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Applying the Feres Doctrine to Prenatal Injury Cases After Ortiz v. United States

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APPLYING THE *FERES* DOCTRINE TO PRENATAL INJURY CASES AFTER ORTIZ V. UNITED STATES

I. INTRODUCTION

An army hospital's medical staff negligently injured the child of an army officer during the child's birth. In a subsequent medical malpractice suit, the district court and the Tenth Circuit applied the *Feres* doctrine to prevent recovery.[1] That doctrine prevents active duty military servicepersons from bringing tort claims against the government, but some courts, including the Tenth Circuit, have construed it to also block relief for a serviceperson's child. Typically, the civilian children of military servicemembers can bring medical malpractice claims against government actors under the Federal Tort Claims Act[2] (FTCA). However, when reviewing cases of prenatal injury, some courts find the connection between child and servicemember mother bring these claims within the purview of the *Feres* doctrine.[3] Applying the "genesis test," these courts hold *Feres* bars the prenatal injury claims because the harm, although to the child, is nonetheless "incident to the service" of the mother.[4] The Tenth Circuit followed that line of reasoning in *Ortiz v. United States*.[5]

Ortiz presents "an important question of federal law that has not been, but should be, settled by [the Supreme] Court"[6]: whether third party civilians receiving injuries in utero caused by the negligence of military medical personnel should be permitted to seek relief under the FTCA.[7] Because the Supreme Court has never ruled on a prenatal injury *Feres* case, there is little uniformity in how lower courts apply the *Feres* doctrine to those cases. Most circuits apply some version of the genesis test, but the variations of that test result in significantly different outcomes for plaintiffs.[8] Whether a court considers (1) the focus of medical treatment, (2) the inception of the injury, or (3) the conduct of the mother when she suffered injury affects whether a child's prenatal injury is barred by *Feres*. This Comment argues the Supreme Court should grant certiorari to review *Ortiz* and resolve the split among the circuit courts on

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1. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 819 (10th Cir. 2015), *petition for cert. filed* (U.S. Oct. 19, 2015) (No. 15-488).
2. 28 U.S.C. §§1346(b), 2671–80 (2012).
3. Ortiz v. United States, 786 F.3d 817 (2015); Ritchie v. United States, 733 F.3d 871, 873 (9th Cir. 2013); Irvin v. United States, 845 F.2d 126 (6th Cir. 1988); Scales v. United States 685 F.2d 970, 971 (5th Cir. 1982).
4. Ortiz v. United States Evans Army Cmty. Hosp., No. 12-CV-01731-PAB-KMT, 2013 WL 5446057, at *7 (D. Colo. Sept. 30, 2013).
5. *Id.*
6. U.S. Sup. Ct. R. 10(c).
7. *Ortiz*, 786 F.3d at 818.
8. *See infra* Part III.

how to apply the *Feres* doctrine to prenatal injury claims. The Court should reject use of any version of the genesis test in prenatal injury cases and adopt a compensation-focused test consistent with the issues central to the *Stencel Aero* holding—the Court's premier case on third party *Feres* claims.[9]

Despite the arguments here that the Court should review *Ortiz*, it is unlikely to do so considering its denial of the petition for certiorari in the recent *Feres* case *Witt v. United States*,[10] and previous prenatal injury cases *Scales*,[11] *Irvin*,[12] and *Minns*.[13] Regardless of whether the Court grants certiorari in *Ortiz*, Congress should amend the FTCA to permit all medical malpractice claims, or at least those alleging injuries resulting from negligent prenatal care. If Congress does not amend the FTCA, it should create a benefit program for children suffering injuries from negligent prenatal care like that established for children of Vietnam veterans born with spina bifida and other birth defects.[14] If the Court denies certiorari in *Ortiz* or grants certiorari and upholds the case, action by Congress is even more critical.

To aid the argument that courts use a compensation-focused test in negligent prenatal care cases, Part II reviews the development of the *Feres* doctrine. Part III tracks the development of the genesis test from its beginning to its recent application by the Tenth Circuit in *Ortiz*. Part IV summarizes the Tenth Circuit's decision in *Ortiz*. Part V critiques *Ortiz* and suggests the compensation-focused framework the Supreme Court should adopt for analyzing prenatal injury claims under *Feres* if it grants certiorari in *Ortiz*. Part VI calls Congress to amend the FTCA or create a benefit program for children suffering prenatal injuries.

II. THE FTCA AND THE *FERES* DOCTRINE

In 1946, Congress enacted the FTCA,[15] a waiver of the federal government's sovereign immunity making the United States "liable . . . in the same manner and to the same extent as a private individual under like circumstances" for most torts committed by people acting on its behalf.[16] In the 1950 case *Feres v. United States*,[17] the U.S. Supreme Court interpreted an exception to that broad waiver of immunity for members of the armed services, holding the FTCA does not create a right of action for

9. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).
10. Witt ex rel. Estate of Witt v. United States, 379 Fed.Appx. 559 (9th Cir. 2010), *cert denied*, 131 S. Ct. 3058 (2011).
11. Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert denied*, 460 U.S. 1082 (1983).
12. Irvin v. United States, 845 F.2d 126 (6th Cir. 1988), *cert denied*, 488 U.S. 875 (1988).
13. Minns v. United States, 155 F.3d 445 (4th Cir. 1998), *cert denied* 525 U.S. 1106 (1999).
14. 38 U.S.C. §§ 1802–05, 1811–16 (2012).
15. 28 U.S.C. §§1346(b), 2671–80 (2012).
16. 28 U.S.C. § 2674 (2012).
17. Feres v. United States, 340 U.S. 135 (1950).

"injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[18]

The Court gave two reasons for its holding. First, the "distinctively federal" nature of the relationship between the government and its military members—a relationship governed exclusively by federal sources and authority—suggests Congress did not intend to disrupt that relationship through the FTCA.[19] Further, the Court noted that the FTCA only confers liability on the government where a private individual would be held liable "under like circumstances,"[20] and no state law permits a military member to sue "his superior officers or the government he is serving" for negligence. Therefore, the Court held the FTCA cannot be read to create such a "novel and unprecedented liabilit[y]."[21] Second, the Court saw the existence of uniform compensation schemes for injured servicemembers, like the Veterans Benefit Act (VBA), as evidence Congress did not intend for the FTCA to apply in the military setting.[22] Had Congress contemplated servicemembers when it drafted the FTCA, the Court reasoned, it would have had to explain whether they could collect both statutory and FTCA remedies or just one, but the FTCA is silent on the matter.[23]

Over time, the two reasons the Court listed for its holding in *Feres* evolved into three rationales: "(1) the distinctly federal nature of the relationship between government and members of its armed forces; (2) the availability of alternative compensation systems; and (3) the fear of dam-

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18. *Id.* at 146. Since it was decided, *Feres* has been regularly admonished in law review articles and applied by courts in agony. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) ("the facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not ours to overrule"); e.g. Patrick J. Austin, *Incident to Service: Analysis of the Feres Doctrine and its Overly Broad Application to Service Members Inured by Negligent Acts Beyond the Battlefield*, 14 APPALACHIAN J.L. 1 (2014). The dissent in *United States v. Johnson* gives a cogent explanation of the doctrinal concerns with the opinion, namely the lack of textual support in the FTCA for its holding. United States v. Johnson, 481 U.S. 681, 699–703 (1987). And as numerous as the arguments to overturn *Feres* are those suggesting medical malpractice lawsuits in particular should be excepted from the *Feres* bar. *E.g.* John B. Wells, *Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*, 32 DUQ. L. REV. 109 (1993); Keith B. Sieczkowski, *Service Member Recovery for Military Medical Malpractice Under the Federal Tort Claims Act: A Judicial Response*, 19 ST. MARY'S L.J. 203 (1987); Jennifer L. Carpenter, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35 (2003). Even Congress has attempted to pass several bills to amend the FTCA to permit medical malpractice claims. *E.g.* H.R. 1161, 99th Cong. (1986); H.R. 3174, 99th Cong. (1986); H.R. 536, 101st Cong. (1989). This Article agrees that "*Feres* was wrongly decided" and the doctrine should, at least, except medical malpractice claims from its bar. But because those arguments have been laid out elsewhere and have been thus far ineffective, this Article proceeds from the posture that *Feres* and its application to medical malpractice claims will be good law for the foreseeable future. *Johnson*, 481 U.S. at 700.

19. *Feres*, 340 U.S. at 143.

20. 28 U.S.C. § 2674.

21. 340 U.S. at 141–42.

22. *Id.* at 144.

23. *Id.*

aging the military disciplinary structure."[24] These three rationales became known as the "*Feres* rationales," "special factors," or "*Feres* factors." The Court applied all three rationales in some cases, but only the military discipline rationale in other cases.[25] Most recently, in *United States v. Johnson*, the Court reaffirmed that all three factors should be considered in a *Feres* analysis.[26]

III. THE GENESIS TEST

The Court's inconsistency in interpreting *Feres* is especially problematic for lower courts adjudicating prenatal injury cases because the fact patterns are substantially different from any *Feres* case the Court has decided. *Feres* analyzed two medical malpractice claims, and another Supreme Court case, *Stencel Aero Engineering Inc. v. United States*,[27] reviewed a third-party claim derivative of a servicemember's claim, but neither court could have contemplated the unique physically-connected relationship between servicemember mother and in utero child. Faced with this novel circumstance and offered no guidance from the Court, lower courts developed their own doctrine: the genesis test. That test further evolved into three versions: (1) the treatment-focused approach, (2) the injury-focused approach, and (3) the conduct-focused approach. The circuit courts apply the genesis test as a way to determine if the prenatal injury is precluded by *Feres*, based on one or more of the *Feres* factors. Most circuits focus only on the military discipline factor, but some have applied all three factors consistent with *Johnson* and *Stencel Aero*.[28] In *Ortiz*, the Tenth Circuit did not rely on any of the factors.[29]

Eight cases are helpful in understanding how each version of the genesis test developed:

(1) *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

(2) *Monaco v. United States*, 661 F.2d 129, 130 (9th Cir. 1981).

(3) *Scales v. United States* 685 F.2d 970, 971 (5th Cir. 1982).

(4) *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988).

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24. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 821 (10th Cir. 2015) (*quoting* Walden v. Bartlett, 840 F.2d 771, 773 (10th Cir. 1988)).

25. The special factors were first articulated by the Court in *Stencel Aero*. 431 U.S. 666, 671–72 (1977). Later, the Court noted that two of the three factors were "no longer controlling" and instead focused on the military discipline rationale. United States v. Shearer, 473 U.S. 52, 58 n.4 (1985). Then in *United States v. Johnson* the Court reaffirmed that all three rationales should be considered. *Johnson*, 481 U.S. 681, 684 n.2 (1987).

26. *Johnson*, 481 U.S. at 684 n.2.

27. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

28. *Monaco*, *Scales*, *Irvin*, *Minns*, *Ritchie* and *Ortiz* apply the genesis test to determine if the claim would undermine military discipline and decision-making; *Romero* and *Brown* apply the genesis test to determine if all three factors are implicated.

29. *Ortiz*, 796 F.3d at 822.

(5) *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992).

(6) *Brown v. United* States, 462 F.3d 609, 610–11 (6th Cir. 2006).

(7) *Minns v. United States*, 155 F.3d 445 (4th Cir. 1998).

(8) *Ritchie v. United States*, 733 F.3d 871, 873 (9th Cir. 2013).

The lower courts have done their best to apply *Feres* to negligent prenatal care cases given the case law at their disposal, but the results are inconsistent and in conflict with the holdings in the only two Supreme Court cases informative on the subject, *Feres* and *Stencel Aero*.

A. The Birth of the Genesis Test

The genesis test supposedly originates in *Stencel Aero*.[30] In that case, a National Guard officer sued the private manufacturer of the ejection system of his fighter aircraft for injuries he suffered when the system malfunctioned during a midair emergency.[31] The manufacturer cross-claimed the United States, arguing any malfunction in the system was the result of poor design plans and components furnished by the government.[32] Applying all three *Feres* factors, the Court disallowed the private contractor from obtaining indemnification from the government, holding the same *Feres* principles that support barring the servicemember from suing the government for the injuries he suffered in the accident also support barring the manufacturer from recovering.[33] First, the government's relationship with the manufacturer, a supplier of ordnance, was just as "distinctively federal" as the government's relationship with its soldiers.[34] Second, the injured serviceman was compensated under the VBA.[35] The Court emphasized this point, holding for the first time that the "military compensation scheme provides an upper limit of liability for the government as to service-connected injuries."[36] Permitting petitioner's claim would "circumvent this limitation," because the government would be paying twice for the same injury—once to the injured airman through the VBA and a second time to the manufacturer through a civil lawsuit.[37] Finally, the claim would have the same effect on military discipline as a suit brought by the soldier directly injured because the manufacturer was indemnifying the government's for its fault in causing that exact injury. Circuit courts have extended *Stencel Aero* "be-

30. *Ortiz*, 786 F.3d at 824 ("The analysis in *Stencel Aero* became what is now known as the 'genesis test.'").
31. *Stencel*, 431 U.S. at 667–69.
32. *Id.* at 668–69.
33. *Id.* at 673–74.
34. *Id.* at 672.
35. *Id.* at 672–73.
36. *Id.* at 673.
37. *Id.*

yond the indemnity context, creating what is now known as 'the genesis test.'"[38]

In *Monaco v. United States*,[39] the Ninth Circuit was the first appellate court to extend *Stencel Aero* to a prenatal injury case.[40] In *Monaco*, the daughter of a serviceman was born with birth defects that resulted from her father's exposure to gene-mutating radiation during his service before her conception.[41] This birth defect induced brain hemorrhages, aphasia, and other permanent injuries.[42] Focusing only on the military discipline factor, the Ninth Circuit found the daughter's civilian status did not open the door to a tort claim because permitting her claim would require a jury to second guess the government's choice to expose its servicemembers to radiation—the precise examination of military decision-making *Feres* intended to prevent.[43] Because "a court could not rule on [the daughter's claim] without examining acts occurring while [the father] was in the service," *Feres* barred the claim.[44] This reasoning, though a variation of the *Stencel Aero* holding, would become the genesis test.

B. Genesis Test in Negligent Prenatal Care Cases: Treatment, Conduct, or Injury Focus?

1. Treatment-Focused Approach

The Fifth Circuit was the first to apply the genesis test to negligent prenatal care. In *Scales v. United States*, Charles Scales brought an FTCA claim against the government because he was born with congenital rubella syndrome that he allegedly contracted from a rubella vaccine negligently administered to his mother by Air Force medical staff during the first trimester of her pregnancy.[45] Citing *Stencel* and *Monaco* as authority and focusing on the military discipline factor, the Fifth Circuit employed what would later become the "treatment-focused genesis test."[46] The court held the treatment accorded Charles' mother was "inherently inseparable from the treatment accorded Charles as a fetus in his

38. *Ortiz*, 786 F.3d at 837 n.3.
39. Monaco v. United States, 661 F.2d 129 (9th Cir. 1981).
40. *Monaco* is one case in a long line of "exposure" cases. Two exposure cases, *Monaco* and *Minns*, are helpful to understanding the development of the genesis test as it has been applied in negligent prenatal care cases. Negligent exposure cases present their own set of problems and have been discussed at length by other authors. Mia Donnelly, *Fighting* Feres*: Creating a VA Benefits Program for the Children of Servicemembers Injured by Parental Exposure*, 83 GEO. WASH. L. REV. 647 (2015); Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1 (2007). The framework for analysis suggested by this Article can apply to both negligent exposure cases and negligent prenatal care cases, but this Article focuses on the latter given the circuit court split induced by *Ortiz*.
41. *Monaco* at 130.
42. *Id.*
43. *Id.* at 133–34.
44. *Id.* at 134.
45. Scales v. United States, 685 F.2d 970, 971 (5th Cir. 1982).
46. *Id.* at 974.

mother's body."[47] *Feres* barred Scales' claim for the same reasons underlying *Monaco*: just as permitting his Scales' mother to sue the medical staff would undermine military decision-making, so too would permitting Charles to bring a claim—his injuries resulted from the same vaccine administered to his mother.[48]

The Sixth Circuit applied the same treatment-focused approach used in *Scales* in *Irvin v. United States* when it coined the term "genesis test."[49] In *Irvin*, a servicewoman and her husband sued the government for the death of their daughter four days after her birth, which allegedly resulted from a military hospital's negligent prenatal diagnosis and care.[50] The hospital cared for the mother as a routine patient instead of classifying her condition as "urgent" as her symptoms and medical history suggested.[51] Following *Scales* and *Monaco* and focusing on the military discipline factor, the court held permitting the claims would place a trial court "in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces[,] precisely the type of examination that *Feres* seeks to avoid."[52] *Feres* barred the claim because the treatment in question was afforded to the servicemember mother, as it was in *Scales*.[53]

The Fourth Circuit applied the genesis test to a nearly identical fact pattern in *Romero v. United States*, but held *Feres* did not bar the claim.[54] The court used the "sole purpose" test, a variation of the treatment-focused approach.[55] Like in *Irvin*, the injury in *Romero* stemmed from inadequate prenatal care that resulted from the medical staff ignoring crucial medical history of the mother.[56] Plaintiff parents, Roxanna and Clifford Romero, alleged the Naval doctors' failure to implement a medical treatment plan for Roxanna, despite knowing about her congenital cervical weakness, resulted in their son, Joshua, being born with cerebral palsy.[57] The court held *Feres* did not apply because the "sole purpose" of the treatment—sutures over Roxanna's cervix to prevent premature labor—would have been directed at Joshua and only served to prevent him from injury.[58] Additionally, the court found that application of

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47. *Id.*
48. *Id.*
49. Irvin v. United States, 845 F.2d 126, 131 (6th Cir. 1988). The Irvin court cited several additional cases having used something like the "genesis" test, including *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), *Lombard v. United States*, 690 F.2d 215, 226 (D.C. Cir. 1982) and *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983).
50. *Irvin*, 845 F.2d at 127.
51. *Id.*
52. *Id.* at 131 (quoting *Scales*, 685 F.2d at 974) (internal quotation marks omitted).
53. *Id.* at 131.
54. Romero v. United States, 954 F.2d 223, 227 (4th Cir. 1992).
55. *Id.* at 225.
56. *Id.*
57. *Id.* at 224.
58. *Id.* at 225.

the three-factor *Feres* balancing test supported its decision to permit Joshua to bring the FTCA claim.[59]

2. Injury-Focused Approach

Eighteen years after its decision in *Irvin*, the Sixth Circuit faced a fact pattern analogous to *Romero*, but instead of applying the treatment-focused genesis test that both *Irvin* and *Romero* used, the court recharacterized those precedents as standing for a focus on the genesis of the *injury*.[60] In *Brown v. United States*, Timothy Brown brought suit on behalf of his daughter Melody against the senior medical officer at a Navy clinic who recommended Timothy's wife, Deborah, stop taking her prenatal vitamins.[61] Timothy alleged the doctor's negligent prenatal treatment caused Melody to be born with spina bifida because she lacked sufficient folic acid during gestation.[62] The Sixth Circuit found the facts analogous to *Romero* because, like the mother in that case who wasn't "injured" by her cervical weakness, Deborah was not "injured" by having less than the recommended amount of folic acid in her system.[63] The court held that Melody could bring a claim because, like the plaintiff in *Romero*, she suffered injury independent of any injury to her servicemember parent and, where negligent prenatal care affects only the health of the fetus, the three *Feres* rationales are simply inapplicable.[64]

3. Conduct-Focused Approach

Six years after its *Romero* decision, the Fourth Circuit took the genesis test in a different direction in *Minns v. United States*, another preconception exposure case.[65] In *Minns*, wives and children of servicemen brought FTCA claims against the government on the theory that their husbands' and fathers' exposure to toxins and pesticides during military preparation caused a chromosomal change that led to birth defects in the children conceived after the exposure.[66] The court applied a conduct-focused genesis test that, like the tests used in *Irvin*, *Scales*, and *Monaco*, was chiefly concerned with the impact of the circumstances on military discipline.[67] The court held the genesis test does not ask when and where the injury occurred, but "whether the [government's] negligent act is the basis for the '*type* of claim that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'"[68] The court held that the "negligence in [administer-

59. *Id.*
60. Brown v. United States, 462 F.3d 609, 612–13 (6th Cir. 2006).
61. *Id.* at 610–11.
62. *Id.*
63. *Id.* at 614–16.
64. *Id.*
65. *See* Minns v. United States, 155 F.3d 445 (4th Cir. 1998).
66. *Id.* at 447.
67. *Id.* at 450.
68. *Id.*

ing the exposure-program] to the servicemen thus was the 'genesis' and the 'but for' cause of the injuries to the wives and children,"[69] and so the plaintiffs' claims were the type of claim that would result in a civilian court second-guessing military decision-making.[70]

In *Ritchie v. United States*, the Ninth Circuit was the last court to apply the genesis test to a prenatal injury case before *Ortiz*, and so concludes the historical development of the test.[71] In analyzing the case, the court emphasized its commitment to applying the injury-focused genesis test from *Monaco* and other Ninth Circuit precedent.[72] That version of the test asks (1) whether the family member's FTCA claim has its "genesis in injuries to members of the armed forces" and, more especially, (2) whether entertaining the claim would cause a court to "examine the government's activity in relation to military personnel on active duty."[73] In *Ritchie*, a civilian father brought an FTCA claim against the United States for loss of consortium and wrongful death.[74] He alleged that officers in the U.S. Army caused his son's death by ordering his pregnant wife, a servicewoman on active duty, to perform physical training that contradicted her doctors' instructions.[75] The physical activity induced premature labor that caused the son's death thirty minutes after birth.[76] The plaintiff analogized the facts to *Romero* and *Brown* where the mother's "injury" was no injury at all, but the child suffered severe injury independently.[77] The Ninth Circuit rejected the plaintiff's suggestion to adopt out-of-circuit "doctrinal contortions."[78] Instead, it applied its version of the genesis test to hold the civilian father's claim was barred by *Feres* because it asked the court to scrutinize orders given to his wife by her military supervisor—precisely the military decision-making *Feres* intended to protect.[79]

The Tenth Circuit decided *Ortiz* in this sea of genesis tests.

IV. ORTIZ V. UNITED STATES

A. Facts

In March 2009, Heather Ortiz, an active duty servicemember of the U.S. Air Force, checked into the Evans Army Community Hospital in Fort Carson, Colorado for a scheduled Caesarean section.[80] Before the

69. *Id.*
70. *Id.*
71. Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013).
72. *Id.* at 877.
73. *Ritchie* at 875–76.
74. *Id.* at 873.
75. *Id.*
76. *Id.*
77. *Id.* at 877.
78. *Id.* at 877–78.
79. *Id.* at 876–77.
80. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 819 (10th Cir. 2015).

procedure began, a nurse at the hospital gave Ortiz Zantac to prevent aspiration of gastric acid during labor or surgery.[81] As clearly noted in her records, Ortiz is allergic to Zantac; she immediately reacted to the medication.[82] Medical staff administered Benadryl to counteract the allergy.[83] But the Benadryl caused a sudden drop in Ortiz's blood pressure that restricted blood flow to the uterus and placenta long enough to cause her child, I.O., to suffer severe brain trauma that caused cerebral palsy.[84]

B. Procedural History

I.O.'s father filed a lawsuit on her behalf against the United States in the federal district court, seeking compensation for I.O.'s injuries, long-term medical care, and life-care needs.[85] The United States moved to dismiss the suit for lack of subject matter jurisdiction pursuant to the *Feres* doctrine.[86] Applying several standards adopted in other circuits, the district court held that because "the harm to I.O. was incident to the service of her mother," *Feres* barred plaintiff's claims related to both (1) the negligent dispensation of Zantac and Benadryl, and (2) the negligent observation of fetal vital signs.[87]

The Tenth Circuit affirmed the lower court's decision relying on *Feres* and *Stencel Aero* as primary authority.[88] The court held the injury-focused version of the genesis test is the appropriate analysis for *Feres* claims involving derivative third-party injuries, including those occurring in utero.[89] Because I.O.'s injury derived from her mother's injury—the drop in blood pressure—*Feres* barred I.O.'s claims.

C. Majority Opinion

The Tenth Circuit affirmed the judgment of the district court, holding the *Feres* doctrine barred I.O.'s claims.[90] Writing for the majority, Judge Timothy Tymkovich began by acknowledging that "the facts here exemplify the overbreadth (and unfairness) of the doctrine, but *Feres* is not [the Tenth Circuit's] to overrule."[91]

First, the majority summarized the history of the *Feres* doctrine and its application in the Tenth Circuit.[92] The court explained the "special factors," and the recent focus by many courts on the third factor, the im-

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Ortiz v. United States by & through Evans Army Cmty. Hosp., No. 12-CV-01731-PAB-KMT, 2013 WL 5446057, at *7 (D. Colo. Sept. 30, 2013).
88. *Ortiz*, 786 F.3d at 823–26.
89. *Id.* at 829–31.
90. *Id.* at 818.
91. *Id.*
92. *Id.* at 820–22.

portance of preserving military disciplinary structure.[93] However, the court clarified that the Tenth Circuit has "essentially rejected any focus on the special factors, finding them unduly redundant, and returned the analysis to the inquiry that *Feres* originally set forth: whether the injury was 'incident to service.'"[94]

Next, the court discussed the framework for "addressing claims asserted by civilian third parties that arise out of injuries to a servicemember."[95] The majority pointed to *Stencel Aero* as the case where the Supreme Court articulated the genesis test as the proper analysis for third party civilian injuries derivative from servicemember injuries.[96] Relying on *Stencel Aero*, the majority announced its adoption of the genesis test for third party *Feres* claims involving derivative injuries, concluding that where a civilian injury has its origin in an incident-to-service injury to a service member, *Feres* will bar the claim.[97] Then, the majority specified its preference for the injury-focused version of the genesis test.[98] This version of the approach asks (1) whether there was an incident-to-service injury to the servicemember, and (2) whether the injury to the third party was derivative of that injury.[99] A negative answer to either question overcomes the *Feres* jurisdictional bar.[100] The court concluded that binding precedents, *Feres* and *Stencel Aero*, command adoption of the injury-focused genesis test and rejection of a focus on the object of the negligence or the target of the medical treatment approaches taken by other courts.[101]

Finally, the majority explained why the injury-focused genesis test applies to in utero cases over a treatment or conduct-focused approach like that suggested by the concurrence.[102] Other circuits have applied a treatment-focused genesis test, but that approach looks closer at the merits than the jurisdictional *Feres* doctrine calls for.[103] The majority emphasized that if *Feres* applies, the government is immune to lawsuits regardless of "the viability of plaintiff's negligence or other tort claims."[104] A treatment-focused genesis test skips to questions of duty, breach, and causation when only two questions need be asked: Was a service member injured? Did that injury cause a non-servicemember's injuries?[105]

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93. *Id.* at 821.
94. *Id.* at 822.
95. *Id.* at 823.
96. *Id.*; *see supra* Part III.A.
97. *Id.* at 824.
98. *Id.*
99. *Id.*at 829–31.
100. *Id.* at 824.
101. *Id.* at 826.
102. *Id.*
103. *Id.* at 829.
104. *Id.*
105. *Id.* at 829–31.

Applying the injury-focused genesis test to the facts in *Ortiz*, the majority concludes I.O.'s injury derived from her servicemember mother's injury.[106] Particularly, in looking at the plaintiff's complaint, the majority found plaintiff did not allege that Ortiz was not injured.[107] Instead, the complaint references Ortiz's "allergic reaction," "blood pressure problems," and "hypotension"—evidence of factual injury, according to the court.[108] From there, it is a short logical step to hold I.O.'s oxygen loss and subsequent brain trauma were the direct result of Ortiz's drop in blood pressure.[109] Because I.O.'s injuries derived from her servicemember mother's injuries, her claims were barred by *Feres*.[110] Accordingly, the Tenth Circuit affirmed the district court's grant of summary judgment in favor of the Government.[111]

D. Concurring Opinion

Judge David Ebel wrote separately to suggest a conduct-focused genesis test, instead of the majority's injury-focused approach, to determine whether *Feres* bars a civilian's claim for in utero injuries that arise out of the military's provision of medical care to a servicemember mother.[112] The conduct-focused genesis test finds *Feres* bars a third party claim where the civilian child's in utero injuries "flowed directly from the military's immunized conduct toward its pregnant servicemember."[113] Judge Ebel argued that, by focusing on the immunity inquiry of the military's conduct, the conduct-focused genesis test offers two advantages over the majority's injury-focused test: (1) it better protects the "peculiar and special" relationship between the military and its servicemembers, and (2) it comports with the Tenth Circuit's front-loaded immunity inquiry in other contexts.[114]

Further, Judge Ebel observed the conduct-focused genesis test is more consistent with the fundamental justifications for *Feres*: (1) the distinctly federal nature of the military's relationship to its servicemembers; (2) the availability of alternative compensation systems for injured servicemembers; and (3) the need to preserve the military disciplinary structure.[115] In particular, the concurrence noticed the Supreme Court has emphasized that the third rational—the realities of the military establishment as a "specialized community" and the importance of protecting the disciplinary structure—is at the heart of the *Feres* doctrine.[116] Dam-

106. *Id.* at 831.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 832.
111. *Id.* at 833.
112. *Id.* at 833–41 (Ebel, J., concurring).
113. *Id.* at 834.
114. *Id.*
115. *Id.* at 834–36.
116. *Id.* at 835.

ages actions brought by servicemembers clearly pose a danger of disrupting the military-servicemember relationship.[117] Actions brought by third parties can pose this same danger.[118] Judge Ebel argued that the conduct-focused approach is the only genesis test that consistently and adequately protects the military-servicemember relationship because it evaluates the military's conduct.[119] If a certain kind of conduct falls under *Feres* immunity, that conduct will be immunized regardless of whom it affects.[120]

V. ANALYSIS

On appeal, the Supreme Court should reverse *Ortiz* and reject the use of any version of the genesis test in prenatal injury cases. The Court should employ a compensation-focused test to analyze those cases. The genesis test must be rejected because it lacks doctrinal support and promotes arbitrary line-drawing that defies basic tort principles. First, the genesis test lacks doctrinal support because it is inconsistent with *Stencel Aero*, the case courts rely on to justify using the test in negligent prenatal care cases.[121] The holding in *Stencel Aero* turns on an application of all three *Feres* factors with an emphasis on the government's statutory limit of liability, and explicitly prevents only third party claims that derive from the *same* servicemember's injury, not claims that derive from an injury to the third party themselves.[122] Further, the genesis test does not effectuate its often-stated purpose to eliminate claims that would call into question military decision-making; it eliminates some of these claims while permitting others.[123] Second, as it is applied in prenatal injury cases, the genesis test contradicts the basic tort principle of causation.[124] The government is let off the hook for causing an injury to a civilian, a person outside the class of persons the *Feres* doctrine prohibits from bringing claims.[125]

The Court should require that lower courts analyze in utero injuries by focusing on the issues central to the *Stencel Aero* holding: (1) whether a military servicemember suffered injury incident to military service; (2) whether they or a third party can recover under the VBA or a similar compensatory scheme for that injury; and if so, (3) whether a third party is attempting to recover damages for the same injury for which the government must already compensate the servicemember or a third party. Put simply, Is the government being asked to pay twice for the same in-

117. *Id.* at 836.
118. *Id.* at 836–37.
119. *Id.*
120. *Id.*
121. E.g., *Ortiz*, 786 F.3d at 824 ("The analysis in *Stencel Aero* became what is now known as the 'genesis test.'").
122. *See supra* Part III.
123. *See supra* Part III.
124. *See infra* Part V.A.2.
125. *See infra* Part V.A.2.

jury? If so, the claim is barred by *Feres*; if not, the claim survives summary judgment. A compensation-focused analysis is supported by *Stencel Aero* and holds the government liable for injuries it causes consistent with ordinary tort principles. In addition to its doctrinal consistency, this test will be relatively easy for lower courts to apply. Further, it will encourage Congress to amend the FTCA to permit more claims or compensate plaintiffs more often under the VBA. Without amendment, the government will have to answer for its torts in civil court. The following comments apply to most prenatal care cases adopting some version of the genesis test, but they are couched in a critique of the Tenth Circuit's application of the genesis test in *Ortiz*.

A. Court Should Reject the Genesis Test

1. No Doctrinal Support

First, the genesis test should be rejected because it lacks doctrinal support. Although it supposedly originates in *Stencel Aero*, the genesis test is inconsistent with that case because the Court's holding to bar the third party manufacturer's claim turned on an application of all three *Feres* factors with an emphasis on the government's limit of liability set by the VBA.[126] Further, the Court explicitly limited the *Stencel Aero* holding to prevent only third party claims deriving from injuries to servicemembers, not third party claims deriving from injuries to the third parties themselves.[127] The genesis test also lacks doctrinal support because it does not eliminate all claims that might cause a trial court to second-guess military decision-making.

Like most versions of the genesis test, the Tenth Circuit's injury-focused genesis test does not follow *Stencel Aero's* analysis. In *Ortiz*, the court rejected reliance on any *Feres* factor and held that any injury finding its genesis in a service member's injury is an injury "incident to service" that *Feres* bars from adjudication.[128] *Ortiz* ignored the compensation emphasis of *Stencel Aero*. *Stencel Aero* held that "the military compensation scheme provides an upper limit of liability for the government as to service-connected injuries."[129] The Court relied on that factor to conclude that even though the manufacturer could not be compensated under the VBA, the government was still not liable to pay twice for the same injury.[130] In subsequent cases where the Court has applied *Stencel*

126. *See supra* Part III. Again, the Stencel Aero Court considered (1) the distinctly federal nature of the relationship between the Government and members of its armed forces; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military disciplinary structure. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671–73 (1977). The court emphasized the compensation-scheme factor in particular. *Id.* at 673.

127. *Stencel Aero*, 431 U.S. at 673.

128. *Ortiz*, 786 F.3d at 824.

129. *Stencel Aero*, 431 U.S. at 673.

130. *Id.* at 672–73.

Aero, it has emphasized that major holding.[131] Proponents of the doctrine might argue that, though not identical to a three-factor *Feres* analysis, the genesis test is still consistent with *Stencel Aero*'s holding. But without considering the availability of compensation, the genesis test bars claims that a three-factor analysis would permit. The genesis test ignores the central piece of the *Stencel Aero* approach.

Further, *Stencel Aero* does not support the genesis test because the Court explicitly limits the holding to preventing third party claims that derive from an already-compensated-servicemember's injury, not claims that derive from an injury to the third party themselves.[132] The Tenth Circuit's derivative-injury focus ignores this limitation. Consider how the *Stencel Aero* Court might have decided the case if it involved a derivative injury. Imagine the third party was a civilian bystander injured by a falling piece of debris while witnessing Captain Donham's midair emergency. Suppose the plane was manufactured entirely by the Air Force and evidence showed the injuries to both the Captain and the bystander were caused by the government's negligence. The Captain's claims would be barred as they were in *Stencel Aero*. But applying each of the three factors, it is likely the *Stencel Aero* Court would have permitted the civilian bystander to recover. In this hypothetical case, certainly the relationship between the government and the bystander was not "distinctively federal in character"[133] as was the relationship between the government and its supplier of ordnance. Nor would the bystander be privy to a military compensation scheme like the Captain. The third factor—whether the claim would cause a trial court to second-guess military orders—is a closer call. However, the Court determined 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 the solider directly or by a third party."[134] Here, it seems the Court means that whether the soldier is demanding a trial court examine the actions leading to his injuries or a third party is demanding a trial court examine the actions leading to the soldier's injuries, the inquiry is the same and undermines military orders. The case of the bystander is different. His case would not concern the injury of a soldier on duty, but his own injuries. The *Stencel Aero* Court stated the implications of its holding explicitly: "[T]he right of a third party to recover in an indemnity action against the United States recognized in Yellow Cab, must be held limited by the rationale of *Feres where the injured party is a serviceman*."[135] The case does not similarly limit claims where the government

131. Hatzlachh Supply Co. v. United States, 444 U.S. 460, 465 (1980); *see also* Hercules, Inc. v. United States, 516 U.S. 417 (1996); Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

132. *Stencel Aero*, 431 U.S. at 673.

133. *Id.* at 672.

134. *Id.* at 673 (emphasis added).

135. *Id.* (emphasis added).

also injures a civilian. Applying all three factors, it seems the Court would have permitted a bystander's claim for a derivative injury under *Feres*. In *Ortiz*, I.O. is situated like the bystander.[136] Her claims did not concern her mother's injuries, but her own injuries.[137] The *Stencel Aero* holding can be reasonably read to permit I.O.'s claims.

Finally, the genesis test lacks doctrinal support because, as the Court applies it in prenatal injury cases, it does not eliminate all claims that might cause a trial court to second-guess military decision-making. The genesis test still permits litigation by third parties where the "issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety."[138] For example, courts have permitted litigants to bring FTCA claims on behalf of babies injured just after birth or during birth if the injury is "direct" and independent from an injury to their mother.[139] It is difficult to see how adjudication of these claims would not "take virtually the identical form" as claims by in utero children.[140] If the goal of courts applying the genesis test in prenatal injury cases is to prevent second-guessing of military decision-making, they are only addressing a portion of the cases they fear.

2. Violates Tort Principles

Second, the genesis test should be rejected because, when applied in negligent prenatal care cases, it consistently violates basic tort principles. In every case surveyed above applying the test, the government's conduct was the but-for cause of the civilian child's injury.[141] No other actor or superseding intervening cause played a role. Yet, the children cannot recover. The genesis test punishes these civilian children for when they suffered injury—if the government causes the injury to the child in the

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136. Perhaps the circuit courts avoid analyzing prenatal injury cases by a direct analogy to *Stencel Aero* to prevent these decisions from turning on an interpretation of personhood or viability—whether the unborn child has independent rights to bring a medical malpractice claim at all. Although the law is not settled everywhere, most jurisdictions permit children to recover for prenatal injuries incurred at any stage of the pregnancy. Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727 (1956) (mother approximately six weeks pregnant); Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951); Smith v. Brennan, 157 A.2d 497 (1960); Bennett v. Hymers,147 A.2d 108 (1958); Sinkler v. Kneale, 164 A.2d 93 (1960) (mother one month pregnant); Sylvia v. Gobeille, 220 A.2d 222 (1966); Daley v. Meier, 178 N.E.2d 691 (1961) (mother approximately one month pregnant); Kelly v. Gregory, 282 A.D. 542 (1953) (third month of pregnancy).

137. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 819 (10th Cir. 2015).

138. *Stencel*, 431 U.S. at 673.

139. *See e.g.* Brown v. United States, 462 F.3d 609, 610–11 (6th Cir. 2006); Romero v. United States, 954 F.2d 223 (4th Cir. 1992); Burgess v. United States, 744 F.2d 771 (11th Cir. 1984) (child permitted to bring suit under the FTCA for injuries suffered during his birth when, to assist with delivery, the doctor broke both of the child's clavicles causing paralysis in the child's upper arm); Williams v. United States, 435 F.2d 804 (1st Cir.1970) (serviceman's child denied treatment at military hospital); Grigalauskas v. United States, 103 F.Supp. 543, 550 (D.Mass. 1951) (serviceman's child sues for post-delivery injuries at military hospital).

140. *Stencel*, 431 U.S. at 673.

141. *See supra* Part III.

womb, the child cannot recover; if the government causes the injury to the child out of the womb, the child can recover. In both cases, the child is a civilian—a person outside the class of persons the *Feres* doctrine aims to prevent from suing under the FTCA—and the government caused the injury. In many cases, the mother also received an injury due to negligence of the medical staff, but that additional injury caused by the government does not change the causation analysis for the child's injury nor eliminate the government's responsibility to the non-servicemember child. The government is immune as to the servicemember's injury, yes, but it is not immune as to the civilian child's injury. This irrational framework not only leaves civilian children and their families without compensation, but also threatens the legal system by creating a loophole for future tortfeasors.

The Tenth Circuit addresses this issue in *Ortiz*. The court admits the military medical personnel caused I.O.'s injuries.[142] But the court stresses "[t]he *Feres* doctrine has always operated as an antecedent jurisdictional hurdle" that may bar plaintiffs' suits regardless of whether they have established a "prima facie tort against the government."[143] This concept isn't striking in *Feres* cases where a servicemember is the only person injured, or where a civilian family member brings a wrongful death claim for their servicemember killed during combatant activities because *Feres* stands for the principle that the government is immune from liability for torts to servicemembers.[144] The concept is shocking in prenatal injury cases where the government is the but-for cause of the harm to the civilian child but refuses to answer for its negligence regardless. Neither *Feres* nor *Stencel Aero* stands for the principle that the government is immune from compensating civilian dependents of servicemembers for injuries it causes.[145] In fact, the government has answered time and again for its torts committed against civilian dependents.[146]

Again, applied in these cases the genesis test punishes civilian children for *when* they suffered injury rather than assessing liability based on *who* suffered injury. The Tenth Circuit's argument that it doesn't matter whether a plaintiff has a prima facie case against the government makes sense when applied to servicemembers clearly excluded by *Feres* from bringing FTCA claims, but it fails to find support from tort law when applied to civilians suffering their own injuries caused by the government.

142. *Ortiz*, 786 F.3d. at 818.
143. *Id.* at 829, 829 n.12.
144. Feres v. United States, 340 U.S. 135, 146 (1950).
145. *See supra* Parts II–III.
146. *See supra* note 125.

B. Compensation-Focused Test

The Court should adopt a compensation-focused test to analyze prenatal injury claims. Such a test should focus on the issues central to *Stencel Aero*, asking (1) whether a military servicemember suffered injury incident to military service, (2) whether they or a third party can recover under the VBA or a similar compensatory scheme for that injury, and if so, (3) whether a third party is attempting to recover damages for the *same* injury for which the government must already compensate the servicemember or a third party. If the government is being asked to pay twice for the same injury, the claim is barred by *Feres*.

The test is consistent with Supreme Court precedent cases *Feres* and *Stencel Aero* because it includes the "incident to service test" and respects the "upper limit of liability" imposed by the VBA, but does not unnecessarily prevent civilians from properly bringing claims under the FTCA. Applied to *Ortiz*, the compensation-focused test would permit I.O. to bring her claims against the government because neither the second nor third prong is met.

1. Foundations of Compensation-Focused Test

The compensation-focused test is consistent with *Feres*, *Stencel Aero*, and the subsequent cases where the Court has applied *Stencel Aero*. Recall *Feres* holds the FTCA does not create a right of action for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[147] Again, *Stencel Aero*, the Court's premier case on third party *Feres* claims, held a third party's claim was *Feres* barred because (1) the petitioner had a distinctly federal relationship with the government, (2) the petitioner's claim would cause the government to pay twice to compensate the same injury, and (3) the claim would "take virtually the identical form" as a claim brought by the servicemember.[148] *Stencel Aero* also stands for the premise that "the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries."[149] In subsequent cases where the Court has applied *Stencel Aero*, it has emphasized the case's major holding "that the existence of an exclusive statutory compensation remedy negates tort liability."[150] It follows then, that where an exclusive statutory compensation remedy does not exist, the government may be liable for its torts. Combining the holdings from *Feres* and *Stencel Aero*, it makes sense to design a test for third party *Feres* claims that precludes recovery when a servicemember was injured incident to military service and someone has been compensated by statute. This formulation will preclude claims

147. *Feres*, 340 U.S. at 146.
148. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 672–73 (1977).
149. *Id.* at 673.
150. *See supra* note 119.

brought by servicemembers for injuries for which they have been compensated. It will prohibit wrongful death claims where the family member has been compensated under the VBA, as was the case in *Johnson*.[151] It may preclude negligent exposure cases like *Monaco* if there is a statutory remedy in place, but will permit exposure claims where there is no remedy. Finally, the compensation-focused test will permit negligent prenatal care claims until the government creates a benefit program for children suffering those injuries.

2. Benefits of Compensation-Focused Test

Not only is a compensation-focused analysis supported by *Stencel Aero* and *Feres*, but the test also holds the government responsible for injuries it causes consistent with tort liability and the FTCA. *Feres* was not decided to bar civilians from bringing claims under the FTCA; its holding aimed to bar servicemembers from bringing claims.[152] The compensation-focused test will permit civilians to bring FTCA claims against the government regardless of their relationship with the injured servicemember, whether by umbilical cord or supplier contract. Civilians will be permitted to recover so long as there is no statutory compensation available to them. The permissiveness of the test will encourage Congress to amend the FTCA to permit more claims, compensate plaintiffs for more injuries under the VBA, or create more benefit programs[153] to avoid answering for its torts in civil court.

Additionally, a compensation-focused test will be easy for lower courts to apply. The first prong requires a military service member to have suffered an injury incident to military service—the same inquiry employed in the genesis test. Because lower courts have been liberal in defining injuries as "incident to service," this prong will usually be met.[154] Of course, where an injury is clearly not incident to military service, the plaintiff can bring their claim. The second prong asks whether the injured servicemember or a third party can recover under the VBA or a similar compensatory scheme for the injury. Parties can easily demonstrate to the court whether compensation is available by pointing to the statute on point or its nonexistence. The third prong is likewise a simple inquiry: Is the third party seeking compensation for the same injury as the military member (like *Stencel Aero*), or for a separate injury? If the government has not paid for causing the injury, the claim is permitted, where the government has paid for causing the injury, the claim is not permitted.

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151. United States v. Johnson, 481 U.S. 681, 683 (1987) ("Johnson's wife[] applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act.").

152. *Feres*, 340 U.S. at 146 ("We conclude 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.").

153. 38 U.S.C. §§ 1802–05, 1811–16 (2012).

154. See *supra* Part III.

3. Compensation-Focused Test Applied to *Ortiz*

Applying the compensation-focused test to *Ortiz*, the first question is whether Ortiz suffered an injury incident to military service. The Tenth Circuit held she did.[155] With *Feres* as precedent, servicemember injuries suffered in medical settings will almost always be incident to service. The second issue is whether Ortiz could recover for her injury under a compensation scheme. Although the case does not reach this question, it is likely the answer is "no." Ortiz suffered "hypotension," or a drop in blood pressure.[156] For her, this is not a cognizable injury for which she could receive compensation because her blood pressure eventually returned to normal levels leaving no trace of permanent damage. This would end the inquiry and permit I.O. to bring her tort claims.

Even assuming Ortiz suffered an injury incident to service for which she could recover under the VBA, the third prong—whether a third party is attempting to recover damages for the *same* injury—is still not met. I.O. brought claims against the government for her own injuries—the brain damage that led to cerebral palsy. This is a different injury to a different person that the government has not paid for. If the government compensated Ortiz for injuries related to her low blood pressure, that is of no consequence for I.O. She may still bring the claim. Whether or not Ortiz is considered to have a compensable injury, I.O. would be permitted to sue the government for the injuries she suffered due to the military hospital's negligence.

VI. CONGRESSIONAL ACTION

Regardless of whether the Court grants certiorari in *Ortiz*, Congress should amend the FTCA to permit all medical malpractice plaintiffs to bring suit, or at least those suffering prenatal injuries, or create a benefit program for children suffering injuries from negligent prenatal care.

Congress has several times attempted to pass a bill excepting medical malpractice claims from the *Feres* jurisdictional bar.[157] Most recently, Rep. Barney Frank in the 101st Congress (1989-90) introduced H.R. 536 "[t]o amend chapter 171 of title 28, United States Code, to allow claims against the United States under that chapter for damages arising from certain negligent medical care provided members of the Armed Forces."[158] The bill passed in the House of Representatives via voice vote.[159] It was received in the Senate and referred to the Committee on Armed Services.[160] The bill died in committee, never making it to the Senate

155. Ortiz v. United States Evans Army Cmty. Hosp., 786 F.3d 817, 831–32 (10th Cir. 2015).
156. *Id.* at 831.
157. *E.g.* H.R. 1161, 99th Cong. (1986); H.R. 3174, 99th Cong. (1986); H.R. 536, 101st Cong. (1989).
158. H.R. 536, 101st Cong. (1989).
159. *Id.*
160. *Id.*

floor. H.R. 536 is a good model for the bill Congress should pass. It authorizes the following:

> [Claims] for personal injury or death or a member of the Armed Forces in a medical facility operated by the Secretary of a military department or any other medical facility operated by the United States … [that] have arisen out of noncombatant medical or dental care furnished the member….[161]

The bill also restricts claimants to recovering only one form of compensation. If claimants receive an award or judgment on a claim under the amendment, they cannot collect an additional benefit from a statutory compensation scheme. If they lose the lawsuit, they can collect the statutory benefit available. Alternatively, Congress could permit only medical malpractice claims from children suffering prenatal injuries due to negligence on the part of military medical personnel. This carve out may be more acceptable to members of Congress that opposed H.R. 536 due to the servicemembers already receiving benefits through the VBA and those under the impression that "dependents of active duty personnel … may [always] sue the Government for malpractice at military medical facilities."[162]

If Congress does not amend the FTCA, it should create a benefit program for child victims of negligent prenatal care designed similarly to that established for children of Vietnam veterans born with spina bifida or other birth defects.[163] That section of the VBA provides comprehensive healthcare, rehabilitation, vocational training, and a monetary allowance to children covered by the Act.[164] The VBA could be similarly amended to include a section compensating child victims of negligent prenatal care. The new benefit program should include compensation for long-term medical care and life-care needs, as well as loss of consortium benefits to family members.

VII. CONCLUSION

"The right a pregnant woman has to serve means little if her service requires she put her fetus's health and well-being at risk."[165] The Supreme Court should grant certiorari to review *Ortiz* and resolve the split among the circuit courts about how the *Feres* doctrine applies in prenatal injury cases. The Court should reject any use of the genesis test in prenatal injury *Feres* cases in favor of a compensation-based test that permits recovery to third parties unless (1) a military servicemember suffered

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161. 135 CONG. REC. H3224-01 (1989).

162. *Id.* (statement of Rep. Schiff that "the Government is already paying an amount to those people in the military who are injured through malpractice"); *id.* (statement of Rep. Byron).

163. 38 U.S.C. §§ 1802–05, 1811–16 (2012).

164. *Id.*

165. Ritchie v. United States, 733 F.3d 871, 881 (9th Cir. 2013).

injury incident to military service; (2) they or a third party can recover under the VBA or a similar compensatory scheme for that injury; and (3) a third party is attempting to recover damages for the same injury for which the government must already compensate the servicemember or a third party. Not only does this test better comport with the Supreme Court holdings in *Feres* and *Stencel Aero*, but it also promotes equity and would be easy for courts to apply. The test would hold the government liable for injuries it causes consistent with ordinary tort principles and encourage Congress to amend the FTCA or VBA to compensate people for more injuries.

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