No. _____

In The Supreme Court of the United States

LINDA LANUS, as Personal Representative of the Estate of ERIC K. LANUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRETT C. POWELL*
P. BRANDON PERKINS
KRISTEN D. PERKINS
THE POWELL LAW FIRM, P.A.
18001 Old Cutler Road
Suite 325
Palmetto Bay, FL 33157
Telephone: (305) 232-0131
Facsimile: (305) 232-0191
Email:
brett@powellappeals.com

JIULIO MARGALLI
THE MARGALLI
LAW OFFICE, P.A.
501 Whitehead Street
Suite 1
Key West, FL 33040
Telephone: (305) 295-9382
Facsimile: (305) 295-6916

CHARLES W. FLYNN
CHRISTOPHER MCKAY
STOLZENBERG, GELLES,
FLYNN & ARANGO, LLP
1401 Brickell Avenue
Suite 825
Miami, FL 33131
Telephone: (305) 961-1450
Facsimile: (305) 373-2735

**Counsel of Record*

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The doctrine established in *Feres v. United States*, 340 U.S. 135 (1950), creates a non-textual exception to the Federal Tort Claims Act that bars tort claims brought by service members that arise incident to military service. The doctrine has been widely criticized since its inception and the rationale supporting the doctrine no longer exists. As such, it is imperative that this Court address the following question presented: Should the *Feres* Doctrine be abolished?

PARTIES TO THE PROCEEDING

Petitioner is Linda Lanus, as personal representative of the Estate of Eric K. Lanus. She was the Plaintiff in the District Court and the appellant in the Court of Appeals.

Respondent is the United States of America. It was the Defendant in the District Court and the appellee in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1 (2007).....9, 19, 20, 25

Matthew Molash, *Transition: If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. Ill. L. Rev. 317 (1983).....6

Michael E. Noone, *The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 63 (1986).....25

The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 17 (1986).....19

Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1 (2003).....10, 11, 21, 22, 23

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals for which this petition is filed is reported at 2012 WL 4840799.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals was entered on October 12, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq*. and the combatant activity exception to the FTCA, 28 U.S.C. § 2680(j).

28 U.S.C. § 1346(b) provides in pertinent part:

> 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. § 2680 provides in pertinent part:

> 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.

STATEMENT OF THE CASE AND FACTS

As succinctly stated by the Eleventh Circuit, the facts are as follows:

> U.S. Coast Guard Fireman's Apprentice Eric K. Lanus returned to his assigned housing at Naval Air Station Key West in the early morning hours of February 8, 2009, a Sunday, after spending the previous evening in Key West. He turned on the stove in the

kitchen, apparently preparing to cook, and went to his bedroom in the apartment's upper floor. Around 5 a.m., heat from the forgotten stove ignited a fire that eventually engulfed the ground floor of the apartment. The fire department extinguished the fire an hour later. Serviceman Lanus was found dead in his bedroom.

When he died, Serviceman Lanus had been "on liberty." Liberty status refers to short time periods, often including weekends, when active-duty personnel are not on authorized leave from duties but are outside normal working hours. While on liberty, crew members may depart from their units and move about as they please until they must return to duty. Serviceman Lanus was scheduled to report for duty that Monday.

His mother, Linda Lanus, brought an action on her son's behalf for wrongful death against the United States acting through the Department of Defense, the Department of Homeland Security, the U.S. Navy, and the U.S. Coast Guard, which could include her son's superior officers. She claimed that a number of safety deficiencies in the apartment had allowed the fire to spread unnoticed, and she attributed these safety deficiencies to negligent upkeep of the premises by the United States and its failure to warn him of the apartment's conditions. She brought her claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674.

> The United States responded with a motion to dismiss for lack of subject matter jurisdiction under the *Feres* doctrine, which removes district courts' jurisdiction for a serviceman's injuries that "arise out of or are in the course of activity incident to service," *Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950).
>
> The district court concluded that the *Feres* doctrine controlled and granted the United States' motion.

(App. 2, 3). On appeal, the Eleventh Circuit concluded "[t]he facts of this case are substantially similar to the facts in *Feres*, and we therefore affirm the district court's dismissal for lack of jurisdiction." (App. 9). This Petition follows.

INTRODUCTION

In 1946, Congress enacted the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 1346(b). Congress intended the FTCA to act as a broad waiver of sovereign immunity from tort liability for the acts of federal employees. The FTCA contains thirteen exceptions, which provide the federal government with immunity from tort liability. *See* 28 U.S.C. § 2680 (2006). Congress's wording in the statute makes its intent clear: it did not mean to prohibit all lawsuits by service members. Instead, it only intended to limit claims related to combat injuries.

The legislative history of the FTCA supports this interpretation. As this Court in *Feres* made clear, Congress expressly rejected language in bills prior to the FTCA that expressly precluded all lawsuits by service members. *Feres*, 340 U.S. at 139 (stating "that eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its introduction made no exception") (*citing Brooks v. United States*, 337 U.S. 49, 51 (1949)). Despite this rather straightforward interpretation, the *Feres* Court created an exception that bars active-duty service members from suing the government from injuries arising out of activity incident to service. *Feres*, 340 U.S. at 146.

Over time, courts have increasingly given *Feres* an even broader interpretation. *See Purcell v. United States*, 656 F.3d 463, 465 (2011) (*citing Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991); *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987)). At this point, *Feres* has gone in so many different directions it is difficult to know what it means today. *Taber v. Maine*, 67 F.3d 1029, 1032, 1038 (2d Cir. 1995). Lower Courts have struggled to apply this "extremely confused area of law." *Id.* Because of its poor construction, the circuits have analyzed claims brought by service members differently. As the various tests illustrate, the *Feres* doctrine has done everything but create uniformity amongst the federal circuit. Accordingly, *Feres* has justifiably received

widespread criticism. *United States v. Johnson*, 481 U.S. 681, 700-01 (1987) (Scalia, J., dissenting); *see also Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997); *Taber*, 67 F.3d at 1032, 1038.[1] Now, sixty years after *Feres* and twenty-five years after *Johnson* there is no doubt that countervailing considerations exist to overrule a judicially created doctrine that is outdated.

REASONS FOR GRANTING THE PETITION

The doctrine of sovereign immunity has its roots in English law. *See* Matthew Molash, *Transition: If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. Ill. L. Rev. 317, 319 (1983). In *Cohens v. Virginia*, 19 U.S. 264 (1821), this Court held that the United States was immune from suits unless Congress consented to a suit. *See id.* at 411-12. This Court has held that Congress determines the breadth of the waiver and

[1] Criticism of *Feres* does not end with our judiciary; academia and other commentators have contributed to the criticism of *Feres*. *Selbe v. United States*, 130 F.3d 1265 (7th Cir. 1997) (*citing* Wells, "*Providing Relief to the Victims of Military Medicine: A New Challenge to the Application of the Feres Doctrine in Military Medical Malpractice Cases*," 32 Duq. L. Rev. 109 (1993)); Note, "*Military Medical Malpractice and the Feres Doctrine*," 20 Ga. L. Rev. 497 (1986); Bennett, "*The Feres Doctrine, Discipline, and the Weapons of War*," 29 St. Louis U. L.J. 383 (1985); Rhodes, "*The Feres Doctrine After Twenty-Five Years*," 18 A.F. L. Rev. 24 (1976).

courts must strictly interpret Congress's waiver of immunity. *See Lane v. Pena*, 518 U.S. 187 (1996) (holding that court cannot imply a waiver of sovereign immunity; instead, Congress must unequivocally waive its sovereign immunity in a statute); *United States v. Kubrick*, 444 U.S. 111, 118 (1979) (holding that the Courts should not extend Congress's waiver of sovereign immunity when construing the FTCA); *United States v. Sherwood*, 312 U.S. 584 (1941) (holding that courts must strictly interpret a waiver of sovereign immunity); *United States v. Shaw*, 309 U.S. 495 (1940) (holding courts cannot broaden Congress's waiver of sovereign immunity); *Schillinger v. United States*, 155 U.S. 163 (1894) (holding a court cannot extend Congress's waiver of sovereign immunity). As such, a court must not broaden Congress's grant of sovereign immunity. *See United States v. Muniz*, 374 U.S. 150, 165-66 (1963) ("[w]e should not . . . narrow the remedies provided by Congress"); *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957) ("[t]here is no justification for the United States Supreme Court to read exemptions into the Federal Torts Claims Act beyond those provided by Congress. . . ."); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) ("[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are unable to add to its rigor by refinement of construction where consent has been announced").

Therefore, although this Court affords *stare decisis* a presumption of correctness when the case involves statutory construction, *Patterson v. McLean*

Credit Union, 491 U.S. 164, 172-73 (1989); *see also Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (citations omitted), "this cautionary principle must give way to countervailing considerations in appropriate circumstances." *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 708 (1978) (Powell, J., concurring) (citations omitted). This case presents such considerations. First, it illustrates how *Feres* is a clear departure from this Court's precedent regarding a congressional waiver of sovereign immunity. The text of the FTCA and its legislative history reveal the *Feres* Court narrowed the scope of Congress's waiver of sovereign immunity when it promulgated the "incident to service exception." Second, the rationales set forth by this Court in *Johnson* no longer support upholding the *Feres* doctrine. Finally, because no uniform approach exists on how to handle a FTCA claim under *Feres*, the policy considerations that, ordinarily, would provide *Feres* a presumption of correctness do not exist. Accordingly, *stare decisis* should not induce this Court to "leave bad enough alone." *Johnson*, 481 U.S. at 703 (Scalia, J., dissenting) (stating that had respondent requested *Feres* be overruled, this Court would have to consider whether *stare decisis* would induce this Court to leave *Feres* alone).

I. THE *FERES* DOCTRINE RUNS CONTRARY TO CONGRESS'S INTENT AND THE TEXT OF THE FTCA.

When Congress enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), it lifted the traditional barrier that prevented a finding of tort liability on the part of the government. *Rogers v. United States*, 902 F.2d 1268, 1270 (7th Cir. 1990) (*citing* 28 U.S.C. § 2674 ("[t]he United States government 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")). Congress intended the FTCA to act as a broad waiver of sovereign immunity from tort liability for the acts of federal employees. *See* Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1, 10 (2007). Indeed, as Justice Scalia's dissent in *Johnson* explains, the text of the FTCA "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (emphasis included). While the FTCA contains thirteen exceptions, no exception explicitly precludes a FTCA suit brought by a service member. *Compare* 28 U.S.C. § 2680 (2006) *with Johnson*, 481 U.S. at 694 (Scalia, J., dissenting). The most pertinent exception states that the government is not liable for "[a]ny claim 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). Congress's wording makes its intent clear, it did not mean to preclude all lawsuits by

service members; instead, it only intended to limit claims related to combat injuries during a time of war. *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting).

Congress contemplated precluding all lawsuits by service members prior to enacting the FTCA. As this Court in *Feres* made clear, Congress expressly rejected language in bills prior to the FTCA that precluded all lawsuits by service members. *Feres*, 340 U.S. at 139. Specifically, the *Feres* Court acknowledged "eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its introduction made no exception." *Id*. at 140 (*citing Brooks v. United States* 337 U.S. 49, 51 (1949)). Yet Congress, having considered such preclusion, decided to limit preclusion to combat injuries when it enacted the FTCA. 28 U.S.C. § 2680. The House of Representatives' decision to amend 28 U.S.C. § 2680(j) by adding the word "combatant" provides further evidence of Congress's intent to narrow the exceptions with regard to service members. Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 8 (2003) (*citing* Note, *United States v. Johnson*: *The Feres Doctrine Gets New Life and Continues to Grow*, 38 Am. U. L. Rev. 185, 196 n.71 (1988)). Congressional intent, as 28 U.S.C. § 2680(j) evidences, was to "get[ ] lawyers out of the foxhole." Turley, *supra* at 8.

Despite this clear textual meaning, the *Feres* Court extended the FTCA to include claims arising incident to a service member's service. *See Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) ("[t]here was no proper basis for us to supplement – *i.e.*, revise – that congressional disposition"). Such an extension completely ignored this Court's precedent that required strict interpretation and no expansion of a sovereign immunity statute. *See Sherwood*, 312 U.S. 584 (holding that courts must strictly interpret a waiver of sovereign immunity); *Aetna Cas. & Sur. Co.*, 338 U.S. at 383 ("[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are unable to add to its rigor by refinement of construction where consent has been announced."). Had the *Feres* Court followed the plain language of the FTCA it would have held, as the *Brooks* Court did, that Congress only intended to preclude a service member's lawsuit that relates to combat. *See Johnson*, 481 U.S. at 692-93 (Scalia, J., dissenting) (*citing Brooks*, 337 U.S. at 51) (stating that in light of the exceptions for combat claims, it is absurd to believe that Congress did not have service members in mind when passing the FTCA). Instead, the *Feres* Court expanded on the FTCA's explicit exceptions and found implicit in the FTCA the "incident to service" exception. An exception that time has expanded to encompass all injuries sustained while in service. *See* Turley, *supra* at 9 n.45 ("[t]he expansion of the original *Feres* doctrine to encompass areas 'incident to service' and then 'any benefit' is an example of judicial version of mission creep. The *Feres*

doctrine has been allowed to grow in scope to a degree that would have given a congressional committee pause as a legislative matter, let alone as a unilateral judicial decision").

II. THE RATIONALE SET FORTH BY THIS COURT IN *JOHNSON* NO LONGER SUPPORTS AFFIRMING *FERES*.

When this Court readdressed the *Feres* doctrine in *Johnson*, it attempted to breathe new life into the rationale the *Feres* Court set forth in support of its "incident to service" exception. *See Johnson*, 481 U.S. at 688-92. Specifically, the *Feres* rationale are: (a) the FTCA requires parallel private liability, *Feres*, 340 U.S. at 146; (b) "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character,'" *id*. at 143; (c) the FTCA's primary purpose "was to extend a remedy to those who had been without," *id*. at 140; and (d) a service member's lawsuit under the FTCA is the "type of claim that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of *military discipline* and effectiveness." *United States v. Shearer*, 473 U.S. 52, 59 (1985) (emphasis added). This petition will discuss each rationale in turn and show why these rationales do not justify the "incident to service" exception.

A. This Court Has Explicitly And Implicitly Rejected The Parallel Private Liability Rationale Of *Feres*.

Under the FTCA, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. *Feres* reasoned that 28 U.S.C. § 2674 shields the Government from liability because a "private individual" cannot raise an army and States have not consented to suits by militia members. *Feres*, 340 U.S. at 141-42 ("the plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the Government"). However, in its analysis of the *Feres* rationales in *Johnson,* this Court did not mention the "parallel private liability" rationale. *See Johnson,* 481 U.S. at 688-91.[2] Indeed, the majority's failure to state this rationale implicitly accepts what Justice Scalia stated in his dissent: "[this Court] subsequently recognized [its] error and rejected *Feres*' 'parallel private liability' rationale." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting) (*citing Rayonier, Inc. v. United States*,

[2] The three rationales this Court in *Johnson* emphasized as underlying *Feres* were: (1) "the relationship between the Government and members of its armed forces is distinctively federal in character, *Johnson*, 481 U.S. at 689 (citations omitted); (2) "the existence of these generous statutory disability and death benefits is an independent reason why [*Feres*] bars suit for service-related injuries, *id.*; and (3) the protection from judicial involvement in "sensitive, military affairs at the expense of military discipline and effectiveness." *Id.* at 690 (citations omitted).

352 U.S. at 319; *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69 (1955)).

B. The Distinctively Federal Character Of The Relationship Between The Government And Armed Forces Does Not Support Narrowing The Remedies Available To Service Members Under The FTCA.

The basis of the second rationale is that Congress did not intend local tort law to govern the "distinctively federal" relationship between the Government and military members. *Feres*, 340 U.S. at 142-44. Instead, it is better to apply a federal remedy, the application of which provided for "simple, certain, and uniform compensation for injuries or death of those in armed services." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977). However, this Court has described the "distinctively federal character" rationale as "no longer controlling." *Johnson*, 481 U.S. at 695 (Scalia, J., dissenting) (quoting *Shearer*, 473 U.S. at 58 n.4).

This Court's decision in *Muniz* provides a clear illustration of why the "distinctively federal character" rationale no longer supports *Feres*. In *Muniz*, Chief Justice Warren analyzed the "distinctively federal character" rationale in the context of federal prisons. Specifically, Chief Justice Warren admitted that variations of state law would hamper the "uniform administration of federal prisoners" just as the *Feres* Court feared it would hamper the military.

Muniz, 374 U.S. at 161. Additionally, Chief Justice Warren acknowledged state law variations could affect a prisoner's opportunity to recover, just as this Court noted in *Feres*. *Id*. However, this Court found the impact of state law upon the federal prison system *did not* warrant narrowing a federal prisoner's recovery. *Id*. at 162. This Court reached that decision *despite* admitting that: (1) federal prisoners lack of control over their geographic locations; (2) allowing state tort law into the federal prison system would hamper the uniform administration of federal prisoners; and (3) state law would affect prisoner recovery – all reasons why this Court in *Feres* narrowed a service member's remedies under the FTCA.

Given this Court's disparate treatment of the "distinctively federal character" rationale, it seems as though *Feres* punishes an individual who serves his or her country. Indeed, as Justice Scalia stated in *Johnson*, "[t]he unfairness to servicemen of geographically varied recovery is . . . an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than . . . the uniform nonrecovery [provided by *Feres*]." *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting) (*citing Muniz*, 374 U.S. at 162). Yet, this Court still finds the lack of control service members have over their geographic location a valid reason to narrow the remedies available to service members while refusing to narrow the remedies available to federal prisoners, who have the same lack of control, and for obviously less admirable reasons.

Adherence to the concept of uniformity cannot justify this disparate treatment. First, as shown above in *Muniz*, many other federal agencies and departments can be sued under the FTCA despite the need for uniformity. *See Muniz*, 374 U.S. at 161 (acknowledging the need for uniformity in the federal prison system). This Court's rejection of uniformity as a reason to narrow remedies available under the FTCA extends beyond federal prisons. *See Stencel Aero Engineering Corp.*, 431 U.S. at 675 (Marshall, J., dissenting). Second, the text of the FTCA contradicts this rationale. *See Johnson*, 481 U.S. at 696 (Scalia, J., dissenting). Some of the FTCA's exceptions demonstrate that Congress considered the problem of uniformity. *See, e.g.,* 28 U.S.C. §§ 2680(b), 2680(i), 2680(k). Accordingly, Congress easily could have established uniformity as to all claims brought by service members, if uniformity was indeed the will of Congress. *See, e.g.,* 28 U.S.C. § 2680(j). Finally, this Court has rejected this justification by permitting service members to recover under the FTCA for injuries not incident to service and by permitting civilians to recover for injuries caused by military negligence. *See Johnson*, 481 U.S. at 696 (Scalia, J., dissenting) (*citing Indian Towing*, 350 U.S. 61). Accordingly, this rationale is not a plausible explanation of congressional intent and therefore, cannot justify *Feres*' narrowing the remedies available to service members.

C. The "Veterans' Benefits" Exception Is Not Supported By This Court's Decisions In *Brooks* And *Brown*. Moreover, The VBA Does Not Provide Service Members A Superior And More Efficient Alternative Of Recovery To The FTCA.

The Veterans' Benefits Act ("VBA"), 72 Stat. 1118, as amended, 38 U.S.C. § 301 *et seq.*, compensates service members injured or killed in the line of duty. The *Feres* Court "veterans' benefit" rationale reasons that Congress already provides a simple, certain, and uniform system to compensate service members for their injuries or death. The majority in *Johnson* similarly reasoned that "the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service related injuries." *Johnson*, 481 U.S. at 689. Accordingly, the absence of a provision to address dual recovery under the VBA and the FTCA provided persuasive evidence that a court would interpret the FTCA to permit recovery for an injury incident to service. *Id*. at 697 (*citing Feres*, 340 U.S. at 144).

However, two reasons seriously undermine this rationale. First, both before and after *Feres* this Court permitted an injured service member compensated under the VBA to bring an FTCA suit. *Johnson*, 481 U.S. at 697 (Scalia, J., dissenting). In *Brooks*, this Court permitted two service members injured "off-duty" to sue the Government even though they had already received VBA benefits. *Id*. (*citing Brooks*, 337 U.S. 49). In permitting the service members to sue,

the *Brooks* Court noted "nothing in the [FTCA] or the veterans' laws . . . provides for exclusiveness of remedy." *Brooks*, 337 U.S. at 53.

Furthermore, the *Brooks* Court refused to "call either remedy . . . exclusive . . . when Congress has not done so." *Id*. As further proof that the VBA should not prevent a service member's suit, the *Brooks* Court noted that Congress included three exclusivity provisions in the FTCA, 28 U.S.C. §§ 2672, 2676, 2679, but failed to mention a plaintiff service member. *Brooks*, 337 U.S. at 53. *United States v. Brown*, 348 U.S. 111 (1954), is proof that *Brooks* remained valid after *Feres*. In *Brown* this Court, just as in *Brooks*, stressed that "Congress had given no indication that it made the right to compensation [under the VBA, a] veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the [FTCA]." *Id*. at 113. *Brooks* and *Brown*, neither of which this Court has expressly disapproved nor overruled, clearly hold the VBA is not a service member's exclusive remedy.

Second, the VBA is no longer a superior, generous, and more efficient, alternative to the FTCA because it is no longer an efficient alternative as believed in *Feres*, 340 U.S. at 145, and is not as generous as believed in *Johnson*, 481 U.S. at 689. In *Feres,* this Court characterized the veterans' compensation system as a superior alternative to the FTCA because it "normally requires no litigation" and therefore, provides veterans with benefits quickly. *Feres*, 340 U.S. at 145; *see Stencel Aero Engineering Corp.*,

431 U.S. at 673 ("[the VBA] . . . provides a swift, efficient remedy for the injured service [member]"). Today, however, the VBA is no longer a superior and efficient remedy. Service members seeking VBA benefits are "stranded in administrative limbo," left to the mercy of agonizingly slow medical evaluation or a compensation system administered by a large and inefficient bureaucracy. Brou, *supra* 4, at 46-47. Additionally, a service member's disability claim usually requires an advocate to assist with the claim that often requires extensive proof that a causal connection exists between the injury and the claim. *Id*. at 47. Perhaps, at the time of *Feres* the VBA presented a swift and efficient alternative to litigation. However, that time is long gone. Now the VBA process is just as burdensome as FTCA litigation. As such, this Court can no longer justify this limitation based on expediency and efficiency.

Additionally, this Court in *Johnson* characterized veterans' benefits as "generous." *Johnson*, 481 U.S. at 689. This is a misplaced belief. Military benefits are not compensatory; instead, they act as supplemental earnings. Brou, *supra* 4, at 49. Consequently, many injured service members who receive veterans' benefits struggle financially. *See, e.g., The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 17 (1986) (testimony by service member's mother maintaining it takes all of the veterans' benefits plus $600 to $800 a month to care for the

service member). Furthermore, benefits received by service members do not take into account economic damages. Specifically, the benefits calculation does not take into account a service member's increased earning potential. *See* 10 U.S.C. § 1401 (2000). Moreover, veterans' benefits do not provide the estate of the service member to recover non-economic damages. Brou, *supra* 4, at 50. Instead, all a service member will receive is his/her retirement pay based on the member's pay upon retirement. *See id.* § 1401. Such a remedy is hardly superior to that allowed under the FTCA and characterizing the VBA as "generous" is no longer accurate.

Narrowing a service member's remedies to the VBA does not prevent double recovery nor over recovery; instead, it prevents our service members and their families from leading normal lives when that service member is injured or is killed. Furthermore, by allowing service members to recover under both the FTCA and VBA, both before and after *Feres*, reveals that the "veterans' benefits" exception is no longer persuasive. *Shearer*, 473 U.S. at 58 n.4. Accordingly, the third *Feres* rationale no longer supports its decision.

D. Military Discipline Is Not Undermined By Allowing Service Members To Bring Suit Under The FTCA.

To accomplish each mission, the military relies on the obedience, unity and commitment of its members.

Johnson, 481 U.S. at 691 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). To ensure the military can accomplish its objectives, *Feres* and its progeny assert that an FTCA suit would "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," *Johnson*, 481 U.S. at 690 (quoting *Shearer*, 473 U.S. at 59), and implicate military judgments and decisions that "are inextricably intertwined with the conduct of [a] military mission." *Johnson*, 481 U.S. at 691. However, military discipline is nothing more than a *post hoc* rationalization aimed at this Court's vision of a "distinct system of military immunity" Turley, *supra* 5, at 17, when it made itself a "self-constituted guardian of the military – a position already assigned to Congress." *Id*. at 16.

In support of this statement, we need look no further than the FTCA's text, which provides no support for this rationale. 28 U.S.C. § 2680 specifically prevents: (1) a service member from suing the Government for injuries or death when it results in combat, § 2680(j); (2) claims based on performance of discretionary functions, § 2680(a); claims arising in foreign countries, § 2680(k); and intentional torts, § 2680(h). The aforementioned exceptions prevent a service member from suing in a scenario where it would undermine military discipline. § 2680(j) prevents any claim related to a negligent decision made in combat. As such, military commanders need not worry about judicial intrusion of "complex, subtle, and professional decisions" just because he/she had a

General Custer moment. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Costo v. United States*, 248 F.3d 863, 875 (9th Cir. 2001) (concluding "*Feres* . . . was not necessary to preserve our tradition of judicial deference to the 'complex[,] subtle, and professional decisions as to the compositing, training, equipping, and control of a military force").

For acts that do not occur in combat, this Court need look no further than § 2680(a) and its bar on discretionary functions. This exception fills the void left by § 2680(j). Section 2680(a) applies regardless of whether an officer abuses his/her discretion, and is designed to avoid the type of second-guessing *Feres* feared. Turley, *supra* 5, at 20; *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). In *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), this Court applied § 2680(a) to protect military decision-making. *Id*. at 511 (stating "[t]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function. . . . [that] involves . . . judgment as to the balance of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness"). The exceptions created by Congress provided the military with sufficient discretion without undermining its authority, making *Feres* useless. *See* Turley, *supra* 5, at 20 (*citing Boyle*, 487 U.S. at 511).

The fact that service members have been able to sue the Government and military for relief further undermines *Feres'* ability to promote discipline and

unity. Specifically, this Court has allowed service members to make constitutional challenges on military conduct.[3] Service members also have the ability to file internal claims alleging mistreatment. Turley, *supra* 5, at 25. This process allows a service member's claim to be heard by an independent review of his/her supervising commander. *Id*. (*citing* Michael B. Richardson, *The Department of the Navy's Equal Employment Opportunity Complaint Dispute Resolution Process Pilot Program: A Bold Experiment That Deserves Further Exploration*, 169 Mil. L. Rev. 1 (2001)). Such independent review will necessarily involve "second-guessing" of the officer/commander in question. This has not, however, been found to affect the discipline or unity of the military.

Furthermore, the "military discipline" rationale cannot explain why this Court prevents service members from suing the Government on claims not related to a military judgment decision. In the present case, the decedent was not on a military mission; instead, he died in a fire while asleep in on-base military housing. The suit alleges negligent upkeep of the premises, not poor military judgment. Allowing suit here would not somehow prevent other service

[3] *See, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (reviewing a First Amendment challenge); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Brown v. Glines*, 444 U.S. 348 (1980) (reviewing first amendment challenge); *Wilkins v. United States*, 279 F.3d 782 (9th Cir. 2002) (reviewing a first amendment challenge that alleged the military was discriminating against nonliturgical chaplains).

members from following the orders of their commanding officers. Indeed, if a civilian brought a similar suit (a claim of a non-military nature) against the military, the same or even greater level inquiry would result. *See C.R.S. v. United States*, 761 F. Supp. 665, 668 (D. Minn. 1991) (holding that the government failed to show how a medical malpractice claim would imperil military missions or national security). The best summation of this paradox is that the real aim of *Feres* is not to promote military discipline; rather, *Feres* is designed to protect the military from monetary losses. *See United States v. Stanley*, 483 U.S. 669, 683 (1987) (in *Bivens* actions, this Court has distinguished between remedies designed to prevent constitutional violations rather than award monetary damages); *Wilkins*, 279 F.3d at 787.

Viewed in this light, the "military discipline" rationale is a highly subjective standard that produces conclusory decisions unsupported by any empirical or substantive evidence and cannot support *Feres'* limitations on FTCA claims by service members. *Feres* must be abolished, because as Justice Scalia stated in *Johnson*, "[neither] the three original *Feres* reasons nor the *post hoc* rationalization of 'military discipline' justifies our failure to apply the FTCA as written. *Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at 473.

III. THE CIRCUITS ARE NOT SETTLED ON HOW TO APPLY *FERES*. BECAUSE THE LAW IS NOT SETTLED, *STARE DECISIS* DOES NOT COMPEL THIS COURT TO AFFIRM *FERES*.

Certiorari was granted in *Johnson* to resolve the disparity among the Federal Circuits' interpretations of the *Feres* doctrine. *Johnson*, 481 U.S. at 685. However, as shown above, the rationales underlying *Feres* do not support its outcome. Moreover, in the twenty-five years since *Johnson* no definition of "incident to service" has been established. Brou, *supra* 5, at 26; *see also* Michael E. Noone, *The Feres Doctrine and Military Medical Malpractice: Hearing on S. 489 and H.R. 3174 Before Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 99th Cong. 63-64 (1986) (stating that the problem for those "in the tort claim business" is that for the past thirty-six years, we do not know what "incident to service" means). As the Second Circuit observed, *Johnson's* failed attempt to solidify *Feres* left lower courts with more loose ends than ever. *Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995) ("it is not surprising that *Johnson* – a decision that we are bound to follow – left both the [*Feres*] doctrine and the lower courts more at loose ends than ever"). It is not surprising then that lower courts have struggled in analyzing and applying *Feres*.

To compensate for *Johnson*'s loose ends, lower courts have taken their own approach in an attempt to produce a somewhat coherent and workable version of *Feres*. Some circuits have implemented a

multi-factor test. *See Day v. Massachusetts Air National Guard*, 167 F.3d 678, 682 (1st Cir. 1999) (analyzing FTCA claims with the following factors: (1) whether the injury occurred on a military facility; (2) whether the injury arose out of a military activity or was associated with military life; and (3) whether the service member was involved in military service at the time of his/her injury; and (4) whether the injured member is suing a superior or an individual who was cooperating with the military); *Richards v. United States*, 176 F.3d 652 (3d Cir. 1999) (inquiring into the nature of the service member's activity at the time of death/injury and the location of the negligent act); *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir. 1995) (analyzing FTCA claims with the following factors: (1) the duty status at the time of injury; (2) the location of the injury; and (3) the activity being performed by the service member at the time of the injury). Other circuits have decided to analyze *Feres* in the totality of the circumstances. *See Tootle v. USDB Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004) ("[r]ather than focusing on the presence or absence of the *Feres* rationales [ ] the relevant question is whether [the] alleged injury arose "incident to service.'"; *Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996) (the "[a]pplication of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case. Rather[,] the test is whether the injuries are based on service related injuries"). The Second Circuit *uses* a *respondeat superior* analysis to analyze *Feres*. *See Taber*, 67 F.3d at 1033 ("[t]he courts have uniformly equated the

FTCA's 'line of duty' language with the phrase 'scope of employment,' as that concept is defined by the *respondeat superior* law of the jurisdiction in which the accident occurred) (*citing McHugh v. University of Vermont*, 966 F.2d 67, 75 n.9 (2d Cir. 1992)) (*citing McCall v. United States*, 338 F.2d 589 (9th Cir. 1964), *cert. denied*, 380 U.S. 874 (1965); *Merritt v. United States*, 332 F.2d 397, 398 (1st Cir. 1964)). However, because of this undertaking the uniformity *Feres* so desperately sought no longer exists. Indeed, nothing about *Feres* is well settled. Consequently, *stare decisis* does not compel this Court to affirm *Feres*.

A. The Eleventh Circuit Is An Example Of A Circuit Unsettled On How To Apply Its Three-Factor Test.

Similar to the Fifth Circuit, the Eleventh Circuit has adopted a multi-factor test to determine whether *Feres* applies. Those factors are: (1) the duty status at the time of injury; (2) the location of the injury; and (3) the activity being performed by the service member at the time of the injury. *See Whitley v. United States*, 170 F.3d 1061, 1070-71, 1076 (11th Cir. 1999). After considering these factors in their totality, the district courts in the Eleventh Circuit attempt to determine whether *Feres* applies. However, the application of these factors often produces inconsistent and contradictory outcomes.

Elliott By & Through Elliott v. United States, 13 F.3d 1555 (11th Cir. 1994), *reh'g granted and opinion*

vacated sub nom., Elliott By & Through Elliott v. United States, 28 F.3d 1076 (11th Cir. 1994), *aff'd on reh'g by an equally divided court*, *Elliott v. United States*, 37 F.3d 617 (11th Cir. 1994), provides an excellent illustration of a circuit unsettled on how to analyze a FTCA claim. In *Elliott*, David Elliott, Jr., a staff sergeant in the U.S. Army, lived with his wife, a civilian, in an apartment provided by the military on base at Fort Benning, Georgia. On August 14, 1989, David Elliott, per his request, received ordinary leave. This request altered his duty status to "on leave" and "absent with authority." While in the home, Elliott's wife and Elliott himself suffered carbon monoxide poisoning and were rendered unconscious due to a faulty venting system attached to the apartment's water heater. *Id*. at 1556.

Initially, the Eleventh Circuit, affirmed the lower court's judgment in favor of the plaintiff. In its discussion, the Court found the "VBA" and "federal character" rationales as no longer vital, leaving only the "military discipline" rationale. *Id*. at 160 (*citing Johnson*, 481 U.S. at 698 (Scalia, J., dissenting)). The Eleventh Circuit held the circumstances surrounding Elliott's injuries did not implicate military concerns or matters that would harm military discipline. *Id*. In its analysis of the three-factor test, the court held that although the injury occurred on base, Elliott's injury did not arise out of a military duty, purpose, or mission. *Id*. However, when the Eleventh Circuit reheard the case *en banc* the judges were equally divided on how to properly dispose of the case. *Elliott By &*

Through Elliott v. United States, 37 F.3d at 618. As *Elliott* makes clear, although the Eleventh Circuit is settled on the appropriate inquiry, it is unsettled on how to apply its three-factor test.

B. A Comparison Of The Fifth And Eleventh Circuits' Application Of Its Three-Factored Test Illustrates The Unsettled Application Of *Feres*.

A comparison of the Eleventh and Fifth Circuits, both of which utilize the same three-factor test, further highlights how circuits are unsettled on how to apply *Feres*. Specifically, under the Fifth Circuit, a service member on liberty is off-duty under the first factor. *Shults v. United States*, 421 F.2d 170, 171 (5th Cir. 1969) (holding that liberty was comparable to furlough because liberty is an extended leave from military duties). Yet, in this case, the Eleventh Circuit held that Lanus's liberty status was not akin to furlough. *Lanus v. United States*, 2012 WL 4840799 at *2 (11th Cir. 2012). As shown, had the Fifth Circuit heard this case it would have considered Lanus "off-duty" and "on-duty" whereas the Eleventh Circuit held Lanus was on-duty. *Compare Shults*, 421 F.2d at 171 *with Lanus*, 2012 WL 4840799 at *3 (stating that Lanus's liberty status was functionally similar to the service member in *Feres* who was on active duty and sleeping between on-duty shifts).

Furthermore, in the Fifth Circuit, sleeping constitutes a personal activity despite it occurring in

off-base military housing. *Hall v. United States*, 130 F. Supp. 2d 825, 829 (S.D. Miss. 2000), provides an illustration. In *Hall,* the Southern District of Mississippi allowed a service member's estate to bring a FTCA suit when the member died from carbon monoxide poisoning while in his on-base house. *Id*. at 829. The district court found, "despite the fact that the injury . . . occurred . . . on base, the court is ultimately not persuaded under the totality of the circumstances that it occurred incident to his military services. At the time of his injury, [the service member] was asleep while off duty for the weekend, a purely personal activity." *Id*. Had the Southern District of Mississippi heard this case, *Feres* would not have applied. The similarities are obvious. Lanus, similar to the service member in *Hall*, was off-duty at the time of his death. *Id*. Lanus did not have to answer to military orders. Rather, he was free from military control and compulsion, similar to *Hall*. Accordingly, Lanus, similar to *Hall*, was engaged in a purely personal activity, sleeping, despite performing the activity, just as in *Hall*, in military housing. *See id*. Despite this persuasive case, the Eleventh Circuit still applied *Feres* and found *Hall* distinguishable. *Lanus*, 2012 WL 4840799 at *3 n.4. Consequently, the Eleventh Circuit muddied the *Feres* doctrine even further.

CONCLUSION

WHEREFORE, Petitioner Lanus respectfully requests this Court grant her Petition for Writ of Certiorari and overturn the *Feres* doctrine.

Respectfully submitted,

BRETT C. POWELL*
P. BRANDON PERKINS
KRISTEN D. PERKINS
THE POWELL LAW FIRM, P.A.
18001 Old Cutler Road
Suite 325
Palmetto Bay, FL 33157
Telephone: (305) 232-0131
Facsimile: (305) 232-0191
Email:
brett@powellappeals.com

JIULIO MARGALLI
THE MARGALLI
LAW OFFICE, P.A.
501 Whitehead Street
Suite 1
Key West, FL 33040
Telephone: (305) 295-9382
Facsimile: (305) 295-6916

CHARLES W. FLYNN
CHRISTOPHER MCKAY
STOLZENBERG, GELLES, FLYNN
& ARANGO, LLP
1401 Brickell Avenue
Suite 825
Miami, FL 33131
Telephone: (305) 961-1450
Facsimile: (305) 373-2735

**Counsel of Record*

Attorneys for Petitioner

2012 WL 4840799

United States Court of Appeals,
Eleventh Circuit.

Linda LANUS, as personal representative of the Estate of Eric K. Lanus, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 12-11506 | Non-Argument Calendar. | Oct. 12, 2012.

Attorneys and Law Firms

Brett Chance Powell, Powell Law Firm, Palmetto Bay, FL, Charles William Flynn, Christopher Thomas McKay, Stolzenbert, Gelles & Flynn, LLP., Miami, FL, Jiulio F. Margalli, The Margalli Law Office PA, Key West, FL, for Plaintiff-Appellant.

Wifredo A. Ferrer, Anthony Pogorzelski, Laura Thomas Rivero, Kathleen Mary Salyer, Anne Ruth Schultz, U.S. Attorney's Office, Miami, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 4:11-cv-10078-KMM.

Before BARKETT, PRYOR and COX, Circuit Judges.

Opinion

PER CURIAM:

This case considers whether a deceased serviceman's wrongful death claim against the United

States, brought through a personal representative, can survive a motion to dismiss for lack of subject matter jurisdiction under the *Feres* doctrine. The district court determined that *Feres* barred the court's jurisdiction to hear the case. Accordingly, the court granted the United States' motion to dismiss. Because we cannot meaningfully distinguish this case from the facts considered by the Supreme Court in *Feres,* we affirm.

I. FACTS AND PROCEDURAL HISTORY

U.S. Coast Guard Fireman's Apprentice Eric K. Lanus returned to his assigned housing at Naval Air Station Key West in the early morning hours of February 8, 2009, a Sunday, after spending the previous evening in Key West. He turned on the stove in the kitchen, apparently preparing to cook, and went to his bedroom in the apartment's upper floor. Around 5 a.m., heat from the forgotten stove ignited a fire that eventually engulfed the ground floor of the apartment. The fire department extinguished the fire an hour later. Serviceman Lanus was found dead in his bedroom.

When he died, Serviceman Lanus had been "on liberty." Liberty status refers to short time periods, often including weekends, when active-duty personnel are not on authorized leave from duties but are outside normal working hours. While on liberty, crew members may depart from their units and move about as they please until they must return to duty.

Serviceman Lanus was scheduled to report for duty that Monday.

His mother, Linda Lanus, brought an action on her son's behalf for wrongful death against the United States acting through the Department of Defense, the Department of Homeland Security, the U.S. Navy, and the U.S. Coast Guard, which could include her son's superior officers. She claimed that a number of safety deficiencies in the apartment had allowed the fire to spread unnoticed, and she attributed these safety deficiencies to negligent upkeep of the premises by the United States and its failure to warn him of the apartment's conditions. She brought her claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674.

The United States responded with a motion to dismiss for lack of subject matter jurisdiction under the *Feres* doctrine, which removes district courts' jurisdiction for a serviceman's injuries that "arise out of or are in the course of activity incident to service," *Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950).

The district court concluded that the *Feres* doctrine controlled and granted the United States' motion. Ms. Lanus appeals. We affirm.

II. ISSUE ON APPEAL AND STANDARD OF REVIEW

Ms. Lanus contends that the district court erred by determining that her son's death occurred "incident to" his military service. Thus, whether Serviceman Lanus's death was incident to his service under the *Feres* doctrine is the issue before us. Because the determination involves an application of law to undisputed facts, we consider this issue de novo. *See Whitley v. United States,* 170 F.3d 1061, 1068 (11th Cir.1999).[1]

III. DISCUSSION

The doctrine of sovereign immunity bars suit against the United States unless the United States expressly consents. *United States v. Mitchell,* 463 U.S. 206, 212, 103 S.Ct. 2961, 2965, 77 L.Ed.2d 580 (1983). The FTCA represents the United States' consent to tort liability "in the same manner and to the same extent as a private individual under like

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[1] A party may attack the district court's subject matter jurisdiction by challenging the sufficiency of the complaint (a facial attack) or by challenging the facts themselves (a factual attack). In a facial attack, the district court takes as true the complaint's factual allegations. *McMaster v. United States,* 177 F.3d 936, 940 (11th Cir.1999). Here, the court found that it lacked subject matter jurisdiction even assuming as true all of Ms. Lanus's factual allegations. We therefore do the same and assume all facts in the complaint are true. Only a disputed application of the *Feres* doctrine to those facts is left for our review.

circumstances." 28 U.S.C. § 2674. This consent does not extend, however, to claims "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).

In *Feres,* the Supreme Court took this exception a step further and prohibited suits under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," regardless of whether the United States is at war. 340 U.S. at 146, 71 S.Ct. at 159. The *Feres* Court considered the case of a serviceman on active duty who died while sleeping. He died after a defect in his assigned on-base housing's heating system ignited a fire and the housing's emergency alarm system failed to operate. *Id.* at 137, 71 S.Ct. at 155. The Court determined that the serviceman's active-duty status and on-base location rendered the injury sufficiently "incident to service" and affirmed the dismissal of the case. *Id.* at 146, 71 S.Ct. at 159.

As one might imagine, the United States aligns the present case with *Feres* by highlighting the similarities. Both men were outside their normal working hours but still on active duty when they died. Both men lived in assigned housing on their respective military bases. Both men died while sleeping due to a fire allegedly caused by the negligence of the United States in maintaining the premises. These facts led the *Feres* Court to conclude that the serviceman's injury was incident to his service, thus barring suit.

Ms. Lanus proposes two distinctions. First, she emphasizes that her son was "on liberty" when he died. Second, she declares that the housing to which her son was assigned was not solely military housing but instead "from time to time" hosted "non-military government employees[ ] and civilian contractors and agents." (R.1-1 at ¶ 13.) These two points, she says, command a different outcome than *Feres*. We disagree.[2]

Ms. Lanus first argues that her son enjoyed a different duty status (liberty) at the time of his death than the serviceman in *Feres*. While on liberty, her son had "far less restriction than merely being released from the day's chores" and he did not intend "to return to duty for over 24 hours at the time of his death." (Appellant Br. at 14.) She further asserts that her son was not restricted in his ability to travel and "was not required to report to any supervisors during the period of his liberty." *Id.* These characteristics of liberty status, she claims, render it "the functional equivalent of being on a furlough or a pass," *id.,* and courts have decided that injuries sustained while on

[2] Ms. Lanus attempts to rely on a three-factor test our court has developed to evaluate potential *Feres* applications to situations falling between the facts in *Feres,* barring the claim, and those in cases in which the Supreme Court has come to an opposite conclusion, allowing the claim to proceed. (*See* Appellant Br. at 12-13 (citing *Whitley,* 170 F.3d at 1070).) Because we conclude that the facts of this case are sufficiently similar to *Feres,* we find no need to use the test to evaluate whether the *Feres* doctrine bars Ms. Lanus's claim.

furlough, leave, or pass are not incident to service under the *Feres* doctrine. *See, e.g., Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949) (holding that a serviceman injured while on a requested and authorized furlough could bring suit under the FTCA); *Pierce v. United States,* 813 F.2d 349 (11th Cir.1987) (holding that a serviceman injured while on a requested and authorized "pass" akin to a furlough or leave could bring suit under the FTCA).

This characterization of Serviceman Lanus's status, however, does not materially distinguish *Feres.* Liberty status includes nights and weekends "off" in the sense that the serviceman, though on active duty, is simply not required to perform duties at that time.[3] Though *Feres* does not go into detail, the decedent's status in *Feres* (on active duty and sleeping between on-duty shifts) is functionally similar to the active-duty liberty status attributed to Serviceman Lanus. That Serviceman Lanus was enjoying a weekend on liberty rather than a single night does not distinguish the case.

Ms. Lanus's second proposed distinction refers to her son's assigned housing. She argues that injuries in on-base locations accessible to civilians, such as

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[3] As the Ninth Circuit has put it, liberty status "refers generally to the time between the end of normal working hours on one day, and the beginning of normal working hours on the next." *Costo v. United States,* 248 F.3d 863, 864 n. 1 (9th Cir.2001).

her son's housing unit, support a finding that the injury did not occur incident to service.

That Serviceman Lanus's on-base housing occasionally provided a roof for civilian government employees, however, also fails to differentiate the case from *Feres*. The *Feres* Court made no mention of whether the decedent's barracks also housed civilians from time to time, and the relevance of the distinction remains unclear. Case law supporting Ms. Lanus's position is scant.[4]

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[4] Ms. Lanus cited three cases in support of the idea that injuries sustained in on-base locations may be distinguishable from the injury in *Feres* due to the fact that civilians also could access the location. Two of the cases are district court cases from outside our circuit and do not support her point. *See Hall v. United States,* 130 F.Supp.2d 825, 829 (S.D.Miss.2000); *Ordahl v. United States,* 601 F.Supp. 96, 100 (D.Mont.1985).

Ms. Lanus's third case is a district court opinion affirmed by an equally divided court sitting *en banc. See Elliot* ex rel. *Elliott v. United States,* 877 F.Supp. 1569 (M.D.Ga.1992), *aff'd by an equally divided court,* 37 F.3d 617 (11th Cir.1994) (en banc). Though this case is not binding precedent, *see United States v. Cerceda,* 172 F.3d 806, 812 n. 6 (11th Cir.1999) (en banc), it deserves note due to its apparent similarity to this case. In *Elliot,* a serviceman and his wife sustained injuries when their on-base assigned housing at Fort Benning, Georgia developed a carbon monoxide leak. 877 F.Supp. at 1572. In their negligence suit against the United States, the district court rejected the contention that *Feres* barred the serviceman's claim, determining that, though the injury occurred in his assigned on-base living quarters, he had been engaged in a purely personal activity (watching television) and-most importantly-had been on requested and authorized leave rather than on active duty. *Id.* at 1575-77. Liberty, however, is not furlough, leave, or pass, and it

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As we see no meaningful distinction between the facts before us and the facts before the *Feres* Court, we affirm the district court's order.

IV. CONCLUSION

The facts of this case are substantively similar to the facts in *Feres,* and we therefore affirm the district court's dismissal for lack of jurisdiction.

AFFIRMED.

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is not a requested or authorized reprieve from active duty-indeed, it is not a reprieve from active duty at all. Serviceman Lanus was on active duty at the time of his death, a critical distinction from *Elliott. See Jiminez v. United States,* 158 F.3d 1228, 1229 (11th Cir.1998) (recognizing that "the serviceman's duty status [i]s the most important criterion in determining whether an injury was incident to military service" (citing *Parker v. United States,* 611 F.2d 1007 (5th Cir.1980))).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 11-cv-10078-KMM

LINDA LANUS, as personal representative of the estate of Eric K. Lanus,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant. /

ORDER GRANTING DEFENDANT'S RENEWED MOTION TO DISMISS

THIS CAUSE came before the Court upon the Government's Renewed Motion to Dismiss (ECF No. 16). Plaintiff filed a Response (ECF No. 19). The Government filed a Reply (ECF No. 22). This motion is ripe for review.

UPON CONSIDERATION of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court, enters the following Order.

I. BACKGROUND[1]

This is an unfortunate case involving the death of United States Coast Guard Fireman's Apprentice Eric K. Lanus. Lanus died in his assigned on-base housing, in his sleep, when an aluminum pot he left on a burning stove caught fire. Plaintiff Linda Lanus, as representative of her son's estate, sues Defendant United States. Plaintiff seeks recovery for alleged negligence pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674. Plaintiff alleges that the United States was negligent in maintaining her son's assigned on-base housing unit. Defendant seeks to dismiss this claim for lack of subject matter jurisdiction.[2]

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[1] The factual background is taken from Defendant's Renewed Motion to Dismiss, Plaintiff's Response, Defendant's Reply, and Plaintiff's Complaint (ECF No. 1).

[2] A defendant may attack subject matter jurisdiction either facially or factually. Facial attacks on the complaint require the Court determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in the complaint are taken as true. *McMaster v. United States,* 177 F.3d 936, 940 (11th Cir. 1999) (internal citations omitted). "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion – the court must consider the allegations of the complaint to be true, but when the attack is factual, the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56." *Lawrence v. Dunbar,* 919 F.2d 1525, 1528-29 (11th Cir.1990). In evaluating a factual attack, the trial court can "weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the

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II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. *Milburn v. United States,* 734 F.2d 762, 765 (11th Cir. 1984). On a motion to dismiss, the Court must accept the factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *SEC v. ESM Grp., Inc.,* 835 F.2d 270, 272 (11th Cir. 1988). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. v. Twombly,* 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. If the facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown the pleader is entitled to relief. *Id*. at 1950. A complaint must also contain enough facts to indicate the presence of the required elements. *Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1302 (11th Cir. 2007). However, "[a] pleading that offers 'a formulaic recitation of elements of a cause of

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trial court from evaluating for itself the merits of jurisdictional claims." *Id*. In the instant case, the United States brings both facial and factual attacks. Accordingly, to the extent necessary, the Court may look to evidence outside the four corners of the Complaint.

action will not do.'" *Iqbal,* 129 S. Ct. at 1949 (quoting *Twombly,* 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis,* 297 F.3d 1182, 1188 (11th Cir. 2002).

III. ANALYSIS

The Government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. *Feres v. United States,* 340 U.S. 135, 146 (U.S. 1950). In *Feres*, the Court heard three cases by servicemen bringing claims against the United States for injuries suffered incident to their service. Of the three cases in the *Feres* decision, one provides a situation analagous to the case at bar. In one of the *Feres* component cases, the Court barred recovery by the executrix of a serviceman's estate after the serviceman died in a fire in a barracks at Pine Camp, New York. The Court held that a serviceman could not recover when his injuries arise out of, or are in the course of, activity incident to service. The Court distinguished the situation in *Feres* from its holding in *Brooks v. United States,* 337 U.S. 49, 52 (1949). In *Brooks,* two brothers who were in the Army were on furlough when a government vehicle collided with their car. The Court held that the brothers' furlough status meant that their activities were in fact not incident to their service. *Id.*

Here, the situation is analagous to *Feres*. Lanus was off-duty at the time of the fire, or in a status the Coast Guard refers to as "liberty." Compl. ¶ 14; Moore Dec. ¶¶ 4, 5. However, he was off duty in the course of his regular active duty service, and not due to any special request or authorization tantamount to the furlough in *Brooks. Id.*; *see also Whitley v. United States,* 170 F.3d 1061, 1071 n.19 (11th Cir. 1999). Lanus' liberty status reflected an off duty status that was not derived from a request on his part to be absent from regular duty status. Instead, it was the normal time off that a service member encounters when he is not required to be present to perform duties. Lanus' death while off duty was in the course of his service and his recovery is therefore barred.

The result is the same under the Eleventh Circuit's three-part test, which considers (1) duty status, (2) location, and (3) activity, to determine whether a service member's injuries resulting from government negligence are compensable under the FTCA. *Id.* at 1070. Lanus was off duty but not on furlough, and was sleeping on base in quarters provided to him because of his status as a service member. Compl. ¶¶ 3, 12, 28. His duty status, location, and activity all indicate that his death was incident to his service in the Coast Guard.

The FTCA is a waiver of the United States' sovereign immunity from suit. Where the FTCA has not waived sovereign immunity, no claim is cognizable. *Feres*, 340 U.S. at 140. Lanus' claim cannot be

brought under the FTCA and therefore this case must be dismissed for lack of subject matter jurisdiction.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the Government's Renewed Motion to Dismiss (ECF No. 16) is GRANTED. This case is DISMISSED WITH PREJUDICE for lack of Subject Matter Jurisdiction.

The Clerk of the Court is instructed to CLOSE this Case. All pending motions are DENIED AS MOOT.

DONE. AND ORDERED in Chambers at Miami, Florida, this 6th day of February, 2012.

/s/ K. M. Moore
K. MICHAEL MOORE
UNITED STATES
DISTRICT JUDGE

cc: All counsel of record