No. 23-

IN THE

Supreme Court of the United States

RYAN G. CARTER; KATHLEEN E. COLE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1946, Congress enacted the FTCA waiving sovereign immunity and authorizing tort claims against the federal government. Yet, for nearly 75 years, the courthouse doors have been closed to tortiously injured military service members and their families—a harsh consequence of the judge-made rule that is *Feres v. United States*, 340 U.S. 135 (1950), and its progeny. As Justice Scalia wrote in his salient *U.S. v. Johnson* dissent, "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." 481 U.S. 681, 700 (1987).

Feres, having evolved with unbridled fortitude for decades, hardly resembles its former self, with the federal circuits split on the doctrine's applicability, scope, and rationales. Petitioners' case represents yet another chilling example of the breadth and injustice of *Feres*, where an inactive duty service member, under no military orders and on no military mission, and whose status was retroactively altered from inactive to active duty post medical malpractice, is summarily precluded from bringing his congressionally authorized FTCA claims in a civil court of law.

The questions presented are:

1. Should the *Feres* doctrine be limited and not bar tort claims brought by service members alleging medical malpractice where the service member was under no military orders, not engaged in any military mission, and whose military status was retroactively altered from inactive to active duty post medical malpractice?

2. Does the *Feres* doctrine conflict with the plain language of the Federal Tort Claims Act and should it be clarified, limited, or overruled?

RELATED CASES

- *Carter v. U.S.*, No. 1-21-cv-1315, U.S. District Court for the District of Maryland. Judgment entered May 24, 2022.

- *Carter v. U.S.*, No. 22-1703, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Mar. 7, 2024.

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INTRODUCTION

The Federal Tort Claims Act ("FTCA") waives the historical immunity of the sovereign and authorizes tort actions against the federal government for the negligence of its employees, while expressly retaining immunity for "claim[s] arising out of the *combatant activities* of the military…*during time of war*." 28 U.S.C. §2680(j) (emphasis added). Despite the plain language of the FTCA, this Court in *Feres v. United States* held that the FTCA broadly precludes claims by military service members where the injuries "arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). Over the ensuing three-quarters of a century, federal courts have routinely wrestled with the applicability, scope, and rationales of *Feres*.

In the case *sub judice*, *Feres* neither applies to nor bars Petitioners' congressionally authorized medical malpractice FTCA claims. On April 6, 2018, Petitioner Ryan Carter, while inactive and under compulsion of no military orders, walked into the Walter Reed National Military Medical Center in Bethesda, Maryland where he underwent an elective orthopedic spine procedure to surgically correct a degenerative condition in his cervical spine that was negatively impacting his quality of life. Tragically, Ryan Carter has not walked again since this fateful day, having suffered a traumatic and completely avoidable spinal cord injury. During the placement of a trial spacer between the C4/C5 disc spaces of his cervical spine, Ryan Carter's spinal cord was traumatized—a permanent cervical spine injury that left Ryan Carter paralyzed with little function in his arms and legs.

Physically, Ryan Carter requires 24/7 assistance with all activities of daily living, including bathing, toileting, dressing, eating, and ambulating. Mentally and emotionally, Ryan is a shell of his former self, yearning for the life he once had with his wife and family. Mr. Carter's independence has been stolen from him and he struggles daily with the fear, stress, and anxiety caused by his dispiriting condition. Mr. Carter's life has been unaccountably turned on its head—all due to the allegedly tortious conduct of government healthcare providers.

As of his April 6, 2018, spine surgery, Mr. Carter was a 43-year-old inactive duty Air National Guard Staff Sergeant subject to no military orders—no active duty orders, no medical orders, nor any other orders. On April 6, 2018, Mr. Carter was not engaged in military duties or a military mission; he was inactive; his treatment did not involve any military exigencies, decisions, or considerations; his role was simply that of a civilian patient seeking medical and surgical care from trained healthcare professionals. It was not until *after* his traumatic spinal cord injury that Mr. Carter's military status was *retroactively* altered from inactive to active duty. This retroactive military status change from inactive to active duty is dispositive and removes Mr. Carter's claims from beneath the *Feres* umbrella.

Mr. Carter's underlying medical negligence civil claims, timely filed according to the plain language of the FTCA, do not involve any military exigencies, decisions, or considerations; do not intrude upon military affairs; nor will they impact the military disciplinary structure. Mr. Carter was not involved in the *combatant activities of the military during time of war*, nor were his April

6, 2018, injuries incident to service. Mr. Carter was an inactive duty serviceman entitled to all the healthcare benefits of a military veteran. The rationales underpinning *Feres* do not apply to Mr. Carter's claims or, quite simply, to any medical malpractice claims asserted by inactive duty service members and their families. The *Feres* doctrine has no justification where an inactive duty service member is simply a patient, and the acts or omissions at issue are purely medical, not military, decisions. Mr. Carter's injuries occurred, not because of any military exigencies or considerations, but because of the failure of Mr. Carter's healthcare providers to follow and implement basic standards of care, standards which are national in scope, and which should be followed by any healthcare provider, military or otherwise, in treating similarly situated patients. The application of *Feres* to the facts of this case, and any medical malpractice case, lacks justification and acts to license the tortious conduct of government healthcare providers while mandating second-class citizenship to those servicemembers (and their families) who have dedicated their lives to the defense of our great nation.

Today, an otherwise healthy person—whether a member of the military, a veteran, or a civilian—should not be injured and paralyzed by the allegedly negligent conduct of trained healthcare professionals, without remedy and recourse. Under *Feres*, military service members and their families receive arbitrarily disparate treatment under the law, as compared to both civilians and their ex-military, veteran counterparts. If a similarly situated veteran had sustained comparable injuries at any government medical facility, that individual could bring a civil tort claim against the federal government for medical malpractice under the FTCA, for the same type of treatment and allegedly negligent conduct inflicted upon Mr. Carter. The claim would involve the same proof, the same witnesses, and the same law.

Notwithstanding the inapplicability of *Feres* to Petitioners' medical malpractice claims, should this Court find that *Feres* applies in some way to the facts of this case, which it wholeheartedly should not, this Court should take action to clarify, limit, or overrule *Feres*. Because *Feres* was engrafted upon the FTCA by this Court, rather than Congress, only this Court can address the multitude of problems and inequities arising from the decision. "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of judge-made rule…and experience has pointed up the precedent's shortcomings." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2417 (2015) (Alito J., dissenting) (citations and internal quotation marks omitted). S*ee also*, *Johnson v. United States*, 576 U.S. 591 (2015) (Scalia, J., joined by Roberts, C.J. and Ginsburg, Breyer, Kagan, JJ.) ("Decisions…proved to be anything but evenhanded, predictable, or consistent…underline, rather than promote, the goals that *stare decisis* is meant to serve.").

The tides are changing and now is the appropriate time to inspect the underlying rationales and disparate consequences of *Feres* under a microscope and reconsider the practicality and applicability of *Feres* given the decades of widespread, universal criticism it has justly received. As Justice Clarence Thomas noted:

> '*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received'…. Such unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*. Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits 'would (insofar as we are permitted to inquire into such things) be just'…. But it did not.

Daniel v. United States, 139 S.Ct. 1713 (2019) (Thomas, J., dissenting from denial of certiorari) (internal citations omitted). Failure to act will only serve to renew and validate the federal government's unbridled license for tortious conduct and otherwise mandate second-class citizenship to some of our country's most honored and revered citizens—our military service members, veterans, and their families. "Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (citing E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 188 (1962)).

For the reasons detailed herein, and otherwise articulated in Justice Scalia's salient *U.S. v. Johnson* dissent, this Petition for a Writ of Certiorari should be granted.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit's unreported per curiam opinion is reproduced at Appendix 1a-3a. *Carter v. United States*, No. 22-1703, 2024 WL 982282 (4th Cir. Mar. 7, 2024).

The United States District Court for the District of Maryland's memorandum opinion is unreported and reproduced at Appendix 4a-64a. *Carter v. United States*, No. 1:21-cv-01315-ELH, 2022 WL 1642260 (D. Md. May 24, 2022).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its unreported per curiam opinion affirming the United States District Court for the District of Maryland on March 7, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners brought the underlying action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C §§ 1346, 2671, *et seq.*, which waives the historical immunity of the sovereign and authorizes tort actions against the federal government for the negligence of its employees, while expressly retaining immunity for, amongst other things, "claim[s] arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j). The pertinent provisions of the FTCA are reproduced at Appendix 65a-77a.

STATEMENT OF THE CASE

At the time of the alleged medical malpractice and his resulting catastrophic injuries on April 6, 2018, Ryan Carter was a 43-year-old inactive duty Air National Guard Staff Sergeant, a "dual status" military technician, and a civilian employee of the federal government.[1] Mr. Carter was married to Kathleen Cole. According to orders under 10 U.S.C. 12301(d)[2], Mr. Carter had just completed an active tour of duty with the Air Force beginning on August 27, 2017, and ending on March 13, 2018. Between March 14 and April 6, 2018, Mr. Carter was inactive and under compulsion of no military orders. He was not serving on a military mission, nor was he engaged in military duties. Mr. Carter's military status on April 6, 2018, was more akin to a civilian, retiree, or veteran than an active duty service member.

1. Pursuant to 10 U.S.C. § 10216, dual-status military technicians are federal civilian employees required to maintain membership in the military reserves. *See Jentoft v. United States*, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (holding that "the plain language of [10 U.S.C.] § 10216(2) makes clear that" dual-status technicians are civilians).

2. 10 U.S.C. § 12301(d) states as follows: "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned."

On April 6, 2018, due to a past medical history that included degenerative cervical disk disease, Mr. Carter presented to the Walter Reed National Military Medical Center in Bethesda, Maryland for anterior cervical diskectomy and fusion surgery[3] in connection with a diagnosis of cervical spondylotic myelopathy. There was nothing distinctively military about the surgery or the care provided to Mr. Carter. Intraoperatively, Mr. Carter sustained injury to the C4/C5 level of his spinal cord. Following surgery, Mr. Carter was awoken from anesthesia and unable to move his arms and legs. Mr. Carter underwent emergent reoperation that same day. Postoperatively, Mr. Carter was transferred to the ICU, intubated, and sedated, with persistent motor and sensory deficits. Mr. Carter was diagnosed with an ASIA A[4]

3. Anterior cervical diskectomy and fusion (ACDF) is one of the most common spinal operations in the United States. Between 2006-2013, an average of 137,000 ACDF procedures were performed per year, with a total of 1,059,403 ACDF procedures performed over the course of 7 years.

4. The extent of a spinal cord injury (SCI) is defined by the American Spinal Injury Association (ASIA) Impairment Scale using the following categories:

> A = Complete: No sensory or motor function is preserved in sacral segments S4-S5
>
> B = Incomplete: Sensory, but not motor, function is preserved below the neurologic level and extends through sacral segments S4-S5
>
> C = Incomplete: Motor function is preserved below the neurologic level, and most key muscles below the neurologic level have a muscle grade of less than 3
>
> D = Incomplete: Motor function is preserved below the neurologic level, and most key muscles below the

spinal cord injury. Mr. Carter remained admitted to the Walter Reed surgical ICU under close observation for approximately three weeks.

On April 25, 2018, Mr. Carter was discharged from Walter Reed and transferred to the Hunter Holmes McGuire VA Medical Center in Richmond, Virginia for comprehensive spinal cord injury rehabilitation and therapy. In addition to extensive rehabilitation therapy, Mr. Carter also required ongoing treatment and care for his neurogenic bladder, neurogenic bowel, oropharyngeal dysphagia, pressure ulcers of the sacral and gluteal regions, spasticity, obstructive sleep apnea, obstruction of the pelvic-ureteric junction, adjustment disorder with mixed emotions, generalized anxiety disorder, and depression.

On June 27, 2018, approximately 82 days after his April 6, 2018, surgical misadventure and traumatic spinal cord injury, Ryan Carter's military status was *retroactively* altered from inactive to active duty by way of a 10 U.S.C. 12301(h)[5] Air National Guard Call to Duty Order, with a

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neurologic level have a muscle grade that is greater than or equal to 3

E = Normal: Sensory and motor functions are normal

5. 10 U.S.C. 12301(h) states as follows:

(1) When authorized by the Secretary of Defense, the Secretary of a military department may, with the consent of the member, order a member of a reserve component to active duty—

(A) to receive authorized medical care;

(B) to be medically evaluated for disability or other purposes; or retroactive start date of March 14, 2018, pre-dating his April 6, 2018, spine surgery and traumatic cord injury.

On April 8, 2019, Mr. Carter was discharged from the Hunter Holmes McGuire VA Medical Center and transferred to CareMeridian Nursing and Rehabilitation in Littleton, Colorado for continued spinal cord injury rehabilitation. In April 2021, Mr. Carter relocated with his wife to Tampa, Florida, where he resides today. Mr. Carter continues to receive outpatient medical care and treatment, including rehabilitation therapy, through the James A. Haley Veterans' Hospital in Tampa, Florida, in connection with his paralysis and other related injuries and damages.

Petitioners, Ryan Carter and his wife, Kathleen Cole, complied with all provisions of 28 U.S.C. § 2675 of the FTCA. They each submitted timely administrative claims to the United States government. Their claims were denied. Petitioners filed a Complaint in the District Court on May 27, 2021, under the FTCA, 28 U.S.C. §§ 1346, 2671,

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(C) to complete a required Department of Defense health care study, which may include an associated medical evaluation of the member.

(2) A member ordered to active duty under this subsection may, with the member›s consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.

(3) A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned.

et seq. On November 24, 2021, the United States moved to dismiss for lack of subject matter jurisdiction. Petitioners responded in opposition on February 7, 2022. The United States replied on March 30, 2022. On March 24, 2022, the District Court, the Honorable Ellen L. Hollander presiding, entered an order and judgment dismissing the case. Petitioners timely filed a notice of appeal on June 28, 2022. The United States Court of Appeals for the Fourth Circuit heard oral argument on January 25, 2024, before the Honorable G. Steven Agee, Julius N. Richardson, and A. Marvin Quattlebaum, Jr. and affirmed the ruling of the District Court by unpublished per curiam opinion dated March 7, 2024.

REASONS FOR GRANTING THE PETITION

A. Petitioners' Congressionally Authorized Medical Malpractice Claims Fall Squarely Within the Historical and Plain Language Meaning of the Federal Tort Claims Act.

The FTCA waives the historical immunity of the sovereign and authorizes tort actions against the federal government for the negligence of its employees, while expressly retaining immunity for "claim[s] arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war.*" 28 U.S.C. §2680(j) (emphasis added).

At the time of his elective surgery and traumatic spinal cord injury on April 6, 2018, Ryan Carter's military duty status was "inactive," and he was subject to no military orders, including no active duty orders, no medical orders, nor any other orders. Implicitly, and even explicitly, at the time of his injury, Mr. Carter was not involved in the *combatant activities of the military during time of war*, nor were his April 6, 2018, spinal cord injuries *incident to service* in any logical or meaningful way. As of April 2018, Mr. Carter was no different than a military veteran seeking medical and surgical care from a government healthcare facility. Mr. Carter's civil medical malpractice claims are analogous to the congressionally authorized claims routinely asserted by ex-military veterans against government medical centers and providers nationwide under the FTCA.

The starting point in construing a statute is the plain language. This Court often recites the "plain meaning rule," that, if the statutory language is plain and unambiguous, it must be applied according to its terms. Eig, L. M. (2014). *Statutory Interpretation: General Principles and Recent Trends* (CRS Report No. 7-5700) at 3. Under text-based analysis, the cardinal rule of statutory construction is that the whole statute should be drawn upon as necessary, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. *Id.* at 4. Justice Scalia, who was in the vanguard of efforts to redirect statutory construction toward statutory text and away from legislative history, has characterized this general approach: "Statutory construction...is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*

Accordingly, a proper analysis of the FTCA requires an application of the principles of statutory interpretation. When interpreting a statute, courts begin with the statutory text. The Fourth Circuit has recognized that "as a settled principle, 'unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language....'" *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (citing *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001)). Statutory analysis must end with the plain language because "[t]he preeminent canon of statutory interpretation requires [courts] to presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (alterations made).

Here, a simple plain meaning interpretation of the FTCA works in tandem with Congress in carrying out the statute's intended purpose, that is, to permit individuals like Ryan Carter—civilian, veteran, and military alike—to pursue civil claims for personal injuries caused by the negligent or wrongful acts or omissions of a government employee while acting within the course and scope of his or her office or employment, under circumstances where the United States, if a private person, would be liable to the claimant under the law of the place where the act or omission occurred. The FTCA reads, in pertinent part, as follows:

> 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. § 1346(b)(1).

The FTCA includes a detailed list of exceptions to its waiver of government immunity. 28 U.S.C. § 2680. Two of these exceptions are not only relevant to the instant calculus but also represent clear and explicit examples of the considerations and calculations made by Congress, demonstrating a clear legislative intent regarding the applicability, scope, breadth, and limitations of the FTCA. Section 2680 reads, in pertinent part, as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to…
>
> (j) Any claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war.*
>
> (k) Any claim arising in a foreign country.

28 U.S.C. § 2680(j)-(k) (emphasis added).

Congress enacted and codified specific exceptions to the FTCA's waiver of government immunity that contemplate the combatant activities of the military during times of war, as well as claims arising in a foreign country. In so doing, Congress specifically excluded from the FTCA's waiver of immunity exceptions claims arising out of the *noncombatant activities of the military during times of peace*.

Interpreting the plain language of the FTCA requires an understanding of the landscape in which the statute sits and the context in which it was created. Before 1946, the federal government could not be held liable for tortious activity based on the doctrine of sovereign immunity. Indian Health Service, Risk Management Manual, *The Federal Tort Claims Act*, Section Seven. (citing 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680; 25 U.S.C. § 5321(d), 458aaa-15; 42 U.S.C. § 233). With sovereign immunity, the United States Government could not be sued. *Id.*

In 1946, Congress exacted the FTCA, waiving sovereign immunity for tortious conduct caused by government employees acting within the scope of employment. 28 U.S.C. §§1346(b), 2401(b), 2671-2680. The purpose of the FTCA was two-fold: first, it provided compensation for the wrongdoings of government employees, and, second, the legislation worked to deter tortious activity on behalf of the government while incentivizing proper supervision of government employees. *Loumiet v. United States*, 828 F.3d 935, 941 (D.C. Cir. 2016).

However, the FTCA was not Congress' first attempt to waive sovereign immunity. Beginning in 1887, Congress waived tort immunity on behalf of the federal government concerning certain contract claims. *See* Jennifer L. McMahan and Mimi Vollstedt, *Researching the Legislative History of the Federal Tort Claims Act,* United States Attorneys' Bulletin, Vol. 50 Number 1, 2011. The Tucker Act of 1887 memorialized that change and was one of the first steps by Congress to move away from the early practice of hearing private bills and deciding whether to provide compensation or to allow a case to escalate to a court. *Id.* The FTCA would go on to take on a variety of shapes before its official enactment in 1946. Congress introduced over thirty tort claims bills between 1925 and 1946 to address tort immunity. *Id.*

Historians note that when Congress was contemplating FTCA enactment, there was fear amongst the legislature of "unwarranted judicial intrusion[s] into areas of governmental operations and policymaking." *Gray v. Bell,* 712 F.2d 490, 506 (D.C. Cir. 1983). To assuage these concerns, Congress "opted to explicitly preserve the United States' sovereign immunity from more than a dozen categories of claims." *See generally,* 28 U.S.C. § 2680(a)-(n). As stated, these explicitly detailed FTCA exceptions demonstrate Congress' clear intent to limit the waiver of sovereign immunity to some government torts and not others. These articulate and plainly defined exceptions illustrate Congress' thorough contemplation of what the FTCA would and would not cover. *See Johnson*, 481 U.S. at 692 (stating "Congress specifically considered, and provided what it thought needful for, the special requirements of the military."). For Petitioners' claims, Congress implicitly provided a waiver of sovereign immunity for stateside, non-combatant (*e.g.*, medical malpractice) claims brought by active or inactive duty military service members and their families during times of peace.

This Court has laid the foundation for the plain language interpretation of the FTCA with cases like *Brooks v. United States*, a case in which an off-duty military service member was injured by a government employee in a traffic accident and sought recovery for personal injury under the FTCA. 337 U.S. 49 (1949). The *Brooks* Court, employing a plain language interpretation of the FTCA, explicitly declined to find that the FTCA's immunity exemptions applied to an off-duty military service member. The *Brooks* Court concluded that the FTCA provided the District Court with subject matter jurisdiction over certain civil claims and, to the extent that Congress did not waive sovereign immunity for certain claims, such exemptions were codified and written into the plain language of the statute:

> The [FTCA] statute's terms are clear. They provide for District Court jurisdiction over *any claim founded on negligence* brought against the United States. *We are not persuaded that 'any claim' means 'any claim but that of servicemen.'* The statute [has] exceptions. None exclude petitioners' claims. One [exception] is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. [] *It would be absurd to believe that Congress did not have the*

> *servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.*

Id. at 51 (emphasis added). The *Brooks* Court concluded that the FTCA was enacted to address the need for adjudication of *all* tort claims, and not just those claims brought by non-service members. *Id.*

Abiding by the plain language meaning of the FTCA, as written, is of the utmost importance as it dictates whether countless service members (like Ryan Carter) and their family members (like Kathleen Cole), receive fair and just recovery from the federal government. Construing the FTCA statute as written allows not only for just recovery but also for Congress' true intent to be fulfilled. When taking a plain-meaning approach to statutory interpretation, it is important to recognize what language is present in writing and what is intentionally absent. Petitioners do not ask this Court to create a different meaning for the words it has before it or read into the FTCA statute what is not there. Petitioners ask this Court to apply the FTCA to the facts of this case, consistent with the statute's plain meaning.

B. Just as this Court Held in *Brooks v. United States* and *U.S. v. Brown*, the *Feres* Doctrine is Limited in Scope and Does Not Apply To Petitioners' Medical Malpractice Claims.

Shortly after the enactment of the FTCA in 1946, this Court issued a series of opinions interpreting the Act. In the first, *Brooks v. United States*, this Court permitted a service member to bring a claim against the United

States when the plaintiff was injured in a traffic accident on a public highway. *Id.* ("The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. *We are not persuaded that 'any claim' means 'any claim but that of servicemen*.'" (emphasis added)). This Court permitted the *Brooks'* claims under the FTCA, as they were "dealing with an accident which had nothing to do with the *Brooks'* army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired." *Id.* at 52.

One year later, in *Feres v. United States*, 340 U.S. 135 (1950), this Court held that a plaintiff's decedent's estate and his widow were prohibited from bringing a wrongful death claim under the FTCA when the decedent perished in a barracks fire. This Court premised its decision on three rationales: first, unlike the *Brooks* plaintiffs, the *Feres* plaintiff's injuries arose "in the course of activity incident to service." *Id.* at 146. Second, according to this Court, aggrieved service people are generously compensated through the Veterans Affairs benefits system.[6] *Id.* at 145 ("The compensation system, which normally requires no litigation, is not negligible… [t]he recoveries compare extremely favorably with those provided by most workman's compensation statutes."). This second reason this Court premised on the general notion underlying any compensation system: service people enter a "grand bargain" whereby they are guaranteed benefits in exchange for recourse in the courts. *See id.*

6. Servicepeople injured or killed in the performance of their military duties are compensated under the Veterans' Benefits Act ("VBA"). 38 U.S.C. § 301, *et seq.*

Such a "grand bargain" served the additional purpose of conformity of recourse for peripatetic service people, who otherwise would be "dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." *Id.* at 143. Third, and also concordant with the incident-to-service concept, is that this Court doubted that Congress intended for service members to be able to recover under both FTCA and Veterans Affairs benefits schemes. *Id.* at 144.

A final reason—apocryphally attributed to *Feres* by subsequent decisions yet is nowhere to be found in the *Feres* opinion itself—is that tort claims by service people would be detrimental to military discipline. *Cf. Johnson*, 481 U.S. at 690 ("*Feres* and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the *types* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." (brackets, quotation marks, and citation omitted)), *with Feres*, 340 U.S. 135 (1950); *see also*, *Johnson*, 481 U.S. at 699 ("In sum, neither of the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies our failure to apply the FTCA as written.").

Four years after *Feres*, this Court decided *United States v. Brown*, and sustained the plaintiff's medical negligence claims. 348 U.S. 110 (1954). In *Brown*, the plaintiff's injury occurred after his honorable discharge, "while he enjoyed a civilian status," and the "damages resulted from a defective tourniquet applied in a veterans' hospital." *Id.* at 112. Thus, this Court held that *Brooks*, rather than *Feres*, controlled. *Id.*

In the decades following *Brooks*, *Feres*, and *Brown*, the Federal District and Courts of Appeal have dutifully and broadly applied *Feres* to preclude suits by military service members and their families whose injuries arose incident to service. At the same time, these courts have plainly stated their regret in applying such draconian precedent and, near uniformly quoting Justice Scalia's *Johnson* dissent, have unabashedly stated that *Feres* "was wrongfully decided and heartily deserves the widespread, almost universal criticism it has received." *See, e.g., Clendening v. United States*, 19 F.4th 421, 431 (4th Cir. 2021) ("However, despite the rampant criticism, the *Feres* doctrine still stands, and this Court is bound by it."). *See also, Appelhans v. United States*, 877 F.2d 309, 313 (4th Cir. 1989) (quoting J. Scalia's dissent and concluding that "the fact that the doctrine may in many cases lead to undeniably harsh results does not relieve this court of its obligation to apply precedent"); *Bozeman v. United States,* 780 F.2d 198, 200 (2d Cir. 1985) ("The *Feres* doctrine is a blunt instrument; courts and commentators have often been critical of it"); *LaBash v. U.S. Dep't of the Army,* 668 F.2d 1153, 1156 (10th Cir. 1982) ("Although many courts have expressed reservations about the continuing validity of the broad *Feres* doctrine, only the United States Supreme Court can overrule or modify *Feres.*"); *Perez v. Puerto Rico Nat. Guard*, 951 F. Supp. 2d 279, 296 (D.P.R. 2013) (quoting J. Scalia's dissent and stating "[w]e join the chorus of higher courts and renowned jurists who have vehemently expressed their disdain for the unbridled *Feres* doctrine"); *Smith v. Saraf*, 148 F. Supp. 2d 504, 508 (D.N.J. 2001) (quoting J. Scalia's dissent); *Cummings v. Dep't of Navy*, 116 F. Supp. 2d 76, 79 (D.D.C. 2000), *rev'd sub nom. Cummings v. Dep't of the Navy*, 279 F.3d 1051 (D.C. Cir. 2002) (quoting J. Scalia's dissent and stating that "this Court agrees" with his criticism); *Siddiqui v. United States*, No. 17-13351, 2018 WL 6178983, at *4 (E.D. Mich. Nov. 27, 2018), *aff'd,* 783 F. App'x 484 (6th Cir. 2019) (quoting J. Scalia's dissent and bemoaning that since *Feres*, a "judicially-engineered exception to the FTCA[,]" service members "suffering even the most brutal injuries due to military negligence have been shut out of the courts"); *Bosh v. United States*, No. C19-5616 BHS, 2019 WL 6728636, at *1 (W.D. Wash. Dec. 11, 2019), *aff'd,* 831 F. App'x 834 (9th Cir. 2020) (quoting J. Scalia's dissent and regretting that "*Feres*, however, is the law of the land"); *Fianko v. United States*, No. PWG-12-2025, 2013 WL 3873226, at *6 (D. Md. July 24, 2013) (quoting J. Scalia's dissent).

Here, *Feres* neither applies to, nor bars Petitioners' FTCA claims. The three *Feres* rationales, and the *ex post hoc* rationale of military discipline, are not implicated by the facts of this case. The reasons why are simple and facially obvious. First, there is no dispute that Mr. Carter's active duty period ended on March 13, 2018, and there is no dispute that, at the time of Mr. Carter's surgery on April 6, 2018, and his subsequent injury, he was inactive, subject to no military orders and on no military mission. Second, Mr. Carter has not been "generously compensated" through the Veterans Affairs benefits system. Third, case law before and after *Feres* permits recovery under both the FTCA and VBA. Finally, Mr. Carter's medical negligence claims do not impute military discipline or sensitive military matters. Like the *Brown* plaintiff, Mr. Carter's injuries occurred not in the line of duty, but in a stateside hospital setting, where Mr. Carter's only role was that of a surgical patient. 348 U.S. at 112. And like the *Brooks* plaintiff, the negligence in Mr. Carter's case "had nothing to do with [his National

Guard] career[, and his], injuries [were] not caused by [his] service except in the sense that all human events depend upon what has already transpired." 337 U.S. at 52.

At the time of his injury on April 6, 2018, Mr. Carter was an inactive duty, dual-status member of the Air National Guard, and a civilian employee of the federal government. As a Guardsman, Mr. Carter was required to "(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year." 32 U.S.C. § 502(a); *see also* 38 U.S.C. § 101(23) (defining "inactive duty training…[i]n the case of the…Air National Guard of any State" as that falling under section 316 and 502, *et seq.*).

Critically, Mr. Carter's April 6, 2018, spinal cord injury was not suffered while satisfying his Guardsman responsibilities, at a military base, at a military-sponsored event, or because of the military's provision of dangerous substances. Mr. Carter's spinal cord injury occurred in connection with an elective surgical procedure during which it is alleged that government employees and healthcare providers deviated from the standards of care in negligently placing a spinal disc spacer, permanently traumatizing and injuring Mr. Carter's cervical spinal cord. At the time of the negligence and injury, Mr. Carter was sedated, unconscious, and immobile, lying on an operating room table, in a surgical suite.

Consistent with Mr. Carter's argument that his medical negligence claims were not *incident to service*, and therefore not subject to *Feres*, the Federal Circuits and this Court have sustained medical negligence claims brought by inactive duty service members. In the *Brown* case, this Court held that a claim for severe nerve damage resulting "from a defective tourniquet applied in a veterans' hospital" was not barred by *Feres*. 348 U.S. at 112. In *Bradley v. United States*, the Fourth Circuit reversed summary judgment on a wrongful death claim where the plaintiff alleged an off-duty servicewoman died of infection after medical staff repeatedly refused her treatment. 161 F.3d 777, 778-82 (4th Cir. 1998). In *Cortez v. United States*, the Fifth Circuit reversed the lower court's dismissal under *Feres*, when the plaintiff alleged medical negligence against an army medical center psychiatric facility, where the plaintiff's decedent, on the Temporary Disability Retired List—not active duty—was left unattended on the 8th floor and jumped to his death. 854 F.2d 723, 727 (5th Cir. 1988). Mr. Carter was not on active duty, he was under no military or medical orders, and he was not engaged in an activity implicating the military or military service—as he was fully unconscious while under the knife—and thus his claims are not barred under *Feres*.

C. The Rationales Underpinning the *Feres* Doctrine and the Incident-to-Service Test Have Been Discarded by the Courts and Do Not Apply to Petitioners' Medical Malpractice Claims.

This Court in *Feres* initially articulated several "rationales" in defense of its judicially engineered *incident-to-service* test which were predicated on the "distinctly federal" relationship between the United States and its service personnel, on the presence of an alternative military compensation system, and on the fear of damaging the military disciplinary structure. *See generally, Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671-72 (1977); s*ee also, Davis v. United States,* 667 F.2d 822, 825 (9th Cir. 1982); *Lewis v. United States,* 663 F.2d 889, 890 (9th Cir. 1981); *Hunt v. United States,* 636 F.2d 580, 597 (D.C. Cir. 1980). As this Court will see, the rationales underpinning the *Feres* doctrine are not implicated in this case and, in turn, the *Feres* doctrine is not applicable.

1. The "Distinctively Federal Relationship" Rationale Has Been Discarded by the Courts and No Longer Controls.

The first reason the *Feres* Court gave for barring claims of service members relates to the idea that the FTCA applies the "law of the place where the act or omission occurred," 28 U.S.C. 1346(b) and that Congress could not have intended for local tort law to control issues that are federal in nature. 340 U.S. at 142-44. The *Feres* Court believed that Congress would have wanted uniformity of law in situations involving military service members and was primarily concerned with the "*unfairness to the soldier* of making his recovery turn upon where he was injured, a matter outside of his control." *Johnson*, 481 U.S. at 693 (citations omitted) (emphasis in original).

This first *Feres* rationale was discredited and put to rest years ago in *United States v. Shearer* when this Court held that the "distinctively federal" rationale was "no longer controlling." 473 U.S. 52, 58, n. 4 (1985). This rationale has not been a viable rationale for *Feres* since this Court discarded it in *United States v. Muniz*, 374 U.S. 150

(1963). Justice Scalia pointed out in his *Johnson* dissent that "[t]he unfairness to servicemen of geographically varied recovery is...an absurd justification, given that… nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." 481 U.S. at 695-96 (citing *Muniz*, 374 U.S. 150, 162).

2. Petitioners Benefit From No "Grand Bargain."

The second reason the *Feres* Court gave for exempting military personnel from the right to bring suit under the FTCA is that the Veterans Benefits Act ("VBA") compensates service members. In so concluding, this Court violated the maxim "absence of evidence is not evidence of absence," as pointed out by Justice Scalia in his *Johnson* dissent: "*Feres* described the absence of any provision to adjust dual recoveries under the FTCA and VBA as 'persuasive evidence that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.'" *Johnson*, 481 U.S. at 697 (quoting *Feres*, 340 U.S. at 144-45).

Also pointed out by Justice Scalia, such a prohibition is inconsistent with the FTCA—the text of which, among clearly articulated exceptions, does not include an exception for related VBA claims—as well as prior and subsequent case law, which has permitted FTCA claims when the plaintiff also received VBA benefits. In the *Brooks* case, this Court plainly stated: "nothing in the [Federal] Tort Claims Act or the veterans' laws…provides for exclusiveness of remedy," and this Court refused to "call either remedy…exclusive…when Congress has not done so." 337 U.S. at 53; *see also, Johnson*, 481 U.S. at 697 (stating the same). In *Brown*, this Court also stated that

"Congress had given no indication that it made the right to [VBA] compensation the veteran's exclusive remedy…the receipt of disability payments…did not preclude recovery under the [Federal] Tort Claims Act." 348 U.S. at 111; *see also, Johnson*, 481 U.S. at 698 (stating the same). This Court in *Brooks* and *Brown* was not looking to sidestep the principles of statutory interpretation and followed the plain language meaning of the FTCA statute.

Petitioner Ryan Carter walked into a government hospital on April 6, 2018, and never walked again. He can remember his very last steps—into a government facility where substandard surgical care robbed him of his independence—his ability to use his legs, arms, and hands, to toilet and bathe on his own. The VBA likely covers certain aspects of Mr. Carter's medical care. But well-known systemic problems with the veterans' health care system, including quality and access issues, preclude Mr. Carter from receiving the breadth and quality of care he so desperately requires and deserves. Further, the true cost of his traumatic spinal cord injury—the loss of his livelihood, his independence, and his ability to parent and to be a husband to his wife—is simply not addressed by the VBA.

3. Only One Legitimate *Feres* Rationale Remains: The Evolution and Refinement of the *Feres* Rationales and the *Post Hoc* Rationalization of Military Discipline.

Over the years that followed *Feres*, lower courts realized that, when applied, the *Feres* doctrine is, in effect, a license for tortious conduct and a mandate of second-class citizenship for military service members and their families. This Court did not take the causal impact of *Feres* lightly and in subsequent cases refined the foundations of the doctrine, announcing that the doctrine "seems best explained" by only one of the initially articulated rationales—what has now become known as the "military discipline rationale" and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling." *Brown,* 348 U.S. at 112; *Muniz,* 374 U.S. at 162; *Chappell v. Wallace,* 462 U.S. 296, 299 (1983); *Shearer,* 473 U.S. 52, 87 L.Ed.2d at 44 n. 4.

This Court further noted that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules" and that the *Feres* bar should be erected only where "the suit requires the civilian court to second-guess military decisions... and…the suit might impair essential military discipline." *Id.* This Court also stated that the *Feres* doctrine barred the "*type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 45 (emphasis in original).

With this Court's lead, lower courts focused on the *reasons* underlying the *Feres* doctrine, declining to erect the *Feres* bar when the primary rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine" was not implicated by the facts of the particular case. *Hunt v. United States,* 636 F.2d 580, 599 (D.C. Cir. 1980); *see also, Scales v. United States,* 685 F.2d 970, 973 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082 (1983) ("*Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant").

4. Petitioners' Medical Malpractice Claims Do Not Impute the Military Discipline Rationale.

Post-dating *Feres* by decades, yet wrongfully attributed to the doctrine, "the *post hoc* rationalization of military discipline"—even if it were valid—would not preclude Petitioners' claims. *Johnson*, 481 U.S. at 699. This "rationalization" is premised on the notion that service members' suits under the FTCA would undermine military discipline "and civilian courts would be required to second-guess military decisionmaking." *Id.* Accordingly, to satisfy this dubious test, courts "must ask whether particular suits would call into question military discipline and decisionmaking and would require judicial inquiry into, and hence intrusion upon, military matters." *Clendening*, 19 F.4th at 427 (quoting *Cioca v. Rumsfeld*, 720 F.3d 505, 515 (4th Cir. 2013)) (brackets and quotation marks omitted).

In justifying the military discipline rationale, courts interpreting *Feres* have endeavored to identify activities that could harm the military's disciplinary system if litigated in a civil action. In doing so, courts identified two distinct ways in which military discipline could be impeded by the possibility of civil suits concerning activities bearing a strong relationship to military affairs. First, military decision-makers subject to civil suit "might not be willing to act as quickly and forcefully as is necessary, *especially during battlefield conditions*," if their actions could be second-guessed in a civilian court." *Jaffee v. United States,* 663 F.2d 1226, 1232 (3rd Cir. 1981) (emphasis added). *See also, Stencel,* 431 U.S. at 673. Second, encouraging military personnel to question decisions by their superiors might have some effect on the willingness of such personnel to follow orders. *See, e.g., Jaffee,* 663 F.2d at 1232; *Hunt,* 636 F.2d at 599.

In *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987), a service member was injured by negligent medical care in the course of giving birth. The Ninth Circuit held that the military discipline rationale had no application to these facts:

> *No military considerations govern the treatment in a non-field hospital* of a woman who seeks to have a healthy baby. *No military discipline applies to the care a conscientious physician will provide* in this situation. Thus, in treating Atkinson for complications of her pregnancy, Atkinson's doctor was implementing decisions of military judgment only in the remotest sense….

Atkinson, 825 F.2d at 205 (emphasis added).

Here, Mr. Carter's elective spine surgery while on inactive duty, his resulting spinal cord injury, and the civil medical malpractice tort claims that naturally followed, do not involve military matters or military discipline, as "no military discipline applies to the care a conscientious physician will provide." *Id*. Mr. Carter's medical malpractice claims do not implicate a military decision-maker's willingness to "act quickly and forcefully…during battlefield conditions," nor will they have any impact on the "willingness of [military] personnel to follow orders." *Jaffee,* 663 F.2d at 1232; *Stencel,* 431 U.S. at 673; *Hunt,* 636 F.2d at 599.

Mr. Carter's leaders and colleagues in the Air National Guard had no say and no interest in his elective surgery. The surgery was not related in any way to his duties and responsibilities—active, inactive, reservist, civilian, or otherwise. *See* 32 U.S.C. § 502(a); *see also* 38 U.S.C. § 101(23). Mr. Carter was not under any medical orders to undergo surgery. He elected to have surgery, after discussion with his medical providers, spouse, and family. Indeed, his medical records are rife with notes stating that his practitioners "obtained informed consent" for his elective and corrective procedure. Mr. Carter *consented* to surgery; he was not *ordered* to undergo surgery. He was not *duty-bound* to undergo surgery.

Further, Mr. Carter was not on active duty, but rather, inactive duty. By definition, his injuries did *not* occur "in the course of his day-to-day, active duty service[,]" and thus his injuries *did not* "stem from the relationship between [him] and his service in the military." *Clendening*, 19 F.4th at 428 (brackets omitted).

Lastly, Mr. Carter was not injured on a military base. Unlike the plaintiffs in *Feres* and *Clendening*, where the general functioning of the military, in its provision of barracks, water, or some other essential element of military function, was implicated, Mr. Carter was injured in a government hospital. As discussed, the Federal Courts and this Court have not considered medical negligence in a hospital setting as an absolute bar to claims under the FTCA. *See generally, Brown*, 348 U.S. at 112; *see also, Bradley v. United States*, 161 F.3d 777, 778-82 (4th Cir. 1998); *Cortez v. United States*, 854 F.2d 723, 727 (5th Cir. 1988).

In short, where there is no relevant relationship between a service member's actions or behavior and the military's interests that civil suits might jeopardize, the *Feres* doctrine should not bar recovery.

D. *Feres* Was Wrongfully Decided and Should Be Clarified, Limited, or Overruled.

Feres directly conflicts with the plain language meaning of the FTCA and has outgrown its purpose and utility. Even the lone remaining rationale underpinning *Feres*—military discipline—is inadequate to justify the widespread injustice and inequity caused by its arbitrarily disparate and hazardous application.

For the reasons outlined in Justice Scalia's *U.S. v. Johnson*, 481 U.S. 681, 691-703, dissent, *Feres* should be clarified, limited, or overruled. "*Feres* was wrongfully decided and heartily deserves the widespread, almost universal criticism it has received." *Id.* at 700; *see also*, *Daniel v. United States*, 139 S.Ct. 1713 (2019) (Thomas, J., dissenting from denial of certiorari and stating that "[s]uch unfortunate repercussions—denial of relief to military personnel and distortions of other areas of law to compensate—will continue to ripple through our jurisprudence as long as the Court refuses to reconsider *Feres*.") (internal citations omitted).

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the Supreme Court of the United States grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1703

RYAN G. CARTER; KATHLEEN E. COLE,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Ellen Lipton Hollander, Senior District Judge. (1:21-cv-01315-ELH).

January 25, 2024, Argued
March 7, 2024, Decided

Before AGEE, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Ryan G. Carter, a reservist in the Air National Guard and dual-status technician for the military, and his wife, Kathleen E. Cole, appeal the district court's judgment dismissing their Federal Tort Claims Act action for lack of subject matter jurisdiction under *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), having found the injuries arose out of or were in a course of activity "incident to service." We have jurisdiction under 28 U.S.C. § 1291, and we review dismissals under *Feres* de novo. *Clendening v. United States*, 19 F.4th 421, 426 (4th Cir. 2021). We affirm the district court's dismissal.

The district court properly dismissed the claims of alleged medical malpractice, lack of informed consent and loss of consortium all stemming from surgery that took place at Walter Reed National Military Medical Center. Carter received the surgery at Walter Reed—performed by military doctors—because he was a member of the military. And although he was on inactive status as an Air National Guardsman at the time of the surgery, he was neither discharged from the military nor on leave substantially similar to discharged or veteran status. Under our precedent, that is enough to bar the couple's claims under *Feres*.[1] *See Appelhans v. United States*, 877 F.2d 309, 311 (4th Cir. 1989) (finding *Feres* applicable to servicemember on excess leave pending discharge because "his injury occurred as a result of medical treatment by military doctors . . . conclusively demonstrat[ing] that that injury was 'incident to service'"); *see also Clendening*, 19

1. A derivative loss of consortium claim is similarly barred by *Feres* under our precedent. *See Kendrick v. United States*, 877 F.2d 1201, 1206-07 (4th Cir. 1989).

F.4th at 428 (noting the current breadth of the doctrine in the circuit, "encompass[ing], at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military" (citation omitted)). Accordingly, we

AFFIRM

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED MAY 24, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ELH-21-1315

RYAN G. CARTER, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

May 24, 2022, Decided
May 24, 2022, Filed

MEMORANDUM OPINION

Plaintiffs Ryan G. Carter and his wife, Kathleen E. Cole, have filed a tort suit against the United States of America (the "Government") (ECF 1), "pursuant to and in compliance with" the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, and the "National Defense Authorization Act" ("NDAA"), 10 U.S.C. § 2733 *et seq. Id.* ¶ 17.[1] The suit stems from cervical spine

1. As the Government notes (ECF 18-1 at 15-17), plaintiffs' reference to the "NDAA" is somewhat confusing. "NDAA" is the

surgery performed on Carter at Walter Reed National Military Medical Center ("Walter Reed") on April 6, 2018. Tragically, the surgery left Carter with life altering, substantial, and permanent injuries. *See* ECF 1, ¶¶ 24-39.

Plaintiffs lodge three counts against the Government: "Medical Negligence" (Count I); "Loss of Consortium" (Count II); and "Informed Consent" (Count III). *See* ECF 1, ¶¶ 45-62. The Complaint is supported by numerous exhibits. ECF 2-3 to ECF 2-17.[2]

The Government has moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) (ECF 18), supported by a

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name given to the defense policy bill annually passed by Congress. *See, e.g.*, National Defense Authorization for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021). The provision of law cited by plaintiffs, 10 U.S.C. § 2733, is contained within the Military Claims Act ("MCA"), 10 U.S.C. § 2731 *et seq.*, which provides an administrative mechanism to settle certain claims against the United States for personal injury, death, or property damage caused by a DoD civilian employee or service member. *See Minns v. United States*, 974 F. Supp. 500, 507-08 (D. Md. 1997), *aff'd*, 155 F.3d 445 (4th Cir. 1998).

The Government suggests (ECF 18-1 at 16-17) that plaintiffs' use of the term "NDAA" is a reference to an amendment to the MCA contained in the National Defense Authorization Act for Fiscal Year 2020. *See* Pub. L. No. 116-92, Div. A, Title VII, Subtitle C, § 731(a)(1), 133 Stat. 1198, 1157-60 (2019). Codified at 10 U.S.C. § 2733a, this amendment permits service members to file administrative claims for injuries incident to service caused by medical malpractice, in some contexts. This issue is discussed further, *infra*.

2. The exhibits were docketed separately from the Complaint.

memorandum (ECF 18-1) (collectively, the "Motion") and numerous exhibits. ECF 18-2 to ECF 18-9. According to the Government, the suit is barred by the doctrine first articulated by the Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950).

Plaintiffs oppose the Motion. ECF 21 (the "Opposition"). The Government has replied (ECF 28, the "Reply"), supported by additional exhibits. ECF 28-1 to ECF 28-7.

No hearing is necessary to resolve the Motion. *See* Local Rule 105.6. For the reasons that follow, I am compelled to grant the Motion.

I. Factual Background[3]

A.

In April 2018, Carter was a 43-year-old Air National Guard Staff Sergeant. ECF 1, ¶ 23.[4] He is married to

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3. As discussed, *infra*, because the Government mounts a factual challenge to subject matter jurisdiction, I "may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)

Throughout the Memorandum Opinion, the Court cites to the electronic pagination. But, the electronic pagination does not always correspond to the page number imprinted on the particular submission.

4. The Complaint and the briefing refer to Carter as a Staff Sergeant ("SSgt"). However, as the Motion notes (*see* ECF 18-1 at

Cole. *Id.* ¶ 9. Carter enlisted in the Maryland Air National Guard and the Air National Guard of the United States in 2009. ECF 18-2 (Decl. of Bernard E. Doyle, Associate General Counsel, National Guard Bureau), ¶ 5.[5] "The Air National Guard of the United States is a Reserve Component of the United States Air Force." *Id.*

Carter attended "initial active duty training," which is "commonly known as 'basic training,'" in February and March 2010, at Lackland Air Force Base in San Antonio, Texas. *Id.* ¶ 6; *see* ECF 18-4 (initial active duty training order). Between April and November 2010, Carter also completed "'technical school' training" at Kessler Air Force Base in Biloxi, Mississippi, and Sheppard Air Force Base in Wichita Falls, Texas. ECF 18-2, ¶ 7; *see* ECF 18-4; ECF 18-5; ECF 18-6; ECF 18-7 (training orders).

According to the Complaint, as of April 2018, Carter had "a medical history that included degenerative cervical disk disease, chronic neck pain, difficulty with fine motor skills, as well as numbness and tingling in his fingers." ECF 1, ¶ 23. The Complaint does not include any allegations as to the origin of Carter's medical conditions. But, materials submitted by the Government reflect that Carter's medical conditions derived, at least in part, from

2 n.2), some documents refer to Carter's rank as Tech Sergeant ("TSgt"), suggesting he was promoted from Staff Sergeant to Tech Sergeant "in the final months or years prior to his retirement." *Id.* This issue is not material.

5. Doyle reviewed a number of records relating to Carter's employment and service with the Air National Guard. ECF 18-2, ¶¶ 2, 3.

injuries he sustained during basic training. Doyle avers: "In early 2010 SSgt Carter sustained injuries after falling from a pull-up bar during his basic training. It is my understanding that SSgt Carter has experienced ongoing medical issues since that injury." ECF 18-2, ¶ 7. Carter does not contest the government's assertions.

Similarly, according to Charles P. Franz, Jr., the Associate General Counsel for the Defense Health Agency ("DHA"), Carter "sustained injuries after falling from a pull-up bar during his basic training." ECF 18-9 (Franz Decl.), ¶ 5.[6] "Since that fall, TSgt Carter has reported a progression of steadily worsening symptoms, including chronic back pain in his leg, back, shoulder and neck, increased difficulties with fine motor skills, and reoccurring numbness and tingling in his fingers and other extremities." *Id.* ¶ 6.

Carter continuously sought and received care for "these and other symptoms" from Walter Reed and other military hospitals and medical providers. *Id.* ¶ 7. Walter Reed, previously known as the "National Naval Medical Center," is located in Bethesda, Maryland, and is a "military hospital or treatment facility" managed by the DHA, a "combat support agency within" the Department of Defense ("DoD"). *Id.* ¶ 2. Beginning in May 2015, Carter was seen and evaluated at Walter Reed for these symptoms, and was diagnosed by Walter Reed physicians with "cervical spondylotic myelopathy." *Id.* ¶ 8.[7]

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6. Franz reviewed medical records and administrative claims related to Carter. ECF 18-9, ¶¶ 3, 4.

7. The Court may take judicial notice that "[c]ervical spondylotic myelopathy is damage to the spinal cord in the neck."

An order submitted with the Complaint reflects that Carter was activated to active duty status for the period from August 27, 2017, to March 27, 2018, for service with the 175th Wing of the Maryland Air National Guard in support of "Operation Freedom's Sentinel." ECF 2-16 (the March 23, 2018 Order) at 2.[8] This period was later shortened to end on March 13, 2018. *Id.* According to the order (*id.* at 2), the legal authority for this activation was 10 U.S.C. § 12301(d), which provides: "At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member."

Colonel Joed I. Carbonell of the United States Air Force was Carter's commanding officer for Carter's active duty tour that began in August 2017. ECF 28-1 (Carbonell Decl.), ¶ 2. Materials included by the Government with the Reply, including a Declaration by Carbonell, provide more details as to Carter's active duty service.

Carbonell avers: "In August 2017, I issued the special orders, which activated SSgt Carter to active duty with the [Maryland Air National Guard 276 Cyberspace Operations] Squadron to perform duties, pursuant to 10

Cervical spondylotic myelopathy, Columbia Univ. Irving Med. Ctr., https://www.neurosurgery.columbia.edu/patient-care/conditions/cervical-spondylotic-myelopathy (last visited May 9, 2022); *see also* Fed. R. Evid. 201.

8. "The term 'active duty' means full-time duty in the active military service of the United States." 10 U.S.C. § 101(d)(1).

U.S.C. § 12301(d), in support of Operation Freedoms SE [sic]." *Id.* ¶ 7.[9] As noted, the active duty period originally was from August 27, 2017, to March 27, 2018, but the end date was later changed to March 13, 2018. *See* ECF 2-16; ECF 28-2; ECF 28-3; ECF 28-4 (orders). During this period, Carter worked under Carbonell's command "as a Cyber Operations Planner supporting Air Forces Cyber and the Cyber National Mission Force." ECF 28-1, ¶ 8.

According to Carbonell, in 2017 Carter was "assigned to a position as a military technician (dual status)." *Id.* ¶ 6. "Military technicians (dual status) are full-time, federal civilian employees whose employment is conditioned on maintaining their military position in the National Guard." *Id.* As a dual status military technician, Carter was required to maintain membership in the Maryland Air National Guard, meaning he was obligated to attend "inactive duty training one weekend a month as well as two weeks of annual training a year." *Id.*; *see also* 32 U.S.C. § 502 (specifying National Guard training requirements); 32 U.S.C. § 709 (authorizing dual status military technicians).

B.

Carbonell avers that he "was aware that SSgt Carter sought and received medical care as an active duty service member from [Walter Reed] during [Carter's service in

9. This appears to be a typographical error. The name of the operation is Operation Freedom's Sentinel. *See* ECF 2-16 at 2; ECF 28-2 at 1.

the unit, from August 27, 2017, to March 13, 2018], for a spinal injury that he sustained while in basic training." ECF 28-1, ¶ 8.

According to Franz, during an evaluation of Carter at Walter Reed on or around March 1, 2018, "it was recommended" to Carter that he undergo surgery "in order to alleviate and prevent the worsening of the pain, radiculopathy, and other symptoms he was experiencing in his neck." ECF 18-9, ¶ 9. On or about April 6, 2018, Carter "presented" to Walter Reed "for anterior cervical discectomy and fusion ('ACDF') surgery in connection with a diagnosis of cervical spondylotic myelopathy." ECF 1, ¶ 24.[10]

The surgery was performed by Bradley A. Dengler, M.D., "with general endotracheal tube anesthesia administered and monitored by the anesthesia team." ECF 1, ¶ 25.[11] Plaintiffs allege that "[i]ntraoperatively, the procedure was complicated by a loss and/or depression in neurophysiological signals during the negligent placement of a trial spacer at the C4/5 level." *Id.* ¶ 27. After the discectomy, Carter awoke from anesthesia and was "unable to move his extremities." *Id.* ¶ 28. "Thereafter, Mr. Carter was again sedated and sent emergently for an MRI to evaluate for injury to his cervical cord. The results

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10. In general, the Complaint does not define or explain its medical terminology.

11. In ECF 1, ¶¶ 44, 48, plaintiffs identify 30 health care providers involved with Carter's surgical procedure and subsequent medical care.

of the MRI showed a slight increase in the T2 signal within the spinal cord at the C4/5 level." ECF 1, ¶ 29. Given these "T2 hypersensitivities," Carter "underwent a posterior C3-6 laminectomy and fusion that same day." *Id.* ¶ 30. This second procedure was likewise recommended and performed by Dr. Dengler. *Id.*

"Postoperatively, Mr. Carter was transferred to the Surgical ICU, intubated and sedated, and with persistent motor and sensory deficits." *Id.* ¶ 31. Upon admission, he was reported to have an "ASIA A spinal cord injury with a motor score of two." *Id.* ¶ 32. "In the hours and days that followed, Mr. Carter underwent examination and testing, including CT, MRI, and ultrasound imaging to determine the cause, nature, and extent of his diminished postoperative neurological function and pain." *Id.* ¶ 33. A postoperative MRI showed "'persistent severe spinal canal stenosis from C3-C5' indicating that the surgery was unsuccessful." *Id.* ¶ 34. Carter was monitored at the Walter Reed Surgical ICU for approximately three weeks after the surgery, where he also underwent wound care, physical therapy, recreational therapy, and occupational therapy. *Id.* ¶ 37; *see also* ECF 18-9, ¶ 13. However, his hospital treatment was "complicated" by "a left upper extremity deep vein thrombosis ("DVT") for which he was initially anticoagulated with heparin and later transitioned to Lovenox (enoxaparin)." ECF 1, ¶ 36.

On or about April 25, 2018, Carter was transferred from Walter Reed to the Hunter Holmes McGuire Veterans Affairs ("VA") Medical Center in Richmond, Virginia, for comprehensive spinal cord injury rehabilitation therapy. *Id.* ¶ 38; *see also* ECF 18-9, ¶ 14. There, Carter received "continued rehabilitation therapy for ASIA B tetraplegia due to his April 6, 2018 spinal cord injury, as well as ongoing treatment for his neurogenic bladder, neurogenic bowel, oropharyngeal dysphagia, pressure ulcers of sacral and gluteal regions, spasticity, obstructive sleep apnea, obstruction of the pelvic-ureteric junction, adjustment disorder with mixed emotions, generalized anxiety disorder, and depression." ECF 1, ¶ 39. And, he underwent several operative procedures, including "the debridement of his right buttock wound, cystoscopy with left retrograde pyelogram, and cystoscopy and suprapubic catheter placement." ECF 1, ¶ 40.

"At the time of his surgery on April 6, 2018, and at all time [sic] when he received care and treatment at [Walter Reed], TSgt Carter was a member of the Air National Guard." ECF 18-9, ¶ 18. However, the specific details are more complicated.

As noted, Carter's active duty status ended on March 13, 2018. However, the Complaint alleges that on or about June 27, 2018, Carter's duty status was "retroactively converted from 'inactive duty' to 'active duty'" as of March 14, 2018. ECF 1, ¶ 41. The Complaint includes a "Verification of an Air National Guard Call to Duty Order," signed by Colonel Carbonell and dated June 27, 2018. ECF 2-17. The document identifies the "Type of Duty/Authority" as "Active Duty for Operational Support Medical Hold," and cites 10 U.S.C. § 12301(h). ECF 2-17 at 2.[12] And, the

12. 10 U.S.C. § 12301(h) provides:

> (1) When authorized by the Secretary of Defense, the Secretary of a military department may, with the

document refers to an "Itinerary" beginning March 14, 2018, and ending June 11, 2018. ECF 2-17 at 2. The Complaint does not include any further allegations as to this retroactive conversion, including as to the motivation for doing so. However, the Opposition hypothesizes, without citation to evidence, that the conversion was "presumably due to the nature and severity of [Carter's] newfound medical situation." ECF 21-1 at 5.

Materials included with the Reply provide further details as to these circumstances. Colonel Carbonell

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consent of the member, order a member of a reserve component to active duty—

(A) to receive authorized medical care;

(B) to be medically evaluated for disability or other purposes; or

(C) to complete a required Department of Defense health care study, which may include an associated medical evaluation of the member.

(2) A member ordered to active duty under this subsection may, with the member's consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.

(3) A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned.

avers that he was aware of Carter's scheduled surgery, but not aware that it was to occur after Carter completed his active duty tour. ECF 28-1, ¶ 8. He asserts: "As a military technician (dual status) and drilling member of the Maryland Air National Guard, SSgt Carter normally would not have been eligible for medical care or surgery at a military hospital, such as Walter Reed." *Id.* ¶ 9. Therefore, he "assumed when [Carter] had left the Squadron that SSgt Carter had received special orders extending his active duty to receive medical treatment." *Id.* However, reviewing Carter's records after the surgery, he "realized" that Carter "had received medical treatment after his active duty tour without having first obtained orders continuing active duty status for medical treatment. Thus, SSgt. Carter was not qualified to receive the sought [sic] medical treatment and care at Walter Reed." *Id.* ¶ 10.

Accordingly, Carbonell issued a series of orders modifying Carter's status, activating him to active duty status "so that he could be placed on 'Medical Hold.'" *Id.* ¶ 11. First, on April 18, 2018, he issued an order placing Carter on a "Special Medical Training Hold" under 32 U.S.C. §§ 502(f)(1)(B) and 503. *Id.*; *see* ECF 28-5 (the "April 18, 2018 Order").[13] This order specified an "Itinerary"

13. 32 U.S.C. § 502(f)(1)(B) authorizes a member of the National Guard to be ordered to perform additional training or duty with his consent, with or without pay. 32 U.S.C. § 503, as relevant here, authorizes a "limited number of members of the Air National Guard" to attend service schools except the United States Air Force Academy, and to "be attached to an organization of the Air Force corresponding to the organization of the Air National Guard to which

period of March 14, 2018, to June 11, 2018. ECF 28-5 at 1. The order advised: "The purpose of this extension is to allow additional time to assess the member's medical condition and for the medical treatment facility (MTF) toinitiate [sic] or complete a LOD,[14] determine whether the medical condition renders the member unable to meet retention or mobility standards, and provide medical documentation to support a request for MEDCON orders, if applicable." ECF *Id.* This order also states: "The Verbal Orders of the Commander (VOCO) on 14 Mar 2018 are confirmed; circumstances prevented written orders in advance." *Id.* at 2. However, the Order apparently did not place Carter on active duty.

Carbonell subsequently issued two orders placing Carter on active duty. ECF 28-1, ¶ 11. The first, dated May 30, 2018, placed Carter on active duty for the period from June 11, 12, 2018, to July 11, 2018. ECF 28-6 (the "May 30, 2018 Order") at 1. The May 30, 2018 Order identifies the "Type of Duty/Authority" as "Activation Medical Hold," citing to 10 U.S.C. § 12301(h). *Id.* at 1. It states: "Member is being extended under this authority pending resolution of a medical issue." *Id.* The May 30, 2018 Order also describes the "Reserve Active Duty Reason" as "K — 10 USC 12301 (H) Voluntary Tour for Medical Treatment." *Id.* at 2. In addition, it advises: "While performing under these orders, member is subject to the Uniform Code of Military Justice." *Id.* at 1.

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the member belongs, for routine practical instruction at an air base during field training or other outdoor exercise."

14. The acronym "LOD" is not defined.

The second order is dated June 27, 2018. ECF 28-7 (the "June 27, 2018 Order"). It is generally similar to the May 30, 2018 Order. The "Type of Duty/Authority" is given as "Active Duty for Operational Support Medical Hold," citing to 10 U.S.C. § 12301(h). *Id.* at 1. And, the dates for duty are March 14, 2018, to June 11, 2018. ECF 28-7 at 1. Similar to the April 18, 2018 Order, but unlike the May 30, 2018 Order, the June 27, 2018 Order states: "The Verbal Orders of the Commander (VOCO) on 14 Mar 2018 are confirmed; circumstances prevented written orders in advance." *Id.* at 2. This is the retroactive conversion order alleged in the Complaint (*see* ECF 1, ¶ 41), although the Complaint includes a slightly different "verification" document. *See* ECF 2-17.

Carbonell describes being on "medical hold" as a type of active duty, and explains that someone on medical hold can still be subject to the same types of military orders as any other active duty service member. ECF 28-1, ¶ 12. He concludes his Declaration by stating, *id.* ¶¶ 13-14:

> These orders were issued at SSgt Carter's request and in coordination with the 175th Medical Group—an entity responsible with administering medical benefits for the Air National Guard—because if SSgt Carter had been considered to be in his status as a military technician and drill status guardsmen at the time of the surgery, he could not have been found injured in the line of duty. Had SSgt. Carter not been injured in the line of duty, he would not have been eligible for pay

> and benefits, continuing medical treatment, disability and medical retirement benefits, and veterans' benefits after he was discharged from military service. . . .
>
> The decision to issue these orders was made in light of the foregoing, but particularly because SSgt. Carter's [sic] requested it. In issuing these orders, no consideration was given to potential administrative claims or litigation.

Although the Carbonell Declaration was included with the Reply, plaintiffs have not sought to contest the circumstances described in Carbonell's Declaration. As mentioned, the Complaint alleges retroactive conversion based on an order of June 27, 2018, consistent with the Declaration. *See* ECF 1, ¶ 41. However, it does not provide any further detail.

In particular, Carter has not specified whether he requested the retroactive conversion to active duty status in order to obtain medical care through the military. However, and of import, the authorizing statute, 10 U.S.C. § 12301(h), permits medical activation only with the "consent of the member." Furthermore, both the May 30, 2018 Order and the June 27, 2018 Order describe the reason for activation as a "*voluntary* tour for medical treatment." ECF 28-6 at 2; ECF 28-7 at 2 (emphasis added).

The Government's declarants agree that Carter's eligibility for surgery at Walter Reed on April 6, 2018, was premised on his military service. But, there seems to be some disagreement, or at least a lack of clarity, as to whether Carter had to be on active duty status to undergo the surgery. As discussed, Colonel Carbonell apparently believes that Carter was not eligible for the surgery at Walter Reed, a military hospital, unless he was on active duty status. *See* ECF 28-1, ¶¶ 9-10. For his part, Franz avers that Carter "was able to receive medical treatment and evaluation at [Walter Reed], including his April 6, 2018 surgery, because of his service in the Air National Guard," but states that Carter "would have received the same medical treatment and April 6, 2018 surgery, regardless of whether he was on active or inactive duty status." ECF 18-9, ¶ 19.

Doyle asserts: "As a matter of law and regulation, SSgt Carter would not have been eligible for the medical care and surgery he received at any of the military hospitals he visited, including [Walter Reed], unless he was enrolled in the Defense Enrollment Eligibility Reporting System ("DEERS")." ECF 18-2, ¶ 10. But, Doyle provides no explanation as to what DEERS is, or its implications in this case.

Doyle directs the Court's attention to a DoD policy regarding "Benefits for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals," and specifically to the section covering "Benefits for National Guard and Reserve Members of the Uniformed Services." *See* ECF 18-3 at 11-12. Doyle does not highlight any particular part of this section. But, the policy appears to specify that National Guard members are only eligible for "direct care" at "military treatment facilities" if they are on active duty for periods greater than thirty days. ECF 18-3 at 11; *see id.* at 8, 54 (defining abbreviations).

C.

Carter was discharged from Hunter Holmes McGuire on or about April 8, 2019, and transferred to Care Meridian Nursing and Rehabilitation in Littleton, Colorado, for continued spinal court injury rehabilitation. ECF 1, ¶ 42; *see also* ECF 18-9, ¶¶ 15-16. While at Care Meridian, Carter was enrolled in the VA Eastern Colorado Health Care System. ECF 1, ¶ 42. In April 2021, Carter relocated to Tampa, Florida, "to be closer to his family." *Id.* ¶ 43. He receives outpatient care and treatment, including rehabilitation therapy, through the James A. Haley Veterans' Hospital. *Id.*; *see also* ECF 18-9, ¶ 17.

On November 1, 2019, an Informal Physical Evaluation Board ("IPEB") found that Carter's "medical condition prevents him from reasonably performing the duties of his office, grade, rank or rating," and recommended that he be "permanently retired with a disability rating of 100%." ECF 18-8 at 3. The IPEB said: "*While on Active Duty orders*, the [service member] underwent cervical neck surgery in Apr 2018 for progressively worsening neck pain and radiculopathy. Post surgery, [he] developed quadriplegia and has been receiving supportive/rehabilitative care since." *Id.* (emphasis added). Then, on November 13, 2019, Carter signed a form indicating he agreed with the findings and recommended disposition of the IPEB, and waived his rights for any further appeal. *Id.* at 16. By order dated November 21, 2019, and effective January 27, 2020, Carter received medical retirement, due to 100 percent physical disability, and was relieved from active duty. ECF 18-2, ¶ 9; *see* ECF 18-8 at 1 (November 21, 2019 Order).

Plaintiffs filed a complaint with the Maryland Health Care Alternative Dispute Resolution Office (the "Office") on or about November 25, 2020, together with a Certificate Report of Qualified Expert and Preliminary Report, and a Notice of Election to Waive Arbitration. ECF 1, ¶¶ 1-3; *see* ECF 2-3; ECF 2-4; ECF 2-5. On December 8, 2020, the Office issued an "Order of Transfer" to this Court. ECF 1, ¶ 4; *see* ECF 2-6. Plaintiffs also assert that they have "exhausted all administrative remedies and fully complied with the provisions of" the FTCA and 10 U.S.C. § 2733. ECF 1, ¶ 20; *see* ECF 2-7 to ECF 2-15. And, they state that under the FTCA, because the Government has not made a final disposition regarding these claims within six months of when they were originally filed, plaintiffs' claims "were effectively denied as of September 24, 2020." ECF 1, ¶ 21.

This litigation followed. Plaintiffs allege that Dr. Dengler and a number of other Walter Reed health care providers were negligent in their care and treatment of Carter, breaching the applicable standard of care in a variety of ways. ECF 1, ¶ 48. As a result, according to the Complaint, Carter has suffered significant, permanent injuries. *Id.* ¶ 49. Carter and Cole, his wife, claim that they have suffered loss of consortium. *Id.* ¶¶ 53-54.

Plaintiffs also allege that the Government "failed to timely, adequately, completely, and appropriately obtain [Carter's] informed consent." *Id.* ¶ 58.

Additional facts are included in the Discussion, *infra*.

II. Legal Standards

A. Rule 12(b)(1)

The Motion is premised entirely on the ground that the Court lacks subject matter jurisdiction. Accordingly, it is brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Federal district courts are courts of limited jurisdiction; they possess "'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)); *see Home Depot U.S.A., Inc. v. Jackson*, U.S. , 139 S. Ct. 1743, 1746, 204 L. Ed. 2d 34 (2019); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005). Simply put, "if Congress has not empowered the federal judiciary to hear a matter, then the case must be dismissed." *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 432 (4th Cir. 2014); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (citation omitted). "Because jurisdictional limits define the very foundation of judicial authority, subject matter jurisdiction must, when questioned, be decided before any other matter." *United States v. Wilson*, 699 F.3d 789, 793 (4th Cir.2012).

Under Rule 12(b)(1), the plaintiff bears the burden of proving, by a preponderance of evidence, the existence of subject matter jurisdiction. *See Demetres v. E. W. Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015); *see also The Piney Run Preservation Ass'n v. Cty. Comm'rs of Carroll Cty.*, 523 F.3d 453, 459 (4th Cir. 2008); *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). However, a court should grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) "'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *B.F. Perkins*, 166 F.3d at 647 (citation omitted).

A challenge to subject matter jurisdiction under Rule 12(b)(1) may proceed "in one of two ways": either a facial challenge or a factual challenge. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009); *accord Hutton v. Nat'l Bd. of Exam'rs Inc.*, 892 F.3d 613, 620-21 (4th Cir. 2018). In a facial challenge, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns*, 585 F. d at 192; accord *Clear Channel Outdoor, Inc. v. Mayor and City Council of Baltimore*, 22 F. Supp. 3d 519, 524 (D. Md. 2014).

In a factual challenge, on the other hand, "the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction," *Kerns*, 585 F.3d at 192, "[u]nless 'the jurisdictional facts are intertwined with the facts central to the merits of the dispute.'" *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009), *cert. denied*, 558 U.S. 875, 130 S. Ct. 229, 175 L. Ed. 2d 129 (2009). In a factual challenge, the court "may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *see also Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). In particular, "the district court may . . . resolve the jurisdictional facts in dispute by considering evidence . . . such as affidavits." *Vuyyuru*, 555 F.3d at 348. When appropriate, the court may also "hold an evidentiary hearing to determine whether the facts support the jurisdictional allegations." *United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999); *see also Schneider v. Donaldson Funeral Home, P.A.*, 733 Fed. App'x 641, 644 (4th Cir. 2018); *Kerns*, 585 F.3d at 192.

The Government contends that the Motion may be considered either as a facial or a factual challenge, and should be granted either way. *See* ECF 18-1 at 7 & n.7. It has submitted numerous exhibits. Because the exhibits are relevant to the resolution of the Motion, I will construe the Motion as a factual challenge and consider the submissions.

B. The FTCA

"Absent a statutory waiver, sovereign immunity shields the United States from a civil tort suit." *Kerns*, 585 F.3d at 193-94 (citing *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)). But, to the extent that the United States has expressly waived sovereign immunity, a plaintiff may recover against the United States. *See, e.g., Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005) (citation omitted); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (holding that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed") (citation and internal quotation marks omitted).

The Complaint is brought under the FTCA. *See* ECF 1, ¶¶ 17, 18, 20, 21.[15] Under the FTCA, Congress has waived the sovereign immunity of the United States, exposing it to tort liability for claims "for money damages . . . 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," so long as certain conditions are satisfied. 28 U.S.C. § 1346(b)(1); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-18, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008). But, "'the FTCA is strictly construed, and all ambiguities are resolved in favor of the United States.'" *Lins v. United States*, 847 Fed. App'x 159, 162 (4th Cir.

15. To the extent that plaintiffs also seek to invoke the Military Claims Act, or what they refer to as the NDAA, this issue is discussed, *infra*. But, it does not alter the outcome.

2021) (quoting *Williams v. United States*, 50 F.3d 299, 305 (4th Cir. 1995)). Moreover, the United States may be liable under the FTCA only to the extent that a "private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), and only "in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 2674. Thus, "the substantive law of each state establishes the cause of action." *Anderson v. United States*, 669 F.3d 161, 164 (4th Cir. 2012).

However, the United States is not liable for *all* torts committed by federal employees. Section 1346(b) of Title 28 "grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity." *F.D.I.C. v. Meyer*, 510 U.S. 471, 477, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). For a claim to fall within that "certain category," it must be:

> "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] 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."

Id. (quoting 28 U.S.C. § 1346(b)(1)) (alterations in original).

In the Fourth Circuit, the plaintiff has the burden of establishing that an "unequivocal waiver of sovereign immunity exists and that none of the [FTCA's] waiver exceptions apply to his particular claim." *Welch*, 409 F.3d at 651; *see also United States v. Clendening*, 19 F.4th 421, 426 (4th Cir. 2021) (same, in *Feres* context).[16]

C. The *Feres* Doctrine

The *Feres* doctrine is an exception to the FTCA's waiver of sovereign immunity, although it is not contained in the text of the FTCA. It was first articulated by the Supreme Court in 1950, in *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152, which was decided a few years after the enactment of the FTCA. Under *Feres*, FTCA claims are barred "for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*." *Id.* at 146 (emphasis added).

Notably, the *Feres* doctrine has been the subject of intense criticism. "Justices, judges, and scholars have routinely noted the harsh results brought about by the doctrine, and many have suggested *Feres* itself was wrongly decided." *Clendening*, 19 F.4th at 431; *see also United States v. Johnson*, 481 U.S. 681, 700-01, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has

16. Plaintiff argues that the Government bears the burden of proving the applicability of a FTCA waiver exception, citing only Ninth Circuit case law. *See* ECF 21-1 at 7. The law in the Fourth Circuit is to the contrary.

received.") (internal citation omitted). However, as the Fourth Circuit has remarked, the Supreme Court has, if anything, broadened the applicability of *Feres* since it was first decided. *See Clendening*, 19 F.4th at 428; *Aikens v. Ingram*, 811 F.3d 643, 651 (4th Cir. 2016); *Stewart v. United States*, 90 F.3d 102, 105 (4th Cir. 1996). Moreover, "despite the rampant criticism, the *Feres* doctrine still stands, and this Court is bound by it." *Clendening*, 19 F.4th at 431; *see also Johnson*, 481 U.S. at 686. Therefore, I turn to a discussion of the *Feres* doctrine.

"[T]he Fourth Circuit has said the sole task of a lower court deciding whether to apply *Feres* 'is to assess whether appellant's injuries *arose out of activity incident to service*.'" *Colon v. United States*, 320 F. Supp. 3d 733, 740 (D. Md. 2018) (quoting *Stewart*, 90 F.3d at 104) (emphasis in *Stewart*). "'In making this determination, [courts should be] mindful that, since its inception, the *Feres* doctrine has been broadly and persuasively applied by federal courts . . . .'" *Colon*, 320 F. Supp. 3d at 740 (quoting *Stewart*, 90 F.3d at 104) (alteration in *Colon*).

The Fourth Circuit recently considered the *Feres* doctrine in *Clendening*, 19 F.4th 421. In that case, the wife of a former active duty Marine officer who had died brought suit against the government. She claimed her husband had died due to his exposure to contaminated water and environmental toxins while he was stationed at Camp Lejeune, North Carolina. *Id.* at 425-26. The Court determined that the suit was barred under the *Feres* doctrine. *Id.* at 425, 431. In reaching that conclusion, the Court summarized its *Feres* jurisprudence.

The Court recognized that the *Feres* doctrine is "admittedly 'broad and amorphous.'" *Id.* at 427 (quoting *Aikens*, 811 F.3d at 651). And, the Court observed that it had "remarked numerous times on the vast coverage of the *Feres* doctrine." *Clendening*, 19 F.4th at 427. Indeed, it noted that "'in recent years the [Supreme] Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military." *Id.* at 427-28 (quoting *Stewart*, 90 F.3d at 105) (alteration in *Clendening*; emphases in *Stewart*).

Moreover, the Fourth Circuit reiterated: "There is no 'specific element-based or bright-line rule' for determining whether certain conduct was 'incident to service.'" *Clendening*, 19 F.4th at 427 (quoting *Aikens*, 811 F.3d at 650); *see United States v. Shearer*, 473 U.S. 52, 57, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985). "Instead, [the court] must ask whether 'particular suits would call into question military discipline and decisionmaking [and would] require judicial inquiry into, and hence intrusion upon, military matters.'" *Clendening*, 19 F.4th at 427 (quoting *Cioca v. Rumsfeld*, 720 F.3d 505, 515 (4th Cir. 2013)) (second alteration in *Cioca*); *see also United States v. Stanley*, 483 U.S. 669, 682, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987). "'Put another way, where a complaint asserts injuries that stem from the relationship between the plaintiff and the plaintiff's service in the military, the incident to service test is implicated.'" *Clendening*, 19 F.4th at 427 (quoting *Cioca*, 720 F.3d at 515).

Of import here, the Fourth Circuit identified three "considerations" that are "relevant" as to whether a particular case falls under the *Feres* umbrella: "the duty status of the service member,[] whether the injury took place on base, and what activity the service member was engaged in at the time." *Clendening*, 19 F.4th at 428. However, the Court cautioned that these considerations "are not always determinative." *Id.* As to the duty status of the service member, "courts often examine whether the service member was on active duty (including while on liberty), leave, furlough, or entirely discharged at the time the wrongful act occurred," with "[t]hese statuses . . . usually considered on a spectrum." *Id.* at 428 n.4.

"Moreover, this test 'does not inquire whether the discrete injuries to the victim were committed in support of the military mission.'" *Id.* at 428 (quoting *Cioca*, 720 F.3d at 515). And, "the 'focus' of the *Feres* doctrine 'is not upon when the injury occurs or when the claim becomes actionable, rather it is concerned with when and under what circumstances the negligent act occurs.'" *Clendening*, 19 F.4th at 428 (quoting *Kendrick v. United States*, 877 F.2d 1201, 1203 (4th Cir. 1989)); *see also Aikens*, 811 F.3d at 651 ("[T]he situs of the injury is not as important as 'whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline.'") (quoting *Shearer*, 473 U.S. at 57).

In a footnote, the *Clendening* Court also observed: "'The Supreme Court has emphasized three broad rationales underlying the *Feres* doctrine: (1) the distinctly federal nature of the relationship between the government and members of the armed forces, (2) the availability of existing alternative compensation schemes in the military, and (3) the fear of damaging military structure and discipline.'" *Clendening*, 19 F.4th at 427 n.2 (quoting *Kendrick*, 877 F.2d 1201 at 1204).

In *Appelhans v. United States*, 877 F.2d 309, 311 (4th Cir. 1989), the Fourth Circuit remarked: "In determining whether particular injuries were in fact 'incident to service,' courts typically look to the three rationales articulated above. Although some courts and commentators once questioned the continuing vitality of the first and second rationales, the Supreme Court recently reaffirmed the importance of all three rationales in [*Johnson*]." *See Johnson*, 481 U.S. at 688-91 (discussing the three rationales). But, more recent Fourth Circuit decisions have discussed the three rationales only in a cursory fashion or not at all. *See, e.g., Clendening*, 19 F.4th at 427 n.2 (mentioning the rationales only in a footnote); *Aikens*, 811 F.3d at 650-52 (not mentioning the rationales at all); *Cioca*, 720 F.3d at 512-17 (same).

In any event, in analyzing a *Feres* issue, "it is useful to keep [the three] rationales in mind . . . ." *Colon*, 320 F. Supp. 3d at 739. However, "the absence of one or more of them is no reason to hear an FTCA claim against the government where *Feres* immunity would otherwise be appropriate." *Id.* at 739-40. Furthermore, "application of the *Feres* test does not depend on the military status of the alleged offender." *Aikens*, 811 F.3d at 651.

The discussion above makes clear that, in analyzing the applicability of the *Feres* doctrine, courts have focused in large part on the rationale as to military structure and discipline. The Supreme Court has "'explicitly rejected a special factors analysis which would consider how military discipline would actually be affected in a particular case.'" *Id.* (quoting *Ricks v. Nickels*, 295 F.3d 1124, 1130 (10th Cir. 2002)). Moreover, the rationale of "preserving military discipline . . . does not arise only when the lawsuit calls into question the orders of a superior officer." *Stewart*, 90 F.3d at 106. "[T]he relevant inquiry is not whether the particular lawsuit involves a challenge to a military order. Rather, the proper question is whether the plaintiff's claims 'are the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* (quoting *Shearer*, 473 U.S. at 59) (emphasis in *Shearer*).

Other cases make clear the breadth of the "incident to service" test. The Fourth Circuit said in *Aikens*, 811 F.3d at 651 (quoting *Hass for Use & Benefit of U.S. v. United States*, 518 F.2d 1138, 1141 (4th Cir. 1975)):

> "'Incident to service' is not, of course, a narrow term restricted to actual military operations such as field maneuvers or small arms instruction. It has been held that a member of the military is engaged in activity incident to his military service when he is enjoying a drink in a noncommissioned officers club, and when he is riding a donkey during a ballgame sponsored by the Special Services division of

> a naval air station, and while swimming in a swimming pool at an airbase."

In its Reply, the Government asserts that "*Feres* and its progeny have given rise to two discrete lines of defense for tort suits brought by military servicemembers against the federal government," namely a "predominant line" focusing on the "injured servicemember," and a "second body of *Feres* jurisprudence" looking to "the nature of the challenged activity." ECF 28 at 6 n.6. According to the Government, this second body of jurisprudence has to do with cases involving judicial intrusion into issues of military discipline and management. ECF 26 at 6 n.6. The Government maintains that this case falls within the first body of law, and so some cases cited by plaintiffs that spring from the second body are inapposite. *Id.* at 6 n.6, 11.

But, the Government has offered no case law supporting its theory of two separate lines of *Feres* jurisprudence. Indeed, the three Supreme Court cases the Government cites in its footnote do not hint at this division at all. *See Stanley*, 483 U.S. 669; *Johnson*, 481 U.S. 681; *Shearer*, 473 U.S. 52. To the contrary, the cases suggest a single, unified body of *Feres* jurisprudence, in which the issues labelled by the Government as belonging to the second body of law are considered as part of the overall analysis of whether an injury is incident to service. *See, e.g., Clendening*, 19 F.4th at 427-28; *Aikens*, 811 F.3d at 650-51; *Cioca*, 720 F.3d at 512-13.

III. Discussion

A.

As noted, the sole ground for the Motion is that the *Feres* doctrine bars plaintiffs' suit. Accordingly, I turn to assess the application of the *Feres* doctrine to plaintiffs' claims.

The Government argues that because Carter is a military service member who received treatment by military medical professionals in a military hospital, for conditions stemming from an accident that occurred in basic training, his injury was "incident to service" and subject to *Feres*. ECF 18-1 at 10-11. Although Carter was retroactively converted to active duty (*id.* at 12 n.10), the Government maintains that, even if Carter were on inactive duty status, the conclusion would be the same. *Id.* at 12-14.

Plaintiffs devote much of their Opposition to a fulsome broadside against the *Feres* doctrine in general. They argue that *Feres* is unsupported by the text of the FTCA; they challenge its rationale; and they label the doctrine "a license for tortious conduct and a mandate of secondclass citizenship for servicemen." ECF 21-1 at 24. Moreover, they urge the Court, if it determines that *Feres* applies, to "inspect the underlying rationales and disparate implications of *Feres* under a microscope and otherwise reconsider the practicality and applicability of *Feres* given the decades of widespread, universal criticism it has justly received." *Id.* at 3.

As discussed, plaintiffs are hardly the first to assail *Feres*. But, "despite the rampant criticism, the *Feres* doctrine still stands, and [this Court] is bound by it." *Clendening*, 19 F.4th at 431. Indeed, over the past several decades, the Supreme Court and the Fourth Circuit have consistently affirmed *Feres. See, e.g., Johnson*, 481 U.S. at 686; *Clendening*, 19 F.4th at 428; *Aikens*, 811 F.3d at 651; *Stewart*, 90 F.3d at 105. "[T]he fact that the doctrine may in many cases lead to undeniably harsh results does not relieve this court of its obligation to apply precedent." *Appelhans*, 877 F.2d at 313 (referring to *Feres*); *see, e.g., Lockwood v. Prince George's Cty., Md.*, 58 F. Supp. 2d 651, 659 (D. Md. 1999) ("This Court is bound to follow the precedent of the United States Supreme Court and the Fourth Circuit.").

Beyond this criticism, plaintiffs contend that *Feres* does not apply here. They argue that Carter's injuries were not incident to service because the surgery occurred while Carter was inactive and off-base; because the surgery was not related to any military decision and did not implicate military discipline; and because the *Feres* rationales do not apply. ECF 21-1 at 2, 16-27. The Government responds by asserting that plaintiffs misstate and misapply *Feres*. ECF 28 at 6-16. And, it maintains that Carter was, in fact, on active duty status at the time. *Id.* at 12-14.

In the Motion, the government argues that Counts I and III (the medical negligence and informed consent claims) are directly barred by *Feres*, and that Count II (loss of consortium) is derivative of Counts I and III and therefore it must also be dismissed. ECF 18-1 at 14-15;

see Kendrick, 877 F.2d at 1206-07 ("The limits imposed by *Feres* are equally applicable when the claims of a family member are derivative to the service member's cause of action under the applicable state law."); *Rowe v. United States*, 37 F. Supp. 2d 425, 428 (D. Md. 1999) ("In that [plaintiff] has no viable malpractice claim [because of *Feres*], the plaintiffs' joint consortium claim, which is entirely dependent upon the existence of a valid underlying claim, must also be dismissed, under clear Fourth Circuit case law.") (citing *Minns v. United States*, 155 F.3d 445, 448 (4th Cir. 1998)). Plaintiffs do not contest this point. Therefore, it seems clear that the viability of the entire suit depends on *Feres*.

B.

As a general matter, the "duty status of the service member" is not necessarily "determinative" in the *Feres* analysis. *Clendening*, 19 F.4th at 428. But, it is of significance.

Plaintiffs contend that Carter was on inactive duty status. ECF 21-1 at 4, 6-7, 17-21. The Government contends that, given the June 27, 2018 Order, Carter was on active duty status. ECF 18-1 at 12 n.10; ECF 28 at 12-14. At first glance, this issue may appear to be a factual dispute, of the type that could warrant an evidentiary hearing. *See Kerns*, 585 F.3d at 192. But, the parties agree as to the basic sequence of events.

There is no dispute that Carter's active duty period originally ended on March 13, 2018, per his orders. ECF

1, ¶ 41; ECF 2-16; ECF 28-1, ¶¶ 7-10; ECF 28-4. There is no dispute that, as a result, at the time of Carter's surgery on April 6, 2018, he was not on active duty status. ECF 1, ¶¶ 23-24, 41; ECF 28-1, ¶¶ 7-10. And, there is no dispute that, pursuant to the June 27, 2018 Order, Colonel Carbonell retroactively converted Carter to active duty status for the period from March 14, 2018, to June 11, 2018—a period that included his surgery. ECF 1, ¶ 41; ECF 2-17; ECF 28-1, ¶ 11; ECF 28-7.[17] And, according to Colonel Carbonell, he did so with Carter's consent. ECF 28-1, ¶¶ 13-14; *see also* 10 U.S.C. § 12301(h) (specifying that active duty under this provision may only occur with member's consent). Plaintiffs do not challenge the legality or validity of the June 27, 2018 Order. The dispute is not over these facts, but rather over the legal significance of them under *Feres*.

If Carter were considered to be on active duty status for his surgery, it is clear that *Feres* would bar the claim as a matter of settled law. This was the Fourth Circuit's holding in *Appelhans*, 877 F.2d 309, which concerned a medical malpractice suit by a plaintiff relating to treatment he received while at an Army hospital. *Id.* at 310. The plaintiff was on active duty status with the Army at the time, but because he had been sentenced to discharge by a court-martial for bad conduct and this sentence was under review on appeal, he had been placed on "indefinite excess leave." *Id.* In this status, the plaintiff

17. As discussed, Carbonell also issued two orders prior to the June 27, 2018 Order. But, neither of these orders appears to have converted Carter to active duty status for the period including April 6, 2018. *See* ECF 28-1, ¶ 11; ECF 28-5; ECF 28-6.

did not receive pay, could hold civilian employment, and could travel anywhere in the continental United States as long as he kept the Army apprised of his whereabouts. *Id.* at 312. Nevertheless, he was still considered to be on active duty status, and so he was entitled to health care at military facilities, remained subject to the Uniform Code of Military Justice, and could be recalled at any time. *Id.*

The Fourth Circuit agreed with the plaintiff that his "active duty status, standing alone, is insufficient to invoke the *Feres* doctrine's bar." *Id.* at 311. But, the Court held: "The fact that his injury occurred as a result of medical treatment by military doctors . . . conclusively demonstrates that that injury was 'incident to service.'" *Id.* And, it rejected the plaintiff's argument that his connection to the Army, on indefinite excess leave, was so "tenuous" as to defeat *Feres*. *Id.* at 312-13.

Scheppan v. United States, 810 F.2d 461 (4th Cir. 1987), is also relevant. There, the Fourth Circuit upheld the application of *Feres* to block a medical malpractice suit by a commissioned officer of the United States Public Health Service, who alleged that she had been injured during an elective surgery at an Indian Health Service hospital where she worked. *Id.* at 462. The plaintiff was on medical leave at the time of the surgery, and the Public Health Service, although it is one of the "uniformed services" of the United States, is not a part of the Armed Forces. *Id.* at 462-63. Nevertheless, the Fourth Circuit affirmed that *Feres* applied. *Id.* at 463.

As both the *Appelhans* Court and the Motion note, numerous other circuits have reached similar conclusions as to malpractice claims involving military medical facilities. *Appelhans*, 877 F.2d at 312 (collecting cases); ECF 18-1 at 11 n.9 (collecting cases). Indeed, two of the three cases that were consolidated into *Feres* itself involved medical malpractice claims against Army surgeons by active duty personnel. *See Feres*, 340 U.S. at 137.

If Carter was not on active duty status at the time of his surgery, however, the analysis is more complicated. The Government reads *Appelhans* for the broad assertion that *Feres* bars any malpractice suit for injuries sustained while being treated at a military hospital, regardless of active duty status. *See* ECF 18-1 at 11. Although certain portions of the opinion could be read to stand for such a proposition, it is clear from the opinion as a whole that the plaintiff's active duty status was at least a factor in the Court's analysis. This is demonstrated, for example, in the Court's examination of whether the plaintiff being on indefinite excess leave rendered his connection to the Army so tenuous as to preempt *Feres*. *See Appelhans*, 877 F.2d at 312-13. And, regardless, other case law paints a nuanced picture.

A few years after *Feres*, the Supreme Court decided *United States v. Brown*, 348 U.S. 110, 75 S. Ct. 141, 99 L. Ed. 139 (1954). In that case, the plaintiff was a "discharged veteran" who sued the Government for alleged negligence in regard to surgery on his knee at a Veterans Administration hospital. *Id.* at 110. The original injury to the plaintiff's knee occurred while he was on active duty, which led to his honorable discharge. But, the surgery was approximately seven years later. *Id.* The Court acknowledged that the plaintiff was at the veterans' hospital "because he had been in the service and because he had received an injury in the service." *Id.* at 112. It concluded that the case was not governed by *Feres. Id.* The Court said: "The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." *Id.*

Two Fourth Circuit decisions further illustrate the complexity of this doctrine. They are *Kendrick*, 877 F.2d 1201, which was decided shortly after *Appelhans*, 879 F.2d 309, and *Bradley v. United States*, 161 F.3d 777 (4th Cir. 1998), which was decided nine years later.

In *Kendrick*, 877 F.2d at 1201-02, the Fourth Circuit confronted the application of *Feres* to a medical malpractice suit brought by an individual on the Army's "Temporary Disability Retired List" ("TDRL"). Disabled service members are placed on the TDRL while they are evaluated to determine whether they should be retired from the military as a result of their disability. *Id.* at 1203. As later described by the Fourth Circuit in *Bradley*, an individual on the TDRL receives retirement pay, is not considered to be on active duty, and cannot be recalled to active duty. *Bradley*, 161 F.3d at 781. To receive TDRL benefits, an individual is required only to present for regular examinations, pending the retirement determination. *Id.* A TDRL individual is subject to the

Uniform Code of Military Justice, but "failure to report for a required physical examination would only subject [the individual] to termination of pay and administrative discharge." *Id.*

In *Kendrick*, 877 F.2d at 1202, the plaintiff was injured in a car accident while on active duty, prescribed a medication, and two months later was placed on the TDRL. He alleged that military physicians were negligent for continuing to prescribe the medication without monitoring for symptoms of toxicity. *Id.* The Fourth Circuit noted: "It is well established that receipt of medical care in military facilities by members of the military on active duty is 'activity incident to service' and thus a lawsuit against the United States arising from medical treatment of a service member on active duty is barred under *Feres*." *Id.* at 1203.

The *Kendrick* Court found that this principle extended to Kendrick's case, for a few reasons. First, the initial "alleged negligent act" of prescribing the medication commenced while the plaintiff was on active duty, under the case of military physicians. *Id.* In other words, "[a]ll of Kendrick's medical treatment arose out of an activity incident to service." *Id.* Second, he was not a civilian when the alleged negligent act occurred, and continued to be subject to military discipline throughout. *Id.* at 1204. Third, it was inappropriate to apply local tort law to a service member injury, such as this one. *Id.* Fourth, the plaintiff was already benefiting from veterans' benefits. *Id.* at 1204-05. Fifth, and finally, "to allow a service member on TDRL to maintain a tort action against the military would have a disruptive effect on military discipline, obedience and commitment, especially if the service member is later returned to active duty," as the plaintiff theoretically could have been. *Id.* at 1205. Permitting the suit would have a "chilling effect" on the military's decision making regarding disability issues. *Id.* at 1206. However, the Court noted: "We do not hold that the *Feres* doctrine bars an action based upon a truly independent or post-service tort. This is not such a case." *Id.* at 1204 n.2.

The Fourth Circuit reached a contrary result in *Bradley*, 161 F.3d at 778.[18] Like *Kendrick*, *Bradley* concerned an individual, Sharon Bradley, who was on the TDRL. As a Navy medical laboratory technician, Bradley contracted a Staph A infection, became disabled, and was placed on the TDRL. *Id.* After this placement, Bradley scheduled an appointment at Walter Reed for bone grafting, to repair damage caused by the infection. *Id.* She was flown to Walter Reed in a military transport plane, during which time she began experiencing a high fever and severe chest pains. *Id.* Medical personnel took no action. *Id.* She was eventually admitted to the emergency room at Walter Reed several days later, and her condition deteriorated quickly. *Id.* She died of a Staph A infection. *Id.*

The Fourth Circuit held that the *Feres* doctrine did *not* bar the suit. The Court noted that the case was at the summary judgment stage, and it was a disputed fact as to whether the Staph A infection that killed Bradley was

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18. Suit in *Bradley* was brought by Sharon Bradley's husband on behalf of her estate. 161 F.3d at 778.

a reoccurrence of the previous Staph A infection that she acquired while on active duty. *Id.* at 780-81. But, the Court said, *id.* at 781: "[E]ven were we to conclude that Bradley's infection was a reoccurrence of the Staph A infection she received incident to service, the present facts would be distinguishable from those found to be controlling in *Kendrick*." Unlike in *Kendrick*, "the allegedly negligent conduct giving rise to the claims of medical malpractice at issue here cannot be characterized as having begun while Bradley was on active duty," but rather while she was on the TDRL. *Id.* The fact that she received allegedly negligent treatment at Walter Reed, where she was entitled to seek treatment because of her prior active service, and the fact that she would not have travelled to Walter Reed but for her prior service-related injury, were "not controlling." *Id.*

The Court acknowledged Bradley's TDRL status, but found that although it was "not a full discharge, it is comparable to permanent retirement status, which has been held not to bar an FTCA claim under the *Feres* doctrine." *Id.* at 782 (citing *McGowan v. Scoggins*, 890 F.2d 128, 137-39 (9th Cir. 1989)). Thus, the Court rejected application of *Feres*. *Bradley*, 161 F.3d at 782.[19]

19. *Bradley* is not easy to reconcile with *Kendrick*. The Fourth Circuit identified as a distinction whether or not the alleged initial negligent act began while the plaintiff was on active duty. But, much of the other reasoning in *Kendrick*, for example the import of TDRL status and the effect on military discipline, would also seem to apply to *Bradley*, and vice versa.

These cases reflect that, notwithstanding the breadth of the *Feres* doctrine, there do appear to be some limits on its application to medical malpractice injuries that occur when the plaintiff's relationship to the military is tenuous, even if the injuries were in some way related to the plaintiff's military service. At the same time, the Government points to several decisions by judges of this Court that support the idea that *Feres* applies even if the individual was on inactive duty status.

Foremost is *Rowe*, 37 F. Supp. 2d 425. A meaningful part of the Government's briefing is premised on *Rowe* (*see* ECF 21-1 at 13-14; ECF 28 at 14-16), and understandably so, given its similarities to this case.

In *Rowe*, 37 F. Supp. 2d at 426, the plaintiff was a member of the United States Naval Reserve. He sustained an injury to his knee while playing volleyball at the United States Naval Academy, during his annual active duty period. The plaintiff was put on "inactive reserve status" for surgery to repair the knee, which occurred at Walter Reed some eight months later. *Id.* He alleged that the "treatment . . . was negligent" and he was left disabled. *Id.*

Judge Smalkin held that *Feres* applied. He reasoned, *id.* at 426-27:

> It remains well-settled, almost 50 years after *Feres*, that a service member cannot recover for medical malpractice arising out of care given in a military hospital. The cases are both legion and unanimous in applying *Feres*

> to bar malpractice actions brought by service members—even inactive reservists—against the Government on account of care rendered in a military medical facility. . . . The fact that Mr. Rowe was not on active duty while he was actually being operated upon is inconsequential in the application of the *Feres* doctrine's "incident to service" rule.

Judge Smalkin noted that "the *Feres* doctrine was applicable because the service member was, indeed, only entitled to treatment at a military medical facility in the first place because of [his] status as a member—*qua* member—of the Armed Forces." *Id.* at 427. And, he emphasized that the actual injury that led to the surgery was sustained while the plaintiff was on "active reserve status for training." *Id.*

Rowe cited three decisions, all out-of-circuit, regarding this issue. *Id.* at 427. In *Jackson v. United States*, 110 F.3d 1484 (9th Cir. 1997), the plaintiff lacerated his hand while at weekend inactive duty training with the Naval Reserve, and sued for malpractice regarding treatment received at a naval hospital the next day, when he was no longer in training. *Id.* at 1486. The Ninth Circuit held that although this status was relevant, *Feres* still applied, given that the initial injury arose out of activity incident to service; treatment was at a military facility; plaintiff received military benefits; and he was a member of the Naval Reserve throughout. *Id.* at 1487-89. In *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994), plaintiff sustained a knee injury while on active duty, but "off duty." *Id.* at 763. Given that he was on active duty and received medical treatment at a military facility, the First Circuit applied *Feres* to his malpractice claim. *Id.* at 763-64. Finally, in *Quintana v. United States*, 997 F.2d 711 (10th Cir. 1993), the Tenth Circuit applied *Feres* to a member of the Army National Guard who injured her knee while on "inactive duty training," and then sued for alleged malpractice stemming from her subsequent knee surgery at a military facility. *Id.* at 712. The Tenth Circuit stated that the plaintiff "is a servicemember who was entitled to the surgery at [the military facility] precisely because of her military status and the surgery was performed by military servicemembers in a military hospital." *Id.*

The Government also cites *Colon*, 320 F. Supp. 3d 733. In *Colon*, the plaintiff served in the Army from 2004 to 2014, when she was discharged for medical reasons. *Id.* at 736. Near the end of her service, and continuing afterwards, she was involved in a protracted custody dispute with another Army officer, with whom she had an affair. *Id.* at 736-37. She alleged that in 2013 and then again in 2015, the officer convinced two Army doctors whom he knew to access the plaintiff's confidential health records, which he then attempted to use against her in the custody dispute in 2015. *Id.* Judge Hazel held that *Feres* barred the plaintiff's FTCA claims, because the plaintiff's injuries "arose out of her treatment by military doctors at military medical installations—treatment she received solely because she was a member of the military," and while she was on active duty. *Id.* at 740. Although the plaintiff's injury, and one of the alleged access incidents, did not occur until after the plaintiff was discharged, "the access was still incident to her service because it related to the use and management of her active duty medical records by a military doctor." *Id.* at 741.

In addition, a number of out-of-circuit cases confirm that, as a general matter, suits against reservists may be barred by *Feres* even for injuries sustained while not on active status, if the injuries are incident to service. *See, e.g., Jackson*, 110 F.3d at 1486-89 (discussed *supra*); *Wake v. United States*, 89 F.3d 53, 57-62 (2d Cir. 1996) (*Feres* barred suit by member of Navy Reserve Officers Training Corps ("NROTC"), an inactive Naval reserve member, who was injured in accident while in NROTC-owned van returning from "precommissioning physical examination"); *Schoemer v. United States*, 59 F.3d 26, 29-30 (5th Cir. 1995) (*Feres* barred malpractice suit stemming from preenlistment medical exam for Louisiana National Guard, by enlistee who held inactive status in the Army); *Quintana*, 997 F.2d at 712 (discussed *supra*); *Duffy v. United States*, 966 F.2d 307, 311-12 (7th Cir. 1992) (*Feres* barred suit by reservist alleging he had been called to active duty illegally).

Although I am not aware of a ruling by the Fourth Circuit on this issue, nearly all circuits to have considered the issue have concluded that *Feres* applies to suits by dual status National Guard military technicians if the injury is otherwise incident to service. These suits have generally been in the employment discrimination context. *See, e.g., Wetherill v. Geren*, 616 F.3d 789, 792-97 (8th Cir. 2010); *Walch v. Adjutant General's Dep't of Texas*, 533 F.3d 289, 294-301 (5th Cir. 2008); *Overton v. New York State Div.*

of Military and Naval Affairs, 373 F.3d 83, 89-93 (2d Cir. 2004); *Wright v. Park*, 5 F.3d 586, 588-91 (1st Cir. 1993).[20] As noted, as of his surgery, plaintiff was a dual status technician. ECF 28-1, ¶ 6.

C.

The parties have not cited to any case addressing the effect of a retroactive change in status on the *Feres* analysis, and the Court has not identified one. But, I am skeptical of the idea that it is appropriate to classify plaintiff as on active duty, for *Feres* purposes, when he was not on active duty at the time of the alleged injury, and his status was retroactively altered several months later. The Government has not offered any authority suggesting that such a retroactive classification is proper in the context of *Feres*. And, in *Clendening*, 19 F.4th at 428 n.4, the Fourth Circuit noted that "courts often examine whether the service member was on active duty . . . *at the time the wrongful act occurred*." (Emphasis added.) *See also id.* at 430 ("By contrast, at the time of Clendening's exposure, he was on active-duty status and stationed on base due to his position as a Marine Corps Officer.").

Colonel Carbonell asserts that, while Carter was on active duty " as a 'medical hold,'" he could "be subjected to the same types of military orders as any other active duty service member." ECF 28-1, ¶ 12. The June 27, 2018

20. The one exception is a decision by the Federal Circuit regarding an Equal Pay Act suit. *See Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006).

Order also provides that, while performing under the order, Carter "is subject to the Uniform Code of Military Justice (UCMJ)." ECF 28-7 at 1. But, in practice, it is difficult to see how the Government could retroactively issue an order to Carter directing particular conduct on April 6, 2018, or attempt to retroactively apply military discipline. And, an attempt on April 6, 2018, to give Carter an order, or discipline him, would presumably have been met with considerable confusion, given that Carter had not yet been retroactively classified as on active duty.

However, even if I do not embrace the Government's argument as to Carter's active duty status, this does not lead to denial of the Motion. It simply means that a more holistic analysis is required. The case law discussed above does not present an obvious answer. And, it is plaintiffs' burden to demonstrate that sovereign immunity has been unequivocally waived. *See Clendening*, 19 F.4th at 426; *Welch*, 409 F.3d at 651. Given the "vast coverage of the *Feres* doctrine" that the Fourth Circuit has repeatedly recognized, *Clendening*, 19 F.4th at 427, I readily conclude that this case falls within the ambit of *Feres*.

The *Feres* "'incident to service test is implicated'" when "'a complaint asserts injuries that stem from the relationship between the plaintiff and the plaintiff's service in the military.'" *Clendening*, 19 F.4th at 427 (quoting *Cioca*, 720 F.3d at 515); *see also Clendening*, 19 F.4th at 427-28 (noting that "'in recent years the [Supreme] Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military") (quoting *Stewart*, 90 F.3d at 105) (first alteration in *Clendening*; remainder in *Stewart*).

Such a relationship seems apparent here. Carter was injured in the context of medical treatment at a military hospital by military doctors; the treatment was for a medical condition that occurred during his basic training, when he was on active duty. Although Carter was not on active duty at the time of the surgery, he was a member of the Air National Guard and a full-time dual status military technician, with substantial connection to the military. And, his eligibility for his medical treatment at Walter Reed flowed directly from his military status.

The suit is of the type that would implicate the judiciary in military discipline and decision making, as it has been broadly defined for *Feres* purposes. I canvass these issues below.

Clendening, 19 F.4th at 428, identified relevant considerations in the *Feres* analysis as including "the duty status of the service member,[ ] whether the injury took place on base, and what activity the service member was engaged in at the time." As to the second and third considerations, the injuries here took place at a military hospital, while the plaintiff was undergoing medical treatment provided by hospital personnel, including military doctors. *See, e.g.*, ECF 1, ¶¶ 12, 13, 18, 24, 25; ECF 18-9, ¶¶ 2, 11-13. Although these circumstances are not necessarily dispositive in the way they might be if Carter had been on active duty status, they clearly are significant considerations pointing in favor of the application of *Feres*, as numerous cases reflect. *See, e.g., Jackson*, 110 F.3d at 1487-89; *Quintana*, 997 F.2d at 712; *Kendrick*, 877 F.2d at 1202-04; *Appelhans*, 877 F.2d at 311; *Scheppan*, 810 F.2d at 462-63; *Colon*, 320 F. Supp. 3d at 740-41; *Rowe*, 37 F. Supp. 2d at 426-27.

In their Opposition, plaintiffs characterize Walter Reed as merely a "government hospital," and not a "military base." ECF 21-1 at 20, 23, 27. This is not accurate. Walter Reed is a hospital, to be sure. But it is a "military hospital," also known as a military "treatment facility," managed by the DHA, an agency within the DoD. ECF 18-9, ¶ 2. Its full name is the "Walter Reed National *Military* Medical Center." *Id.* ¶ 1 (emphasis added). According to Franz, the Associate General Counsel at the DHA, civilians are generally ineligible for medical care at Walter Reed as a matter of law and policy; "receiving treatment at [Walter Reed] is an exclusive benefit to members of the military and their dependents." *Id.* ¶ 19. The medical professionals on the Walter Reed staff who performed Carter's treatment at Walter Reed included "military doctors." *Id.* ¶ 12. And, Walter Reed has been implicated in numerous claims in which *Feres* has been successfully invoked. *See, e.g., Colon*, 320 F. Supp. 3d at 740-41; *Rowe*, 37 F. Supp. 2d at 426-27; *Davis v. U.S. Dep't of the Army*, 602 F. Supp. 355, 356-59 (D. Md. 1985).

Plaintiffs also emphasize that Carter's surgery was "elective," and not in support of any military mission or order. ECF 21-1 at 19-20. It is not clear that the elective nature of a surgery has been a meaningful factor in other cases applying *Feres* to medical malpractice suits involving military hospitals. *See, e.g., Appelhans*, 877 F.2d at 311; *Scheppan*, 810 F.2d at 462-63; *Rowe*, 37 F. Supp. 2d at 426-27. Indeed, in *Scheppan*, 810 F.2d at 462, the Fourth Circuit explicitly described the plaintiff's surgery as "elective," before going on to hold that *Feres* precluded the suit.

In any case, the evidence provided by the Government in the Motion—which has not been contested by plaintiffs—reflects that the medical conditions that prompted Carter to seek surgery stemmed from an injury sustained by Carter at basic training in 2010. *See* ECF 18-2, ¶ 8; ECF 18-9, ¶¶ 5-9; ECF 28-1, ¶ 8. This root cause, although again not dispositive, strengthens the relationship between the surgery and Carter's military service and status. In that respect, it is similar to the other cases discussed above that applied *Feres*, in the context of reservists or members of the National Guard, to treatment for an injury sustained during active duty service. *See, e.g., Jackson*, 110 F.3d at 1487-89; *Quintana*, 997 F.2d at 712; *Rowe*, 37 F. Supp. 2d at 426-27.

The other *Clendening* consideration is the duty status of the service member. 19 F.4th at 428. As discussed, I do not agree with the Government that, at the time of surgery, Carter was on active duty status based on the retroactive application of the June 27, 2018 Order. *See* ECF 1, ¶¶ 23, 41; ECF 28-1, ¶¶ 7-11. But, plaintiffs' attempt to depict Carter as having minimal connection to military service also misses the mark. *See, e.g.*, ECF 21-1 at 8 ("As of April 2018, Mr. Carter was, for all intents and purposes, a military veteran seeking surgical care from a government health care facility. Mr. Carter's claims are no different than the congressionally authorized medical negligence claims routinely asserted by military veterans against Veterans Administration medical centers nationwide in accordance with the FTCA.").

As stated, at the time of Carter's surgery, and since at least 2017, Carter was a member of the Air National Guard, and a full-time dual status military technician. ECF 18-9, ¶ 18; ECF 28-1, ¶ 6. Although military technicians are nominally civilian employees, the Fifth Circuit has commented that "the military character of their service is extensive." *Walch*, 533 F.3d at 296; *see also Wetherill*, 616 F.3d at 791 ("[Plaintiff, an Army National Guard colonel, was] a 'dual-status' National Guard technician, which meant that she was paid as a civilian employee under the Civil Service system, but her job required her at all times to be an officer of the National Guard, and she worked in uniform."). Under the governing statute, military technicians may be employed only in support of certain specified types of work in support of the National Guard, Armed Forces, or DoD. *See* 32 U.S.C. § 709(a).

Moreover, Carter's activities with the Air National Guard were not confined to the annual and weekend training required of all inactive duty National Guard members, as the Opposition implies. *See* ECF 21-1 at 19-20. To the contrary, only weeks before his surgery, Carter finished a nearly six-month active duty tour, supporting work on Operation Freedom's Sentinel. ECF 2-16; ECF 28-1, ¶¶ 7-8; ECF 28-2; ECF 28-3; ECF 28-4. There is no indication from the materials that Carter was near retirement, or that this sort of work was an aberration. *Cf. Kendrick*, 877 F.2d at 1205 (noting the disruptive effect on military discipline of permitting a tort suit against the military by a "service member . . . later returned to active duty.").

In short, notwithstanding that Carter was not on active duty status as of April 6, 2018, his professional circumstances were marked by a pervasive entanglement with military service. If duty status is a "spectrum," as the Fourth Circuit put it in *Clendening*, 19 F.4th at 428 n.4, then Carter's status surely ranks as somewhere in the middle, as opposed to simply on the inactive side, as plaintiffs assert. Indeed, this is consistent with the consensus among the circuit courts that *Feres* applies, as a general matter, to suits by reservists, members of the National Guard, and dual status technicians. *See Wetherill*, 616 F.3d at 792-97; *Walch*, 533 F.3d at 294-301; *Overton*, 373 F.3d at 89-93; *Jackson*, 110 F.3d at 1487-89; *Wake*, 89 F.3d at 57-62; *Schoemer*, 59 F.3d at 29-30; *Wright*, 5 F.3d at 588-91; *Quintana*, 997 F.2d at 712; *Duffy*, 966 F.2d at 311-12; *see also Rowe*, 37 F. Supp. 2d at 426-27.

These circumstances, in my view, distinguish Carter's case from *Brown* and *Bradley*, which present the strongest arguments for plaintiffs' position. Both of these cases featured substantially more tenuous relationships between the injured party and the military. *Brown*, 348 U.S. at 110, 112, concerned a "discharged veteran" who received treatment at a Veterans Administration facility, and whose injury occurred "while he enjoyed a civilian status." *Bradley*, for its part, involved a service member on the TDRL, who "was required only to present herself for periodic medical examinations," and little more. 161 F.3d at 781. The Fourth Circuit characterized this status as "not a full discharge, [but] comparable to permanent retirement status." *Id.* at 782. Indeed, in *Appelhans*, 877 F.2d at 310, 312, the plaintiff's indefinite excess leave status, pending review of his court-martial, meant that he received no pay and could hold full-time civilian employment. Unlike Carter, the plaintiff in *Appelhans* was considered to be on active duty. But, in practice, Carter's connection to military service seems, if anything, more significant than that of the *Appelhans* plaintiff. In other words, this is not the "'truly independent or post-service tort'" recognized in *Bradley*. 161 F.3d at 782 (quoting *Kendrick*, 877 F.2d at 1204 n.2).

Moreover, although I do not regard Carter as having active duty status based on his retroactive conversion, the circumstances of his conversion are noteworthy. The conversion itself buttresses the overall conclusion that Carter was more than inactive.

Carter's conversion was only possible because of his preexisting, ongoing membership in the Air National Guard. *See* 10 U.S.C. § 12301(h); ECF 28-7. The text of the statute reflects that this activation may only occur "with the consent of the member," *i.e.*, Carter. 10 U.S.C. § 12301(h)(1). And, the June 27, 2018 Order describes the activation as "voluntary." ECF 28-7 at 2. According to Colonel Carbonell, this retroactive conversion was done at Carter's request, in order to ensure his eligibility for various medical benefits. ECF 28-1, ¶¶ 13-14. Notably, plaintiffs have not challenged the validity of the retroactive change.

It is clear that Carter's eligibility for his medical treatment stemmed directly from his status as a member of the Air National Guard. *See* ECF 18-2, ¶ 10; ECF 18-9, ¶ 19.[21] Indeed, Carter had a history of receiving medical care from military hospitals such as Walter Reed. ECF 18-9, ¶ 7. At an evaluation at Walter Reed on March 1, 2018, while Carter was on active duty status, the surgery was recommended. *Id.* ¶ 9. This circumstance reinforces the relationship between Carter's injury and his military service. *See, e.g., Jackson*, 110 F.3d at 1488-89 ("[The plaintiff] received cost-free treatment at the Naval Hospital . . . as a benefit of service in the Naval Reserve and pursuant to [his] military benefits."); *Quintana*, 997 F.2d at 712 ("[The plaintiff] is a servicemember who was entitled to the surgery at Kirtland precisely because of her military status and the surgery was performed by military servicemembers in a military hospital."); *Appelhans*, 877 F.2d at 312 (noting that "excess leave personnel," such as the plaintiff, "can obtain free health care at military facilities"); *Bon v. United States*, 802 F.2d 1092, 1095 (9th Cir. 1980) (considering as relevant in *Feres* analysis if plaintiff enjoyed a benefit "solely by virtue of her status as a member of the military"); *Colon*, 320 F. Supp. at 740 (plaintiff received her treatment "solely because she

21. As noted, there is some confusion as to whether Carter needed to be on active duty status to be eligible for the medical treatment that he received at Walter Reed. *Compare* ECF 18-9, ¶ 19 *with* ECF 28-1, ¶¶ 9-10. But, this is a separate issue.

was a member of the military"); *Rowe*, 37 F. Supp. 2d at 427 ("[T]he *Feres* doctrine was applicable because the service member was, indeed, only entitled to treatment at a military medical facility in the first place because of her status as a member—*qua* member—of the Armed Forces.").

In the Opposition, plaintiffs argue that their claims do not implicate military discipline or sensitive military matters, a rationale for *Feres* they criticize in any case. ECF 21-1 at 16, 25-27. In particular, they contend that their claims would not impact the willingness of military personnel to follow orders, nor the willingness of decision makers subject to suit to act decisively. *Id.* at 26.

Plaintiffs' approach to this analysis is too cramped. The *Feres* case law approaches these issues broadly, and with extreme generality. As discussed, *Feres* looks to "whether the plaintiff's claims 'are the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Stewart*, 90 F.3d at 106 (quoting *Shearer*, 473 U.S. at 59) (emphasis in *Shearer*). This rationale "does not arise only when the lawsuit calls into question the orders of a superior officer," and "the relevant inquiry is not whether the particular lawsuit involves a challenge to a military order." *Stewart*, 90 F.3d at 106. The Supreme Court has "'explicitly rejected a special factors analysis which would consider how military discipline would actually be affected in a particular case.'" *Aikens*, 811 F.3d at 651 (quoting *Ricks*, 295 F.3d at 1130).

Thus, the Fourth Circuit has explained that *Feres* bars a vehicle accident tort suit, because litigating suits alleging "that a service member acted negligently while discharging his military duties . . . could affect military discipline and decisions." *Stewart*, 90 F.3d at 106. The Court said, *id.* (quoting *Johnson*, 481 U.S. at 691):

> This is because "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word."

For example, the *Stewart* Court indicated that the case would involve an assessment of military vehicle regulations. *Stewart*, 90 F.3d at 106. It would also require "service members involved, any eyewitnesses, and military medical personnel . . . 'to testify in court as to each other's decisions and actions.'" *Id.* at 106 (quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977)) (ellipsis added).

Similarly, the Fourth Circuit remarked in *Kendrick*, 877 F.2d at 1205, regarding a medical malpractice suit: "A tort suit based upon service-related injuries necessarily implicates military judgments and decisions integral to the execution of the military mission." A judgment for the plaintiff in the case, it said, would imperil the military's ability to make effective decisions regarding disability and compensation, and would undermine "government authority and discipline." *Id.* at 1206.

This logic certainly applies to plaintiffs' suit. For similar reasons, the medical malpractice suit here, involving medical treatment by military personnel at a military hospital and necessarily questioning the conduct of those personnel, could affect "military discipline and decisions." *Stewart*, 90 F.3d at 106. Service members, eyewitnesses, and Walter Reed medical personnel would more than likely be required to testify at a trial, or at least be deposed. And, the Court might be required to scrutinize, and pass judgment on, military policy, such as procedures for surgery, testing, diagnosis, referral, and informed consent (*see* ECF 1, ¶ 48); procedures for the internal review and discipline of military medical personnel; and issues relating to status and benefits.

Finally, to the extent that the three rationales underpinning *Feres* should be considered, *see Colon*, 320 F. Supp. 3d at 739-40, they weigh in favor of applying the doctrine. The issue of military discipline has been discussed above. The rationale regarding the "distinctly federal nature of the relationship" between the Government and service members, which ought to preempt local tort law, applies here just as much as to any injury incident to service. *Kendrick*, 877 F.3d at 1204 (applying this rationale in a medical malpractice case). And, as to the availability of existing, alternative compensation schemes, plaintiffs concede in the Opposition that "[c]ertain aspects of Mr. Carter's medical care are likely covered by his [Veterans

Benefits Act] benefits," although they argue that the "true cost" of his injury will not be addressed, especially given problems in the provision of veterans' health care. ECF 21-1 at 23-24.

Indeed, the record reflects that since April 2018, Carter has been receiving VA health care to recover from his injuries. ECF 1, ¶¶ 38-40, 42-43; ECF 18-9, ¶¶ 14-17. In addition, Carter may also receive disability compensation as a result of his medical retirement, due to 100 percent physical disability. ECF 18-2, ¶ 9; ECF 18-8 at 1-5, 11-15.[22]

Finally, as noted, Congress recently amended the Military Claims Act ("MCA") to permit the payment of medical malpractice claims against DoD health care providers, when incident to service. *See* 10 U.S.C. § 2733a. This could provide an additional avenue for recovery by plaintiffs. Indeed, they appear to have submitted such claims in March 2020. *See* ECF 1, ¶ 20; ECF 2-8; ECF 2-10; ECF 2-12. This issue is discussed, *infra*.

Courts must be "'mindful that, since its inception, the *Feres* doctrine has been broadly and persuasively applied by federal courts . . . .'" *Colon*, 320 F. Supp. 3d at 740 (quoting *Stewart*, 90 F.3d at 104) (alteration in *Colon*). Consistent with this principle, I conclude that *Feres* bars plaintiffs' tort claims.

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22. The potential receipt of such benefits is suggested by the materials provided by the Government. For example, a letter of October 28, 2019, from the VA to Carter indicates that he may be entitled to monthly VA compensation in the amount of $8,919.54, based on his disability status. ECF 18-8 at 5. However, the parties do not discuss this specific issue.

D.

As noted, plaintiffs' Complaint appears to assert the "NDAA" as a basis for suit. *See* ECF 1, ¶¶ 17, 19, 20. Therefore, I briefly examine this issue.

Although the Complaint refers to the NDAA, the actual provision of law cited in the Complaint—10 U.S.C. § 2733—is a portion of the Military Claims Act, 10 U.S.C. § 2731 *et seq.* Conversely, "NDAA" is the name given to the defense policy bill annually passed by Congress. *See, e.g.*, National Defense Authorization for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).

To the extent that plaintiffs seek to bring suit under the MCA, they may not do so. The MCA "provides that the secretaries of the military departments 'may' settle claims against the United States for, *inter alia*, personal injury or death caused by a civilian officer or employee of their departments or a member of the Army, Navy, or Air Force acting within the scope of their employment, or otherwise incident to noncombat activities of their department." *Minns v. United States*, 974 F. Supp. 500, 507 (D. Md. 1997) (quoting 10 U.S.C. § 2733(a)), *aff'd*, 155 F.3d 445. However, a claim may not be "for personal injury or death of such a member or civilian officer or employee whose injury or death is *incident to his service*." 10 U.S.C. § 2733(b)(3) (emphasis added).

Furthermore, "[n]otwithstanding any other provision of law, the settlement of a claim under [the MCA] is final and conclusive." *Id.* § 2735. "The great weight of authority addressing the MCA . . . holds that absent a constitutional violation, the disallowance of an MCA claim is not subject to judicial review." *Minns*, 974 F. Supp. at 507 (collecting cases). In other words, the MCA does not provide an alternative cause of action under which plaintiffs may file suit, apart from the FTCA.[23]

The Government suggests (ECF 18-1 at 15-17) that plaintiffs' use of the term "NDAA" is a reference to the amendment to the MCA contained in the National Defense Authorization Act for Fiscal Year 2020. *See* Pub. L. No. 116-92, Div. A, Title VII, Subtitle C, § 731(a)(1), 133 Stat. 1198, 1157-60 (2019). Codified at 10 U.S.C. § 2733a, this new section provides that the Secretary of Defense "may allow, settle, and pay a claim against the United States for personal injury or death *incident to the service* of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider." 10 U.S.C. § 2733a(a) (emphasis added).[24] The authorization of payments for medical malpractice claims does, indeed, appear relevant to plaintiffs' circumstances.

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23. There is no suggestion that plaintiffs present a constitutional claim.

24. The provision applies to any claim filed on or after January 1, 2020. *See* Pub. L. No. 116-92, § 731(d)(1), 133 Stat. 1460. Claims filed in calendar year 2020 "must be presented to [DoD] in writing within three years after the claim accrues." 32 C.F.R. § 45.2(c)(2).

Plaintiffs' "Military Claims" were filed on March 24, 2020. ECF 1, ¶ 41; *see* ECF 2-8; ECF 2-10; ECF 2-12. And, the allegedly botched surgery occurred on April 6, 2018, or within two years of when plaintiffs filed their claims.

However, in the Opposition, plaintiffs expressly reject any reliance on 10 U.S.C. § 2733a, which they refer to in the Opposition as the "NDAA." ECF 21-1 at 27-28. This is for a straightforward reason: § 2733a only authorizes payments for injury or death "incident to . . . service," and the entire crux of plaintiffs' argument is that Carter's injuries were *not* incident to service. In any case, the limitations on judicial review applicable to the MCA as a whole apply to claims under 10 U.S.C. § 2733a. *See* 10 U.S.C. § 2735; *see also* 32 C.F.R. § 45.14(a) ("As provided in 10 U.S.C. 2735, the adjudication and settlement of a claim under this part is final and conclusive and not subject to review in any court. Unlike the FTCA, the Military Claims Act, 10 U.S.C. chapter 163, which provides the authority for this part, does not give Federal courts jurisdiction over claims.").

Although plaintiffs make clear in the Opposition that they do not rely on 10 U.S.C. § 2733a, they do not actually explain what they meant in the Complaint by invoking the NDAA, or by citing 10 U.S.C. § 2733. Indeed, the Opposition could be read to indicate that plaintiffs only base their suit on the FTCA. *See* ECF 21-1 at 18 ("Mr. Carter's congressionally authorized civil claims were appropriately brought pursuant to the plain meaning of the FTCA.").

Given that no part of the MCA can provide a basis for plaintiffs' suit, this is largely an academic exercise. This issue does not alter the conclusion that the Motion should be granted. Still, the use of the "incident to . . . service" language in 10 U.S.C. § 2733a suggests an awareness by

Congress that the *Feres* doctrine has precluded recovery by service members of at least some medical malpractice claims. After all, "it is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 292, 132 S. Ct. 1441, 182 L. Ed. 2d 497 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992)). In addition, as discussed above, the potential availability of 10 U.S.C. § 2733a as a means of providing some recovery to Carter may buttress the application of *Feres* to his case.

IV. Conclusion

For the reasons stated above, I shall grant the Motion and dismiss the case for lack of subject matter jurisdiction under the *Feres* doctrine.

An Order follows, consistent with this Memorandum Opinion.

Date: May 24, 2022

/s/
Ellen L. Hollander
United States District Judge

APPENDIX C — STATUTES OF THE CONSTITUTIONAL PROVISIONS BOOKMARKED

28 U.S.C. § 1346. United States as defendant

Effective: March 7, 2013

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy

> Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) 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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 2671. Definitions

Effective: November 13, 2000

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. § 2674.

Liability of United States

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.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2675.

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2679.

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

> **(A)** which is brought for a violation of the Constitution of the United States, or
>
> **(B)** which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4)[1] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this

1. So in original. Probably should be "Rule (4)(i) of the Federal Rules of Civil Procedure".

subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

> **(A)** the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> **(B)** the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

Effective: October 6, 2006

The provisions of this chapter and section 1346(b) of this title shall not apply to –

> **(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> **(2)** the interest of the claimant was not forfeited;
>
> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

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1. So in original. Second period probably should not appear.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.