UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. No. 12-11506-FF

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

vs.

THE UNITED STATES OF AMERICA

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 11-10078-CIV-MOORE/TORRES

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3, Appellant, Plaintiff, LINDA LANUS, as Personal Representative of the Estate of ERIC K. LANUS, certifies that the following represents a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable entities related to a party:

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8. Hon. Edwin G. Torres, U.S. Magistrate Judge

9. Hon. K. Michael Moore, U.S. District Judge.

10. United States of America, Defendant.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Linda Lanus, as Personal Representative of the Estate of Eric K. Lanus, requests oral argument in this case, as counsel believes oral argument will assist the panel in its determination of the issues on appeal.

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STATEMENT OF JURISDICTION

The trial court had jurisdiction over the instant case pursuant to 28 U.S.C. §§ 2671-2680. Appellant appeals from a final order of the lower court that disposes of all parties' claims. This Court has jurisdiction to hear the instant appeal from the district court's order dismissing Plaintiff's Complaint with prejudice pursuant to Fed.R.Civ.P. 54(a).

The court's Order was entered on February 6, 2012. Appellant's Notice of Appeal was filed on March 15, 2012.

QUESTION PRESENTED

The *Feres* doctrine holds "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." In *Feres*, the United States Supreme Court noted that the doctrine did not apply to servicemen who were on furlough, driving along the highway with a civilian in the car, not under compulsion of orders or duty and on no military mission. Does *Feres* apply to servicemen who are on liberty, sleeping in an apartment building that houses civilians, under the compulsion of no orders or duty and on no military mission?

INTRODUCTION

This Initial Brief is filed on behalf of Appellant, LINDA LANUS, as PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC K. LANUS, ("Appellant" or "Plaintiff"), who was Plaintiff below and appeals the ORDER GRANTING DEFENDANT'S RENEWED MOTION TO DISMISS entered in favor of Appellee, UNITED STATES OF AMERICA ("Appellee").

STATEMENT OF THE CASE AND FACTS

Appellant, as personal representative for the estate of Eric Lanus ("Lanus" or "Decedent"), filed a one-count Complaint against the UNITED STATES OF

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AMERICA alleging its negligence was the proximate cause of the death of Eric Lanus, a Fireman's Apprentice in the U.S. Coast Guard stationed aboard the U.S. Coast Guard Cutter Mohawk and being temporarily housed at Naval Air Station Key West. (App. A at 1-7).

The Complaint alleged that Eric Lanus was on *liberty* when a fire started in his shore-based housing at Sigsbee Park at Naval Air Station Key West. (*Id.* at 3). The apartment complex existed to provide transitory housing and, from time to time, was resided in by members of the military, non-military government employees, and *civilian contractors and agents*. (*Id.* at 3).

On the evening of Saturday, February 7, 2009, Lanus was off-duty and was enjoying weekend liberty with friends and shipmates in nearby Key West. (*Id.*). In the early morning hours of Sunday February 8, 2009, he returned to his apartment. (*Id.*). At this point in time, he was still on liberty and not engaged in any activity incident to his service in the United States Coast Guard and was not due to return to service until the following Monday. (*Id.* at 3-4). Upon his return to his apartment, the Decedent evidently turned on the electric kitchen stove to heat up some food in an aluminum cook pot, but then went upstairs. (*Id.* at 4). The kitchen stove continued to operate, generating enormous heat. (*Id.*). Neither the kitchen nor the stove had any kind of automatic shut-off, breaker or thermostat which would have caused the overheating stove to shut off. (*Id.*). At approximately 5:00 am

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Sunday morning, the heat of the stove caused a fire to ignite in the kitchen, which spread to the walls, ceiling, cabinetry of the kitchen, and eventually engulfed the ground floor of the apartment. (*Id*.).

The apartment had no automatic fire suppression system nor sprinklers and had inadequate, inoperable, or defective heat and/or flammability resistance. (*Id*.). As the fire spread and consumed the materials in the apartment, it created a dense smoke containing heated toxic gases and particulates. (*Id*.). Despite the heavy smoke, the smoke detectors in the apartment failed to activate, and the upper floor of the apartment was inundated with smoke. (*Id*.). The Key West Fire Department extinguished the blaze at approximately 6:00 am. (*Id*.). Lanus, however, was found dead, lying in his bed in the upper floor of his apartment. (*Id*.).

Appellant's theory of the case, as evident from the Complaint[1], is that the Appellee knew or should have known that Lanus' assigned apartment was unsafe in that: (a) the stove was defective and/or incorrectly wired, installed or maintained to prevent runaway operation in the event it was left on; (b) the apartment had inadequate, inoperable and/or defective heat and/or flammability resistance; (c) the apartment had no automatic fire sprinklers or fire suppression systems; and (d) the apartment had inoperable smoke detectors. (*Id*. at 6).

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[1] The Complaint alleges duty, breach, proximate cause and damages. (App., Ex. A at 6).

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The Appellee moved to dismiss the complaint for lack of subject matter jurisdiction arguing that the "*Feres* doctrine" precluded the action. (App. Ex. B, C). The trial court granted the United State of America's Motion to Dismiss and dismissed the Complaint with prejudice. (App., Ex. D). This appeal followed.

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SUMMARY OF THE ARGUMENT

The resolution of this case turns on two points of law. First, whether the *Feres* doctrine applies to a United State Coast Guard serviceman who was off-duty and *on liberty* at the time of his death. *See Feres v. United States*, 340 U.S. 135, 146 (1950). Second, whether the *Feres* doctrine applies to a serviceman who was injured as a result of negligence related to the unsafe condition of his assigned transitory housing, when the assigned housing also provided transitory housing to civilians as well as military personnel.

Without question, the *Feres* doctrine would not bar recovery if the decedent was on furlough status, or otherwise had sought permission to be absent from duty. Here, the decedent was on *liberty* status, which is the functional equivalent of furlough status. To be sure, the facts alleged in the Complaint show that the deceased was not acting incident to his U.S. Coast Guard service at the time of his death because the Decedent was on liberty, engaged in purely personal activities, and was not acting subject to military orders. The *Feres* doctrine therefore does not apply.

Moreover, the *Feres* doctrine is also inapplicable because the housing units at Naval Air Station Key West house both military personnel and civilians. Applying the *Feres* doctrine to the facts alleged in the Complaint leads to the inequitable and arbitrary result whereby service personnel on furlough and

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civilians may recover for damages related to the fire, but service personnel on liberty may not.

STANDARD OF REVIEW

The standard of review is de novo. *See Whitley v. United States*, 170 F.3d 1061, 1068 (11th Cir. 1999).

ARGUMENT

III. THE TRIAL COURT ERRED IN DETERMINING THAT IT HAD NO JURISDICTION OVER APPELLANT'S CLAIM.

A. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OF APPELLANT'S CLAIMS PURSUANT TO THE PLAIN LANGUAGE OF THE FEDERAL TORT CLAIMS ACT AND *BROOKS V. UNITED STATES* .

The Federal Tort Claims Act (FTCA) provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. Notwithstanding the broad waiver of soverign imunity for tort claims, the FTCA expressly precludes:

> Any 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). In *Brooks v. United States*, the Supreme

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Court considered "the question [of] whether members of the United States armed forces can recover under [the FTCA] for injuries not incident to their service." 337 U.S. 49, 50 (1949). The facts of *Brooks* reveal that two brothers (Arthur and Welker Brooks), who were both on active duty, were riding in a car with their father (James Brooks), when a United States Army truck (driven by a civilian employee of the Army) struck them. At the time of the accident, the *Brooks* brothers were on furlough status; Arthur Brooks died in the accident, Welker and James Brooks were badly injured. *Id*. Welker and the administrator of Arthur's estate brought actions against the United States in the District Court. In finding that the claims were permitted by the FTCA, the Supreme Court reasoned:

> The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute doe[s] contain twelve exceptions. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.
>
> More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in

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> Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans' Act of 1924, compensation for injury or death occurring in the first World War. When H.R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared.
>
> The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented.

Brooks v. United States, 337 U.S. 49, 51-52 (1949) (internal citations omitted). Here, as in *Brooks*, Eric Lanus was on liberty status at the time of his death. In addition, the accident, which killed Lanus, had nothing to do with combat activities, his Coast Guard career, or caused by his service. At the time of his death, he was engaged in a purely personal activity of sleeping and was not merely off-duty at the end of a day of work, but was on liberty for the weekend.

A year after the Supreme Court issued its opinion in *Brooks*, the Court decided *Feres v. United States* and introduced the *Feres* Doctrine.

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B. THE *FERES DOCTRINE* DOES NOT APPLY TO THE CASE AT BAR.

Because Lanus was on liberty at the time of his death, the *Feres* doctrine does not preclude an FTCA action. In *Feres*, the Supreme Court held: "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." *Feres v. United States*, 340 U.S. 135, 146 (1950). The facts of *Feres* are instructive:

> The District Court dismissed an action by the executrix of Feres against the United States to recover for death caused by negligence. Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch.

Id. at 136-37 (1950). In concluding that the executrix of Feres claims were barred, the Supreme Court distinguished[2] *Brooks* based on the following "vital

[2] Interestingly, the analysis advanced in support of the conclusion in *Feres* directly contradicts the analysis of *Brooks*, but the Court did not overrule *Brooks*. In fact, four years after *Feres*, the Court decided *United States v. Brown*, 348 U.S. 110, 112 (1954)(holding that *Brooks* applies, rather than *Feres*, in a medical negligence action brought by a discharged serviceman against the Veterans Administration because the serviceman was not on active duty or subject to military discipline). The *Brown* opinion also partially undermines the analysis of *Feres*. *See United States v. Johnson,* 481 U.S. 681, 697 (1987) (Scalia, J. Dissenting) ("The credibility of this rationale is undermined severely by the fact that both before and after *Feres* we permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA.").

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distinction:"

> The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A Government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

Feres v. United States, 340 U.S. 135, 146 (1950). Here, the "vital distinction" sways in favor of allowing an action pursuant to the FTCA, because Eric Lanus was on liberty at the time of his death. Lanus was "under compulsion of no orders and on no military mission." *Id*. Simply put, Lanus was biding his time in Key West, Florida, with no immediate plans or orders to ship out and no duties to fulfill at the time of his death. As such, his "relationship while on leave was not analogous to that of a solider injured while performing duties under orders." *Id.*

C. THIS COURT'S THREE-PART TEST RECOGNIZED IN *WHITLEY V. UNITED STATES* DEMONSTRATES THAT APPELLANT MAY PRESENT HER CLAIMS.

The apparent contradiction between the reasoning of *Brooks* and *Feres* has created conflict among the various circuits and even within the various circuits. A prime example of such conflict is this Court's opinion in *Elliott v. United States*, wherein this Court, sitting *en banc*, equally divided on the applicability of the

Feres doctrine. The facts of *Elliott* help illustrate the *Feres-Brooks* dichotomy, and resulting disparate treatment of FTCA actions brought by service members.

> David Elliott, Jr., a staff sergeant in the U.S. Army, lived with his wife, Barbara Elliott, a civilian, in an apartment provided for them on the military base at Fort Benning, Georgia. On August 14, 1989, David Elliott received ordinary leave, pursuant to his request, altering his duty status to "on leave" and "absent with authority." Under the terms of his leave, the Army did not expect Elliott to report to duty until the morning of August 30, 1989.
>
> Before his leave expired, Elliott returned to his apartment at Fort Benning. During the evening of August 28, 1989, Barbara Elliott returned to the apartment from work and went to bed early because she felt nauseous. When Barbara went to bed, David was awake watching television, sitting on the living room sofa. The following day, after Barbara failed to report to work, the Army dispatched military police to the Elliotts' apartment. Upon breaking into the apartment, the military police discovered Barbara Elliott on the bed and David Elliott on the sofa, unconscious and comatose. Military personnel immediately transported the Elliotts to a hospital at Fort Benning, where the medical staff treated them for carbon monoxide poisoning resulting from a faulty venting system attached to the water heater in the apartment.

Elliott By & Through Elliott v. United States, 13 F.3d 1555, 1556-57 (11th Cir. 1994) *reh'g granted and opinion vacated sub nom. Elliot By & Through Elliot v. United States*, 28 F.3d 1076 (11th Cir. 1994) *aff'd on reh'g by an equally divided court*, 37 F.3d 617 (11th Cir. 1994). On these facts the District Court found that the *Feres* doctrine did not bar recovery. What's more, the panel decision (that was vacated) found that the *Feres* Doctrine did not bar recovery. And, this Court

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ultimately affirmed the District Court's opinion by operation of law because it was equally divided. Nonetheless, the interesting aspect of the case was not the outcome; it was the obtrusive facts that refused to fit neatly in either the *Feres* box or the *Brooks* box. That David Elliot was on furlough incanted the *Brooks'* distinction to *Feres*. But the injury itself, a death in on-base housing caused negligent construction or maintenance of the housing facility, is directly analogous to *Feres*. To further blur the *Feres-Brooks* line, Barbara Elliot, a civilian, was permitted to live with her husband on base. Because she was injured, and could certainly sue in her own right, the original rationale supporting the *Feres* decision was non-existent.[3]

In 1999, this Court decided *Whitley v. United States*, 170 F.3d 106 (11th Cir. 1999), and after exhaustively examining the *Feres* jurisprudence, this Court prescribed a three-part test to determine whether a service member's activities at

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[3] The *Feres* decision cited three reasons supporting the outcome: (1) there is no liability 'under like circumstance' because no private individual has the power to conscript or mobilize a private army with such authority as the government vests; (2) the relationship between the government and its military is distinctly federal in character and state tort law should not apply; and (3) Congress provides for simple, certain and uniform compensation for injuries and death of those in the armed services. 340 U.S. at 141-46.
Subsequent to *Feres*, the Court adopted a fourth rationale: "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." *United States v. Brown*, 348 U.S. 110, 112 (1954)

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the time of injury giving rise to an FTCA action are incident to service. The test considers: (1) duty status; (2) location; and (3) activity. Although the Court suggests that duty status is the most important element, it also instructs the totality of the factual circumstances must be considered in deciding whether the injury in question was incident to service. *Whitley* at 1070-71, 1076.

Here, the duty status is "on liberty," similar to *Brooks* and *Whitley*, and militating in favor of the right to bring an action pursuant to the FTCA. The location of the injury was in a transient apartment building that housed both service members and civilian contractors. The activity was sleeping, a universal activity common to civilians and service members alike. *See Hall v. United States*, 130 F.Supp. 2d 825, 829 (S.D. Miss. 2000) (Allowing recovery for decedent service member where the serviceman's accidental carbon monoxide poisoning on base occurred while the serviceman "*was asleep while off duty for the weekend, a purely personal activity.*").

Looking at the totality of the circumstances, it is clear that Eric Lanus' death, which occurred while he was sleeping and on liberty, in no way was related to or incident to his military service. Lanus just happened to be in the military at the time of the accident.

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1. “LIBERTY” STATUS IS THE FUNCTIONAL EQUIVALENT OF A FURLOUGH.

As this Court explained in *Parker v. United States*:

> If an individual has been discharged from the service, his activities are normally not “incident to service.” At the other extreme, one who is on active duty and on duty for the day is acting “incident to service.” Between these extremes are degrees of active duty status ranging from furlough or leave to mere release from the day's chores. One on furlough or leave, as in *Brooks*, normally has an FTCA action. One with only an unexercised right to a pass or who is only off duty for the day usually is held to be acting “incident to service.”

611 F.2d 1007, 1013 (5th Cir. 1980). At the time of Lanus’ death he had not been discharged from the service, but he had far less restriction than merely being released from the day’s chores. Lanus was on liberty, not intending to return to duty for over 24 hours at the time of his death. There were no restrictions on his travel, and he was not required to report to any supervisors during the period of his liberty. His “liberty” status was the functional equivalent of being on a furlough or a pass for FTCA purposes. *See Pierce v. United States*, 813 F.2d 349, 353 (11th Cir. 1987) (“Because Pierce received a “discretionary time off privilege granted by [his] supervising officer,” he arguably left the base on a “pass.”). In *Pierce*, this Court held: “Just as a serviceman on furlough may bring an action under the Federal Tort Claims Act, a soldier exercising his rights under a pass may maintain an action.”

Further, this Court explained in *Parker* that "[s]ince 1972 formal passes have not been necessary for service members not on their regular duty hours. Therefore, "off-duty" service members who need not report until the next day, now technically have the same status as members on 'pass.'" *Parker* at fn. 9. Undeniably, Eric Lanus exercised his right and/or privilege of being on liberty in the hours leading up to his death. The Complaint alleged that Lanus had been in the City of Key West and enjoyed his time off with his friends just as any civilian would be able to do. Accordingly, Lanus should have the right to maintain a FTCA action.

2. THE LOCATION OF LANUS' DEATH DOES NOT RAISE THE *FERES* BAR.

It is undisputed that Lanus' death occurred in a military housing unit located on the military reservation at NAS Key West. The location of the injury is an important factor in determining whether the service member's injury occurred during activity incident to service. *See Elliott*, 170 F.3d at 1072. However, the location factor does not stand alone, and must be considered in conjunction with the service member's activity at the time of the injury. *Id*. at fn. 24. Under the *Feres* doctrine, FTCA recovery can still be had even if the injury occurred on a military reservation, including while in a military housing unit. *Id*. In fact, as noted above, this Court has encountered an analogous situation—carbon monoxide poisoning in a housing unit on a military reservation—and ultimately affirmed (by

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a equally divided Court) the decision of the District Court which allowed recovery. *Elliott v. United States*, 37 F.3d 617 (11th Cir. 1994).

Similarly, in *Hall v. United States*, 130 F.Supp. 2d 825 (S.D. Miss. 2000), a service member along with his four children died of carbon monoxide poisoning while in his on-base housing at Merdian Naval Air Station. As in the present case, the decedent in *Hall* was off-duty for the weekend at the time of his death. Considering the location factor in conjunction with the decedent's activity at the time of death, the trial judge concluded:

> In this case, despite the fact that the injury at issue occurred while Johnston was on base, the court is ultimately not persuaded under the totality of the circumstances that it occurred incident to his military service. At the time of his injury, *Johnston was asleep while off duty for the weekend, a purely personal activity.*

Id. at 829. Ultimately, the trial court allowed the service member's FTCA action to proceed. Likewise, in *Ordahl v. United States*, 601 F.Supp. 96 (D. Montana 1985), the trial court permitted an FTCA action to proceed by a service member who was struck in the eye by a dart from a blow gun fired by another service member who had the weapon in the barracks in contravention of Air Force Regulations. The Court rejected the argument that the plaintiff would not have been in the barracks and would not have been injured had he not been in the military, concluding that there was nothing to prevent a civilian from visiting a service member at his barracks. *Ordahl,* 601 F. Supp. at 100 ("The United States'

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position is that the plaintiff was taking advantage of a uniquely military benefit at the time of the injury in that he would not have been in the barracks were he not in the military. This court takes a contrary view; there is nothing which would preclude a civilian from visiting a service member at his barracks.").

As noted in *Ordahl,* civilian access is a question to be considered when evaluating the location factor. When the location of the injury is one where civilians also have access, the *Feres* doctrine does not support dismissal. *See Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007) (holding FTCA action was not barred where injury occurred on a road at military based partially open to the public); *Dreier v. United States*, 106 F.3d 844 (9th Cir 1997) (*Feres* does not bar FTCA action by service member injured at on-base picnic area accessible to civilians). In contrast, if the injury occurred on-base in an area accessible *only* by military personnel, and as a military benefit, then the location factor would weigh more heavily. *See, e.g., Starke v. United States*, 249 Fed. Appx. 774 (11th Cir. 2007). This distinction (between military only areas and areas where civilians have access) is significant because the Personal Representative's Complaint alleges:

> The apartment complex in question contained transitory housing and, from time to time, was resided in by members of the military, non-military government employees, and civilian contractors and agents.

Complaint, ¶ 13. Accordingly, the location factor should be given only slight weight in this Court's *Feres*/*Brook's* analysis.

3. LANUS' ACTIVITIES AT HIS DEATH DO NOT IMPLICATE THE *FERES* DOCTRINE

At the time of his death, Lanus was in his apartment, apparently sleeping. Because a pot on the stove caught fire, it is evident that Lanus was likely cooking in the hours before his death. Although the exact facts are not known, it is clear that Lanus was not performing any duties under orders or performing any military mission; rather he was engaged in the purely personal activities, activities as a consequence of being on liberty.

In *Elliot*, the court concluded that watching television in ones living quarters while on leave was a purely personal activity. Similarly, in *Hall*, 130 F. Supp. 2d at 829, the court concluded that sleeping while off duty for the weekend was a purely personal activity. In *Ordahl*, the court concluded that socializing in a military barracks while off duty was a purely personal activity precluding application of the *Feres* doctrine. *Ordahl*, at 100 ("It appears that plaintiff's activities were not related to his military duties; he was in the barracks socializing with another service member who happened to live there.").

Here, Lanus, at the time of his death, (whether he was cooking or sleeping) was nevertheless engaged in personal activities in his base apartment while on

liberty. There is no reason to treat Lanus' activities any differently than those that occurred in *Elliot*, *Hall*, or *Ordahl*. Therefore, because Lanus was engaged in purely personal activities, the *Feres* doctrine does not bar suit.

D. THE POLICIES UNDERPINNINGS OF THE FERES DOCTRINE ARE ABSENT IN THIS CASE

Interference with military discipline is the policy concern at the heart of the *Feres* doctrine. *Whitley*, 170 F.3d at 1069. As noted by this Court: "In the last analysis, *Feres* seems best explained by [the military discipline rationale]." *Id.*, *citing United States v. Shearer*, 473 U.S. 52, 57 (1985). The *Feres* bar exists to prevent a civilian court from second-guessing military decisions that would impair essential military discipline. *Id.* at 1069. Therefore, this Court must consider whether the alleged negligence is of the sort that would harm the military discipline system if litigated. *Id.* at 1070. *Ordahl*, 601 F. Supp. at 99 ("The court, consistent with *Feres,* was cautious in its approach to issues which may allow an injured service member to "second-guess" the judgment of his superiors. *Johnson, Id.* To allow an action which would amount to second-guessing of military decisions could easily affect the future willingness of service members to obey orders.").

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Here, the facts giving rise to Lanus' claim have no bearing on military discipline and in no way raise the specter of second-guessing military orders. This is particularly true since Plaintiff does not seek to impose a civilian or court-created standard of fire safety on the operations of the military that is at variance with the military decision-making prerogatives. On the contrary, Plaintiff seeks nothing more than that the military abide by the rules it has established for itself related to fire safety. In *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), the Ninth Circuit allowed an FTCA action to proceed where the plaintiff service member was injured while working at a second job at the base NCO club which was being operated in clear violation of Air Force regulations. In concluding that the case would not "involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review," the court observed that:

> We are not dealing with a case where the government's negligence occurred because of a decision requiring military expertise or judgment. Rather, *the government is negligent precisely because it failed to follow established military rules and procedures* . . . .

704 F.2d at 1440 (emphasis added). *See also, Ordahl*, 601 F. Supp 96, 99-100 (erosion of military discipline not implicated where government is negligent because it failed to follow established military rules and procedures), citing *Johnson*.

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This is the same policy at issue in *Elliot*. Although Circuit Judge Hatchett's opinion in *Elliot*, 13 F.3d 1555 (11th Cir. 1994), was vacated and the decision of the trial court was affirmed without opinion, Judge Hatchett's persuasive reasoning bears repeating here:

> Providing and maintaining single-family housing for military personnel does not involve the federal judiciary in sensitive military affairs or the "second-guessing of military orders . . . Moreover, the Elliotts' lawsuit did not require Army officers to testify in court as to each other's decisions and actions because providing safe housing does not require that military officers exercise discretion. The decision-making process involved in this case is not the type of discretionary decision-making that *Feres* sought to protect. Litigating the issues arising in this case will not make military decision makers hesitant to act, or cause them to refuse to act out of fear or liability. ***To the contrary, as the Army's conduct suggests, legal actions forcing compliance with regulations may be the only means to guarantee that the Army follows its own regulations regarding the provision of safe housing.***

13 F.3d at 1560 (emphasis added) (internal citations and quotations omitted).

The Department of Defense has established a comprehensive scheme of rules and regulations applicable to fire safety in military housing under the Unified Facilities Criteria (UFC) that are directly applicable to this case. UFC 3-600-01 (26 Sept. 2006) is titled "Fire Protection Engineering for Facilities." In Section 6-1.2 and 6-1.4 thereof (applicable to barracks, dormitories, lodges, temporary or

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transient facilities, and sleeping quarters for over 10 persons), operable smoke detectors are required as follows:

> 6.1.2 **Smoke Detection**
>
> Provide smoke detectors in accordance with NFPA 101, *Life Safety Code*. A smoke detector must be provided for each sleeping room regardless of occupancy or the presence of other detection or protection systems in the building. When activated, the affected detector must generate an audile signal in the room. Primary power for the smoke detectors can be either 120 Vac or 24 Vdc. Detectors with a battery as the primary power source are not permitted.
>
> 6-1.4 **Apartment-Style Personnel Housing Quarters**
>
> Provide hard-wired detectors in accordance with NFPA 101.

Similarly, UFC 3-600-02 (1 Jan. 2001), titled "Operations and Maintenance: Inspection, Testing, and Maintenance of Fire Protection Systems," establishes a comprehensive inspection, testing and maintenance protocol, including occupant training, for residential smoke detectors. This includes testing the detector with a smoke simulant, cleaning it, and replacing it if found to be non-functional.[4]

Appellant's FTCA action, alleging negligence, would not result in the trial court intermeddling with military affairs; the rules applicable to fire safety in

[4] Because this case was dismissed before discovery had been completed, Appellant is not aware of what other UFC regulations, if any, are applicable to her claim. Plaintiff's Complaint does not allege the UFC regulations because, under Fed. R. Civ. P. 8(a), there is not requirement to do so. As a matter of pleading, the Defendant should be held to have notice of its own regulations.

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Lanus' housing unit are the very rules that the United States of America has itself established for housing fire safety. The trial court would not be mandating a fire safety code for military housing; rather the court would only be finding liability for the military's failure to do what it has already agreed to do under its own regulations. Under these circumstances, the likelihood that Plaintiff's action would undermine military discipline or involve the court in matters of military expertise or discretion is extraordinarily remote.[5] Accordingly, the policy objectives behind the *Feres* doctrine are not offended by permitting Appellant's action to proceed.

II. THE *FERES* DOCTRINE WAS ESTABLISHED OVER A HALF-CENTURY AGO. THE DOCTRINE HAS BEEN CRITICIZED BY THE COURT AND COMMENTATORS ALIKE. *FERES* SHOULD NOT BE FURTHER EXPANDED TO ELIMINATE THE VITAL DISTINCTION CREATED BETWEEN *FERES* AND *BROOKS*

In *United States v. Johnson*, Justice Scalia writing for the dissent opined:

> [N]either 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.

---

[5] "[P]aying damages does not mean that the military is told by a court that it must do things differently, or even that it must take steps to control its employees. Injunctions and regulations tell people what they must do and what they must not do, and it is these types of intrusions that would entangle the courts in military affairs. Tort Judgments do neither of these things . . .[U]nder the FTCA, courts simply hold that [fault-based] harms done by military employees of the government are compensable costs of the military enterprise." *Whitley*, 170 F.3d at 1070 n. 18, *citing Taber v. Maine*, 67 F.3d 1029, 1047-48 (2d Cir. 1995) (emphasis and brackets by the Court).

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> . . .
> We have not been asked by respondent to overrule *Feres,* and so need not resolve whether considerations of *stare decisis* should induce us, despite the plain error of the case, to leave bad enough alone.

United States v. Johnson, 481 U.S. 681, 700, 703 (1987) (Scalia, J. dissenting, joined by Brennan, J. Marshall, J., and Stevens, J.). Given the widespread and almost universal criticism that the *Feres* doctrine has received, this Court should maintain the "vital distinction" that exists between *Feres* and *Brooks*.[6] That distinction is based on the status of the service member at the time of injury. If the service member is on furlough or leave at the time of injury, the FTCA action is permitted. *Whitley*, 170 F.3d at 1071. If the service member is on active duty, not on leave, furlough or a pass, the FTCA action is not permitted. *Id.* Here, the liberty status of the decedent, at the time of his death, brings this case under the control of *Brooks*, not *Feres*. Expanding *Feres* to bar Appellant's action would impermissibly limit *Brooks,* and expand *Feres* to a situation beyond *Feres'* rationale.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, Appellant, LINDA LANUS, as PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC K. LANUS, respectfully request that this Court reverse the trial court's order granting Defendant's renewed motion to dismiss.

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[6] To preserve the issue for a Petition for Writ of Certiorari, Appellant also requests this Court to overrule *Feres*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **April 30, 2012,** a true and correct copy of the foregoing was electronically filed with the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served on the following counsel of record via U.S. Mail and transmission of Notices of Electronic Filing generated by CM/ECF this **30TH** day of **April, 2012** to: Anne R. Schultz, United States Attorney's Office, 99 N.E. 4th Street, # 512, Miami, FL. 33132-2111

BY: ___/s/ Brett Powell ___________
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,510 words.

BY: ___/s/ Brett Powell_______
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