No. 17-35002

---

**In the United States Court of Appeals**
**for the Ninth Circuit**

---

Tracy Jahr, et al.,

*Plaintiffs-Appellants*,

v.

United States of America,

*Defendant-Appellee*.

---

Appeal from the United States District Court
for the Western District of Washington
No. 2:14-cv-01884-BJR
Hon. Barbara J. Rothstein

---

# Brief of Appellants Tracy Jahr and W. Brett Roark

---

Brian C. Brook
CLINTON BROOK & PEED
641 Lexington Avenue
13th Floor
New York, NY 10022
(212) 328-9559
brian@clintonbrook.com

Gregory M. Lipper
CLINTON BROOK & PEED
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(202) 621-1828
glipper@clintonbrook.com

*Counsel for Appellants*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other**

## STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over Plaintiffs' Federal Tort Claims Act lawsuit under 28 U.S.C. § 1346(b) and 28 U.S.C. § 2674. Plaintiffs also complied with the timeliness and exhaustion requirements set forth in 28 U.S.C. § 2401(b) and 28 U.S.C. § 2675. *See* ER 123.

The district court granted Defendant's motion to dismiss, for lack of subject-matter jurisdiction, the claims brought by two of the four plaintiffs, Tracy Jahr and W. Brett Roark. ER 7. As authorized by Federal Rule of Civil Procedure 54(b), the court then "direct[ed] that final judgment be entered dismissing the claims of those Plaintiffs and certifying them for immediate appeal." ER 3. Final judgment was entered on December 6, 2016. ER 1.

In accordance with Federal Rule of Appellate Procedure 4(a), Jahr and Roark timely filed their notice of appeal on January 4, 2017. ER 19.

## ISSUES PRESENTED FOR REVIEW

Due to the Army's negligence, Michael Roark was shot and killed after he was discharged from the military. The Department of Veterans Affairs denied death benefits to his parents because "the evidence does

not establish any relationship between [the death] and the veteran's service." His parents then filed suit against the United States under the Federal Tort Claims Act (FTCA) to redress his wrongful death. This appeal raises the following questions:

1. Should the *Feres* doctrine, which forbids certain FTCA claims arising from injuries to servicemembers, be expanded to bar claims for injuries suffered entirely after the victim left the military?

2. Should the oft-maligned, judge-made *Feres* doctrine be retained if it strips veterans and their families of remedies for injuries occurring entirely after military service?

## PRELIMINARY STATEMENT

Two teenagers, Michael Roark and Tiffany York, were shot and killed by a group of Army soldiers allowed to form, fund, and arm a terrorist militia due to the Army's negligence. Tiffany never served in the military, and her parents' FTCA claims are currently scheduled for trial in the district court. But the district court dismissed Michael's parents' claims, invoking the *Feres* doctrine, which bars FTCA claims against the federal government to redress "injuries to servicemen" when those injuries arise out of or are incident to military service.

The district court's ruling misapplied *Feres*. Michael was not a servicemember when he was shot and killed; he died as a civilian. His family received no military death benefit under the Veterans' Benefits Act because, in the Government's words, "the evidence does not establish any relationship" between his death and his military service. Thus, recognized the district court, the dismissal "unfairly leaves [his] family without a remedy to right the wrongs they allege." ER 17.

Applying *Feres* to non-servicemember victims like Michael Roark would expand the doctrine and traverse the bounds of Supreme Court and Ninth Circuit precedent. Already disfavored by courts, *Feres* should not be stretched yet further, especially when doing so would fail to advance its policy rationales and deprive Michael's parents of any statutory recovery for their loss.

## STATUTORY PROVISIONS

Plaintiffs bring their claims under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and

> after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 provides, in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.
>
> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

## STATEMENT OF THE CASE

Michael Roark (age 19) and Tiffany York (age 17) were murdered, execution style, by a terrorist militia comprising current and former Army soldiers—a terrorist militia that the Army negligently allowed to form, operate, and expand on its watch. ER 123. Both were killed after Michael left the Army.

### A. Michael Roark and Tiffany York.

Michael Roark was born in 1991. ER 98. In 2009, he finished his diploma early so that he could enlist in the Army before he turned eighteen. ER 98–100. After finishing basic training, Roark began serving at Fort Stewart, Georgia, where he eventually met and began dating Tiffany York, a local high-school student. ER 101–02. As their relationship became more serious, the two teenagers planned to move to the West Coast, where Michael would rejoin his mother and Tiffany would live with her father. ER 102.

On December 2, 2011, Michael received a general discharge from the Army under honorable conditions. ER 30.

### B. The soldiers that shot and killed Michael and Tiffany.

Stationed at Fort Stewart with Michael was Private Isaac Aguigui, who founded an anti-government militia named "FEAR,"

which supposedly stood for "Forever Enduring, Always Ready." ER 123. Aguigui and FEAR sought to attack a variety of military and civilian targets. Among other things, they planned to bomb Savannah's iconic Forsyth Park, seize control of Fort Stewart, poison the Washington state apple harvest, and assassinate President Obama. *Id.*

Needless to say, Aguigui had a long history of violence. Less than a semester into U.S. Military Academy Preparatory School, in fall 2009, he threatened to kill two fellow cadets, holding a knife to one cadet's throat. ER 32–34. The school expelled him, ER 36, but the Army later let him reenlist and assigned him to Fort Stewart in 2010, ER 40.

While stationed at Fort Stewart, Aguigui became increasingly dangerous. He abused his wife Deirdre (also an active-duty soldier), ER 125, and the Army knew it: In March 2011, the Army entered a protective order for Deirdre and barred him from their home. ER 42–43. The same day, Aguigui's commanding officer ordered him to enroll in the Army Substance Abuse Program and warned him that the Army could discharge him if he continued to break the law. ER 45–46.

But the Army did not discharge him—despite more and more signs of violence. In particular, Aguigui committed two especially serious crimes:

First, in May 2011, Aguigui confessed to Fort Stewart criminal investigators, in writing and under oath, that he conspired with other soldiers to rob and murder a civilian drug dealer. ER 55–58. He admitted that, as part of the conspiracy, he had bought a shotgun to use for the shooting. ER 55.

Second, just two months later, Aguigui strangled his pregnant wife, killing her and their unborn child. *See* ER 125–27. Although he claimed to have found her lifeless when he awoke from a nap, a witness had, a month before, told the Army's Criminal Investigation Command (CID) that Aguigui had joked about killing his wife for insurance money. ER 60–62. Witnesses also told CID that the weekend his wife died, Aguigui had said that he wanted to divorce her and boasted that he would soon receive a lot of money. ER 126.

In fact, the day after he murdered his wife, Aguigui applied to receive her life insurance and death benefits. ER 64–65. Fort Stewart's Casualty Assistance Office contacted CID for guidance; according to the

office's records, a CID special agent responded—inaccurately—that Aguigui was not a person of interest in his wife's death. ER 65, 67. (The CID agent denied saying this, and in turn blamed the Casualty Assistance Office for paying Aguigui. ER 109–10.) In sum, despite suspecting that Aguigui murdered his wife, the Army improperly paid him $500,000 of her life insurance and death benefits. ER 129. And even after realizing its mistake, the Army failed to retrieve the money or otherwise restrain Aguigui. ER 129–30.

With his newfound wealth, Aguigui recruited soldiers and stockpiled weapons, including the guns ultimately used to execute Michael and Tiffany. Aguigui threw a wild party days after killing his wife and paid for soldiers to visit strip clubs. ER 72–80, 82–92. Gun-shop staff knew Aguigui as a "flashy" customer who spent thousands on guns for himself and his friends. ER 94–95. Aguigui's aunt became concerned and warned the FBI that her nephew had bought $32,000 worth of guns in Washington state; the FBI in turn informed CID. ER 130. But Aguigui remained in the Army, unrestrained.

By late 2011, Aguigui had spent most of the funds he netted from killing his wife—using the money to finance FEAR's growth and recruit

co-conspirators with guns, drugs, lap dances, and cash. ER 129–30. Aguigui recruited not only privates, but also a decorated Sergeant and a military policeman using drugs, cash, and car payments. ER 131. He even paid one of his supervisors $6,000 to refrain from reporting his chronic misconduct to commanders. ER 130.

### C. After Michael Roark leaves the Army, he and Tiffany York are shot and killed by Aguigui and other members of FEAR.

Michael Roark and Aguigui served together at Fort Stewart. ER 124. During that time, Aguigui met both Michael and Tiffany, and he told Michael about FEAR. *Id.* Aguigui later worried, however, that Michael would tell law enforcement about the terrorist militia. *Id.* So Aguigui decided to have Michael and Tiffany killed.

Michael was discharged from the Army on December 2, 2011. ER 30. On the night of December 5, 2011, Aguigui and three of his comrades lured Michael and Tiffany to the woods, claiming that they would be "night shooting" with tracer ammunition. ER 124. When they reached their destination, however, FEAR members shot and killed Tiffany. *Id.* Not only did they worry that Tiffany knew about FEAR's plans, but they also sought to "traumatize [Michael] prior to his

execution." *Id.* After Aguigui and his colleagues killed Tiffany, they shot and killed Michael. ER 123, 134.

### D. The Government denies death benefits to Michael's parents because his murder had no "service connection."

After Michael died, his mother applied for burial and death payments from the Army. ER 118–19. The Department of Veterans Affairs denied her claim: Because Michael's service ended before his murder, the Army determined that there was no "service connection" to his death. *Id.*

### E. Michael's and Tiffany's parents seek to redress their children's wrongful deaths.

Michael's and Tiffany's parents filed this wrongful-death lawsuit in December 2014, in the U.S. District Court for the Western District of Washington, seeking relief against the United States under the Federal Tort Claims Act. *See* ER 122. The claims arising from Michael's death were filed by his parents, Tracy Jahr and W. Brett Roark, *id.*; the claims arising from Tiffany's death were filed by her parents, Brenda Thomas and Timothy Lee York, *id.*

The case was originally assigned to the Honorable Marsha J. Pechman. ER 147. In April 2016, after some discovery, the Government

moved to dismiss the Michael Roark claims under the *Feres* doctrine, a judicially created exception to the FTCA that bars certain claims to redress injuries suffered by servicemembers. *See* ER 149. Michael's parents opposed the motion, arguing that (1) *Feres* did not apply because Michael was not a servicemember when he was shot and killed; (2) even if he had been a servicemember when shot and killed, his injuries did not arise from military service; and (3) even if *Feres* otherwise barred their claims, the doctrine should be abandoned. Dkt. 24 (Pls.' Opp'n) 7–20.

On August 11, 2017, the district court reached the "unhappy conclusion" that the *Feres* doctrine required dismissal of the Michael Roark claims. ER 15. Even though Michael was a civilian when he was shot and killed, the court focused on his "status at the time of the alleged negligent act," and concluded that the negligence at issue took place while he was serving. *Id.*; *see also* ER 16.

Even then, the court agreed that "applying *Feres* to bar claims arising from Michael Roark's death leads to unwanted results": "*Feres* was in part created out of concern for supporting the military's uniform system of compensation under the Veterans Benefits Administration,

and, in this case, Michael Roark's family was denied benefits. Applying *Feres* to bar claims arising out of Michael Roark's death unfairly leaves [his] family without a remedy to right the wrongs they allege." ER 16–17 (citation omitted).

After the court denied a motion for reconsideration, ER 5–6, the case was reassigned to the Honorable Barbara J. Rothstein, ER 151. The court then entered final judgment dismissing the Roark claims so that Michael's parents could immediately appeal. ER 1–4.

Meanwhile, the claims brought by Tiffany York's parents remain pending in the district court. Document and deposition discovery has mostly concluded, the Government's summary-judgment motion has been briefed, and trial is currently scheduled to begin on May 8, 2017. ER 154.

## SUMMARY OF ARGUMENT

Because of the Army's negligence, Michael Roark was shot and killed on civilian property after he left the Army. The *Feres* doctrine, which prevents courts from hearing certain claims involving injuries to "servicemembers," does not prevent claims to redress the post-service injuries at issue here.

First, the *Feres* doctrine does not apply here because Michael was not "a member of the armed forces of the United States at the time the injury was sustained." *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989). An injury to a current servicemember is a threshold requirement, and it is not met here. Every conceivable aspect of Michael's injury took place after he left the Army: He was a civilian when he was lured to the woods, when he was forced to watch his girlfriend die, and when he was shot and killed. Before this case began, even the Government acknowledged that Michael's injuries took place entirely after he served; that is why the Department of Veterans Affairs refused to compensate his mother for his death.

In nonetheless dismissing these claims, the district court bypassed this threshold inquiry into service status and jumped to examining whether Michael's injuries were "incident to military service." But that analysis takes place if and only if there was an injury to a servicemember; here, there was not.

Even if Michael Roark had been injured while serving in the military, his injuries were not "incident to military service." When determining whether *Feres* bars claims involving ongoing negligence

leading to an injury, this Court has focused on the time of the ultimate injury. Here, Michael was shot and killed while he was a civilian, with his civilian girlfriend, on civilian land. Expanding *Feres* to these circumstances, moreover, would undermine the policy goals that the *Feres* doctrine purportedly serves by denying Michael's parents compensation under both the Veterans' Benefits Act and the FTCA. And there is no risk of judicial inquiry into military discipline, certainly none beyond what would take place in the still-pending lawsuit brought by Tiffany's parents.

Second, if the Court nonetheless determines that *Feres* applies to injuries incurred entirely after service, then the doctrine should be abandoned. As explained repeatedly by courts and commentators, including this Court, the *Feres* doctrine is unmoored from the FTCA's text, produces inconsistent outcomes and unfair results, and even may violate the Equal Protection Clause. Although this Court is bound by Supreme Court precedent, we raise the argument to preserve it and because this case epitomizes the *Feres* doctrine's flaws.

In any event, the fate of *Feres* can be left for another day. Decisions from the U.S. Supreme Court, this Court, and other courts

have made clear that *Feres* does not bar claims arising from injuries suffered entirely after service has concluded. Here, "the military may not use the *Feres* doctrine as a shield against a suit filed [on behalf of] a plaintiff who was, by the military's own admission, validly discharged at the time of the injury." *Rogers v. United States*, 902 F.2d 1268, 1273 (7th Cir. 1990).

## STANDARD OF REVIEW

When evaluating a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), courts must accept the plaintiff's factual allegations as true and resolve all factual issues in favor of the non-movant. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996), *as amended* (Feb. 4, 1997). In addition to the factual allegations, a court may also consider "affidavits or any other evidence properly before the court." *Id.* Upon reviewing these materials, the claim may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989) (quotation marks omitted).

On appeal, "[w]hether the *Feres* doctrine applies to the facts in the record is reviewed de novo. Factual findings are reviewed de novo, with all disputed facts resolved in favor of the non-moving party." *Costo v. United States*, 248 F.3d 863, 865–66 (9th Cir. 2001).

## ARGUMENT

### I. *Feres* does not apply to claims brought by Michael Roark's parents because he was a civilian when he was shot and killed.

The FTCA waives the federal government's sovereign immunity from suit for "tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Yet in *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court created an exception to the FTCA, holding that the government is immune from claims seeking to redress (1) "injuries to servicemen," (2) "where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Since then, courts have struggled to apply this "extremely confused and confusing area of law," and the doctrine has "lurched toward incoherence." *Taber v. Maine*, 67 F.3d 1029, 1038, 1039 (2d Cir. 1995).

That said, *Feres* cases have "two common factors." *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989). First, courts must determine whether "[t]he injured person was a member of the armed forces of the United States at the time the injury was sustained." *Id.* That is a threshold requirement, which preserves claims when "[t]he injury occurred after his discharge, while [the victim] enjoyed a civilian status." *United States v. Brown*, 348 U.S. 110, 112 (1954).

Second, *if* the victim was a member of the armed forces when injured, "[t]he injury must arise out of or occur in the course of activity incident to military service." *McGowan*, 890 F.2d at 132. The Court considers "the following four factors to determine whether an activity is incident to military service: (1) the place where the negligent act occurred; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act occurred." *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986).

Here, the district court erred in dismissing the Michael Roark claims because the first, gateway *Feres* requirement is unmet: Michael

was not "a member of the armed forces of the United States at the time the injury was sustained." *McGowan*, 890 F.2d at 132.

### A. *Feres* does not apply when the victim was injured as a civilian.

Unlike the victims in *Feres* and its descendants, Michael Roark was not part of the military when he was injured. In *Feres*, "[t]he common fact underlying the three cases [was] that each claimant, *while on active duty and not on furlough*, sustained injury due to negligence of others in the armed forces." 340 U.S. at 138 (emphasis added). At the time, no state "permitted members of its militia to maintain tort actions for injuries suffered *in the service*." *Id.* at 142 (emphasis added). Likewise, in *United States v. Shearer*, 473 U.S. 52 (1985), the Supreme Court applied *Feres* because the decedent had been an active-duty soldier (albeit off-duty and off-base) when he was kidnapped and murdered. *See id.* at 57–59.

Meanwhile, the Supreme Court has declined to apply *Feres* when "[t]he injury for which suit was brought was not incurred while [the victim] was on active duty or subject to military discipline." *Brown*, 348 U.S. at 112. In *Brown*, the *Feres* doctrine allowed a claim alleging

malpractice at a veterans' hospital because "[t]he injury occurred after his discharge, while [the victim] enjoyed a civilian status." *Id.*

This Court's cases likewise emphasize the threshold requirement of an injury suffered during service. In *McGowan*, the Court held that *Feres* did not apply to injuries suffered by a former Army officer, on a military base, at the hands of military officers, because at the time the victim "was not a member of the armed forces of the United States." 890 F.2d at 137. The victim's injuries, though perhaps incident to his past military service, were not "incident to *current* military service." *Id.* at 138 (emphasis in original).

If anything, Michael was more firmly separated from the Army than was McGowan at the time of injury. *See id.* at 139 (Sneed, J., concurring) (treating plaintiff as a civilian because nothing suggests that his return to "active duty status is either imminent or even probable"). Unlike Michael, McGowan was receiving disability payments and other military benefits and could have been recalled to active duty. *See id.* at 137–38 (majority opinion).[1]

[1] Nor was Michael under any lingering military supervision or control. *Compare Stauber v. Cline*, 837 F.2d 395, 400 (9th Cir. 1988) (*Feres* bars

Other courts agree that *Feres* applies only when the victim suffered injuries during military service. In *Rogers*, a service member was wrongly arrested for desertion because, unbeknownst to him, the Navy had never finished his discharge paperwork. 902 F.2d at 1269. *Feres* barred the claim, the Seventh Circuit held, because "the relationship between [the plaintiff] and the Navy was not formally terminated until he received his discharge papers following [his wrongful arrest]." *Id.* at 1275. The court would have ruled differently if he had already been discharged at the time of injury: "Civilians who happen to be veterans, validly discharged from the military, deserve access to the same remedies available to other civilians for injuries that occur following discharge." *Id.* at 1274.

Yet more decisions have distinguished between pre- and post-discharge injuries:

---

civilian National Guard technician from suing supervisor because he was "always under the direct command of active-duty military officers"); *Daberkow v. United States*, 581 F.2d 785, 788 (9th Cir. 1978) (*Feres* bars lawsuit by West German pilot "engaged in joint military activities" with U.S. Air Force).

- *Feres* bars "tort claims of members of the armed forces who were subject to military discipline at the time of their injury." *Gaspard v. United States*, 713 F.2d 1097, 1100 (5th Cir. 1983);

- *Feres* bars "cases brought by servicemen concerning injuries suffered while on active duty in the armed forces." *Lombard v. United States*, 690 F.2d 215, 219 (D.C. Cir. 1982);

- "The injuries of the plaintiffs in this case satisfy this test because they occurred while plaintiffs were on active duty during a military operation." *Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996); and

- "[W]e have consistently found that a service-member's injury is incident to military service whenever the injury is incurred while the individual is on active duty or subject to military discipline." *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994).

These and other cases highlight what the Supreme Court first announced in 1950: The *Feres* doctrine applies only to claims "for injuries suffered in the service." 340 U.S. at 142.

Here, Michael was a civilian when he suffered his injuries. The gunshot to his head, the resulting damage to his brain, and his tragic death—each phase of his injury took place after his discharge. By its terms, *Feres* does not bar his parents' claims seeking redress for his murder.

Because Michael had already concluded his military service, this case differs from those presenting injuries—such as exposure to carcinogens—received during service but manifesting or intensifying

afterwards. *Feres* barred the claims in *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), because the soldier's post-discharge symptoms reflected an underlying injury (exposure to radiation) taking place while "he was engaged in active military service." *Id.* at 130. The same analysis applied in *Maas*, 94 F.3d at 294 (victims "exposed to radiation during military service"); *Gaspard*, 713 F.2d at 1098 (victims "were servicemen who, under military orders, took part in atmospheric atomic weapons tests during the early 1950's"); *Lombard*, 690 F.2d at 216 (victim was "expos[ed] to radiation during military service"); and *Laswell v. Brown*, 683 F.2d 261, 262 (8th Cir. 1982) (victim was exposed to radiation during nuclear tests while he "was a member of the United States Army stationed in the South Pacific").[2]

Given these cases, the Government eventually compared in-service exposure to radiation to what it called Michael Roark's in-

[2] *See also In re Consol. U.S. Atmospheric Testing Litig.*, 616 F. Supp. 759, 777 (N.D. Cal. 1985) ("claims resulting from radiation exposure allegedly sustained while in the military service"); *Kelly v. United States*, 512 F. Supp. 356, 357 (E.D. Pa. 1981) (victim was exposed to nuclear radiation "while serving in the United States Navy"); *Schnurman v. United States*, 490 F. Supp. 429, 430 (E.D. Va. 1980) (victim was exposed to mustard gas while a Naval Seaman Apprentice).

service "exposure to dangerous soldiers." Dkt. 26 (Def.'s Reply) 2. There is no comparison. Bad people do not emit poisons by their mere presence; toxic chemicals do. Even the district court did not adopt this Government theory. *See* ER 15.

Before this case began, the Government itself acknowledged that Michael's injuries took place entirely after he served. When his parents sought Veterans' Benefits Act compensation for their son's death, the Government rejected their request, "den[ying] entitlement to service connection for the cause of the veteran's death because the evidence does not establish any relationship between it and the veteran's service." ER 119. Under the relevant regulations, the necessary "service connection" exists when "a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces." 38 C.F.R. § 3.303(a).

In short, when the Government denied compensation for want of a service connection, it confirmed that Michael was not injured "coincident with service in the Armed Forces." And that is another way of saying that Roark was not "a member of the armed forces of the

United States at the time the injury was sustained." *McGowan*, 890 F.2d at 132 (citations omitted).

### B. The district court improperly skipped the threshold inquiry into Michael Roark's status when he was injured.

Even though Michael was not a servicemember when he was injured, the district court opined that the "relevant inquiry, for purposes of *Feres*, is Michael Roark's status at the time of the negligent act." ER 15 (quoting *Monaco*, 661 F.2d at 133). That put the cart before the horse.

The victim's status at the time of negligence is one formulation of one of four factors used by this Court "to determine whether an activity is incident to military service." *Bon*, 802 F.2d at 1094. But the Court examines whether an injury was "incident to military service" only if the case involves an injury to a servicemember. For example, this Court announced the four-part "incident to military service" test in a case brought by a plaintiff injured while serving as an "Air Force officer." *Johnson v. United States*, 704 F.2d 1431, 1433 (9th Cir. 1983), *as amended* (Aug. 2, 1983). Because *Johnson* unquestionably featured an

injury to a servicemember, all that mattered was whether he was injured "incident to military service."

On the other hand, this case does not implicate an "injury to a servicemember" because Michael's injuries took place after he left the military, free and clear. That begins and ends the *Feres* inquiry. The district court simply had no need to ask or answer whether Michael's injuries were "incident to military service."

In bypassing the threshold "injury to servicemember" requirement and proceeding to examine Michael's status at the time of negligence, the court quoted *Monaco v. United States*, whose victim's injuries began while he was serving but did not manifest until afterwards. *See* 661 F.2d at 133 (plaintiff suffered "exposure to radiation while in the service"). *Monaco* held that *Feres* governs injuries sustained while serving but discovered or exacerbated afterwards, because "it would be anomalous for recovery to hinge on a fact as fortuitous as when *an injury becomes apparent*." 661 F.2d at 133 (emphasis added). And because (unlike Michael Roark) the soldier had been a servicemember when his injuries commenced, his status at the time of negligence became important.

A later case built on *Monaco*'s analysis. In *McGowan*, this Court observed that "Monaco did not discover he had been exposed to radiation until July of 1971, long after he had been discharged from the military." 890 F.2d at 134. As a result, said the Court, "[w]e rejected [Monaco's] argument that his injury was the cancer, rather than his exposure to radiation." *Id.* This language reinforces that the Court proceeded to the four-factor "incident to military service" inquiry—and ultimately barred Monaco's claim—because he was poisoned by radiation "while he was on active duty." *Id.* at 134–35.[3] Another case, *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007), likewise moved to the "incident to military service" test because the plaintiff was

[3] *See also, e.g.*, *Henning v. United States*, 446 F.2d 774, 776 (3rd Cir. 1971) (victim contracted tuberculosis while serving in Army, but did not discover the disease until after he was discharged); *Stanley v. CIA*, 639 F.2d 1146, 1148–49 (5th Cir. 1981) (victim unknowingly ingested LSD as part of a chemical-warfare experiment in which he participated while serving as an Army Master Sergeant); *Katta v. United States*, 774 F. Supp. 1134, 1142 (N.D. Ill. 1991) (victim suffered from PTSD caused by "his traumatic Vietnam War combat experiences"); *Pitts v. United States*, 663 F. Supp. 593, 594 (M.D. Ga. 1987) (victim developed psychosis while serving in the Army); *Hopkins v. United States*, 567 F. Supp. 491, 492 (E.D.N.Y. 1983) (victim diagnosed with "chronic paranoid schizophrenia" while serving). Each of these cases featured an injury suffered while serving, "even if the injury manifests itself only after the serviceman has reentered civilian life." *Id.* at 494.

injured as a "a Lance Corporal in the United States Marine Corps." *Id.* at 1017, 1019–23.

Under *Monaco*, *McGowan*, and *Schoenfeld*, the *Feres* doctrine might apply if Michael had been shot while serving but died after discharge. Those circumstances would mirror those of the service member who was poisoned by radiation while serving but developed cancer later on; the Court would then need to consider the four "incident to military service" factors, including Michael's status at the time of negligence. But here, the initial injury (a bullet to his head); the consequence of that injury (damage to his brain); and the implications of that injury (his death) all took place after Michael was discharged. ER 123. Under those circumstances, *Feres* stops at the gate.

When the shoe was on the other foot, the Government agreed that time-of-injury controlled. In *Joseph v. United States*, 505 F.2d 525 (7th Cir. 1974), the Seventh Circuit considered the converse of this case: The victim was injured while serving in the Army, but the Army's negligence predated his induction. The court still barred his claim, because *Feres* envelops "'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service'"—"regardless of

when the conduct which may place responsibility for that injury occurred." *Id.* at 526–27 (quoting *Feres*, 340 U.S. at 146). The same rule applies here.

### C. Even if Michael Roark were injured as a servicemember, his injuries were not "incident to military service."

Even if Michael Roark were somehow considered a "servicemember" when he suffered his post-discharge injuries, those injuries did not arise from conduct "incident to military service." Both this Court's four-factor test and the policy considerations underlying *Feres* reveal that the doctrine does not apply when Army negligence culminates in off-site, off-duty injuries to a former servicemember and his civilian girlfriend.

#### 1. *This Court's four-factor test confirm that Michael's injuries were not "incident to military service."*

As discussed above, to determine whether injury-producing activity is "incident to military service," this Court considers: "(1) the place where the negligent act occurred; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act

occurred." *Bon*, 802 F.2d at 1094. Under this standard, Michael's injury was not incident to his military service.

With respect to the first three factors, the negligence took place (1) on civilian land, (2) when Michael was not in the military, let alone on duty, and (3) when Michael was not enjoying any benefits of military service. His situation resembled that in *Schoenfeld*, in which a serviceman was injured by a dangerous guardrail while driving on-base but off-duty. *See* 492 F.3d at 1017–18. Although the military negligently maintained the guardrail over time, the Court permitted the lawsuit to proceed after examining the victim's location (on base), duty status (off duty), and military benefits (none, he was "riding in a car") when he crashed into the guardrail. *See id.* at 1023–25. Likewise, although the Army negligently allowed FEAR to form and flourish over time, that negligence continued after Michael left the Army until at least when Michael was shot and killed. *Cf. Cole v. United States*, 755 F.2d 873, 878 (6th Cir. 1985) (permitting claim on behalf of "former serviceman" alleging that Navy know about "hazards of radiation exposure before and after [his] discharge" and decided "not to warn [the] already

discharged veteran of these dangers"). And at that time, he was a civilian on civilian property with his civilian girlfriend.

This injury-based inquiry into negligence also tracks hornbook tort law. Like most torts, negligence requires an injury resulting from the defendant's conduct. *See, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013) ("Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim," including negligence) (citing Restatement of Torts § 9 (1934)). Accordingly, the Army's ongoing negligence culminated when Michael and Tiffany were shot and killed. Until then, no negligence claim had accrued.

Finally, the fourth and "most important" factor is often described as "the nature of the plaintiff's activities at the time the negligent act occurred." *Costo*, 248 F.3d at 867. Yet in practice, this factor examines "the service member's activities at the time of injury." *Schoenfeld*, 492 F.3d at 1025 (quoting *Johnson*, 704 F.2d at 1439). And Michael was not engaging in service-related activity when he was injured; indeed, he was no longer a member of the service.

*2. The policies underlying* Feres *confirm that Michael's injuries were not "incident to military service."*

There is good reason why courts have declined to expand *Feres* to bar claims like these. Barring this lawsuit would disserve the doctrine's policy goals.

For one, expanding *Feres* to circumstances like these would mean that family members would lose compensation under both the FTCA and the Veterans' Benefits Act. In lieu of tort liability, the Veterans' Benefits Act offers "a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671 (1977). *Feres* reflects "the need for a uniform system of compensation for soldiers spread out across the country and the world" and assumes that "the Veterans' Benefit[s] Act provides soldiers with a generous alternative to recovery in tort." *Id.* at 1019 (acronym omitted).

Yet as discussed above in Section I.A, the Department of Veterans Affairs excluded Michael's parents from that uniform system of compensation, determining that "the evidence does not establish any relationship between [his death] and the veteran's service." ER 119.

Although "in certain cases, soldiers have been permitted to recover under both the [Veterans' Benefits Act] and the FTCA," *Costo*, 248 F.3d at 866, here the Government wants to block both forms of recovery.

But the only apparent statutory basis for *Feres* is not in the FTCA itself, but in the existence of a separate "comprehensive system of relief" created for military personnel and their dependents "by statute." *Feres*, 340 U.S. at 140. Applying *Feres* to bar FTCA claims even when the claims are ineligible for consideration under any other statutory scheme would hence override Congress's decision about whether and when to waive sovereign immunity.

In the district court, the Government suggested that Michael's family received other military death benefits. Dkt. 23 (Def's Mot. to Dismiss) 12. Not exactly. Michael's family did receive just over $50,000 from his Servicemembers Group Life Insurance policy, *id.*, but Michael bought that voluntarily, *see Servicemembers Group Life Insurance (SGLI)*, U.S. Dep't of Veterans Affairs, https://perma.cc/YZV8-UTSY. The $1,200 paid by the Army was not a "death benefit," Dkt. 23 (Def's Mot. to Dismiss) 12, but rather a return of Michael's own contributions towards his future education under the G.I. Bill, *id.* And the military

"headstone" was not sent to Michael's mother until March 2015: over three years after she requested one, long after she buried her son, and only after she brought this case. ER 104–05.

In addition, the Court can allow Michael's parents' claims to proceed without "fear of damaging the military disciplinary structure." *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013). Tiffany's parents are already pursuing similar claims on behalf of their daughter, who never served in the military and who was shot and killed by the same cohort just minutes before Michael. The Government has not suggested that *Feres* disturbs her parents' claims, which have proceeded through discovery and are scheduled for trial in May 2017. *See Taber*, 67 F.3d at 1047 ("*Feres* does not bar suits against the government when the injured plaintiff is a civilian. This remains the case even though the injurer *is* in the military and military discipline is directly involved.") (emphasis in original). Because *Feres* permits the claims brought on Tiffany's behalf, dismissing the claims brought by Michael's parents will achieve no *Feres* goal.

Instead, preventing Michael's parents from vindicating his death will serve one purpose and one purpose alone: depriving them of any statutory compensation for the post-service murder of their son.

## II. Even if *Feres* applies to bar the claims by Michael Roark's parents, the *Feres* doctrine should be abandoned.

If the Court determines that *Feres* applies even though Michael Roark was not injured while serving, the doctrine should be abandoned because it is unsupported by the FTCA's text and produces inconsistent outcomes and unfair results. Although we recognize that this Court must apply Supreme Court precedent, we raise the argument to preserve it and because this case—featuring two similarly situated decedents being treated differently—highlights the doctrine's flaws especially clearly.

The *Feres* doctrine "has received steady disapproval from the Supreme Court on down." *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 822 (10th Cir. 2015). Jurists from Justice Scalia to Justice Brennan to judges on this Court and other courts have recognized that the doctrine diverges from the FTCA's text and produces confounding outcomes.

Dissenting for himself and Justices Brennan, Marshall, and Stevens in *Johnson*, Justice Scalia wrote that "Congress not only failed to provide such an exemption, but quite plainly excluded it." 481 U.S. at 692 (Scalia, J., dissenting). He added: "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Id.* at 700 (quoting *In re "Agent Orange" Prod. Liabilty Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)); *see also id.* at 701 n.* (citing eleven cases and seven academic articles criticizing the doctrine).

Multiple judges on this Court have likewise criticized *Feres*. This Court has recognized that criticism of the *Feres* doctrine is "shared . . . by countless courts and commentators," *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991); at least two of its rationales "had been largely discredited," *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987); and its "results have not flowed easily from the doctrine's purported rationales," *Estate of McAllister v. United States*, 942 F.2d 1473, 1476 (9th Cir. 1991). In sum, this Court has said, "[w]e can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long." *Ritchie*, 733 F.3d at 878.

Judges writing separately have criticized the doctrine even more harshly. Concurring in *Atkinson*, Judge Noonan identified multiple "anomalies caused by the application of *Feres*," including that "a single tortious act should not result in different legal consequences for different victims." 925 F.2d at 206 (Noonan, J., concurring). Judge Nelson, writing separately in *Ritchie,* warned that "[r]efusing to compensate a class of victims—servicewomen and their families—based on the fiction that judicial review in these cases will upend 'military discipline' perpetuates a grave injustice." 733 F.3d at 879 (Nelson, J., concurring). She concluded, "It is past time for the judiciary to reconsider its reasons for refusing compensation to servicemembers under the [FTCA]." *Id.*

Courts have also pointed to the doctrine's problems under the Equal Protection Clause. After the plaintiff in one case raised equal-protection concerns, the Tenth Circuit observed that "[h]e may well have a point—jurists and commentators have indicated that the *Feres* doctrine is not compatible with principles of equal protection." *Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004). Dissenting in *Costo*, Judge Ferguson stated outright that "the *Feres*

doctrine violates the equal protection rights of military service men and women." 248 F.3d at 869 (Ferguson, J., dissenting). And while not addressing the Equal Protection Clause squarely, Justice Scalia's dissent in *Johnson* lamented the resulting unequal treatment: "Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received." 481 U.S. at 703 (Scalia, J., dissenting).

At the very least, the doctrine's flaws vitiate the Government's attempt to expand the doctrine to claims for injuries suffered entirely after service. *Cf. Hein v. Freedom from Religion Found.*, 551 U.S. 587, 614 (2007) (plurality opinion) (acknowledging that Court's previous decision, *Flast v. Cohen*, 392 U.S. 83 (1968), "has been defended by some and criticized by others" and reversing appeals court decision that "extended *Flast*"). That caution is especially well taken here, *see* Section I.C.2, with two identical injuries with identical causes treated

differently merely because one of the victims had earlier served in the military.

## CONCLUSION

The district court's judgment should be reversed with instructions to reinstate the FTCA claims brought by Michael Roark's parents.

Respectfully submitted,

/s/ Gregory M. Lipper

Brian C. Brook
CLINTON BROOK & PEED
641 Lexington Avenue
13th Floor
New York, NY 10022
(212) 328-9559
brian@clintonbrook.com

Gregory M. Lipper
CLINTON BROOK & PEED
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(202) 621-1828
glipper@clintonbrook.com

*Counsel for Appellants*

April 14, 2017

## STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in this Court.

## CERTIFICATE OF SERVICE

On April 14, 2017, I served a copy of this opening brief on all counsel of record through the Court's ECF system.

/s/ Gregory M. Lipper
Gregory M. Lipper

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number** 17-35002

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [7,388] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant [/s/ Gregory M. Lipper] Date [2017-04-14]

("s/" plus typed name is acceptable for electronically-filed documents)