

No. 24-1332

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

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**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***

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*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)*

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**REPLY BRIEF OF APPELLANTS**

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## INTRODUCTION

The Government contends that although *Feres* permits *some* claims arising out of on-base accidents involving members of the armed services, it does not permit claims arising out of Blanca C. Mitchell’s impulsive and uncontested act of careless driving. (Resp. Br. 11.) Instead, the Government maintains that because Staff Sergeant Beck was on duty, on base, and subject to immediate recall at the time of the accident, his injuries are, *per se*, “incident to service” and thus barred by the *Feres* immunity doctrine.

The Government, however, mistakenly interprets *Feres* and its progeny as requiring the strict application of a “status, location, and activity” test when, in fact, the opposite is true. In *United States v. Shearer*, the Supreme Court expressly *rejected* the rigid application of the Government’s “status, location, and activity” test and emphasized that the factors urged by the Government here are “not nearly as important as whether the suit requires the civilian court to second-guess military decisions.” 473 U.S. 52, 57 (1985) (citing *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977)). And this, of course, makes perfect sense. The Court in *Feres* was concerned with the anomalous and potentially dangerous effects of civilian courts interfering with sensitive military affairs.

Therefore, a standard that asks simply whether a particular suit will call into question military decision-making is not only consistent with Supreme Court

precedent (and the precedent of this Court), but it also provides a clear and objective criterion for future *Feres* decisions.

Once more, all that distinguishes this case from *Brooks v. United States*, 337 U.S. 49 (1949), is the status of Staff Sergeant Beck (on lunch break as opposed to leave) and the location of the accident (on base as opposed to off base). But where it counts, this case is equivalent to *Brooks*. We are dealing here with the negligent operation of a vehicle. The Plaintiffs' claims pose *no* risk of interfering with or implicating *any* military decision or affair. Just as in *Brooks*, the accident here had *nothing* to do with Staff Sergeant Beck's military service except in the vague sense that all human events depend upon what has already transpired. *Id.* at 52.

Therefore, Plaintiffs respectfully request that this Court reverse the district court's dismissal and remand this case for further proceedings.

## ARGUMENT

### **I. The *Feres* Doctrine Applies Only to Claims that May Require a Civilian Court to Scrutinize Military Decisions**

#### **A.**

In *Feres v. United States*, the Supreme Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” 340 U.S. 135, 146 (1950). And in *Wetherill v. Geren*, this Court held that “the standard to be applied ... to determine whether a particular claim is barred under the *Feres* doctrine is, quite

simply, the standard articulated in *Feres* itself: Did the injury complained of arise out of or occur in the course of activity incident to military service?” 616 F.3d 789, 798 (8th Cir. 2010). But as others have observed, a standard which asks simply whether an injury arose out of or occurred during activity incident to service has led to the chaotic and incoherent results that plague other circuits. *See Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J. dissenting) (collecting and comparing cases). Indeed, while oftentimes there may be little controversy as to whether an injury occurred “incident to service,” on other occasions, it may be entirely unclear, even as between purely objective jurists. *See e.g., Miller v. United States*, 643 F.2d 481 (8th Cir. 1981).

In our opening brief, we demonstrated that the precedent established in both this Circuit, and in the Supreme Court, is to treat the *Feres* immunity doctrine as applying only to the types of claims that call into question military decision making. (Br. 8-23.) While this Court has never articulated the standard in such certain terms, it has, through the wisdom of its decisions, been guided by its interpretation of the *Feres* doctrine as principally “bar[ing] judicial review of military decision-making.” *Wetherill*, 616 F.3d at 790.

The upshot is that this Court has avoided the chaotic and irreconcilable results that plague other circuits. By treating the *Feres* immunity doctrine as applying only to the types of claims that call into question a military decision, there exists a single

throughline in this Court’s precedent that preserves both the integrity of military decisions and the equitable treatment of service members whose injuries are purely civilian in nature.<sup>1</sup>

The Government, however, claims that because the Supreme Court previously refused to adopt a standard that distinguishes between injuries caused by civilian versus military personnel, *see in United States v. Johnson*, 481 U.S. 681 (1987), it also “foreclosed” a standard that asks whether a particular suit calls into question military decision-making. (Resp. Br. 11.) But the crux of the Court’s decision in *Johnson* was that the distinction between civilian and military negligence made no difference because “[e]ven if military negligence is not specifically alleged,” a suit arising from a service member’s death oftentimes “implicates the military *judgments and decisions* that are inextricably intertwined with the conduct of [a] military mission.” *Johnson*, 481 U.S. at 691 (emphasis added).

As the Supreme Court observed, civilian employees oftentimes play an integral role in military missions. *Id.* at 691 fn. 11. Therefore, rather than accept a standard that distinguished between the negligent acts of civilian and military personnel, the Supreme Court reiterated that *Feres* and its progeny bar the “type[s]

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<sup>1</sup> It is also worthy of pointing out that an “incident to service” test which asks whether the suit is the type that would call into question military decisions is appropriately broad. It grants immunity to the Government for all service-member injuries except for the extremely rare case in which a service member’s injury is purely civilian in nature, which, on a military base, is hardly ever the case.

of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” *Id.* at 690 (quotation omitted). In other words, *Johnson* all but announced the standard that Plaintiffs rely upon here.

The Government also contends that this Court’s own decision in *Cutshall v. United States*, 75 F.3d 426 (8th Cir. 1996), rejects an interpretation of the *Feres* doctrine as principally barring judicial review of military decision-making. (Resp. Br. 12-13.) But in *Cutshall*, the Court merely held that its own precedent barred actions for injuries caused by military doctors because, as it had concluded earlier in *Bowers v. United States*, “a court decision that the physicians who examined [the plaintiff] were negligent would have a direct effect upon *military judgments and decisions*....” *Cutshall*, 75 F.3d at 428 (alteration in original) (quoting *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990)).

The Government’s reliance upon the decisions of other circuits (Resp. Br 13), meanwhile, is of almost no value since, as others have noted, their “attempts to apply *Feres*’ ‘incident to military service’ standard are marked by incoherence.” *Clendening v. United States*, 143 S. Ct. 11, 12 (2022) (Thomas, J. dissenting); *see also Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (“[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable[.]”).

Still, most of the out-of-circuit decisions cited by the Government merely identify various non-dispositive factors utilized to determine whether a service member's injury was incident to military service. *See e.g., Chandler v. United States*, 713 F. App'x 251, 253 (5th Cir. 2017) (unpublished opinion); *Koury v. Sec'y, Dep't of Army*, 488 F. App'x 355, 357 (11th Cir. 2012); *Schnitzer v. Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004); *Costo*, 248 F.3d at 867; *Richards v. United States*, 176 F.3d 652, 655 (3d Cir. 1999); *Stewart v. United States*, 90 F.3d 102, 104 (4th Cir. 1996); *Wake v. United States*, 89 F.3d 53, 58 (2d Cir. 1996). But the existence in other circuits of various non-dispositive factors is hardly a strike against a test that asks whether a particular suit is the type that calls into question military decision making.

In fact, in *Koury v. Sec'y, Dep't of Army*, which the Government cites in support, the Eleventh Circuit expressly stated that the factors it has identified are specifically meant “to separate cases that may interfere with military discipline and command decisions from those that do not,” and cautioned courts to “pay particular attention to whether the service member's claims will implicate civilian courts in conflicts involving the military structure or decisions.” 488 F. App'x at 357. *See also Clendening 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.”). And in *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013), which the Fourth Circuit decided *after Stewart*, the court announced that “the ‘incident to service’ test asks, in relevant part, whether particular suits would call into question military discipline and decisionmaking and would require judicial inquiry into, and hence intrusion upon, military matters.” *Id.* at 515 (cleaned up) (internal quotation omitted).

More importantly, as we are about to explain, the Supreme Court has expressly *rejected* the rigid application of the Government’s proposed “status, location, and activity” test.

Meanwhile, in *Morey v. United States*, the First Circuit held that *Feres* applied, in part, precisely because the claims in that case would have “require[d] the court to delve into questions of military decision making.” 903 F.2d 880, 882 (1st Cir. 1990).

*Tootle v. USDB Commandant*, 390 F.3d 1280 (10th Cir. 2004), on the other hand, is entirely inapposite. *Tootle* merely notes that *Feres* applies to claims brought by military prisoners who have been dishonorably discharged from service. *Id.* This case involves no such claim.

Finally, the Government contends that “plaintiffs read too much into” *Shearer*. (Resp. Br. 16.) According to the Government, *Shearer* created an *additional*, categorical rule, not applicable here, barring all actions “facially challenging” decisions about “the discipline, supervision, and control of [servicemembers].” (*Id.*,

quotation omitted). Put another way, the Government views *Shearer* as simply irrelevant in this case.

The Government is wrong. As the district court observed, *Shearer* did *not* create “a separate and distinct test[.]” App175; R. Doc. 24, at 5. Rather, the Court in *Shearer* was plainly deciding the relevance, if any, of the factors relied upon by the Third Circuit. In the underlying decision, the Third Circuit observed that the terms “in the course of” and “incident to” are “not self-evident truths that leap out to illuminate any factual situation” and identified, instead, several factors that “control *Feres* doctrine cases.” *Shearer v. United States*, 723 F.2d 1102, 1105 (3d Cir. 1983). Specifically, the circuit court identified “the status of the injured soldier at the time of injury, the place of the injury, and the nature of the activity engaged in, and whether the injured party was acting under orders or compulsion.” *Id.*

The Supreme Court, however, rejected the use of a “a few bright-line rules” and held that the factors identified by the circuit court (and pressed by the Government here) were “not nearly as important as whether the suit requires the civilian court to second-guess military decisions.” *Shearer*, 473 U.S. at 57 (citing *Stencel*, 431 U.S. at 673). Critically, the Court did not admonish the circuit court for having failed to apply an *additional*, categorical rule; rather, it explained that *Feres* and subsequent cases barred service member claims “because they were the *type* of

claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” *Id.* at 59.

Just as importantly, the Court in *Shearer* distinguished the claim in *Brooks* (negligent operation of a vehicle) from the claim in *Shearer* (negligent failure to control or warn against a homicidal Private) on the basis that “[u]nlike the negligence alleged in the operation of a vehicle, the claim [in *Shearer*] would require Army officers ‘to testify in court as to each other’s decisions and actions.’” *Id.* at 58 (quoting *Stencel*, 431 U.S. at 673). Indeed, as the Fourth Circuit explained, “[r]esolution of the cause of action in *Brooks* was simply a garden variety automobile personal injury claim which did not require judicial inquiry into, and hence intrusion upon, military matters.” *Cioca*, 720 F.3d at 515 (internal quotation omitted). Thus, the Government’s insistence that *Brooks* is unhelpful to Plaintiffs is belied not only the Supreme Court’s own recitation, but by other circuits as well.

In short, the Government has *Shearer* completely backwards. The Court in *Shearer* expressly *rejected* the rigid application of the Government’s “status, location, and activity” test, which it has derived from this Court’s decision in *Miller*, and instead held that the most important factors when deciding whether an injury in “incident to service” are “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).<sup>2</sup>

Taken together, *Brooks* and *Shearer* make it plain that *Miller* (and *Chambers v. United States*, 357 F.2d 224 (8th Cir. 1966), and *United States v. Carroll*, 369 F.2d 618 (8th Cir. 1966), both of which are also relied upon by the Government) is no longer controlling, and that Staff Sergeant’s injuries did *not* arise out of or occur in the course of activity incident to his military service.<sup>3</sup>

## B.

Although the Government contends that the traditional *Feres* rationales are no longer applicable, a contention with which Plaintiffs agree, the Government nevertheless argues that the traditional factors apply. (Resp. Br. 17-19.) For example, the Government contends that Plaintiffs are entitled to statutory death and other

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<sup>2</sup> Critically, the test does *not* require that courts delve into the *extent* to which a particular suit would call into military decisions, since that would itself intrude upon military matters; rather, the test is simply to ask whether the service member’s claims will implicate civilian courts in a conflict that involves a military decision.

<sup>3</sup> *Chambers* is also clearly distinguishable since the plaintiffs in that case alleged numerous acts of negligence against the military, including its failure to keep lifeguards at the pool, its failure to provide adequate life-saving equipment, its failure to train lifeguards in proper life-saving methods, and its failure to provide adequate general protection for those swimming in the on-base swimming pool. *Chambers*, 357 F.2d at 226. This case would only be analogous to *Chambers* if the Plaintiffs here were alleging that the military was negligent in failing to properly train Ms. Mitchell in how to drive, or in failing to train those first on the scene in proper life-saving methods, or in failing to maintain a system of roads that generally guarded against accidents. But they are not.

benefits resulting from Staff Sergeant Beck’s military service. But that makes this case *even more* analogous to *Brooks*. In *Brooks*, the Supreme Court expressly held that rather than bar recovery, “amounts payable under servicemen’s benefits laws should be deducted, or taken into consideration, when the serviceman obtains judgement under the Tort Claims Act.” 337 U.S. at 920.

The Court in *Feres* also noted the “distinctly federal ... character” of the relationship between the Government and members of its armed forces. By this, the Government says that the Court apparently meant that it “would make ‘no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the [g]overnment to [the] service [member].’” (Resp. Br. 18, quoting *Johnson*, 481 U.S. at 689 (second alteration in original) (quoting *Stencel*, 431 U.S. at 672).). But the Government’s “status, location, and activity” test does *exactly that*. It elevates the situs of the injury above the most important factor, which is whether the suit requires the civilian court to second-guess military decisions. *See Shearer*, 473 U.S. at 57.

In any event, we learn from *Brooks* that while uniformity in the military is important, the FTCA allows for claims where the injury is not “incident to service.” Thus, this factor does not help define *when* an injury is incurred incident to service.

Finally, the Government argues that Plaintiffs’ claims are service related even under *Shearer’s* rationale because “a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably

intertwined with the conduct of the military mission.” (Resp. Br. 18, quoting *Johnson*, 481 U.S. 691.) But this is pure logical fallacy, or *petitio precipii*. The question is, *are* Plaintiffs’ claims for service-related injuries. The answer, as we have shown, is *no*.

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

The Government insists that because Plaintiffs’ claims are barred regardless of whether the suit would require second-guessing military judgments, Plaintiffs’ request for additional discovery was properly denied. But, as we have demonstrated, the precedent established in both this Circuit, and in the Supreme Court, is to treat the *Feres* immunity doctrine as applying only to the types of claims that call into question military decision making. Therefore, although Plaintiffs maintain that their claims fall squarely *outside* the *Feres* immunity doctrine, to extent there is any doubt, it was an abuse of discretion to deny Plaintiffs’ request for jurisdictional discovery.

### **CONCLUSION**

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

Dated: May 17, 2024

Respectfully submitted,

Klamann & Schermerhorn, P.A.

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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: May 17, 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 2,937 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: May 17, 2024

*/s/ Andrew Schermerhorn*  
Andrew Schermerhorn

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 17, 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: May 17, 2024

/s/ Andrew Schermerhorn  
Andrew Schermerhorn