

No. 24-1332

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**KARI BECK, PERSONAL REPRESENTATIVE OF THE ESTATE OF
CAMERON GAYLE BECK; C.B., A MINOR; ESTATE OF CAMERON
GAYLE BECK, BY AND THROUGH HIS PERSONAL
REPRESENTATIVE, KARI BECK,
*PLAINTIFFS-APPELLANTS***

v.

**UNITED STATES OF AMERICA,
*DEFENDANT-APPELLEE***

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI (CIV NO. 4:23-CV-00255)
(THE HONORABLE BRIAN C. WIMES)*

BRIEF OF APPELLANTS

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SUMMARY OF THE CASE

On April 15, 2021, Staff Sergeant Cameron Beck left the Wing Cybersecurity Office on Whiteman AFB to have lunch with his wife and seven-year-old son. At the same time, Blanca Mitchell, a civilian Government employee, left the Stars & Strikes bowling alley. As Mitchell and Beck approached the intersection of Spirit Boulevard and Ellsworth Lane, driving in opposite directions, Mitchell turned left in front of Beck, striking his motorcycle. As a result of the violent collision, Beck was thrown from his motorcycle onto the ground. Mitchell, who *admits* that she was distracted by her cell phone, “felt she had hit something,” but continued driving until her van’s front right tire came to rest on top of Beck’s head. Tragically, Beck suffered serious injuries and was pronounced dead at the scene.

On February 1, 2024, the district court dismissed Plaintiffs’ Complaint against the Government based on the *Feres* doctrine. The district court ruled that although Plaintiffs’ claims do not “implicate military management or otherwise intrude upon sensitive military affairs,” they were nevertheless barred by *Feres* immunity. The district court’s order should be reversed because *Feres* applies only to the types of claims that require “judicial review of *military decision-making*,” *Wetherill v. Geren*, 616 F.3d 789, 790 (8th Cir. 2010) (emphasis added). Since Plaintiffs’ claims are not the type that require judicial review of any military decision, *Feres* does not apply.

Plaintiffs request 10 minutes of oral argument.

RULE 26.1 DISCLOSURE STATEMENT

All the Plaintiffs-Appellants are natural persons.

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JURISDICTIONAL STATEMENT

Plaintiffs bring claims under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for the wrongful death of Staff Sergeant Cameron Gayle Beck and for the loss of Staff Sergeant Beck's 2007 Yamaha XVS650. App001; R. Doc. 1. The district court had original jurisdiction under 28 U.S.C. § 1331. *Id.*

The district court dismissed Plaintiffs' Complaint and entered judgment on February 1, 2024. App171, R. Doc. 24; App181, R. Doc. 25. The district court's dismissal and judgment disposed of all parties' claims. On February 19, 2024, Plaintiffs filed a timely notice of appeal. App182; R. Doc. 26. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE

The Federal Tort Claims Act (the "FTCA" or "Act") broadly waives sovereign immunity against the United States and "renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees." *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting). The Act expressly excepts only a specific class of military-related claims: i.e., those "arising out of ... combatant activities ... during time of war." 28 U.S.C. § 2680(j).

In *Brooks v. United States*, 337 U.S. 49 (1949), the Supreme Court gave effect to the plain meaning of the statute and held, in a case involving the negligent

operation of a motor vehicle by a civilian employee of the Government, that an action against the Government by an injured soldier was permitted under the Act since the “accident had nothing to do with the [injured soldiers’] army careers” and since their injuries were “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), the Supreme Court was presented with a “wholly different case.” *Feres* involved three separate underlying cases. In the first case, the claimant perished by fire in army barracks that were unsafe because of a defective heating plant. The servicemember’s executrix alleged that Army officers were negligent in quartering him in barracks known or which should have been known to be unsafe. *Id.* at 155. In the second and third cases, the plaintiffs were injured during surgeries performed by Army surgeons, all allegedly resulting from the negligence of Army personnel. *Id.*

The Supreme Court reasoned that in the *Feres* cases, unlike in *Brooks*, that the claims were the kind that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. The *Feres* decision emphasized how sharp would be the break in tradition if soldiers were permitted to recover for negligence against their superiors, noting that the effect of the FTCA was not to create a *new* species of liability, but merely to adopt the standards of tort law as applied to private individuals. And since private individuals

cannot maintain armies or army hospitals, the Supreme Court reasoned that those injuries unique to the maintenance and operation of the military fall outside the FTCA's broad waiver of immunity. In short, *Feres* "bars judicial review of *military decision-making*." *Wetherill v. Geren*, 616 F.3d 789, 790 (8th Cir. 2010) (emphasis added).

The *Feres* case was therefore quite different from the *Brooks* case, where the Court allowed recovery under the FTCA for injuries caused by a negligent civilian employee of the Government. Unlike the negligence alleged in the operation of a vehicle, the claims in *Feres* would require Army officers "to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977).

In this case, the issue to be decided is whether Plaintiffs' claims, which arise from the negligent operation of a motor vehicle by a civilian employee of the Government, are governed by the *Brooks* case or the *Feres* case.

Brooks v. United States, 337 U.S. 49 (1949)

Feres v. United States, 340 U.S. 135 (1950)

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

United States v. Shearer, 473 U.S. 52 (1985)

28 U.S.C. §§ 2671-2680

STATEMENT OF THE CASE

I. The Accident

On April 15, 2021, shortly after 7:30am, E-5 Staff Sergeant Cameron Gayle Beck (“Staff Sergeant Beck”), reported to his duty station at the Wing Cybersecurity Office on the Whiteman Air Force base in Knob Noster, Missouri. App066; R. Doc. 6-3 at 2. At around 11:00am, while returning home to have lunch with his wife and seven-year-old son, Staff Sergeant Beck was killed when Blanca C. Mitchell, a civilian Government employee, crashed into Staff Sergeant Beck’s motorcycle. App004; R. Doc. 1 at 4 (Compl., ¶ 10).

On July 30, 2021, the Government charged Mitchell with operating a motor vehicle in a careless and imprudent manner, App022, and on September 7, 2021, Mitchell pleaded guilty to having knowingly operated a motor vehicle in a careless and imprudent manner by making a left turn while failing to yield to an oncoming motorcycle causing an accident that resulted in the death of Staff Sergeant Beck. App006; App041; R. Doc. 1 at 6 (Compl., ¶ 17); R. Doc. 1-4. Specifically, Mitchell admitted that she “did knowingly operate a motor vehicle on a roadway in a careless and imprudent manner by making a left turn from Spirit Boulevard onto Ellsworth Lane while failing to yield to an oncoming vehicle causing an accident that resulted in the death of [Staff Sergeant Beck].” App042; R. Doc. 1-4 at 2. Through her plea,

Mitchell “accepted full and complete responsibility for her actions[.]” *U.S. v. Blanca Mitchell*, No. 4:21-cr-00187-CR-W-JAM (W.D.Mo.), Dkt. No. 16 at 2.

II. The Proceedings Below

On April 14, 2023, Plaintiffs filed a complaint in the district court under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for the wrongful death of Staff Sergeant Beck and for the loss of Beck’s 2007 Yamaha. App001; R. Doc. 1. On September 15, 2023, the Government moved to dismiss the complaint for lack of subject matter jurisdiction under Red. R. Civ. P. 12(b)(1). App056; R. Doc. 5. In their response to the motion, the Plaintiffs requested that the district court “stay its ruling on the motion to dismiss until after the completion of juridical discovery.” R. Doc. 13, at 15-16.

Additionally, while the Government’s motion to dismiss was pending, the parties filed a Joint Motion to File Supplemental Suggestions to Defendant’s Motion to Dismiss and Plaintiffs’ Request for Leave to File Under Seal. App166; R. Doc. 23. The Plaintiffs also requested that they be permitted to submit the deposition of Blanca Mitchell under seal since it remained subject to the district court’s protective order. App167, R. Doc. 23 at 2; App168, R. Doc. 24.

On February 1, 2024, the district court granted the Government’s motion to dismiss and denied as moot the Motion to File Supplemental Suggestions to Defendant’s Motion to Dismiss and Plaintiffs’ Request for Leave to File Under Seal.

App171; R. Doc. 24. In its ruling on the motion to dismiss, the district court held that although Plaintiffs' claims "do[] not directly implicate military management or otherwise intrude upon sensitive military affairs," Staff Sergeant Beck's active duty status and the location of the accident "leaves the Court satisfied that the Feres doctrine bars Plaintiffs' claim." App176-78; R. Doc. 24, at 6-8. The district court also denied the Parties' supplemental suggestions because it found that additional facts regarding the accident "are not material to the Court's analysis under Feres." App179; R. Doc. 24, at 9.

SUMMARY OF ARGUMENT

The Federal Tort Claims Act subjects the United States to liability for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The statute effects a broad waiver of sovereign immunity from suits in tort and allows suits against the Government for negligent acts of government employees. 28 U.S.C. § 2671. It was especially important to Congress that injured individuals be permitted under the FTCA to sue the Government "in respect to such torts as negligence in the operation of vehicles." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 fn. 4 (2004), citing S.Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946) ("With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right

to sue the Government in respect to such torts as negligence in the operation of vehicles”).

In *Feres v. United States*, 340 U.S. 135 (1950), however, the Supreme Court reasoned that the Act does not extend to those who are injured “incident to” military service. While the Court’s rationale for its decision has varied over the years, the key takeaway from *Feres* and its progeny is that the *Feres* immunity doctrine “bars judicial review of military *decision-making*.” *Wetherill v. Geren*, 616 F.3d 789, 790 (8th Cir. 2010) (emphasis added). Put another way, while *Feres* permits the types of claims that do not generally involve judicial second-guessing of military decisions—like those arising from the negligence alleged in the reckless operation of a motor vehicle, *see e.g., Brooks v. United States*, 337 U.S. 49 (1949)—it does *not* allow the types of claims, like those alleged in *Feres*, that would require military officers “to testify in court as to each other’s decisions and actions.” *Stencel*, 431 U.S. at 673.

In this case, Staff Sergeant Beck was killed because of Blanca Mitchell’s careless operation of a government transit van. Plaintiffs’ claims are therefore *not* the type that require military officers to testify in court as to each other’s decisions. In fact, Mitchell *admits* that the only reason she crashed into Staff Sergeant Beck was because she was distracted by her cell phone. Accordingly, Plaintiffs’ claims are permitted under *Feres* and the Federal Tort Claims Act.

ARGUMENT

I. The District Court Erred by Misapplying the *Feres* Doctrine

Standard of Review: This Court reviews the dismissal of a complaint for lack of subject matter jurisdiction de novo. *See Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir.1993).

A. The *Feres* Immunity Doctrine Only Applies to Claims that Require A Civilian Court to Scrutinize Military Decisions

The FTCA subjects the United States to liability for tort claims “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. The statute effects “a broad waiver of sovereign immunity” from suits in tort, *Millbrook v. United States*, 569 U.S. 50, 52 (2013), and allows suit for negligent acts or omissions of government employees, a category specifically defined to include “members of the military or naval forces of the United States.” 28 U.S.C. § 2671. While the Act contains several exceptions to its broad waiver of immunity, “none generally precludes FTCA suits brought by servicemen.” *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). Rather, by its plain terms, the FTCA bars only military-related claims “arising out of ... combatant activities ... during time of war.” 28 U.S.C. § 2680(j).

In *Brooks*, the Supreme Court gave effect to the plain meaning of the statute and held that members of the United States armed forces *can* recover under the FTCA for injuries not incident to their service. In *Brooks*, two servicemen were

injured, while on furlough, in a collision with an Army truck driven by a civilian employee of the military. 337 U.S. at 51. The Government moved to dismiss on the ground that the servicemen were in the armed forces at the time of the accident and were therefore barred from recovery. *Id.*, at 50.

The Supreme Court rejected the Government's contention primarily because the relationship between the Government and the servicemen at the time of the accident "was not analogous to that of a soldier injured while performing duties under orders." *Feres*, 340 U.S. at 146. Unlike service-related injuries that would require Army officers "to testify in court as to each other's decisions and actions," *Stencel*, 431 U.S. at 673, "the negligence alleged in the operation of a vehicle" by a civilian employee is more analogous to the liability that would exist if the United States were a private individual. *Shearer*, 473 U.S. at 58.

One year later, however, in *Feres*, the Supreme Court was presented with a "wholly different case"—one that *would have* required Army officers to testify in court as to each other's decisions and actions—and held that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. Although not readily apparent from the texts of the FTCA, the Court reasoned that the Act was intended by Congress only to "to waive immunity from *recognized* causes of action." *Id.* at 142 (emphasis added). And since no federal law recognizes a cause of action

for injuries arising out of or during military duty (which would, if allowed, require Army officers to testify in court as to each other's decisions and actions), the Court concluded that the Government is not liable under the FTCA to members of the armed forces for injuries arising out of or sustained during activity incident to service. *Id.* at 146.

Although *Feres* was originally predicated upon several grounds, the Supreme Court later stated that “[i]n the last analysis, *Feres* seems best explained by the ‘peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.’” *Shearer*, 473 U.S. at 57, 58 fn.4 (quoting *United States v. Brown*, 348 U.S. 110 (1954)). Put another way, “[t]he *Feres* doctrine [is] premised on the disruptive nature of judicial second-guessing of military decisions.” *Walch v. Adjutant Gen.'s Dep't of Texas*, 533 F.3d 289, 296 (5th Cir. 2008); *see also Uhl v. Swanstrom*, 876 F. Supp. 1545, 1562 (N.D. Iowa 1995), *aff'd*, 79 F.3d 751 (8th Cir. 1996) (“the concern that civilian court inquiry might adversely affect the intramilitary disciplinary structure has emerged as the most compelling rationale for the *Feres* doctrine”).¹

¹ The three rationales originally offered for the *Feres* doctrine are: (1) the “distinctly federal” relationship between the United States and its service personnel; (2) the presence of an alternative compensation system; and (3) the

This later rationalization offered by the Supreme Court has informed all its *Feres* immunity decisions and provides the outer limits of the *Feres* immunity bar. While *Feres* immunity bars civil tort actions that have the effect of challenging a military decision, it does *not* apply to the types of cases, like *Brooks*, that involve impulsive and non-deliberative acts of carelessness occurring in what are otherwise ordinary civilian contexts (like the careless driving of an automobile). Indeed, if the

fear of disrupting the military disciplinary structure. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671–72 (1977). But as this Court has cautioned, “court decisions have tended not to emphasize the first two rationales for the *Feres* doctrine.” *Brown v. United States*, 739 F.2d 362, 365 (8th Cir. 1984) (“*Brown II*”). The Government insists that Courts “need not examine the three ‘rationales’ underlying the *Feres* doctrine.” R. Doc. 6, at 17. Indeed, the presence of an alternative compensation system was noted approvingly by the Supreme Court in *Brooks*, in which the Court *allowed* recovery under the FTCA. See *Brooks*, 337 U.S. at 53–54 (remanding the case for further proceedings to determine whether and by how much Brooks's FTCA judgment should be off-set by their/his military disability benefits). And *Feres* neither overruled *Brooks*, nor limited *Brooks* to its immediate facts as subsequent decisions have applied *Brooks* rather than *Feres*, and allowed FTCA claims in cases in which the injured plaintiffs were fully covered by the government’s compensation scheme. See e.g. *United States v. Brown*, 348 U.S. 110 (1954) (*Brooks* held controlling where veteran sued Veteran’s Administration hospital for malpractice in treating an injury sustained while plaintiff was in military service); *Harvey v. United States*, 884 F.2d 857, 861 (5th Cir.1989) (despite the fact that serviceman “[i]ndisputably ... received some compensation from the military during the time he was on medical hold” he was permitted to sue for injuries sustained due to military medical malpractice); *Johnson v. United States*, 704 F.2d 1431, 1441 n. 6 (9th Cir.1983) (\$1.5 million in Veterans Act benefits deducted from serviceman's \$3.5 million FTCA award). The Court’s new spin on *Feres*, however, *does* justify a distinction between *Brooks* and *Feres*. The *Brooks* case did not involve any judicial second-guessing of military decisions whereas the *Feres* case did.

Supreme Court had intended the *Feres* immunity doctrine to be a complete bar to recovery in cases involving a service member, or even if it had intended the *Feres* doctrine to be a complete bar to recovery in cases involving *active-duty* service members injured on base, the Supreme Court would have described *Feres* as “best explained” by the active-duty status of military personnel or by the geographic zone within which the military maintains domestic operations. It has not. Instead, the Supreme Court has consistently and repeatedly described the *Feres* immunity doctrine as being justified by the anomalous and unprecedented prospect that, if military *decisions* were subject to redress through civilian courts, the military would be unable to properly prepare for combat.² *Cf. Wetherill*, 616 F.3d at 790 (stating that “the *Feres* doctrine ... generally bars judicial review of *military decision-making*” (emphasis added)).

² See e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”); *id.* (“centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.”).

The fact that most distinguishes *Brooks* from *Feres*, then, is not the location of the injury or the status of the injured servicemen; rather, it is the fact that “[u]nlike the negligence alleged in the operation of a vehicle [in *Brooks*], the claim [in *Feres*] would require Army officers to testify in court as to each other’s decisions and actions.” *Shearer*, 473 U.S. at 58 (internal quotation and citations omitted). To permit the latter type of suit, the Supreme Court stated,

would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier’s off-base conduct. But as we noted . . . , such complex, subtle, and professional decisions as to the composition, training, and control of a military force are essentially professional military judgments.

Id.

Thus, when properly applied, the “incident to service test” requires that when a claim on its face is the type that would ordinarily “require[] the civilian court to second-guess military decisions,” or when the complaint, fairly read, calls into question “the ‘management’ of the military”—that is, “basic choices about the discipline, supervision, and control” of service personnel—the court must abstain so as to avoid interference with the unique structure of the military. *Id.* at 57–58. *See also Clendenning v. United States*, 19 F.4th 421, 427 (4th Cir. 2021) (stating that “[t]here is ‘no specific element-based or bright line rule’ for determining whether certain conduct [is] ‘incident to service.’ Instead, we 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.’ ” (first quoting *Aikens v. Ingram*, 811 F.3d 643, 650 (4th Cir. 2016), and then quoting *Cioca v. Rumsfeld*, 720 F.3d 505, 515 (4th Cir. 2013)) (second alteration in original)).

* * *

Justice Thomas recently remarked that attempts by lower courts to apply the *Feres*’ “incident to military service” standard “are marked by incoherence.” *Clendening v. United States*, 143 S. Ct. 11, 12 (2022) (Thomas, J., dissenting from denial of certiorari). And this Court has remarked that the *Feres* doctrine “has been roundly criticized as unjust and unwarranted.” *Cutshall v. United States*, 75 F.3d 426, 429 (8th Cir. 1996). But there is clarity, justification, and a glimmer of fairness at least in the cases decided by this Court and by the Supreme Court of the United States. An attentive review of the relevant and binding authority makes plain that the proper—and righteous—standard to be applied is simply to ask whether the claims at issue are the type that would ordinarily call into question military decisions.

In *Stencel*, for example, a member of the military was permanently injured when the egress life-support system on his F-100 fighter jet malfunctioned. 431 U.S. at 667. The plaintiff sued the Government and the manufacturer, alleging that the system malfunctioned because of the negligence of both. The manufacturer then

cross-claimed the United States for indemnity, charging that the Government provided faulty specifications, requirements, and components. *Id.* at 668.

The Supreme Court, however, reasoned that since the third-party indemnity claim, like a direct action by the servicemember, would necessarily “involve second-guessing military orders, and [] often require members of the Armed Services to testify in court as to each other’s decisions and actions,” it was barred by the *Feres* immunity doctrine. *Id.* at 673-74.

Likewise, in *Shearer*, a Private in the Army was kidnapped and killed while off duty and away from base. It was later discovered, however, that the murderer was another serviceman known by the military to be a danger. Thus, believing that the Government was to blame for having failed to control or warn against the danger, the Private’s mother brought an action under the FTCA claiming that the Army “negligently and carelessly failed to exert a reasonably sufficient control over” the assailant and “failed to warn other persons that he was at large.” 473 U.S. at 54.

After observing that the Third Circuit had “placed great weight on the fact that [the Private] was off duty and away from the base when he was murdered,” the Supreme Court held that “the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions ... and whether the suit might impair essential military discipline.” *Id.* at 57 (internal citations omitted). Since the mother’s claim against the Army in *Shearer* “str[uck] at

the core of these concerns” and “call[ed] into question basic choices about the discipline, supervision, and control of a serviceman,” the Supreme Court held that it was barred by the *Feres* immunity doctrine. *Id.* at 52.

In *United States v. Johnson*, a Lieutenant Commander in the Coast Guard was killed when his helicopter crashed during a rescue mission. 481 U.S. at 682–83. The Lieutenant’s wife filed suit against the Government alleging that the crash resulted from the negligent actions of the Federal Aviation Administration’s civilian radar controllers. *Id.* She argued that since the claims asserted were based solely upon the conduct of civilian employees, the *Feres* immunity doctrine did not apply.

The Supreme Court, however, held that “*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 “*type[s]*” of claims that, if generally permitted, 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 (emphasis in original)). Since the Lieutenant’s injuries arose directly out of a rescue mission, the Supreme Court reasoned that his wife’s suit was *precisely* the kind that, if generally permitted, would involve a wide range of military and disciplinary decisions. *Id.* at 692.

This Court, too, has repeatedly recognized since *Shearer* that the critical issue in deciding whether an injury arose out of or in the course of an activity incident to

service is whether the suit requires the civilian court to second-guess military decisions or whether the suit might impair essential military discipline.

In *Brown II*, for example, a member of the Nebraska Army National guard, Private Dan Briscoe, was participating in training exercises for guardsmen at Fort Gordon, Georgia. While off duty for Memorial Day (though not on furlough), Briscoe attended a party held on the military base during which other guardsmen placed a noose around Briscoe's neck and raised him off the ground. Afterwards, the National Guard investigated the incident but determined that although it was a crude, ill-advised prank, it was not undertaken with the intention of physically harming Briscoe. However, following the mock lynching, Briscoe attempted suicide, leaving him with permanent and severe physical and mental injuries. *Brown II*, 739 F.2d at 368.

Briscoe's mother subsequently brought an action in federal district court against the United States under the FTCA and the individual participants in the incident under 42 U.S.C. § 1981 and 1983. The district court granted summary judgment in favor of all defendants and dismissed the case.

This Court, however, reversed the decision as to the individual defendants. In so holding, the Court utilized an analytical framework broken down into two parts: "(1) whether there is a relevant relationship between the service member's activity and the military service, and (2) whether military discipline will be impeded if the

challenged conduct is litigated in a civil action.” *Id.* at 367 (emphasis added).³ The Court concluded that since the claims against the individual defendants “[did] not involve the command relationship between a service member and his or her superiors, nor [any] military decisionmaking with respect to disciplinary matters,” the mother’s claim was “distinctly non-military” and thus, outside the scope of the *Feres* immunity doctrine. *Id.* at 369.

In contrast, in *Miller*, the plaintiffs brought a claim that was squarely within the scope of the *Feres* immunity doctrine. In *Miller*, a private first class on active duty with the Army was killed when an aluminum ladder with which he was working made contact with an uninsulated electric wire owned and controlled by the Army.

³ As for the first part, the Court focused its attention on three sub-factors: the duty status of the service member, the location of the injury, and the nature of the activity. However, to “truly to determine whether the policy reasons underlying *Feres* will be fulfilled by the application of military immunity,” the Court focused its attention on the third sub-factor and examined “what the serviceperson was actually doing at the time of the injury.” *Brown II*, 739 F.2d at 368 (quoting *Miller v. United States*, 643 F.2d 481, 497 (8th Cir.1981) (en banc) (Heaney, J., dissenting)). As for the second factor—the effect of military discipline—the Court divided the various claims into three categories: (1) the failure to prevent the incident, (2) the actual participation by certain defendants in the incident, and (3) the failure to perform a proper investigation of the incident. The Court held that since the claims against the United States “directly calls into question the disciplinary *decisions* of Briscoe’s superior officers,” and “strikes directly at military *decisionmaking* with respect to a disciplinary matter,” the claims were barred by the *Feres* immunity doctrine. *Brown II*, 739 F.2d at 369. However, as to the claim against the participants, the Court held that since it did not involve any “military *decisionmaking*,” the claim was permitted. *Id.* at 369 (emphases added).

643 F.2d at 490. Although the private was working during his off-duty hours, the decedent's representatives brought a claim against Government alleging that the United States Army was negligent for having failed to de-energize the electric lines in question.

This Court affirmed the dismissal of the claim, reasoning, among other things, that “if [the] case were permitted to go to trial ... the conduct of Miller’s military superior would be called in question in the civil courts, a circumstance that might well have the destructive effect on military authority and discipline mentioned by the Supreme Court[.]” *Id.* at 494.⁴

Meanwhile, in the Court’s most recent *Feres* decision, the Court explicitly described the *Feres* immunity doctrine as “bar[ing] judicial review of *military decision-making*.” *Wetherill*, 616 F.3d at 790 (emphasis added). In *Wetherill*, a National Guard technician brought a claim against the Government alleging that the decision by her military superiors to revoke her waiver of mandatory retirement was motivated by their unlawful discrimination. This Court held that since the claim challenged a decision that plaintiff described as being made “for ‘force management’ issues,” the case fell “[with]in the heartland of the *Feres* doctrine.” *Id.* at 791, 799.

⁴ The various other reasons offered by the Court in *Miller* are of significantly less precedential value since *Miller* was decided before the Supreme Court reconstrued the *Feres* doctrine in *Shearer*.

Likewise, in *Hupp v. U.S. Dep't of the Army*, 144 F.3d 1144 (8th Cir. 1998), the Court affirmed the dismissal of a gender discrimination claim because it was “beyond genuine controversy that [a] [military] hiring decision [was] at issue.” *Id.* at 1145. In fact, the plaintiff in *Hupp* even admitted that military decisions concerning the National Guard “are non-justiciable under the *Feres* doctrine.” *Id.* at 1147.

Similarly, in *Uhl v. Swanstrom*, 79 F.3d 751 (8th Cir. 1996), the Court affirmed the dismissal of a National Guard member’s claim that his discharge from military service violated his right to due process and equal protection. The Court reasoned that the determination that the plaintiff was no longer mentally fit for military duty and the decision to discharge the plaintiff were precisely the type of military decisions with which the courts may not interfere under the *Feres* doctrine. *Id.* at 756.

In the same vein, the Court in *Wood v. United States*, 968 F.2d 738 (8th Cir.1992), affirmed the dismissal of a military employment dispute since it was barred by “the doctrine restricting review of military decision-making.” *Id.* at 739. And in *Watson v. Arkansas Nat. Guard*, 886 F.2d 1004 (8th Cir. 1989), the Court affirmed the dismissal of a National Guardsman’s claim under 42 U.S.C. § 1983 because it “would require a highly intrusive judicial inquiry into personnel decisions” *Id.* at 1008.

In *Bowers v. United States*, 904 F.2d 450 (8th Cir. 1990), rather than challenge an employment decision, the plaintiff challenged the decision by military doctors to conduct an inadequate screen for cancer in their pre-induction medical exam. *Id.* at 451. Nevertheless, the Court affirmed the dismissal of the claim since “a court decision that the physicians who examined Bowers were negligent would have a direct effect upon military judgments and decisions.” *Id.* at 452. *See also Sloan v. United States*, 208 F.3d 218 (8th Cir. 2000) (unreported) (affirming dismissal of a wrongful death action since the plaintiff challenged the decisions of active-duty military personnel); *Brown v. United States*, 151 F.3d 800, 807 (8th Cir. 1998) (affirming dismissal of a medical malpractice action against a U.S. Army surgeon since there existed “a significant likelihood that [the] suit, if allowed to go forward, would interfere with the military’s disciplinary structure”); *Cutshall*, 75 F.3d 426 (dismissing Marine’s medical malpractice claim for injury caused by Navy doctors who treated her non-Hodgkins lymphoma with an antibiotic as if it were an infection).

And in *Dozler v. United States*, 869 F.2d 1165 (8th Cir. 1989), which involved the murder of an Army Sergeant by two fellow servicemen (one having hired the other), the Court held that because the claims there “call[ed] into question [the] military decisions of [the assailants’] superior officers and other military personnel,” the claims were barred by the *Feres* immunity doctrine. *Id.* at 1166.

* * *

In *Miller*, this Court expressly held that “[w]e need not *and do not* hold that every action for injuries sustained by an active duty serviceman while on base is barred by *Feres*.” 643 F.2d at 493 (emphasis added); *see also Chappell*, 462 U.S. at 304 (“This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts...”). And in *Wetherill*, this Court observed that *Feres* “generally bars judicial review of *military decision-making*.” 616 F.3d at 790 (emphasis added). The clear principle that emerges from all these decisions is that civilian courts may not sit in plenary review over the types of claims that ordinarily involve some kind of *military decision-making*.⁵ Regardless of whether it involves a personnel decision, an operational decision, a medical decision, or disciplinary decision, civilian courts may not decide a case that calls into question a decision properly left to the military.

⁵ In *United States v. Stanley*, 483 U.S. 669 (1987), the Supreme Court clarified that inquiry does not depend on the *particular* facts of each suit, since such a specific inquiry would, itself, intrude upon military matters. Rather, as the Court stated in *Johnson*, the *Feres* doctrine applies where the suit consists of the “*type[s]* of claims that, if generally permitted, 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 (emphasis in original)); *see also Egbert v. Boule*, 596 U.S. 482, 496 (2022) (stating that under *Stanley* courts must inquire “more broadly” whether there is a risk of intrusion into military matters).

However, where an active-duty serviceman is injured because of a non-deliberative and spontaneous act of careless driving, as in the *Brooks* case, an action for the injuries sustained by the serviceman is *not* barred by *Feres*. Put another way, the *Feres* immunity doctrine applies only when necessary to protect the military from the types of suits that would ordinarily require the civilian court to second-guess military decisions. Where the suit is instead the kind that will *not* require the civilian court to second-guess military decisions, *Feres* immunity does *not* apply.⁶ Indeed, if the *Feres* immunity doctrine applied even to cases where no military decision is at issue, the doctrine would serve only as a cruel and arbitrary for punishment for the few among us who choose service before self.

B. Plaintiffs’ Claims are Not Barred by the *Feres* Immunity Doctrine

Proper application of the “incident to service” test in this case clearly reveals that Plaintiffs’ claims are *not* the type that, if generally permitted, would call into question any military decisions. Plaintiffs allege that Blanca C. Mitchell, a civilian

⁶ The test articulated here—which asks whether the suit is the kind that will require the civilian court to second-guess military decisions—also fits perfectly with the standard articulated in *Feres* itself: to determine whether an injury arose out of or occurred during an activity incident to military service, one must decide whether the claim resulting from the injury involves some kind of military decision-making. If it does not, the injury can hardly be considered to have emerged from or to have occurred incident to military service. Injuries caused by ordinary acts involving no military decision-making are precisely the kind this Court must have meant when it said that “not ... every action for injuries sustained by an active duty serviceman while on base is barred by *Feres*.” *Miller*, 643 F.2d at 493.

employee of the Government, carelessly and without forethought crashed into Staff Sergeant Beck's motorcycle because she failed to yield to oncoming traffic prior to making a left turn onto Ellsworth Lane. App005; R. Doc. 1 at 5 (Compl., ¶ 13).⁷

After the accident, the Government charged Mitchell with operating a motor vehicle in a careless and imprudent manner, App022, and on September 7, 2021, Mitchell pleaded guilty to having knowingly operated a motor vehicle in a careless and imprudent manner by making a left turn while failing to yield to an oncoming motorcycle causing an accident that resulted in the death of Staff Sergeant Beck. App006; App041; R. Doc. 1 at 6 (Compl., ¶ 17); R. Doc. 1-4. Specifically, Mitchell admitted that she “did knowingly operate a motor vehicle on a roadway in a careless and imprudent manner by making a left turn from Spirit Boulevard onto Ellsworth Lane while failing to yield to an oncoming vehicle causing an accident that resulted in the death of [Staff Sergeant Beck].” App042; R. Doc. 1-4 at 2. Through her plea, Mitchell “accepted full and complete responsibility for her actions[.]” *U.S. v. Blanca Mitchell*, No. 4:21-cr-00187-CR-W-JAM (W.D.Mo.), Dkt. No. 16 at 2.

⁷ Plaintiffs heed the Supreme Court's statement in *United States v. Johnson*, 481 U.S. 681 (1987), that the *Feres* doctrine does not turn on the “military status of the alleged tortfeasor.” But *Johnson* held merely that the status of FAA employees as civilians did not preclude the application of *Feres* when a Coast Guard helicopter pilot crashed during a rescue mission. *Id.* at 691. In the present case, and conversely, Mitchell's status as an employee of the military does not change the character of Mitchell's driving as a *non-military* activity.

Meanwhile, in their Complaint, the Plaintiffs charge only that Mitchell, while acting within the scope of her employment, carelessly and negligently turned left in front of the motorcycle that Staff Sergeant Beck was driving, causing a sudden and violent collision resulting in Staff Sergeant Beck's injuries and death. App005-07; R. Doc. 1 at 5-7 (Compl., ¶¶ 13, 17). Plaintiffs include that Mitchell "pled guilty to knowingly operating a government motor vehicle in a careless and imprudent manner." App006; R. Doc. 1 at 6 (Compl., ¶ 17).

Critically, Plaintiffs do not challenge a *single* military decision nor are their claims the type that would ordinarily require Army officers to testify in court as to each other's decisions. In fact, the district court expressly found that Plaintiffs' claims, which have only to do with the negligent operation of motor vehicle by a civilian employee, "do[] *not* directly implicate military management or otherwise intrude upon sensitive military affairs," and the district court emphasized that "the concerns raised in Shearer are *not* present in the instant case." App175-76; R. Doc. 24, at 5-6 (emphases added).

Indeed, as the Supreme Court, itself, observed, the negligence alleged in the operation of a vehicle is quite "unlike" the kind of negligence that "would require Army officers 'to testify in court as to each other's decisions and actions.'" *Shearer*, 473 U.S. at 58 (quoting *Stencel*, 431 U.S. at 673). And this is no doubt true. Unlike the kinds of claims barred by the *Feres* immunity doctrine, we are dealing instead

with an ordinary traffic accident that had *nothing* to do with Staff Sergeant Beck's military career. No commanding officer or service member will have to stand prepared to convince a civilian court of the wisdom of *any* military or disciplinary decisions. *Pierce v. United States*, 813 F.2d 349, 354 (11th Cir. 1987) (“[T]he negligence alleged in the operation of a vehicle ... [would not] require Army Officers ‘to testify in court as to each other's decisions and actions.’ ” (quoting *Shearer*, 473 U.S. at 58)); *Lee v. United States*, 361 F. Supp. 3d 1306, 1313 (S.D. Ga. 2019) (“operating a motor vehicle while relieved of any militarily assigned tasks is not an activity materially related to military service” (internal quotation omitted)).

In short, the negligence alleged here is *precisely* the kind of garden-variety, ordinary claim that Congress had in mind when it passed the FTCA. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 fn. 4 (2004), citing S.Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946) (“With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles”). Nothing in this case risks interference with the unique structure of the military and nothing in the case will require that the district court sit in review of *any* military decision. Therefore, this case is governed by *Brooks* (which itself involved the negligent operation of a motor vehicle by a civilian employee of the Government) rather than *Feres*.

C. The District Court Erred by Fixating on the Wrong Factors

The district court properly found that that Plaintiffs' claims, which have only to do with the negligent operation of motor vehicle by a civilian employee, "do[] *not* directly implicate military management or otherwise intrude upon sensitive military affairs." App175-76; R. Doc. 24, at 5-6 (emphases added). The district court also properly found that "the concerns raised in Shearer are *not* present in the instant case." *Id.* (emphases added). However, rather than end its analysis once it determined that Plaintiffs' claims do not call into question any military decisions, the district court fixated on Staff Sergeant Beck's active-duty status and the location of the accident on Whiteman Airforce Base. App177; R. Doc. 24, at 7. But those are *precisely* the factors the Supreme Court cautioned courts against fixating on.

In *Shearer*, as stated above, the Supreme Court explained that duty status and the site of incident "[are] not nearly as important as whether the suit requires the civilian court to second-guess military decisions..." 473 U.S. at 57 (internal citations omitted). *See also Parker v. United States*, 611 F.2d 1007, 1014 (5th Cir. 1980) ("where the injury occurred should not be emphasized above all other factors"); *Clendening*, 19 F.4th at 428 ("While considerations such as 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 are relevant, they are not always

determinative.”).⁸ Again, the incontrovertible principle made evident by the decisions of the Supreme Court is that the *Feres* immunity doctrine bars only claims involving some kind of military *decision-making*. While a servicemember’s duty status and the location of the injury are oftentimes relevant factors in the analysis, they are *not* a substitute for analyzing whether the claims at issue are the type that would ordinarily call into question military decision-making or require judicial inquiry into, and hence intrusion upon, military matters.⁹ Nor do they provide an alternative basis upon which to dismiss an otherwise valid claim.

⁸ Numerous courts have permitted military personnel to recover under the FTCA even though the negligent acts complained of occurred on military bases. *See, e.g., Troglia v. United States*, 602 F.2d 1334, 1339 (9th Cir. 1979) (accident on government-owned road adjacent to military base); *Bryson v. United States*, 463 F.Supp. 908, 914 (E.D.Pa.1978) (serviceman on pass injured on-base can sue under FTCA because the “location of the incident bears no significant causal relationship to the injury”); *Downes v. United States*, 249 F.Supp. 626 (E.D.N.C.1965) (plaintiff on-base but “on a pass pursuing his personal affairs.”); *Hand v. United States*, 260 F.Supp. 38, 42 (M.D.Ga.1966) (although accident occurred on-base, relevant question is what plaintiff was doing when injured); *Rich v. United States*, 144 F.Supp. 791, 792 (E.D.Pa.1956) (“The determinative fact in each case is not where the plaintiff was at the time he was injured ... but whether what he was doing at the time was ‘in the course of activity incident to service.’”); *Nowotny v. Turner*, 203 F.Supp. 802 (M.D.N.C.1962) (*Feres* does not bar suit merely because accident occurred on military base). As the Fifth Circuit explained, “[e]ven when the negligence occurred on-base, the court is obligated to explore the nature of the ‘function the soldier was performing at the time of the injury in order to ascertain the totality of the circumstances.’” *Parker*, 611 F.2d at 1014 (*quoting Johnson v. United States*, 704 F.2d 1431, 1437 (9th Cir. 1983)).

⁹ The district court also referenced the fact that since Staff Sergeant Beck was not furlough, leave, or pass, he “remained subject to immediate recall.” JA177; R.

Indeed, were it otherwise, *all accidents* occurring on a military base would be barred by the *Feres* immunity doctrine. But that, of course, is not the law. *See Miller*, 643 F.2d at 493 (“We need not and do not hold that every action for injuries sustained by an active duty serviceman while on base is barred by *Feres*.”); *see also Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) (“While lower courts are bound by the Supreme Court’s decision in *Feres*, they are hardly obliged to extend the limitation....”).

Accordingly, since the district court properly found that Plaintiffs’ claims are *not* the type that call into question military decisions or require judicial inquiry into, and hence intrusion upon, any military matters, and since Plaintiffs’ claims are analogous to those alleged in the *Brooks* case, the district court erred when it dismissed Plaintiffs’ claims for lack of subject matter jurisdiction under *Feres*.¹⁰

Doc. 24, at 7. But as the Fifth Circuit has observed, the Government admits “that even soldiers on furlough can be recalled, yet those soldiers have an FTCA action if injured.” *Parker*, 611 F.2d at 1014 (citing *Hand v. United States*, 260 F.Supp. 38, 41 (M.D.Ga.1966)). Therefore, this fact alone cannot serve as the basis upon which to apply the *Feres* immunity doctrine.

¹⁰ The District Court also properly found that “the act of taking a lunch break is not in and of itself a privilege related to or dependent upon military status, and so the “special category of cases in which the *Feres* rule has been applied because the service members, at the time of the injury, were enjoying a benefit because of their status as military personnel” does not apply. *Brown II*, 739 F.2d at 368.

II. **Alternatively, the District Court Erred by Refusing Plaintiffs' Request that they be Permitted Jurisdictional Discovery**

Standard of Review: This Court reviews the denial of a request for jurisdictional discovery for an “abuse of discretion.” *See Steinbuch v. Cutler*, 518 F.3d 580, 588 (8th Cir. 2008) (employing an abuse of discretion standard in reviewing a district court’s denial of jurisdictional discovery).

Although Plaintiffs insist that it is beyond dispute that their claims belong squarely in the heartland of the *Brooks* case, the Government argues that Plaintiffs’ claims are barred by the *Feres* immunity doctrine since “Staff Sergeant Beck died on base while he remained subject to immediate recall for mission essential purposes by his supervisor to his duty station even during his lunch break.” R. Doc. 6 at 6. “[T]wo primary factors,” according to the Government, “demonstrate[e] [that] Staff Sergeant Beck’s death was incurred ‘incident to service’ in the Air Force.” *Id.* at 8. First, Staff Sergeant Beck was on active-duty status at the time of the accident, and second, the accident occurred “on a secured military base.” *Id.*

But as shown above, the Supreme Court has explained that duty status and the site of incident “[are] not nearly as important as whether the suit requires the civilian court to second-guess military decisions...” *Shearer*, 473 U.S. at 57 (internal citations omitted). *See also Clendenning*, 19 F.4th at 428 (“While considerations such as 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 are relevant, they are not always determinative.”).

In order to show that their suit does *not* require the civilian court to second-guess any military decisions, Plaintiffs requested that the district court “stay its ruling on the Government’s motion to dismiss until after the completion of jurisdictional discovery.” R. Doc. 13, at 15-16. Additionally, the Plaintiffs and the Government *jointly* requested leave to file supplemental suggestions to the Government’s Motion to Dismiss through which Plaintiffs requested leave to submit the testimony of Blanca Mitchell. App166; R. Doc. 23. Specifically, Plaintiffs were prepared to show that in her sworn deposition, Mitchell *admitted* that the accident which resulted in the death of Staff Sergeant Beck was “100 percent” her fault. Mitchell took *full responsibility* for the accident, stating that she turned in front of Staff Sergeant Beck without looking to see if there was any oncoming traffic because she was distracted by the possibility of objects falling from the passenger seat onto the floor.

Mitchell’s testimony *proves* that Staff Sergeant Beck is not to be blamed “for anything he did or didn’t do.” The accident, according to Mitchell, was 100% her fault. App169; R. Doc. 23-1 at 2 (quoting from the deposition of Blanca C. Mitchell). The import, of course, is that Mitchell’s testimony demonstrates, beyond any doubt, that the Plaintiffs’ claims will not involve judicial review of any *military decision-*

making. Wetherill, 616 F.3d at 790 (stating that “the *Feres* doctrine ... generally bars judicial review of *military decision-making*” (emphasis added)).

Additionally, Mitchell testified that, unlike ordinary military personnel who are paid from the appropriated funds of the military, she was a “non-appropriated fund employee.” This means that, unlike other civilian employees, Mitchell was paid from funds earned solely through the operation of civilian services “like the bowling alley, like the restaurant on base, youth center, childcare.” App168-69; R. Doc. 23-1 at 1-2. This, of course, further proves that that this case belongs squarely in the heartland of the *Brooks* case: the accident simply had nothing to do with the military “except in the sense that all human events depend upon what has already transpired.” *Brooks*, 337 U.S. at 52.

The district court, however, denied both Plaintiffs’ request to stay its ruling in lieu of their being permitted to conduct limited jurisdictional discovery and the parties’ joint motion for leave to file supplemental suggestions. App179; R. Doc. 24 at 9. Because the district court mistakenly relied solely upon the location of the accident and the duty status of Staff Sergeant Beck, as aforesaid, the district court erroneously held that “any additional facts from Blanca C. Mitchell’s testimony are not material to the Court’s analysis under *Feres*.” App179; R. Doc. 24 at 9.

To be sure, in *Wetherill*, this Court held that where the allegations laid out in a complaint make the applicability of *Feres* “an open-and-shut” case, a district court

does not err is dismissing the complaint without further discovery. 616 F.3d at 799. However, where the allegations in the complaint do *not* “situate th[e] case in the heartland of the *Feres* doctrine,” *id.*, the proper course is for the district court to “receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute.” *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). Accordingly, since the district court *accepted* the evidence and affidavits of the Government, it abused its discretion by denying Plaintiffs an opportunity to refute the Government’s contentions with evidence of their own.

CONCLUSION

For the reasons explained above, Plaintiffs respectfully request that this Court reverse the district court’s dismissal and remand the case for further proceedings.

Dated: March 29, 2024

Respectfully submitted,

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CERTIFICATE OF VIRUS FREE

The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Appellees' Brief has been scanned for computer viruses and that the document is virus free.

Dated: March 29, 2024

/s/ Andrew Schermerhorn
Andrew Schermerhorn

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f), the Brief contains 8,748 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: March 29, 2024

/s/ Andrew Schermerhorn
Andrew Schermerhorn

CERTIFICATE OF SERVICE

I hereby certify that, on March 29, 2024, a true and correct copy of the foregoing Motion was served with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Dated: March 29, 2024

/s/ Andrew Schermerhorn
Andrew Schermerhorn