*. See *United States* v. *Stanley*, 483 U.S. 669 (1987); *United States* v. *Johnson*, 481 U.S. 681 (1987); *United States* v. *Shearer*, 473 U.S. 52 (1985); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Stencel Aero*, 431 U.S. at 673-674; *United States* v. *Muniz*, 374 U.S. 150 (1963); *United States* v. *Brown*, 348 U.S. 110 (1954). And in *Stencel Aero*, this Court held that, under *Feres*, the FTCA does not permit an indemnification action against the United States for damages paid by a third party to a service member who was injured in the course of military service. See 431 U.S. at 673. "[W]here the case concerns an injury sustained by a soldier while on duty," this Court explained, "the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Ibid.*

Every court of appeals has applied *Feres* to third-party claims. See, *e.g.*, *De Font* v. *United States*, 453 F.2d 1239 (1st Cir.) (per curiam), cert. denied, 407 U.S. 910 (1972); *In re Agent Orange Prod. Litig.*, 818 F.2d 201 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Hinkie* v. *United States*, 715 F.2d 96 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); *Minns* v. *United States*, 155 F.3d 445 (4th Cir. 1998), cert. denied, 525 U.S. 1106 (1999); *Gaspard* v. *United States*,

713 F.2d 1097 (5th Cir. 1983), cert. denied 466 U.S. 975 (1984); *Brown* v. *United States*, 462 F.3d 609 (6th Cir. 2006); *West* v. *United States*, 744 F.2d 1317 (7th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Mossow* v. *United States*, 987 F.2d 1365 (8th Cir. 1993); *Monaco* v. *United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); *Harten* v. *Coons*, 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); *Smith* v. *United States*, 877 F.2d 40 (11th Cir. 1989), cert. denied, 493 U.S. 1069 (1990); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

For example, interpreting *Feres* and its progeny, courts have held that the FTCA does not permit a third-party family member's claim for loss of consortium where that claim had its genesis in a service member's service-related injury. See, *e.g.*, *Ritchie* v. *United States*, 733 F.3d 871, 876 & n.4 (9th Cir. 2013), cert. denied, 134 S. Ct. 2135 (2014); *Skees* v. *United States*, 107 F.3d 421, 426 (6th Cir. 1997); *Schoemer* v. *United States*, 59 F.3d 26, 28, 30 & n.5 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Rogers* v. *United States*, 902 F.2d 1268, 1269, 1275 (7th Cir. 1990); *Kendrick* v. *United States*, 877 F.2d 1201, 1206-1207 (5th Cir. 1989), cert. dismissed, 493 U.S. 1065 (1990); *In re Agent Orange*, 818 F.2d at 203-204; *De Font*, 453 F.2d at 1240.

Similarly, courts have held that the FTCA does not permit third-party family members (including children) to bring claims alleging injuries that arise out of a service member's service-related exposure to radiation or toxic substances. See, *e.g.*, *Minns*, 155 F.3d at 446-447; *In re Agent Orange*, 818 F.2d at 203-204; *Hinkie*, 715 F.2d at 98; *Gaspard*, 713 F.2d at 1098-

1099; *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); *Lombard*, 690 F.2d at 223; *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); *Monaco*, 661 F.2d at 130.

Courts also have applied *Feres* to hold that the FTCA does not permit suits in other contexts in which family members have sought to bring claims that have their genesis in service-related injuries to service members. See, *e.g.*, *Grosinsky* v. *United States*, 947 F.2d 417, 418-419 (9th Cir. 1991) (per curiam) (FTCA does not permit wife's claim for unwanted pregnancy arising from a military surgeon's negligent performance of a vasectomy on her service-member husband); *Harten*, 502 F.2d at 1364 & n.2 (same); *Persons* v. *United States*, 925 F.2d 292, 296-297 (9th Cir. 1991) (FTCA does not permit family member's claim for alleged failure to warn them of service member's impending suicide).

Based on *Feres*, *Stencel Aero*, and the above line of authority, courts have long held that the FTCA does not permit a claim on behalf of an infant who sustains birth-related injuries that arise out of a service-related injury to the infant's mother. For example, in *Ritchie*, the Ninth Circuit held that the FTCA does not permit claims for an infant's premature birth and wrongful death where the plaintiff's theory of liability was that the Army caused the premature birth by ordering the infant's mother to engage in inappropriate military duties. See 733 F.3d at 876. In *Irvin* v. *United States*, 845 F.2d 126, cert. denied, 488 U.S. 975 (1988), the Sixth Circuit similarly held that the FTCA does not permit claims on behalf of an infant and the infant's service-member mother alleging negligent

prenatal care. See *id.* at 127, 131. And in *Scales* v. *United States*, 685 F.2d 970 (1982), cert. denied, 460 U.S. 1082 (1983), the Fifth Circuit held that the FTCA does not permit an infant's claim that military doctors negligently failed to advise his service-member mother that she may have developed a rubella infection that caused the child's birth defects. See *id.* at 971-972.

The courts in those cases applied *Feres* to infants' birth-related claims for the same reasons courts have held that an infant may not bring an FTCA claim for genetic injuries caused by a service member father's (or mother's) service-related exposure to toxic substances. In both contexts, to allow the child's claim would require the courts to "examine the Government's activity in relation to military personnel on active duty," *Monaco*, 661 F.2d at 134, which *Feres* prohibits. See *Johnson*, 481 U.S. at 691 (noting that "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission").

Congress's authorization of medical care, educational benefits, and other benefits for children of service members further confirms that *Feres* applies where, as here, an infant was allegedly injured as a result of the military's provision of negligent pre-natal care to a service-member mother. See *Johnson*, 481 U.S. at 689 n.10 (noting that service members and their dependents receive numerous benefits unique to military service, including educational benefits and "extensive health benefits"). Service-members' children are entitled to free medical and dental care in uniformed services facilities, see 10 U.S.C. 1072(2)(D),

1076(a)(1), 1077, and to be enrolled in TRICARE Prime, see 10 U.S.C. 1097a(a)(1), which provides free medical care from in-network civilian medical providers who have an appropriate referral, as well as medical care from out-of-network providers with co-payments if the member chooses an out-of-network provider. See 32 C.F.R. 199.17(a)(6)(ii)(A) and (d).[1]

As this Court noted in *Johnson*, it is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." 481 U.S. at 690. *Feres* itself made the same point, noting that "it is difficult to see why [Congress] should have omitted any provision to adjust these two types of remedy to each other." 340 U.S. at 144. "The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." *Ibid.*

b. Petitioner argues (Pet. 8-22) that the courts of appeals disagree on the standards that govern whether the FTCA permits a child's claims for birth-related injuries, but that is far from clear. It is true that

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[1] Service members' children who have a serious physical disability also are entitled to receive special services under the military's Exceptional Family Member Program and its Extended Care Health Program, which include early intervention educational services, training, rehabilitation, special education, and assistive technology, among other services. See TRICARE, *Special Programs, Extended Health Option*, http://www.tricare.mil/plans/specialprograms/echo.aspx (Sept. 30, 2015); Military OneSource, *Family & Relationships, Special Needs*, http://www.militaryonesource.mil/efmp (Feb. 19, 2016). Petitioner believes these benefits are inadequate, but that is a judgment for Congress, not the courts.

courts have articulated different approaches, but as the court of appeals here explained, the different facts of those cases "fittingly account[] for the different outcomes in cases involving fetal claims." Pet. App. 29a n.13. Moreover, as the court of appeals' decision itself shows, this would be a poor vehicle for deciding between these different approaches because petitioner's claim would equally fail under all of them. *Id.* at 2a-3a (no claim under "incident to service" test); *id.* at 10a-11a (rationales-based approach is "redundant" of the "incident to service" test); *id.* at 33a ("the result would be the same" under "a treatment-focused approach"); *id.* at 37a (Ebel, J., concurring) (same result based on a "conduct-focused approach").

In assessing whether the FTCA permits a child's birth-related FTCA claim, courts have focused primarily on whether the child's injury arose out of a service-related injury to the parent. Compare Pet. App. 25a-32a; *Ritchie*, 733 F.3d at 878 (FTCA does not permit a claim where the military's actions not only allegedly injured the child, but also caused the service member mother "considerable pain"), with *Brown*, 462 F.3d at 615 (FTCA permits the claim because "the allegedly inadequate treatment produced no injury whatever to the [child's service-member mother]"); *Mossow*, 987 F.2d at 1370 (FTCA permits a claim where the child's "injury is not derivative of an injury to a service member"); *Romero* v. *United States*, 954 F.2d 223, 224-225 (4th Cir. 1992) (FTCA permits a claim where the child's injury "did not derive from any injury suffered by a service member"). This approach, the court of appeals concluded, hews mostly closely to the analysis this Court set forth in *Stencel Aero* for analyzing whether the FTCA permits third-

party claims. Pet. App. 18a-19a; see *Stencel Aero*, 431 U.S. at 673 (noting that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by a soldier directly or by a third party"). And this approach explains the different outcomes of these cases, depending on the different causal relationship between the child's alleged injury and injury to the service-member mother. See Pet. App. 29a n.13; *Brown*, 462 F.3d at 611; *Romero*, 954 F.2d at 224-226; *Del Rio* v. *United States*, 833 F.2d 282, 286 (11th Cir. 1987); *Irvin*, 845 F.2d at 127; *Scales*, 685 F.2d at 974; *Lewis* v. *United States*, 173 F. Supp. 2d 52, 54 (D.D.C. 2001); *Utley* v. *United States*, 624 F. Supp. 641, 645 (S.D. Ind. 1985).

In two cases, courts of appeals also have analyzed whether the medical treatment in question was directed toward the mother and the infant, or solely toward the infant. See *Brown*, 462 F.3d at 615 (FTCA permits child's claim where, "had the proper prenatal care been provided, it would have been solely for the benefit of the fetus and would not have affected the mother's health in any way"); *Romero*, 954 F.2d at 225 (FTCA permits child's claim where, "[i]f the treatment had been administered" to the service-member mother, "its sole purpose would have been directed to preventing injury to [the child]"). In both *Brown* and *Romero*, however, the critical inquiry was whether the child's injury proceeded from a service-related injury to the child's service-member mother. See *Brown*, 462 F.3d at 615; *Romero*, 954 F.2d at 224-225. Thus, neither of those decisions purported to set forth an independent inquiry for assessing the FTCA's applicabil-

ity apart from the "injury-based" approach described above. See Pet. App. 25a-26a.

Petitioner argues (Pet. 10) that *Romero* conflicts with the decisions discussed above because the Fourth Circuit declined to apply a genesis analysis. But petitioner overlooks the Fourth Circuit's statement that the infant's injury in *Romero* "did not derive from any injury suffered by a service member." 954 F.2d at 226; *id.* at 225 (untreated condition did not "affect [the mother's] health"). That distinguishes *Romero* from cases like this one, where "the injuries that [the child] sustained forming the basis of the complaint *are* derivative of the injuries to her mother." Pet. App. 31a (emphasis added). Likewise, in discussing *Mossow* (Pet. 11), petitioner overlooks that the child's legal malpractice claim was allowed to go forward because the parents "suffered no injury" from the challenged conduct. 987 F.2d at 1370 & n.9.

The Fifth Circuit's decision in *Scales* also does not represent a departure from the "injury-based" approach the court of appeals employed here. In *Scales*, an infant born with congenital rubella argued that his condition was caused by his service-member mother's exposure to rubella during the early stages of her pregnancy. 685 F.2d at 970. *Scales* is consistent with the injury-based approach to applying the genesis test under *Stencel Aero* because the Fifth Circuit noted that the mother's exposure to rubella had resulted in the mother herself being given a diagnosis of "probable rubella." See *id.* at 971-972.

To be sure, the Fifth Circuit also noted in *Scales* that "[t]he treatment accorded" the service-member mother "is inherently inseparable from the treatment accorded [the child] as a fetus in his mother's body."

685 F.2d at 974. As petitioner notes (Pet. 27), however, that additional reasoning constitutes non-binding *dicta*. Accordingly, as petitioner correctly observes (Pet. 21-22 & n.7), district courts in the Fifth Circuit have not considered that additional reasoning as constituting binding circuit precedent. *Ibid.* (citing *Pearcy* v. *United States*, No. 02-civ-2257, 2005 WL 2105979 (W.D. La. 2005), and *Browner* v. *United States*, No. A-03-CA-422-SS (W.D. Tex. May 14, 2004) (unpublished)); see *Brown*, 462 F.3d at 614 (noting that the above statement in *Scales* "has since been undercut by subsequent decisions in the Fifth Circuit and elsewhere"). Moreover, after *Scales*, the United States has not argued the FTCA does not permit any birth-related claims on behalf of a service member's child. See *ibid.* (discussing *Dickerson* v. *United States*, 280 F.3d 470 (5th Cir. 2002)). Thus, the United States did not make any such argument below in this case.[2] In any event, this case would be a poor vehicle

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[2] Petitioner incorrectly asserts (Pet. 27) that the court of appeals below "adopt[ed] the outdated *dicta* of *Scales*, by assuming 'the treatment accorded his mother is inherently inseparable from the treatment accorded . . . a fetus in his mother's body.'" *Ibid.* (quoting Pet. App. 21a). In the quoted passage on which petitioner relies, the court of appeals merely described the Sixth Circuit's quotation in *Brown* of that *dicta*. See 462 F.3d at 617. The court of appeals below expressly rejected those *dicta* by, among other things, noting that "certainly there are also cases where the mother and the fetus are injured, but their injuries are truly unconnected—that is, the fetus's injury is not derivative of a service-related injury to the mother." Pet. App. 34a. In that kind of case, the court of appeals below concluded that the FTCA would permit the fetus's claim. See *ibid.* The concurring judge below would have adopted the *Scales dicta* as the rule of decision here, see *id.* at 52a, but the majority rejected that view. And certiorari is not warranted to address non-adopted views stated in a concurrence.

for addressing any difference between these two approaches, because on either approach the FTCA would not permit this suit to go forward. See Pet. App. 33a ("the result would be the same" under "a treatment-focused approach").

Petitioner argues that the decision below conflicts with the Eleventh Circuit's decision in *Del Rio*, because the court there allowed a child's FTCA claim for birth-related injuries to go forward there even though the child's mother was injured. See Pet. 12. But *Del Rio* did not address this Court's decision in *Stencel Aero* or analyze whether the infant's claim had its genesis in an injury to the service-member mother, as *Stencel Aero*'s requires. Accordingly, *Del Rio* does not indicate how the Eleventh Circuit would apply the genesis test to this kind of case, and *Del Rio*'s analysis has been abrogated, as reflected in more recent Eleventh Circuit cases. *Del Rio* held that the FTCA permitted an infant's derivative claim where it would not have implicated any of the rationales that support *Feres*. See 833 F.2d at 287-288. But that approach conflicts with this Court's decisions in *Johnson* and *Stanley*, which reaffirmed the fact-based "incident to service" test and rejected a rationales-based approach to *Feres*. See *Johnson*, 481 U.S. at 685-686; *Stanley*, 483 U.S. at 682 (noting that "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters").

In light of *Johnson* and *Stanley*, the Eleventh Circuit appears to no longer follow *Del Rio*'s rationales-based approach to interpreting the FTCA. Like other

circuits,[3] the Eleventh Circuit has since repeatedly employed a fact-specific test to determine whether the injury arose out of service-related activity, focusing on factors such as the service member's duty status at the time of the alleged negligence, the location of the negligence or injury, and the nature of the service member's activity at the time in question. See, *e.g.*, *Koury* v. *Secretary, Dep't of Army*, 488 Fed. Appx. 355, 357 (11th Cir. 2012) (per curiam) (citing *Speigner* v. *Alexander*, 248 F.3d 1292, 1298 (11th Cir.), cert. denied, 534 U.S. 1056 (2001)); *Starke* v. *United States*, 249 Fed. Appx. 774, 775 (11th Cir. 2007) (per curiam).

Moreover, even if the Eleventh Circuit in a future case were to apply *Del Rio*'s rationales-based approach, the result should be that the FTCA does not permit the child's claim under the facts stated here. As the court of appeals explained, the rationales-based approach is redundant of asking whether the child's injury arose out of a service-related injury to the parent. See Pet. App. 10a-11a. "[W]here the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is

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[3] See, *e.g.*, *Costo* v. *United States*, 248 F.3d 863, 867 (9th Cir. 2001), cert. denied, 534 U.S. 1078 (2002); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Fleming* v. *United States Postal Serv. Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996); *Schoemer*, 59 F.3d at 28; *Stephenson* v. *Stone*, 21 F.3d 159, 162-163 (7th Cir. 1994); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); *Brown* v. *United States*, 739 F.2d 362, 367-368 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985).

identical whether the suit is brought by a soldier directly or by a third party." *Stencel Aero*, 431 U.S. at 673. In *Del Rio*, the Eleventh Circuit noted that the government had "failed to identify any statutory benefits to which [the infant plaintiff there] is entitled." 833 F.2d at 287. But as described above, see pp. 8-9 & n.1, *supra*, Congress has provided no-fault benefits for children like I.O., who are allegedly injured as a result of service-related negligence directed toward an active-duty parent.

c. The courts below correctly held that, under *Feres*, the FTCA does not permit petitioner's FTCA claim because I.O.'s injuries had their genesis in a service-related injury suffered by I.O.'s mother, who was on active duty at the time. The mother received the allegedly negligent medical care because of her active-duty status, and the injuries she suffered as a result of that medical care (an allergic reaction to Zantac and hypotension resulting from Benadryl administered in response) were service-related. See Pet. App. 30a n.15 ("[T]here is no genuine dispute that Captain Ortiz's injury was incident to her military service."). Furthermore, petitioner's own complaint alleges that I.O.'s injuries had their genesis in Captain Ortiz's injury. The complaint alleges that Captain Ortiz sustained an allergic reaction, blood-pressure problems, and hypotension as a result of the Zantac and Benadryl she was provided by military medical personnel, and that I.O.'s birth-related injuries resulted from Captain Ortiz's hypotension. See *id.* at 3a-4a, 31a-32a.

Petitioner suggests (Pet. 29-30) that Captain Ortiz's hypotension was not serious enough to constitute an injury for *Feres* purposes. As the court of

appeals correctly observed, however, there is no such allegation in the complaint and petitioner failed to argue in district court that Captain Ortiz was not injured by the hospital personnel's actions. See Pet. App. 31a. To the contrary, petitioner's district court pleadings repeatedly alleged that Captain Ortiz was actually injured by the drugs she was provided. See *ibid.*

Petitioner suggests (Pet. 29) that applying *Feres* here would be too "broad-sweeping" because an injury to the mother "could be defined as a temporary elevation or drop in maternal blood pressure, heart rate, temperature, white blood cell count, or contractions," among other conditions. But petitioner's own complaint asserts more than a mere temporary drop in blood pressure: it alleges that Captain Ortiz suffered an allergic reaction to Zyrtec, along with "hypotension" and "hypoxia," at an acute enough level that it allegedly caused I.O. to be born with birth defects. And courts are well-able to discern when a mother's condition constitutes an injury for *Feres* purposes. See *Brown*, 462 F.3d at 615 (FTCA permits infant's suit because the military's alleged failure to prescribe folic acid to the service-member mother would not have caused the mother any injury); *Romero*, 954 F.2d at 224-226 (FTCA permits an infant's claim resulting from a failure to treat the service-member mother's cervical weakness, which did not "affect [the mother's] health").

2. Petitioner contends (Pet. 23-30) that reading the FTCA not to permit this suit would amount to unlawful gender-based discrimination. That claim was neither presented nor passed upon in the courts below, and thus does not merit further review. See *United*

States v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to consider arguments the petitioner did not press below); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (a question presented in a certiorari petition but "not raised in the Court of Appeals is not properly before" this Court); see also *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *United States* v. *Mendenhall*, 446 U.S. 544, 551-552 n.5 (1980); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Petitioner's gender-based discrimination claim also lacks merit, because *Feres*'s interpretation of the FTCA is gender-neutral. Indeed, the courts of appeals have repeatedly interpreted the FTCA, in light of *Feres*, not to permit claims by infants alleging injuries that resulted from the exposure of their service-member fathers to toxic substances as a result of the fathers' military service. See, *e.g.*, *Minns*, 155 F.3d at 446-447; *In re Agent Orange*, 818 F.2d at 203-204; *Hinkie*, 715 F.2d at 98; *Gaspard*, 713 F.2d at 1098-1099; *Mondelli*, 711 F.2d at 569; *Lombard*, 690 F.2d at 223; *Laswell*, 683 F.2d at 269; *Monaco*, 661 F.2d at 130. This case is thus fundamentally unlike *Nashville Gas Co.* v. *Satty*, 434 U.S. 142 (1977), which held that a company violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, by denying accumulated seniority to female employees returning from pregnancy leave. See 434 U.S. at 139-140. See also *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983) (holding that denying spouses of male employees the same hospitalization benefits provided to spouses of female employees violated Title VII, as amended by the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)).

3. Petitioner also suggests (Pet. 31-34) that *Feres* itself should be reconsidered, in all its applications, but fails to develop the point. For example, petitioner contends (Pet. 33) that the lower courts have "generated a variety of irreconcilable outcomes" in applying the *Feres* doctrine, but fails to identify any such supposed conflicts. Petitioner also asserts, without citation (*ibid.*), that this Court has "largely abandoned the original justifications for the *Feres* doctrine." But in *Johnson*, this Court reaffirmed each of the "three broad rationales underlying the *Feres* decision." *Johnson*, 481 U.S. at 688-691. Petitioner's suggestion (Pet. 33) that *Feres*'s incident-to-service test is "vexingly vague" is equally at odds with this Court's precedents. See *Stanley*, 483 U.S. at 683 (noting that the incident to service test "provides a line that is relatively clear and that can be discerned [without] extensive inquiry into military matters"). And petitioner's suggestion (Pet. 32) that *Feres* was "engrafted upon the FTCA by this Court rather than Congress" reflects nothing more than petitioner's disagreement with *Feres*'s construction of the FTCA, which is well within the principles that generally guide judicial construction of statutes. See Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 Am. U. L. Rev. 393, 445-465 (2011).

In *Johnson*, decided nearly four decades after *Feres*, this Court specifically "reaffirm[ed] the holding of *Feres*." 481 U.S. at 692. And in the decades since *Johnson*, this Court has repeatedly denied petitions for certiorari urging that *Feres* be overruled or reexamined. See, *e.g.*, *Ritchie* v. *United States*, 134 S. Ct. 2135 (2014) (No. 13-893); *Lanus* v. *United States*, 133

S. Ct. 2731 (2013) (No. 12-862);[4] *Witt* v. *United States*, 131 S. Ct. 3058 (2011) (No. 10-885); *Matthew* v. *Department of the Army*, 558 U.S. 821 (2009) (No. 08-1451); *McConnell* v. *United States*, 552 U.S. 1038 (2007) (No. 07-240); *Costo* v. *United States*, 534 U.S. 1078 (2002) (No. 01-526); *O'Neill* v. *United States*, 525 U.S. 962 (1998) (No. 98-194); *George* v. *United States*, 522 U.S. 1116 (1998) (No. 97-1084); *Bisel* v. *United States*, 522 U.S. 1049 (1998) (No. 97-793); *Hayes* v. *United States*, 516 U.S. 814 (1995) (No. 94-1957); *Schoemer* v. *United States*, 516 U.S. 989 (1995) (No. 95-528); *Forgette* v. *United States*, 513 U.S. 1113 (1995) (No. 94-985); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991) (No. 90-539). This Court should do the same here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Justice Thomas dissented from the denial of *certiorari* in *Lanus*.