

No. _____

IN THE

Supreme Court of the United States

RAYNU CLARK, MOTHER OF TYLER M. GERGLER;
JASON R. GERGLER, FATHER AND EXECUTOR OF THE
ESTATE OF TYLER M. GERGLER,

Petitioners,

v.

SECRETARY OF THE UNITED STATES NAVY; UNITED
STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, contains a broad waiver of the United States' sovereign immunity from tort claims. That waiver is subject to the discretionary-function exception, under which liability is barred for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a). In *United States v. Gaubert*, 499 U.S. 315 (1991), this Court held that the exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 323 (citation omitted). Various courts of appeals have interpreted that public-policy standard to exclude certain categories of cases from the exception's scope: those in which the government conduct was egregiously unreasonable; those in which the conduct involved failure to take easy precautions to guard against a known risk; and those in which the conduct was merely careless rather than grounded in policy. In the decision below, the Third Circuit rejected those limits and applied the exception to bar a suit against the government for the negligence of a Marine Corps recruiter who ordered an eighteen-year-old boy to drive for several hours to attend a one-time social event despite knowing that the boy was too ill to stand, resulting in the boy's death when he lost consciousness behind the wheel.

The question presented is:

Whether the discretionary-function exception to the waiver of the United States' sovereign immunity in the Federal Tort Claims Act immunizes from suit government conduct that no reasonable observer would deem to be based on a policy judgment.

PARTIES TO THE PROCEEDINGS

Petitioners Raynu Clark, Mother of Tyler M. Gergler, and Jason R. Gergler, Father and Executor of The Estate of Tyler M. Gergler, were plaintiffs-appellants below.

Respondents Secretary of the United States Navy and United States of America were defendants-appellees below.

Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Raynu Clark v. Secretary of the Navy, No. 23-1784 (3d Cir. May 23, 2024), published at 102 F.4th 658

Clark v. Del Toro, No. 22-2586 (D.N.J. Mar. 31, 2023)

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Petitioners Raynu Clark, mother of Tyler M. Gergler, and Jason R. Gergler, father and Executor of The Estate of Tyler M. Gergler, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit (Pet.App.1a) is published at 102 F.4th 658 (3d Cir. 2024). The opinion of the district court (Pet.App.7a) appears at 2023 WL 2728808.

JURISDICTION

The May 23, 2024, opinion of the court of appeals (Pet.App.1a) is published at 102 F.4th 658. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (FTCA) are set forth in the appendix to this petition. Pet.App.26a-31a.

INTRODUCTION

The Federal Tort Claims Act includes a broad waiver of the United States’ sovereign immunity for certain torts committed by government agents. That waiver is subject to the discretionary-function exception, which bars liability for “[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * * , whether or not the discretion involved be abused.” 28 U.S.C. 2680(a).

This Court last addressed the scope of the discretionary-function exception more than thirty years ago in *United States v. Gaubert*, 499 U.S. 315 (1991). In *Gaubert*, the Court held that “[b]ecause the purpose of

the exception is to ‘prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,’” the exception “protects only governmental actions and decisions based on considerations of public policy.” *Id.* at 323 (citations omitted).

Since *Gaubert*, lower “courts have had considerable difficulty in deciding whether government actions are grounded in economic, social, or political policy.” *Smith v. WMATA*, 290 F.3d 201, 221 (4th Cir. 2002) (Michael, J., concurring in part and dissenting in part). “Similar facts have led to opposite conclusions,” and several “longstanding, recurring circuit splits involving the discretionary-function exception” have developed. *Xi v. Haugen*, 68 F.4th 824, 842-843 (3d Cir. 2023) (Bibas, J., concurring).

In the decision below, the Third Circuit adopted an extreme approach to the discretionary-function exception. The court of appeals held that the exception protects a Marine Corps recruiter’s decision to force Tyler Gergler—an 18-year-old boy who signed up for the Corps’ Delayed Entry Program—into driving to a social event several hundred miles away when the recruiter knew that Tyler was so sick that he could not even stand up without getting dizzy and lightheaded. Tyler passed out from his illness while driving and tragically died in a single-vehicle accident. The Third Circuit held that the discretionary-function exception applied because “whether and how to encourage attending social gatherings is a debatable policy.” Pet.App.5a.

The Third Circuit’s decision in this case directly creates and exacerbates several circuit splits. Under the court of appeals’ reasoning here, the discretionary-function exception applies whenever the government

can articulate *post hoc* policy considerations that relate to the subject matter of a government actor's conduct at a high level of generality. It does not matter how egregiously unreasonable the conduct was; whether the conduct involved a failure to take easy steps to guard against a known risk (at least, outside the context of mundane issues like lighting or handrails); or whether the conduct was merely careless rather than actually grounded in economic, social, or political policy. Other circuits have found the discretionary-exception inapplicable on all of those grounds, but the Third Circuit has refused to adopt any such limits.

The Third Circuit's decision is also both wrong and deeply harmful. It rests on a misreading of the FTCA's text, which properly shields only decisions that are based on an actual, specific policy judgment. And it undermines one of the only mechanisms that exists for obtaining justice and compensation for people who have been injured or killed by tortious government conduct.

This Court could readily clear up the lower courts' confusion—for instance, by adopting some or all of the limits that the Third Circuit rejected. And the Court's intervention is urgently needed. The divide amongst the lower courts is only growing, leading to geographic disparities and inconsistent results in similar cases. And courts of appeals are expressly pleading for this Court's guidance. The “time” for this “Court to revisit the test for when the FTCA's discretionary-function exception applies” has arrived, *Xi*, 68 F.4th at 842 (Bibas, J., concurring), and this case is an excellent vehicle for doing so.

STATEMENT OF CASE

1. The FTCA broadly waives the United States' sovereign immunity with respect to injuries “caused

by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. 1346(b)(1). But that waiver of immunity is subject to the discretionary-function exception, which precludes liability for “[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. 2680(a).

The discretionary-function exception “marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.” *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). Congress crafted the exception “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *Id.* at 814.

To that end, this Court has held that the discretionary-function exception applies only if the government can make an adequate showing that “the challenged conduct involves an element of judgment * * * of the kind” that the exception was “designed to shield.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If an element of judgment is present, because no binding statute, regulation, or government policy *prescribed* the action in question, the exception applies only if the judgment is policy-based in nature. Accordingly, the

exception “protects only governmental actions and decisions based on considerations of public policy.” *Id.* at 537.

2. Tyler M. Gergler was born into a family with a proud tradition of serving in the U.S. Marine Corps. Pet.App.34a, 39a.¹ From a young age, he wanted to follow in his parents’ footsteps and serve the Nation. Pet.App.34a-35a.

In June 2019, just after Tyler graduated from high school, he enlisted in the Marine Corps Reserve for eight years, with a four-year active-duty obligation, through the Corps’ Delayed Entry Program. Pet.App.35a. That program permits recruits, known as “poolees,” to enlist in the Marine Corps but delay active duty for up to a year in order to prepare “for the physical and mental rigors of recruit training.” Marine Corps Recruiting Command Policy Letter 02-15, at 1 (May 14, 2005); see 10 U.S.C. 513.

Each poolee is assigned a specific member of the Marine Corps to be his “recruiter.” The recruiter’s role is to provide “mentorship, guidance and support, while ensuring” that the recruit is “prepared” for recruit training. Pet.App.8a-9a n.2. Tyler’s assigned recruiter was Sergeant Mitchell Castner. Pet.App.35a.

In the late afternoon on July 26, 2019, Castner ordered Tyler—via a phone call and text messages—to attend a Marine event for poolees the following day. Pet.App.35a, 39a. The event was a social gathering being held several hundred miles away from where Tyler lived. Tyler explained that he could not travel to

¹ All facts recounted here are drawn from petitioners’ complaint (reproduced in full in the petition appendix, beginning at Pet.App.32a).

the event because he was “extremely sick,” had a “migraine,” was “throwing up for the past 16 hours,” and felt “dizzy and lightheaded” whenever he tried to stand up. Pet.App.35a-36a. He told Castner that he could not “drive” because “it’s not safe for me or anyone else on the road.” Pet.App.36a.

Despite knowing that Tyler was too sick to safely operate a vehicle, Castner threatened Tyler with being “discharg[ed]” from the military if Tyler did not drive to the event. Pet.App.36a, 39a (Castner text to Tyler: “they’re gonna talk about discharging you if you don[’]t” attend). Tyler responded, “I guess I’m gonna try and drive then.” Pet.App.36a.

Tyler died in a single-vehicle crash less than ninety minutes later, two months before his nineteenth birthday. Pet.App.37a. He had no drugs or alcohol in his system. Pet.App.38a. It was a sunny day with perfect visibility, and Tyler was driving on a straight and level road. Pet.App.37a. All evidence indicates that he lost consciousness as a result of his illness and then veered off the road, without ever braking, and collided with a guard rail. Pet.App.37a-38a.

3. Tyler’s parents, petitioners Raynu Clark and Jason R. Gergler, filed an FTCA wrongful-death action in federal district court (D.N.J.) against the United States.² They alleged that Castner negligently instructed Tyler to drive while knowing that Tyler was impaired due to illness. Pet.App.43a-44a.

² Both sued in their individual capacities, as Tyler’s parents; Mr. Gergler also sued in his official capacity as executor of Tyler’s estate. Pet.App.32a. Before filing suit, petitioners exhausted all administrative avenues of redress. Pet.App.34a; see Pet.App.2a. Although petitioners sued the Secretary of the Navy as well as the United States, the lower courts concluded that the latter was

a. On a motion to dismiss, and limiting itself to an examination of the face of the complaint, the district court concluded that the FTCA’s discretionary-function exception bars the suit. Pet.App.7a, 17a-18a. The court stated that no “mandatory directive to Marine recruiters” exists that governs “communicat[ions] with recruits under the circumstances confronting Tyler and Castner.” Pet.App.20a. The court also ruled that “the judgment Castner exercised here is of a type susceptible to policy analysis.” Pet.App.20a. According to the court, there is a “rational nexus” between Castner’s “decision and ‘social, economic, and political concerns’” because of the general “need for military personnel to ensure recruits’ readiness through a mix of considerations,” both “physical and mental,” and because of “the necessity of considering tradeoffs between safety and preparedness in the process.” Pet.App.20a-21a (citation omitted).

b. The Third Circuit affirmed, agreeing with the district court that the discretionary-function exception applies here to vitiate the government’s waiver of sovereign immunity. Pet.App.1a. The court of appeals focused on Castner’s “function” at a high level of generality rather than on whether Castner’s decision to force Tyler to attend the social event was actually based on a policy judgment. The court stated that “Castner’s function was to prepare civilians for Marine Corps basic training” and concluded that “whether and how to encourage attending social gatherings is a debatable policy.” Pet.App.4a-5a; see *ibid.* (stating that “[s]ocial gatherings may cultivate camaraderie and create strong bonds among the recruits”).

the only proper defendant, Pet.App.23a-24a, and petitioners do not challenge that conclusion.

In reaching that conclusion, the court of appeals rejected various limits on the scope of the discretionary-function exception. The court rejected the argument that the exception does not apply when a government actor's conduct is "so beyond the pale 'that no reasonable observer would see [it] as susceptible to policy analysis.'" Pet.App.5a (quoting *Hajdusek v. United States*, 895 F.3d 146, 152 (1st Cir. 2018)). According to the court, no such "carve-out" exists, because "Congress barred liability for discretionary functions 'whether or not the discretion involved [is] abused.'" Pet.App.5a (quoting 28 U.S.C. 2680(a)). The court also rejected the argument that the exception does not apply when a government actor fails to take easy precautions to guard against a known risk. Pet.App.5a-6a. The court expressed doubt that the statute permits any such limit on the exception, but concluded in any event that such a limit could come into play only in a case, unlike this one, involving "truly mundane problems, such as failures to install lights, stairways, or railings." Pet.App.5a-6a.

REASONS FOR GRANTING PETITION

The court of appeals' decision raises an exceptionally important issue that warrants this Court's review. That decision conflicts with the decisions of numerous other circuits and is inconsistent with this Court's precedent. Moreover, the decision is wrong and lacks any principled limit. If allowed to stand, the Third Circuit's decision will eviscerate the FTCA's limited waiver of sovereign immunity and will insulate the government from accountability for even the most egregiously unreasonable bad acts. This Court's review is urgently needed.

I. The Circuits Are Split over the Limits to the Discretionary-Function Exception

Since this Court last addressed the scope of the discretionary-function exception more than thirty years ago in *Gaubert*, the lower “courts have had considerable difficulty in deciding whether government actions are grounded in economic, social, or political policy,” *Smith*, 290 F.3d at 221 (Michael, J., concurring in part and dissenting in part), as required in order for the exception to apply. That has led to disuniformity in appellate decisions presenting “[s]imilar facts” and several “circuit splits,” including “longstanding” and “recurring” ones. *Xi*, 68 F.4th at 842-843 (Bibas, J., concurring).

The decision below places the Third Circuit squarely in the middle of three such splits in circuit authority. First, the decision creates a split with the First Circuit concerning whether a government actor’s conduct can be so objectively unreasonable that the actor’s decisionmaking is not susceptible to policy analysis within the meaning of *Gaubert*. Second, the decision creates a three-way split as to whether the failure to take an easy precaution to alleviate a known risk is ever sufficiently policy-based to fall within the scope of the exception. Finally, the decision exacerbates an existing conflict among multiple circuits regarding whether the exception applies when the challenged government conduct was simply careless and did not constitute a considered exercise of policy judgment.

A. *Applicability of exception where government actor’s conduct was “beyond the pale.”* The decision below is irreconcilable with decisions of the First Circuit holding that government conduct can be so objectively unreasonable that it falls outside the scope of the discretionary-function exception because the conduct cannot be deemed policy-based in nature. Pet.App.5a.

1. In *Hajdusek v. United States*, 895 F.3d 146 (1st Cir. 2018), a case that (like this one) involved harm to a poolee in the Marine Corps Delayed Entry Program, the First Circuit concluded that “some discretionary actions” are “so beyond the pale ‘that no reasonable observer would see them as susceptible to policy analysis.’” Pet.App.5a (quoting *Hajdusek*, 895 F.3d at 152). The First Circuit explained that “certain decisions by government actors, though nominally discretionary, may pass a threshold of objective unreasonableness” such that the *Gaubert* requirement that the conduct be susceptible to policy analysis cannot be satisfied. 895 F.3d at 152. For instance, the court of appeals stated, “if a Marine decided that the only way to toughen up poolees was to have them jump off a twenty-foot high cliff onto concrete, we would have no qualms holding that * * * it was simply not a decision that in any objectively reasonable sense could be said to be informed by policy analysis.” *Ibid.*; see *id.* at 152-153 (stating that it would be obvious that such a decision was unreasonable “ex ante” and that the “decision would not constitute a weighing of safety concerns versus intensity concerns; it would amount to a complete rejection of the former”). The court ultimately ruled that the challenged conduct at issue in the case before it, which was an order by a staff sergeant that a poolee participate in a two-hour physical training session with only two short water breaks, was not so objectively unreasonable as to fall into that category. See *id.* at 148-149.

Other First Circuit decisions echo *Hajdusek*’s conclusion that egregiously unreasonable government conduct is not covered by the discretionary-function exception. For example, in *Davallou v. United States*, 998 F.3d 502 (1st Cir. 2021), the plaintiff suffered permanent hearing damage when a military organization

fired a cannon too close to him during a ceremonial event. *Id.* at 503-504. The First Circuit concluded that the discretionary-function exception applied, but explained that circumstances exist “in which such policy considerations could not plausibly have informed [the organization’s] conduct,” such as if “unprotected individuals were standing an arm’s length away” from the cannon as the organization “prepared to fire.” *Id.* at 506. Under those circumstances, the court of appeals explained, the government’s stated policy justifications would “be so far-fetched as to defy any plausible nexus between the challenged conduct and the asserted justification.” *Ibid.* (quoting *Shansky v. United States*, 164 F.3d 688, 695 (1st Cir. 1999)).

Although the First Circuit concluded that the particular government conduct challenged in *Hajdusek* and *Davallou* was not in fact so unreasonable as to be outside the reach of the discretionary-function exception, the court of appeals’ discussion of unreasonable conduct in those decisions is not dicta. Rather, that discussion formed an important part of the First Circuit’s analysis, because it marked an outer bound to the conduct that is covered by the exception and allowed the court to assess the facts before it to see if that outer bound had been crossed. See, e.g., *Hajdusek*, 895 F.3d at 153 (explaining that the challenged decision was “not so objectively beyond the pale that it could not have been informed by policy analysis” by comparing it to other, objectively unreasonable conduct). The importance of marking that outer bound is illustrated by the fact that district courts in the First Circuit have applied the relevant portion of *Hajdusek* to conclude that the discretionary-function exception does not encompass specific egregious conduct. See *K.O. v. United States*, 651 F. Supp. 3d 331, 345 (D.

Mass. 2023) (ruling that, “[a]lthough decisions classifying and housing individuals detained by the United States government are normally susceptible to policy analysis, the actions alleged pass the ‘threshold of objective unreasonableness such that no reasonable observer would see [them] as susceptible to policy analysis’”) (quoting *Hajdusek*, 895 F.3d at 152).

2. In this case, the Third Circuit expressly considered and directly rejected the First Circuit’s approach, holding instead that a government agent’s conduct can *never* be so objectively unreasonable that it falls outside the scope of the discretionary-function exception on the ground that it cannot have been policy-based in nature. Pet.App.5a (citing and discussing *Hajdusek* but “declin[ing]” to “adopt” its reasoning). The Third Circuit stated that the exception bars liability for discretionary acts “whether or not the discretion involved [is] abused” and concluded that “[w]e cannot rewrite this [statutory] language to make the Government liable for discretionary calls, even if they are egregious.” Pet.App.5a (quoting 28 U.S.C. 2680(a)). The court of appeals then framed Castner’s conduct in this case at a high level of generality and concluded that the discretionary-function exception applies because “whether and how to encourage attending social gatherings is a debatable policy.” *Ibid.*

Had this case instead arisen in the First Circuit, the result would have been different. The Third Circuit did not deny that this case involves exactly the kind of egregious, beyond-the-pale, objectively unreasonable government conduct to which the First Circuit has said that the exception does not apply. There is no possible policy analysis that could justify Castner’s choice to threaten a severely ill eighteen-year-old boy with discharge from the military—thereby threatening to end that boy’s military career, cause social

stigma, and harm future employment opportunities—unless the boy agreed to drive multiple hours to attend a single social gathering. The Third Circuit’s rejection of the limit that the First Circuit has placed on the exception was therefore outcome determinative here.

B. Applicability of exception where government actor fails to take easy precautions to guard against known risk. The Third Circuit’s decision also creates a three-way split concerning whether a government actor’s failure to take easy precautions to guard against a known risk falls outside the scope of the discretionary-function exception. The Second, Ninth, and Tenth Circuits hold that such a failure falls outside the scope of the exception because the failure cannot be regarded as a policy judgment. The First and Fourth Circuits hold that such a failure is susceptible to policy analysis and therefore falls *within* the scope of the exception—that is, that suits based on such a failure are barred because the FTCA’s waiver of sovereign immunity does not apply. And in the decision below, the Third Circuit carved out an intermediate position, holding that the failure to take simple steps to guard against a known risk falls outside the scope of the exception only when the failure relates to “truly mundane problems, such as failures to install lights, stairways, or railings.” Pet.App.5a-6a.

1. The Second, Ninth, and Tenth Circuits have held that the government’s failure to address readily addressable known hazards is not the type of “policy” decision that the discretionary-function exception encompasses.

The Second Circuit’s holding in that regard is not limited to any particular set of factual circumstances. In *Andrulonis v. United States*, 952 F.2d 652 (2d Cir. 1991), a bacteriologist contracted rabies during an ex-

periment that involved “obviously dangerous conditions.” *Id.* at 653. The government argued that its decision to conduct the experiment under those conditions “was necessary to fulfill the policy objectives of the CDC,” but the court of appeals rejected the argument that the discretionary-function exception applied. *Id.* at 655. The court explained that “it is hardly conceivable” that keeping silent about “obvious, easily-correctable dangers in experiments” could be susceptible to policy analysis. *Ibid.*

The Ninth Circuit has likewise held that the failure to take an easy precaution to guard against “a specific, known hazard for which the acting agency is responsible is not the kind of broader social, economic or political policy decision that the discretionary function exception is intended to protect”—regardless of the type of hazard involved. *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994). For example, in *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990), the Ninth Circuit ruled that the discretionary-function exception did not cover the government’s failure to post warning signs on a beach containing fire rings. *Id.* at 1215. The court rejected the government’s argument that “decisions regarding the placement and particulars of park signs” requires “balancing aesthetic and safety considerations,” reasoning that there was “no evidence * * * that [the government’s] failure to post warnings * * * was the result of a decision reflecting the competing considerations of the [Park] Service’s sign policy.” *Ibid.*; see, e.g., *Green v. United States*, 630 F.3d 1245, 1252 (9th Cir. 2011) (failure to notify landowners of lighting of “backfire”); *Kim v. United States*, 940 F.3d 484, 491-492 (9th Cir. 2019) (failure to abate or warn of danger posed by tree); *Oberson v. United States Dep’t of Agric.*, 514 F.3d 989, 998 (9th Cir. 2008) (failure to warn of dangerous snowmobile-trail conditions).

The Tenth Circuit has reached the same conclusion. In *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989), that circuit rejected the argument that failing to warn swimmers of known dangers in popular swimming areas was susceptible to “competing economic and social considerations.” *Id.* at 897. The court explained that the failure to provide such a warning “does not implicate any social, economic, or political policy judgments with which the discretionary function exception properly is concerned.” *Id.* at 898; see, e.g., *Duke v. Dep’t of Agric.*, 131 F.3d 1407, 1412 (10th Cir. 1997) (failure to address dangers from falling rocks); *Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976) (failure to warn of super-heated thermal pool). But see *Clark v. United States*, 695 F. App’x 378, 387-388 (10th Cir. 2017) (unpub.).

2. The First and Fourth Circuits have taken the opposite approach. Those courts of appeals have held that the discretionary-function exception encompasses, and therefore bars, suits alleging the government’s failure to take easy precautions that eliminate the risk of a specific, known danger.

For instance, in *Sanchez v. United States*, 671 F.3d 86 (1st Cir. 2012), plaintiffs brought an FTCA claim based on the government’s failure to warn them about contaminants in an area on a Puerto Rican island that was polluted during military exercises. See *id.* at 88, 92. Over Judge Torruella’s dissent, the First Circuit concluded that the discretionary-function exception applied, reasoning that “[w]ith respect to any warning, the Navy would have had to balance its military and national security needs against any perceived benefits to public health and safety in light of the risks and burdens of a warning program and the great public anxiety warnings could create.” *Id.* at 102-103. Alt-

though the majority protested that its decision was consistent with decisions from other circuits, see *id.* at 101-103, Judge Torruella explained that the decision conflicted with the Second Circuit’s decision in *Andrulonis*, and he would have adopted the Second Circuit’s rule: that there is no “reasonable or permissible policy analysis that could justify” a failure to warn plaintiffs “of the known dangers” caused by their activities, *id.* at 116-117 (Torruella, J., dissenting).

The Fourth Circuit, too, has held that a failure to warn of a known danger inherently involves a policy judgment and therefore triggers the discretionary-function exception. The plaintiff in *Wood v. United States*, 845 F.3d 123 (4th Cir. 2017), was injured during a training exercise on a Navy base when she jumped onto a set of mats and landed in a gap between them. See *id.* at 126. The Fourth Circuit ruled that the discretionary-function exception blocked claims that the government negligently maintained the mats and failed to warn that they were dangerous. *Id.* at 130-132. And the court of appeals specifically rejected plaintiff’s argument that the court should follow the rule adopted by the circuits that have found that a failure to warn of a known risk does not implicate any policy judgment, stating that such a rule “would open the Navy to tort liability for *every* similar decision made.” *Id.* at 131.

3. The decision below takes yet a third approach to the issue of a government actor’s failure to address a specific, known risk—and, in doing so, conflicts with the decisions of other courts of appeals.

According to the Third Circuit’s decision in this case, the discretionary-function exception does not apply if a suit alleges a government actor’s failure to “take garden-variety remedial steps to guard against a specific risk that the government was aware of”—but

only if the suit alleges a very specific set of factual circumstances, i.e., a “truly mundane problem[], such as failure[] to install lights, stairways, or railings.” Pet.App.5a-6a.³ That means that, in the Third Circuit’s view, the First and Fourth Circuits take an overbroad view of the scope of the discretionary-function exception (and therefore an overbroad view of when sovereign immunity bars an FTCA suit). It also means that, in the Third Circuit’s view, the Second, Ninth, and Tenth Circuits take too narrow a view of the scope of the exception (and therefore too narrow a view of when sovereign immunity is vitiated), because they deem the exception inapplicable even in cases in which the known risk that the government fails to address is something other than a “truly mundane problem[]” like “failure[] to install lights, stairways, or railings.” Pet.App.5a-6a. In short, no other circuit has applied the Third Circuit’s particular, limited approach to the issue.

That split of authority will inevitably give rise to different results depending on the happenstance of where an FTCA suit is brought. This very case, for instance, would have turned out differently had it been brought in the Second, Ninth, or Tenth Circuits,

³ The Third Circuit previously applied a rule similar to that applied by the Second, Ninth, and Tenth Circuits. See *Gotha v. United States*, 115 F.3d 176, 178 (3d Cir. 1997); *Cestonaro v. United States*, 211 F.3d 749, 757 & n.6 (3d Cir. 2000). But in the published decision below, the Third Circuit limited its earlier decisions to their facts (which involved issues like handrails and lighting) and adopted the broader understanding of the discretionary-function exception described above. Pet.App.5a-6a. At the same time, the court of appeals pointedly disapproved of *any* carve-out from the exception for cases involving the government’s failure to guard against known risks. See *ibid.*

where a failure to guard against a known risk is outside the scope of the exception regardless of whether that failure relates to “truly mundane problems” regarding “lights, stairways, or railings,” Pet.App.5a-6a, or less mundane problems such as failure to address safety conditions in a laboratory or failure to warn landowners of the lighting of a “backfire” intended to fight an existing fire but liable to burn out of control, see pp.13-15, *supra*. In those circuits, the subject matter of the government’s failure is not relevant—and the exception therefore would not apply to the government’s failure to take the simple step of refraining from ordering a seriously ill, weak, and dizzy eighteen-year-old boy, on pain of losing his chosen career, to drive his car on a busy highway for several hours. See pp.5-6, *supra*. Accordingly, in those circuits, the FTCA waiver of sovereign immunity would not be vitiated here, and petitioners’ suit for the utterly senseless death of their teenage son would not have been barred by sovereign immunity at the starting gate.

C. *Applicability of exception where government actor acted carelessly rather than engaging in any policy analysis.* Finally, the Third Circuit’s decision implicates a “longstanding, recurring circuit split[] * * * over whether the [discretionary-function] exception applies when the challenged act was careless rather than a considered exercise of discretion.” *Xi*, 68 F.4th at 843 (Bibas, J., concurring) (collecting cases). There is little question that Castner’s actions here were careless, and there is no indication that he actually attempted to make any sort of judgment of the kind that the discretionary-function exception was designed to shield—that is, one that balanced safety concerns against whatever importance Tyler’s attendance at a single, far-away social gathering might conceivably

have had to the Marine Corps' mission. In that circumstance, some circuits would refuse to apply the discretionary-function exception—but the Third Circuit embraced its application.

1. The Second, Fourth, and Seventh Circuits hold that the discretionary-function exception does not apply, and the government is therefore not entitled to sovereign immunity, when an agent's negligent act resulted from carelessness rather than from a considered exercise of judgment.

For example, the Second Circuit held in *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000), that “negligent acts” arising from laziness, haste, or inattentiveness do not fall within the scope of the exception because they “neither involve an element of judgment or choice within the meaning of *Gaubert* nor are grounded in considerations of governmental policy.” *Id.* at 109. In that case, the plaintiff alleged that “the official assigned to inspect the machine” in the prison gym that caused his injury “may in laziness or haste have failed to do the inspection” or “may have been distracted or inattentive.” *Id.* at 107, 109.

The Fourth Circuit has agreed with “[t]he Second Circuit” that “discretionary conduct cannot be grounded in a policy decision when that conduct is marked by individual carelessness or laziness.” *Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) (citing *Coulthurst*). On that basis, the Fourth Circuit concluded that the discretionary-function exception did not bar a claim based on a prison's failure to properly pat down inmates for weapons. *Id.* at 146. The court observed that, although “the manner in which a patdown is performed” could involve “‘security’ generally as the policy consideration,” if the analysis were performed at that high level of generality then every

government action or inaction would constitute a policy-based decision and the exception would always apply to bar tort claims. *Id.* at 147 n.7.

The Seventh Circuit agrees with the Second and Fourth Circuits. In *Palay v. United States*, 349 F.3d 418 (7th Cir. 2003), a prison inmate brought an FTCA claim based on the government’s failure to protect him from other inmates. *Id.* at 422. The court of appeals explained that, “[a]s in *Coulthurst*, it is easy to imagine a scenario in which [prison] officials behaved in a negligent fashion, but without making the types of discretionary judgments that the statutory exception was intended to exempt.” *Id.* at 432. For example, a corrections officer could have been “asleep” or have “left the unit unattended in order to enjoy a cigarette or a snack.” *Ibid.* The exception would not cover “[t]hat type of carelessness,” which “involves no element of choice or judgment grounded in public policy considerations.” *Ibid.*

2. By contrast, the Eighth, Ninth, and Tenth Circuits hold that the discretionary-function exception applies even when a government actor’s negligent conduct is the product of carelessness rather than an exercise of judgment—so long as the conduct, in the abstract, could conceivably (and counterfactually) have involved some balancing of competing policy considerations.

The Eighth Circuit’s decision in *Willis v. Boyd*, 993 F.3d 545 (8th Cir. 2021), illustrates that approach. In that case, a government agent seized hundreds of boxes of collectible coins and remitted their value to plaintiff in a way that deprived him of the coins’ true value. See *id.* at 547. The agent “admit[ted] that he did not make an effort to determine whether the coins had any” such value, *ibid.*, but the court of appeals ruled that “it does not matter” that “there was never a

balancing of any policy considerations” because, on the most general level, “agents who seize currency must balance the competing interests of expeditious deposit on the one hand and preserving property on the other,” *id.* at 550. The court of appeals thus held that even a careless government act is susceptible to policy analysis and therefore falls within the scope of the discretionary-function exception. *Ibid.*

The Ninth and Tenth Circuits have reached the same result in cases in which careless government conduct was alleged. Those cases have applied the exception to a “lazy or careless” failure to disclose an imminent attack to local law enforcement, because “the challenged decision is one to which a policy analysis *could* apply,” *Gonzalez v. United States*, 814 F.3d 1022, 1033-1034 (9th Cir. 2016); to a “mere oversight” leading to failure to warn of unstable rock formations, because “failure to consider some or all critical aspects of a discretionary judgment does not make that judgment less discretionary,” *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993); and to a careless failure to cut down a tree, because “safety, budget, staffing, wildlife and habitat preservation, impact on the natural vegetation, and aesthetics” could at least conceivably bear on that inaction, *Lam v. United States*, 979 F.3d 665, 681 (9th Cir. 2020); see, e.g., *Ball v. United States*, 967 F.3d 1072, 1077-1080 (10th Cir. 2020) (deeming it irrelevant whether “the inaction specific to the [case] was grounded in policy” as a matter of fact).

3. The decision below accords with the decisions of the Eighth, Ninth, and Tenth Circuits. The court of appeals recognized that Tyler had “told Castner that he was too sick to drive” and that Castner knew Tyler “lived about four hours from the recruiting station.” Pet.App.2a. And yet “Castner pressured [Tyler] to go

anyway.” *Ibid.* Under those circumstances, Castner’s decision could not possibly be the result of a considered exercise of judgment that weighed safety considerations against other considerations—yet the Third Circuit immunized Castner’s careless conduct on the ground that “whether and how to encourage attending social gatherings” could be “a debatable policy” at a high level of generality. Pet.App.5a. In the Second, Fourth, and Seventh Circuits, that would not be enough to trigger application of the discretionary-function exception and thereby bar petitioners’ suit. That conflict is an untenable one.

II. The Third Circuit’s Decision Is Wrong

The Third Circuit’s decision below is wrong and contravenes this Court’s precedent.

Instead of analyzing whether Castner’s decision to coerce Tyler into driving hundreds of miles while incapacitated “involved the kind of policy judgment that the discretionary function exception was designed to shield,” *Gaubert*, 499 U.S. at 332, the court of appeals looked only at Castner’s general “function * * * to prepare civilians for Marine Corps basic training,” Pet.App.4a. Having framed the issue in that highly general way, the court of appeals held that the discretionary-function exception applies because “whether and how to encourage attending social gatherings is a debatable policy.” Pet.App.5a.

That analysis makes a mess of the discretionary-function exception. Virtually any government action can later be described in policy terms if it is framed at a high enough level of generality. But this Court’s decisions make clear that the discretionary-function exception applies only if the government actor’s *specific* conduct is susceptible to policy analysis. For example,

whether and how to maintain the operation of a lighthouse could theoretically involve judgments about allocation of government resources, public safety, economic implications of preventing maritime accidents, and environmental effects of shining a bright light out to sea. But in *Indian Towing v. United States*, 350 U.S. 61 (1955), in which the Coast Guard negligently maintained a lighthouse and allowed the light to go out, the Court held that the government’s failure to maintain the lighthouse in good working condition “did not involve any permissible exercise of policy judgment,” *Berkovitz*, 486 U.S. at 538 n.3 (discussing *Indian Towing*)—even though the Court never denied that policy considerations could *conceivably* come to bear on the maintenance question. See *Indian Towing*, 350 U.S. at 62, 69; see also *Varig*, 467 U.S. at 819 (focusing on the government actor’s *specific* conduct); *Gaubert*, 499 U.S. at 325, 327, 332 (same).

Moreover, the Third Circuit’s decision lacks any principled limit. Under that decision, the discretionary-function exception applies and no liability can exist for any Marine recruiter conduct that can be characterized at a high level as “encourag[ing] attending social gatherings,” Pet.App.5a—no matter how egregiously unreasonable the conduct is. That would hold true even if a recruiter demanded that a poolee known to have been diagnosed with the bubonic plague attend a large in-person gathering, and several people became ill and died as a result; if a recruiter required a poolee to leave a safe shelter during the height of a Category Five hurricane in order to attend a social event several states away, and the poolee was killed in the storm; or if a recruiter forced a poolee who was recovering from invasive surgery to leave the hospital early in order to attend a picnic, due to which the

poolee suffered life-threatening medical complications. The Third Circuit’s decision insulates all of that conduct from liability, even though the conduct clearly lacks any connection to social, economic, or political policy. And it is not hard to see how the decision would have exactly the same effect in other kinds of factual settings as well.

The Third Circuit’s decision is so untenably broad precisely because the court of appeals incorrectly rejected a number of limits on the discretionary-function exception that other circuits have accepted and applied. See pp.9-22, *supra*. For instance, as to placing objectively, egregiously unreasonable government conduct outside the scope of the exception, the Third Circuit asserted that such a limit is inconsistent with statutory language providing that the exception applies “whether or not the discretion involved [is] abused.” Pet.App.5a (quoting 28 U.S.C. 2680(a)). But there is no tension between the limit and that language. As this Court has repeatedly made clear, the exception covers only those discretionary functions or duties that are “grounded in social, economic, and political policy.” *Berkovitz*, 486 U.S. at 537 (quoting *Varig*, 467 U.S. at 814). Conduct that is so unreasonable that it cannot be grounded in policy does not fall within the scope of the exception in the first instance, irrespective of “whether or not the discretion involved” also is “abused.” 26 U.S.C. 2680(a). Moreover, the Third Circuit’s assertion about the meaning of the statute rested on the erroneous proposition that waivers of sovereign immunity “‘must be unequivocally expressed’ and closely cabined to what the law permits.” Pet.App.5a (quoting *United States v. Nordic Vill.*, 503 U.S. 30, 33-34 (1992)). As this Court has explained, that very “principle is ‘unhelpful’ in the FTCA context,

where ‘unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,’ which ‘waives the Government’s immunity from suit in sweeping language.’” *Dolan v. USPS*, 546 U.S. 481, 491-492 (2006) (citations omitted).

The Third Circuit was equally wrong in ruling that a “carve-out” from the discretionary-function exception for failure “to take garden-variety remedial steps to guard against a specific risk that the government was aware of * * * applies only to truly mundane problems, such as failures to install lights, stairways, or railings.” Pet.App.5a. That strange fact-based limitation finds no grounding whatsoever in the FTCA’s language. And to the extent that the Third Circuit’s true motivation for adopting that limitation was hostility to any carve-out at all for failure to take easy steps to guard against a known risk, that hostility is inconsistent with the basic, underlying principle that conduct is covered by the discretionary-function exception only if some policy judgment is involved. See *Gaubert*, 499 U.S. at 325, 327, 332. Failure to take simple steps to guard against a known risk—no matter in what factual context the risk arises—cannot plausibly be characterized as a policy judgment rather than as mere carelessness, laziness, or lack of concern for others’ welfare.

In short, the Third Circuit’s decision is fundamentally flawed. The court of appeals should have focused on Castner’s specific conduct and asked whether policy analysis played a role. Properly framed in that way, the answer is unquestionably no. Castner ordered Tyler to risk his own life and safety, as well as that of others, by driving several hundred miles on a busy, fast-paced highway while incapacitated. Tyler warned Castner that he was “extremely sick” and felt “dizzy and lightheaded” whenever he tried to stand up, and

yet Castner still demanded that Tyler attend the event, going so far as to threaten Tyler with being discharged. Pet.App.35a, 39a. And the social event bore no serious connection to the Delayed Entry Program’s purpose of preparing poolees “for the physical and mental rigors of recruit training.” Marine Corps Recruiting Command Policy Letter 02-15, at 1; see 10 U.S.C. 513. Castner’s egregiously unreasonable conduct, which involved a failure to take a simple step to avoid an overwhelming risk and resulted from carelessness rather than from any balancing of policy concerns, does not fall within the scope of the discretionary-function exception.

This Court could ameliorate many of the problems that the lower courts have experienced in trying to apply the discretionary-function exception by adopting some or all of those limits on the exception’s scope, each of which has been adopted by at least one circuit. Each one gives real force to this Court’s statement in *Gaubert* that the discretionary-function exception is intended to protect only conduct that reflects a policy judgment, not conduct that is outside the exercise of any such judgment. The Court also could modify the *Gaubert* test in a more fundamental way, or overrule *Gaubert* entirely, to ensure that the government is unable to characterize essentially any action or inaction as discretionary within the meaning of the exception.

III. The Question Presented Is Extremely Important, and This Case Presents an Excellent Vehicle to Address It

The discretionary-function exception is the most significant, frequently litigated exception to the government’s waiver of sovereign immunity in the FTCA.

The scope of that exception therefore has extraordinarily serious and direct implications for the ability of victims of government wrongs to obtain redress. That is particularly true where, as here, the victim is not an active-duty member of the military but is nevertheless under the military’s authority, because that part of the Executive Branch exerts enormous power over individuals in its sphere. And the law on the scope of the discretionary-function exception is in tremendous disarray—so much so that lower courts have repeatedly cried out for guidance from this Court on the very circuit disagreements raised here, while noting that this Court has not substantively addressed the discretionary-function exception for several decades. This case, which cleanly presents several key issues about the scope of that exception in a motion-to-dismiss posture, is an excellent vehicle by which the Court can provide that badly needed guidance and ensure that the FTCA’s waiver of sovereign immunity does not become an empty promise.

A. The discretionary-function exception is “the most frequently litigated” exception to the FTCA’s sovereign-immunity waiver. *Matthews v. United States*, 2011 WL 3471140, at *2 (D. Guam 2011), *aff’d*, 586 F. App’x 366 (9th Cir. 2014); see, e.g., Hon. Robert C. Longstreth, *Does the Two-Prong Test for Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, 8 U. St. Thomas L.J. 398, 403 (2011); James R. Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538, 1541 (2000). And, more often than not, the government asserts it successfully to defeat tort claims. See Michael Contino & Andreas Kuersten, Cong. Rsch. Serv., R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview* (Apr. 2023); Gregory C.

Sisk, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. St. Thomas L.J. 295, 301 (2011). One study found that between 2014 and 2023, the government prevailed in 88.3% of appeals in which it invoked the discretionary-function exception. Gregory C. Sisk, *Immunity for Imaginary Policy in Tort Claims Against the Federal Government*, 100 Notre Dame L. Rev. 1, 58-59 (forthcoming 2024). And another study concluded that the government “has invoked the exception nearly twice as often in the twenty-five years since *Gaubert* than in the forty-four years prior to *Gaubert*.” Daniel Cohen, *Not Fully Discretionary: Incorporating A Factor-Based Standard into the FTCA’s Discretionary Function Exception*, 112 Nw. U. L. Rev. 879, 896 (2018).

The issues raised by this case relating to the scope of that exception—that is, whether the exception applies where the government actor’s conduct was objectively unreasonable, or where the government actor failed to take an easy precaution to deal with a well-known risk, or where the government actor simply acted carelessly rather than actually making any judgment about policy—therefore arise over and over again, and they are determinative of whether people harmed by the Executive Branch can obtain any relief. The FTCA is generally “the exclusive remedy for torts committed by Government employees in the scope of their employment.” *United States v. Smith*, 499 U.S. 160, 166 (1991). As such, it is often the only way for people to seek justice and compensation when they have been wronged by federal employees or agents. Indeed, prior to the FTCA’s enactment, government “agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation” but were

“remediless solely because their perpetrator was an officer or employee of the Government.” *Feres v. United States*, 340 U.S. 135, 139-140 (1950). Congress intended the FTCA to provide “workable, consistent and equitable” relief “to those who had been without.” *Ibid.*

But “unduly generous interpretations” of the discretionary-function exception “run the risk of defeating the central purpose of the statute.” *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). The exception exists for the limited purpose of “prevent[ing] judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy,” which strikes a congressionally calibrated balance between “impos[ing] tort liability” and “protect[ing] certain governmental activities” from suit. *Varig*, 467 U.S. at 808, 814. It is difficult indeed to say that careless or egregiously unreasonable government conduct, or government conduct that simply fails to take a simple step to guard against an obvious risk, is “based on considerations of public policy.” *Berkovitz*, 486 U.S. at 537. But if the exception is interpreted so broadly that it encompasses that type of government conduct, then the exception effectively swallows the FTCA’s waiver of sovereign immunity—which means that injured parties lack redress and society is plagued by the “unjust consequences” of sweeping “sovereign immunity.” *Feres*, 340 U.S. at 139.

That state of affairs is highly problematic across the whole range of FTCA cases, encompassing a wide variety of subject matters, in which the government asserts the discretionary-function exception. But the harmful effects of an overbroad exception are acutely illustrated by the particular factual setting in which this case arises: the military’s “interactions with individuals who, although military-adjacent” or (as here)

actually enlisted in the military, “are not active-duty members of the military.” *Hajdusek*, 895 F.3d at 152. The military has vast power over the safety and survival of those individuals—power that, when exercised negligently, will inevitably result in deaths, as in this case, as well as injuries to those whose status disables them from “access[ing] Department of Defense or Veterans Affairs care when injured.” *Ibid.* Without a meaningful ability to invoke the FTCA’s sovereign-immunity waiver, those individuals must take their chances in “a world where” they “can be injured by negligent military actors and have no recourse,” and the military has “no incentive to give due weight to the risk of serious injury.” *Ibid.* That unchecked Executive Branch power has given and will continue to give rise to tragic and avoidable consequences for which the FTCA is designed to create a remedy.

B. The law on the discretionary-function exception issues that this case presents is not only critically important as a practical matter but also in extraordinary disarray—so much so that lower courts have repeatedly warned about arbitrariness and geographic disparity in results and have cried out for this Court’s guidance.

As noted, this Court has not substantively addressed the scope of the discretionary-function exception for more than thirty years. See *Gaubert*, 499 U.S. 315 (1991). Even then, “lower courts [were having] difficulty in applying th[e] test” for deciding whether the exception applies. *Id.* at 335 (Scalia, J., concurring).

Things have gotten considerably worse since then, as lower courts attempting to follow *Gaubert*’s dictates wrestle with what it means for a discretionary decision to be based on policy considerations and whether such considerations encompass egregiously negligent or simply careless decisions. As many circuit judges have

explained, whether a government actor has made a policy-based judgment “presents an ambiguous standard that is difficult to apply and that has produced a large number of inconsistent holdings in the circuit and district courts.” *Rosebush v. United States*, 119 F.3d 438, 444-445 (6th Cir. 1997) (Merritt, J., dissenting); see, e.g., *Smith*, 290 F.3d at 221 (Michael, J., concurring in part and dissenting in part) (“[C]ourts have had considerable difficulty in deciding whether government actions are grounded in economic, social, or political policy. This has led to significant inconsistency in the case law.”). One judge has even gone so far as to declare that the “jurisprudence in this area has gone off the rails.” *Chadd v. United States*, 794 F.3d 1104, 1114 (9th Cir. 2015) (Berzon, J., concurring).⁴

Indeed, the current state of the law is so unclear that lower court judges have repeatedly called on this

⁴ See, e.g., *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (“difficulty of charting a clear path” through “weaving lines of precedent” on what is “susceptible to social, economic, or political policy analysis”); *Cope v. Scott*, 45 F.3d 445, 448 (D.C. Cir. 1995) (same “difficult[y], since nearly every government action” is “subject to ‘policy analysis’”); *Smith*, 290 F.3d at 214 (Michael, J., concurring in part and dissenting in part) (“difficulty in placing any principled limits on” which conduct is “grounded in social, economic, or political policy”); see generally *Irving v. United States*, 49 F.3d 830, 835 (1st Cir. 1995) (“doctrine” is “fraught with difficulty”); *Domme v. United States*, 61 F.3d 787, 793 (10th Cir. 1995) (Henry, J., concurring) (“[C]onfusion in this area of the law needs to be acknowledged and confronted.”); *Baum v. United States*, 986 F.2d 716, 719-720 (4th Cir. 1993) (“difficulty” in applying exception’s “general terms”); 14 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3658.1 (4th ed. 2024) (exception is “‘quagmire’ of interpretive confusion”) (quoting *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981)).

Court to help. Just last year, Judge Bibas—who authored the decision below—wrote that “it might be time for the Supreme Court to revisit the test for when the FTCA’s discretionary-function exception applies.” *Xi*, 68 F.4th at 842 (Bibas, J., concurring). He explained that “there is * * * significant confusion about how to apply the test,” that “[s]imilar facts have led to opposite conclusions” in different courts, and that “there are at least three longstanding, recurring circuit splits involving” that exception. *Id.* at 842-843. And he concluded that “[t]he longstanding confusion shows the need for more guidance” from this Court “on how to apply the exception.” *Id.* at 843.

As this case illustrates, the confusion is only growing, and there is no reason to think that it will abate without action by this Court. Review is therefore badly needed.

C. This case is an ideal vehicle for this Court to address the limits of the discretionary-function exception. The only question presented here is whether Castner’s conduct was “of the kind that the discretionary function exception was designed to shield”—*i.e.*, whether it “involve[d] the permissible exercise of policy judgment.” *Berkovitz*, 486 U.S. at 536, 539. That legal question was cleanly raised and resolved below in both the trial and appellate courts, which had clear jurisdiction to decide it. And because this case was resolved against petitioners on a motion to dismiss that was decided based on the face of the complaint, there are no factual disputes to blur the picture. Accordingly, there are no procedural or factual issues that could complicate this Court’s review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

No. 23-1784

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAYNU CLARK, Mother of Tyler M. Gergler; JASON
R. GERGLER, Father and Executor of the Estate of
Tyler M. Gergler,
Appellants

v.

SECRETARY OF THE UNITED STATES NAVY;
UNITED STATES OF AMERICA

Argued: March 13, 2024

Filed: May 23, 2024

[Published at 102 F.4th 658]

Before: BIBAS, MONTGOMERY-REEVES, and
ROTH, Circuit Judges

OPINION OF THE COURT

BIBAS, Circuit Judge.

Tragedy does not trump sovereign immunity. Recruit Tyler Gergler died in a car accident on his way to a Marine Corps event. His parents blame the Marines for urging him to drive even though he was ill. But because the Marine sergeant's actions were within his discretion to prepare Gergler for basic training, no waiver of sovereign immunity applies. We will thus affirm.

I. Tyler Gergler's Tragic Death

Gergler wanted to be a Marine, so he joined the Marine Corps' Delayed Entry Program. This program prepares people "both physically and mentally" for basic training. App. 45. His recruiter for the program

was Sergeant Mitchell Castner.

Near the end of Gergler's stint in the program, he had to attend a social event for recruits. But because he had fallen ill, he told Castner that he was too sick to drive. As Castner knew, Gergler lived [661] about four hours from the recruiting station. Castner pressured him to go anyway, saying that the staff sergeant might kick him out of the program if he did not show up. Ultimately, Gergler decided to make the drive. On the way, he crashed his car and died.

After Gergler's parents exhausted their administrative claim, they sued the Marine Corps. They claimed that their son had died because Castner had negligently pressured him to drive while he was too sick to do so, a tort under New Jersey law. Because Castner's actions were within the scope of his Marine Corps employment, they argued, the Government was liable.

The Government moved to dismiss. Though the United States has waived sovereign immunity for many claims, it has not done so for government agents' discretionary acts. 28 U.S.C. § 2680(a). When Castner pressured Gergler to drive, the Government argued, he was acting as Gergler's recruiter, a discretionary function. Thus, sovereign immunity bars this suit.

The District Court agreed. It dismissed the suit on the pleadings because Castner had discretion and had been exercising that discretion. Gergler's parents now appeal. We review facial motions to dismiss de novo, accepting the pleadings' factual allegations as true. *Schuchardt v. President of the U.S.*, 839 F.3d 336, 344 (3d Cir. 2016).

II. Sovereign Immunity Bars This Suit Because Sergeant Castner Acted Within His Discretionary Function

The United States and its agents enjoy sovereign immunity from suit. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941) (collecting cases). In the Federal Tort Claims Act, the Government waived its immunity for its agents' torts. 28 U.S.C. §§ 2671–2680. But that waiver does not cover discretionary functions—that is, when a claim arises from an agent's “exercise or performance” of “a discretionary function or duty ... whether or not the discretion involved be abused.” § 2680(a). So such claims remain barred.

To invoke the discretionary-function exception, the Government must show two things: (1) its agent's action “involve[d] an element of judgment or choice” and (2) its agent's judgment was “of the kind that the ... exception was designed to shield,” meaning that it was “susceptible to policy analysis.” *United States v. Gaubert*, 499 U.S. 315, 322–23, 325, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) (brackets and internal quotation marks omitted). Though Gergler's parents forfeited any argument on the first prong, the Government has satisfied both.

A. Castner had discretion to urge Gergler to attend the event

First, the Government must show that the agent had discretion to act. Once the Government does so, the plaintiff may point to limits on that discretion. If a law, regulation, or policy leaves the agent no meaningful choice, the exception does not apply. *Xi v. Haugen*, 68 F.4th 824, 837–38 (3d Cir. 2023).

Once the Government showed that it had discretion, Gergler's parents did not try to rebut that show-

ing before the District Court. But on appeal, they raise a Marine Corps policy that allegedly bound Castner. It requires program supervisors to tell civilian recruits that events are optional. Yet at oral argument, Gergler’s parents admitted that they had forfeited this argument. They also admitted that Castner had told Gergler that the social event was optional. Plus, the policy applies only to physical events, not social gatherings like the one here. Because Castner was not [662] bound to follow a specific course of action, he had discretion to urge Gergler to attend.

B. Castner’s discretion relates to his function of training Marine recruits

Second, the Government must show that the agent’s function was discretionary. The claim must be “based upon the exercise or performance” of an agent’s “discretionary function or duty.” § 2680(a). We look to the agent’s duty and assess what discretion he needed to do it. *Berkovitz v. United States*, 486 U.S. 531, 537, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). If we can analyze or debate an agent’s function in policy terms, we presume that the exception applies. *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 336 (3d Cir. 2012).

Castner’s function was to prepare civilians for Marine Corps basic training. We can analyze that function in policy terms. And reasonable minds can differ on how to toughen up civilians for basic training. Gergler’s parents think that social gatherings should not count as part of training. But the Marines need to prepare recruits for both physical and mental hardships. Social gatherings may cultivate camaraderie and create strong bonds among the recruits to help them withstand the trials ahead. Interactions at such events can also reflect a recruit’s drive and ability to

work with others. At the very least, whether and how to encourage attending social gatherings is a debatable policy. That is enough to trigger the discretionary-function exception.

C. No carve-out applies

Even so, Gergler’s parents try to avoid the exception in two ways. First, they argue that Castner’s conduct was so egregious that it goes beyond policy consideration. In support, they cite a First Circuit dictum. That court suggested that some discretionary actions might be so beyond the pale “that no reasonable observer would see them as susceptible to policy analysis.” *Hajdusek v. United States*, 895 F.3d 146, 152 (1st Cir. 2018).

We decline to adopt that suggestion. Sovereign immunity is the rule. Any exception “must be unequivocally expressed” and closely cabined to what the law permits. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (internal quotation marks omitted). Here, Congress barred liability for discretionary functions “whether or not the discretion involved [is] abused.” 28 U.S.C. § 2680(a). We cannot rewrite this language to make the Government liable for discretionary calls, even if they are egregious.

Second, Gergler’s parents invoke a narrow carve-out for easy precautions. We have held that when a government agent fails to take “garden-variety remedial steps” to guard against a “specific risk” that the government was aware of, the exception does not apply. *S.R.P.*, 676 F.3d at 338. But that carve-out applies only to truly mundane problems, such as failures to install lights, stairways, or railings. *Cestonaro v. United States*, 211 F.3d 749, 755–56 (3d Cir. 2000); *Gotha v. United States*, 115 F.3d 176, 181 (3d Cir.

1997). And it seems hard to justify under the language of the statute. *S.R.P.*, 676 F.3d at 347–48 (Roth, J., concurring). So though we must recognize that exception, we will not extend it further.

* * * * *

Tyler Gergler’s death was a great loss. But the question before the Court is whether the United States clearly and unequivocally waived sovereign immunity, not whether the Government’s alleged conduct [663] was wrong. The United States is immune from suit when its agents commit alleged torts within the discretion accorded by their job function, and Sergeant Castner’s actions were within his discretionary function of preparing Marine recruits for training. So we must affirm.

APPENDIX B

No. 22-2586

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Raynu CLARK and Jason Gergler,
Plaintiffs,

v.

The Honorable Carlos DEL TORO, in his official capacity as the Secretary of the Navy, and The United States of America,
Defendants.

March 31, 2023

OPINION

Katharine S. Hayden, United States District Judge

I. Introduction

Plaintiffs Raynu Clark and Jason R. Gergler (together, “plaintiffs”) have filed this wrongful death action against the United States and Carlos Del Toro, the Secretary of the Navy, under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2401, 2671-80, based on the July 2019 death of their son, Tyler M. Gergler,¹ while he was driving to a U.S. Marine Corps recruiting event. Defendants have moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, and improper venue. (D.E. 6.) For the reasons set forth below, the action will be dismissed for lack of subject matter jurisdiction based on the discretionary function exception to the FTCA.

II. Background

¹ The Court refers to Tyler M. Gergler as “Tyler” throughout this opinion by way of distinction from plaintiff Jason R. Gergler.

The complaint alleges as follows. Tyler was raised in a family with a long history of service in the United States Marine Corps. Both parents and his maternal grandfather were Marines. (D.E. 1, Compl. ¶¶ 17, 56.) In June 2019, shortly after graduating from high school, Tyler enlisted in the Marine Corps Reserve for eight years with a four-year active-duty obligation. (*Id.* ¶ 19.) He joined through the delayed entry program (“DEP”). (*Id.* ¶ 21.) The parties describe the DEP in roughly similar terms: defendants characterize it as a program permitting individuals to “enlist in a Reserve component of a military Service and specify a future reporting date for entry on active duty in the active component that would coincide with availability of training spaces.” (D.E. 6-1, Defs.’ Moving Br. 3 (citing D.E. 6-2, Kayser Decl., Ex. 1, Marine Corps Order 3040.4, Marine Corps Casualty Assistance Program § 1-4, ¶ 2.t (defining DEP).) Plaintiffs describe it as “a military entry program in which individuals enlist in the United States Marine Corps but are not required to report for training and active duty for up to a year.” “[R]ecruits or ‘poolees’ are untrained members of the non-drilling Reserve component of the military” who “show up on an assigned date at the Military Entrance Processing Station (‘MEPS’), at which time, the poolee is discharged from the Reserves and re-enlisted in the active branch of the military chosen.” (D.E. 9, Pls.’ Opp. Br. 2.)²

² See also Marines, Delayed Entry Program, <https://www.marines.com/become-a-marine/process-to-join/delayed-entry-program.html> (last visited March 31, 2023) (“In addition to getting you ready for recruit training, the DEP grants you the opportunity to postpone recruit training ... to complete [school] ... or generally get your affairs in order before setting out on this life-changing, purposeful endeavor.... Your Marine Recruiter will provide you with mentorship, guidance

According to the complaint, in late July 2019, at the behest of Marine Corps Staff Sergeant Mitchell Castner, his recruiter, Tyler prepared to attend a Marine Corps recruiting event in Colts Neck, New Jersey, on July 27, 2019. On July 26th, Castner and Tyler, who lived with his father in Maryland, exchanged text messages. (Compl. ¶¶ 1-2, 16-17, 23.) Castner, texting from Hackensack, New Jersey, told Tyler, in Maryland, to attend, despite Tyler's statements that he was vomiting, dizzy, and lightheaded from a stomach virus and migraine headache. (*Id.* ¶¶ 24-26, 58.) Castner texted Tyler that "you at least need to show because they're making a big deal about people not showing," and Tyler replied back, "I'm trying to get it out of me." (*Id.* ¶ 26.) Castner responded, "Do your best man," leading to the following exchange:

[Tyler]: Give me an hour I'll see if I can get someone to drive me because I can't drive it's not safe for me or anyone else on the road.

[Tyler]: It's not looking good sir ... I really am sorry to be getting sick like this I know this screws a ton of crap up but maybe I'll be able to make it by the 30th for meps?

[Castner]: It ain't about meps man.... this pool function and you not being there is the im-

and support, while ensuring you are prepared for the rigors of recruit training. You will participate in a strenuous physical regimen, to prepare you and your fellow poolees for the recruit training battles ahead.... You will attend family nights with your family and other members of the Delayed Entry Program."); *id.* ("It is at Marine Corps Recruit Training where it will be determined who is driven by a refusal to quit and an uncompromising will to win. To prepare you for these battles, the DEP will test your resolve and ensure you can work collectively with those who share in a common moral cause.").

portant. You need to be up here for the pool function. At least to show face.

[Castner]: And thats coming from [Staff Sergeant Jeremy] [B]lassingame. Cause they're gonna talk about discharging you if you dont.

[Tyler]: I guess I'm gonna try and drive then.

(*Id.* ¶ 26.) A phone call between Castner and Tyler ensued, after which Castner wrote, "Just let me know when you leave and when you get up here." (*Id.*) Tyler responded, "Yes, sir," and just under an hour and a half later, he texted Castner one word: "Leaving." (*Id.*)

Within 90 minutes after that exchange, Tyler died in a single-car crash on a Maryland highway. (*Id.* ¶¶ 27-28.) The Maryland state police reported that he did not brake before impact with a guardrail, and that it did not appear he reacted to leaving the roadway. (*Id.* ¶¶ 31, 46.) He suffered catastrophic injuries and was pronounced dead at the scene. (*Id.* ¶¶ 38-41.) The road conditions and weather were clear, the road was straight and level, and Tyler had no drugs or alcohol in his system. (*Id.* ¶¶ 32-34, 36.) According to the complaint, Tyler "was most likely unconscious when the accident occurred," as he "made no attempt to [brake] prior to striking the guard rail and ... no attempt to avoid the guard rail or steer the vehicle back into the road." (*Id.* ¶ 37.) It further asserts that due to his illness, Tyler "was in no condition to operate a vehicle" and should not have been driving, and Castner knew this when he "ordered Tyler to drive to New Jersey for the recruiting event or face discharge." (*Id.* ¶¶ 44-45, 48-49.)

The Marines declined to provide benefits because Tyler was not yet a Marine; the complaint describes the "official position" to be that Tyler did not qualify

“because he was driving to stay with family in New Jersey that evening and would then drive to the Poolee [recruiting] event the next morning.” (*Id.* ¶ 63.)

Plaintiffs submitted administrative tort claims to the Department of the Navy and to the United States in May and June 2021. (*Id.* ¶ 10.) The Department of the Navy issued a final rejection letter on March 9, 2022. (*Id.* ¶ 12.) Plaintiffs filed their complaint on May 2, 2022, asserting a negligence claim under the FTCA. The contents of text messages purportedly recovered from Tyler’s cell phone were attached as an exhibit to the complaint, as were emails reflecting plaintiffs’ efforts to seek death benefits from the Marines. (*See* D.E. 1-1, Ex. 1 to Compl.)

Defendants have moved to dismiss for lack of subject matter jurisdiction, invoking the discretionary function exception to the FTCA. They further assert that plaintiffs have failed to state a claim for negligence. Finally, they contend that even if subject matter jurisdiction exists and even if plaintiffs have adequately pleaded a claim under Fed. R. Civ. P. 12(b)(6), venue is improper and the action should be dismissed or transferred to the District of Maryland. In support of their motion, defendants rely on briefing (D.E. 6-1, Moving Br.; D.E. 10, Reply Br.), as well as declarations from Castner (D.E. 6-3, Castner Decl.) and Marine Corps Captain Kevin P. Kayser, the Executive Officer of Recruiting Station New Jersey, 1st Marine Corps District (D.E. 6-2, Kayser Decl.). Kayser’s declaration attaches as exhibits several Marine Corps orders that, in pertinent part, describe aspects of the DEP, a policy letter from the Marine Corps recruiting command, and what defendants assert is the hold harmless agreement that Tyler signed. Plaintiffs oppose on all grounds, relying on their opposition

brief. (D.E. 9, Opp. Br.)

III. Legal Standards

A. Rule 12(b)(1) Motions

Defendants have raised the threshold question of subject matter jurisdiction. Without it, “this Court is without power to hear the case,” *Northlight Harbor, LLC v. United States*, 561 F. Supp. 2d 517, 521 (D.N.J. 2008) (Rodriguez, J.), and cannot reach the merits. Because that issue is dispositive here, the Court will not reach defendants’ arguments under Rules 12(b)(3) or (6).

A motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may take the form of either a facial attack or a factual one. *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014). The distinction “determines how the pleading must be reviewed.” *Id.* A facial attack “considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court because, for example, it does not present a question of federal law, or because there is no indication of a diversity of citizenship among the parties, or because some other jurisdictional defect is present.” *Id.* at 358. A defendant can mount this kind of challenge before answering the complaint or “otherwise contest[ing] the factual allegations of the complaint.” *Id.*

“A court ruling on a facial attack considers only the complaint, viewing it in the light most favorable to the plaintiff.” *Long v. SEPTA*, 903 F.3d 312, 320 (3d Cir. 2018). In substance, the same standard that applies to a Rule 12(b)(6) motion applies to a facial attack on subject matter jurisdiction under Rule 12(b)(1): the Court is limited to the complaint allegations and a limited universe of additional materials

(e.g., documents referenced in and attached to the complaint) and construes those allegations in plaintiffs' favor. *Aichele*, 757 F.3d at 358; *see also Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) ("In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.").

A factual attack argues that subject matter jurisdiction is lacking "because the facts of the case ... do not support the asserted jurisdiction." *Id.* For example, although a plaintiff may have adequately *pleaded* diversity jurisdiction, a defendant mounting a factual attack could offer proof that, *in fact*, there is no diversity. *Id.* A court ruling on a factual attack affords no presumption of truthfulness to the complaint allegations; the burden of proving subject matter jurisdiction rests on the plaintiff; and the Court can make factual findings relative to jurisdiction and look outside the pleadings in doing so. *CNA v. United States*, 535 F.3d 132, 139, 145 (3d Cir. 2008) (citations omitted); *accord S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 332 (3d Cir. 2012).

B. FTCA Framework and the Discretionary Function Exception

"The United States of America, as a sovereign, is immune from suit unless it consents to be sued." *Merando v. United States*, 517 F.3d 160, 164 (3d Cir. 2008). The FTCA supplies a limited waiver of that immunity. *Pellegrino v. United States of Am. Transportation Sec. Admin.*, 937 F.3d 164, 169 (3d Cir. 2019) (en banc). More specifically, it waives the government's immunity for certain injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the

scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674; *CNA*, 535 F.3d at 138 (section 1346(b)(1) “allows plaintiffs to bring claims based on the action of [g]overnment employees when private persons engaging in analogous behavior would be liable under state law”).

There are exceptions to the FTCA’s waiver of the government’s immunity; among them is the discretionary function exception, which provides that the FTCA does not apply to:

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

28 U.S.C. § 2680(a). The discretionary function exception “ ‘marks the boundary between Congress’ willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.’ ” *Merando*, 517 F.3d at 164 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984)). Its purpose is “ ‘to prevent judicial “second guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’ ” *Id.* (quoting *Varig Airlines*, 467 U.S. at 808). It is plaintiffs’ burden to show

that their claims fall within the scope of the FTCA (in other words, that the requirements of 28 U.S.C. § 1346(b)(1) are satisfied), but it is the government's burden to show that the discretionary function exception to the FTCA applies. *Id.*; *S.R.P. ex rel. Abunabba v. United States*, 767 F.3d 329, 333 (3d Cir. 2012).

In determining whether the discretionary function exception applies, it is essential to identify the specific conduct that is being challenged. *S.R.P.*, 767 F.3d at 332. Thereafter, the Court engages in a two-part inquiry, which involves asking first “whether the act giving rise to the alleged injury and thus the suit involves ‘an element of judgment or choice.’” *Merando*, 517 F.3d at 164 (quoting *United States v. Gaubert*, 499 U.S. 315, 322 (1991)). The “judgment or choice” requirement is not met if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.” *Id.* (quoting *Gaubert*, 499 U.S. at 322) (internal quotation marks omitted)). The rationale is as follows:

[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Id. at 165 (quoting *Gaubert*, 499 U.S. at 324).

If the conduct does involve an element of judgment or choice, the Court next asks “ ‘whether that judgment is of the kind that the discretionary function exception was designed to shield.’ ” *Id.* (quoting *Gaubert*, 499 U.S. at 322-23). This inquiry carries forth the exception’s purpose – preventing judicial second-guessing of legislative and administrative policy decisions via tort actions – and thus aims to protect policy-based actions and decisions. The focus is on the nature of the action taken, and not on the actor’s subjective intent in exercising discretion. *Id.*

IV. Discussion

It is not clear whether defendants’ challenge to subject matter jurisdiction is intended to be a facial attack or a factual one. In some respects, they have signaled a factual attack by attempting to direct the Court to material outside the pleadings. Castner’s declaration, for instance, offers an interpretation of the text messages that contrasts with plaintiffs’ characterization of them in the complaint. (*Compare* Castner Decl. ¶¶ 4-5 (claiming he did not “order” Tyler to report and instead “informed [him] that participation in DEP functions was voluntary” and “encouraged” him to attend the July 27 function) *with* Compl. ¶ 23 (alleging that Castner “ordered” Tyler to attend).)³ Defendants also invoke Castner’s declaration to challenge plaintiffs’ assertion in their brief

³ Defendants’ briefing also appears to attribute to Castner an additional series of text messages in which the sender offers to buy or make Tyler food. (Moving Br. 7; Reply Br. 4 (citing Compl., Ex. 1).) Those messages are found in the exhibit to the complaint. This appears to be misguided, given the time stamps and the sender’s different phone number, but is ultimately irrelevant.

that the recruiting event was a social event not involving physical training. (*Compare* Pls.’ Opp Br. 2 *with* Reply Br. 2.) They further contend that the Court can consider the hold harmless agreement Tyler allegedly signed because the Court can consider evidence outside the pleadings in ruling on a Rule 12(b)(1) motion. (Moving Br. 23 n.8; Reply Br. 2 n.2) In other respects, however, defendants suggest that the materials they have submitted are appropriate for review on even a facial challenge. (*See* Moving Br. 12 (asserting that “even when a facial challenge to jurisdiction is brought, the Court may still consider public documents and websites”).)

Notwithstanding the soft focus of defendants’ legal analysis, the fact remains that the discretionary function inquiry has a narrow and very specific focus. That is the relevant conduct involved “an element of judgment or choice,” and, if so, whether that judgment is the kind that exception aims to shield. As explained earlier, the first part of that test looks to whether a statute, regulation, or policy mandates certain conduct. If no such authority exists, the Court proceeds to the policy-based inquiry in the second step. Given that, defendants’ efforts to pick factual fights ultimately are not material to the inquiry.⁴

Instead, what controls the inquiry is a limited number of uncontested factual allegations and the

⁴ For example, the government actor’s characterization of his own words—words that, in any event, are reproduced verbatim in the complaint and its accompanying exhibit, and which Castner does not deny sending—is irrelevant to this analysis. *Merando*, 517 F.3d at 165 (“The ‘focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by the statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.’ ” (quoting *Gaubert*, 499 U.S. at 325)).

policy letter attached to Kayser’s declaration. To be clear, the Court does not have to look outside the pleadings and materials appropriate to a facial challenge to subject matter jurisdiction in order to conclude that the discretionary function exception applies here. As such, labeling defendants’ motion a factual attack or a facial attack is beside the point, because even with the additional procedural protections that a facial attack gives plaintiffs,⁵ the Court is constrained to conclude that subject matter jurisdiction is lacking.

In their lawsuit, plaintiffs seek to prove that the government, through Castner, was negligent to the point of causing Tyler’s death insofar as his text exchange compelled Tyler to drive to a recruiting function while he was impaired by illness.⁶ Notwithstanding that defendants *characterize* Castner’s language differently, there is no dispute about the statements he actually made, and there is no dispute that the relevant conduct is Castner’s choice of words in communicating with Tyler about attending the function.

⁵ As explained earlier, these protections are a presumption of truth attaching to plaintiffs’ factual allegations and limits on the scope of what the Court can consider. The Court also cannot make factual findings relative to jurisdiction. *See Aichele*, 757 F.3d at 358; *CNA*, 535 F.3d at 139, 145; *S.R.P.*, 676 F.3d at 332. The burden to prove the applicability of the discretionary function exception rests on defendants regardless of the type of challenge to subject matter jurisdiction. *See S.R.P.*, 676 F.3d at 344-45.

⁶ Although the complaint asserts that Staff Sergeant Jeremy Blassingame also engaged in “actions ... [that] provide clear liability for the government” (Compl. ¶ 22) plaintiffs offer no factual allegations regarding the conduct they purport to attribute to him. Instead, his name appears in a text message Castner sent to Tyler.

The next question is whether that conduct “involves ‘an element of judgment or choice,’ ” an inquiry that looks to whether a “federal statute, regulation, or policy *specifically prescribes* a course of action for an employee to follow.” *Merando*, 517 F.3d at 164 (emphasis added). Defendants argue that “[t]here are no Marine Corps policies or orders mandating how the recruiter should have exercised his judgment in his treatment of [Tyler] under these circumstances.” (Moving Br. 17.) They cite Marine Corps Recruiting Command Policy Letter 02-15, Exhibit 2 to the Kayser Declaration, on risk management for pool (and other) functions, a document plaintiffs do not challenge on any procedural grounds⁷ and which the Court may review. *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017).

A careful reading convinces the Court that its guiding principle is common sense. The text relates the purpose of the DEP—“to prepare poolees and candidates for the physical and mental rigors of recruit training and Officer Candidates School (OCS) in order to reduce attrition”—and cites the importance of “exercising common sense,” or the “‘sound practical judgment that is independent of specialized knowledge, training, or the like,’ ” when planning and carrying out events. (*Id.* at 1-2.) It directs commanding officers to “implement specific control measures to mitigate risk,” for physical activities. (*Id.* at 2.) It lists steps to take such as designating a Marine in charge,

⁷ Although plaintiffs argue that the Court should not consider the unsigned hold harmless agreement appended to this document in the context of defendants’ Rule 12(b)(6) argument, they do not suggest that the Court cannot consider the policy letter itself. Moreover, the hold harmless agreement (whether the signed version or unsigned version) is irrelevant to the Court’s resolution of this matter under Rule 12(b)(1).

telling civilian personnel that participation is voluntary and what the scope of the event is, having means of communication (such as charged cell phones with sufficient signal strength) available, and mitigating risks from the terrain and weather. There are no specifics on how to communicate with recruits or how hard to push them to attend specified events.

In short, Marine Corps Recruiting Command Policy Letter 02-15 is not a mandatory directive to Marine recruiters to communicate with recruits under the circumstances confronting Tyler and Castner, nor does it impose specific requirements about how to motivate poolees to attend events. Implicitly those matters are left to recruiters' discretion. Plaintiffs point to no other sources for any requirements imposed, and they do not contend that discovery is needed for them to establish that such a requirement exists.

Absent such a mandate, the second step of the analysis examines whether the decision defendants made—specifically, the judgment Castner exercised in strongly exhorting Tyler to attend the event—is the type of judgment the exception aims to shield. When “established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion,” a rebuttable presumption arises that the agent's acts when exercising that discretion are grounded in policy considerations. *S.R.P.*, 676 F.3d at 336 (quoting *Gaubert*, 499 U.S. at 324) (internal quotation marks omitted).

Plaintiffs have not rebutted that presumption here, but even in the absence of any presumption at all, it is apparent that the judgment Castner exercised here is of a type susceptible to policy analysis. To satisfy that requirement, “there must be a ‘ration-

al nexus’ between the Government’s decision and ‘social, economic, and political concerns.’ ” *Id.* (quoting *Cestonaro v. United States*, 211 F.3d 749, 759 (3d Cir. 2000)). Defendants point to the need for military personnel to ensure recruits’ readiness through a mix of considerations – physical and mental – to embark on service with the Marine Corps, and to the necessity of considering tradeoffs between safety and preparedness in the process. (See Moving Br. 15-18; Reply Br. 1.)

Plaintiffs argue that attendance at a social event has nothing to do with combat readiness, proper resource allocation, or preparation for boot camp, and contend that the case law dismissing similar claims by poolees involved physical training, not social gatherings. Preparedness for military training and service inescapably does involve social considerations, and courts have so recognized. In *Snow v. United States*, the court wrote that discretionary decisions satisfying the second prong of the discretionary function analysis can involve balancing “technical, military, *and even social considerations*, including specifically the tradeoff between greater safety and greater combat effectiveness.” 2012 WL 1150770, at *3 (E.D. Tex. Mar. 13, 2012) (emphasis added), *report and recommendation adopted*, 2012 WL 1150765 (E.D. Tex. Apr. 5, 2012). See also *Hajdusek v. United States*, 2017 WL 4250510, at *6-7 (D.N.H. Sept. 21, 2017) (same, and noting need for balancing poolee safety concerns against interest in preparing poolees for physical and mental rigors of training and service), *aff’d*, 895 F.3d 146 (1st Cir. 2018); *James v. United States*, 2013 WL 12086793, at *3, 4 (C.D. Cal. July 24, 2013) (United States had “demonstrated that the discretionary function exception applies to judgments made by the USMC in training its personnel and

conducting recruiting events”; “[d]efendants’ decisions as to how to train its military personnel and conduct recruiting events” are based on public policy and their “determinations as to how best to recruit and train new Marines ... are precisely the type of judgments the ... exception is designed to protect”). As the First Circuit said, albeit in a physical training case but in language that illustrates the broad considerations in play:

Work the poolees too much, and the Corps loses potential new members; work them too little, and preparedness and discipline might suffer. We doubt that Congress intended judges to dictate this balance, especially given that judges would only be reviewing claims of error in one direction.

Hajdusek, 895 F.3d at 151. Castner’s exhortations to Tyler to, among other statements, “at least” show up and “show face” fit readily within this policy-based rubric; he was urging Tyler to show readiness and resolve to be a Marine by showing up.

Plaintiffs, appearing to recognize the constraints of the discretionary function exception as applied here, suggest that Castner’s behavior was so objectively unreasonable that it should not be shielded. This “objectively unreasonable” language comes from *Hajdusek*, where the panel addressed a concern that dismissing that case would give the military “a license to behave unreasonably in its interactions” with poolees who have no access to care or other benefits if injured. 895 F.3d at 152. The panel suggested that a hypothetical situation might exist in which certain decisions may “pass a threshold of objective unreasonableness such that no reasonable observer would see them as susceptible to policy analysis,” such as a Marine deciding to “toughen up” poolees by

having them jump off a 20-foot-high cliff onto concrete. *Id.* In that hypothetical scenario, the decision could not in any reasonable way have been informed by policy considerations; it would represent a “complete rejection” of safety considerations in favor of “intensity concerns,” “contrary to guidance from the Marines.” *Id.* at 152-53.

Leaving aside that this dictum does not appear to have been adopted by the Third Circuit, plaintiffs here, as with the plaintiff in *Hajdusek*, have “not alleged anything close to the situation described above.” *Id.* at 153. Here, the conduct consisted of communications between a recruiter and his poolee comprised of a series of text messages and an unrecorded phone call that ends with Castner telling Tyler to let him know when he’s getting on the road, which Tyler does. The specific conduct that is the focus is Castner’s persistence in urging Tyler to get to the event even if all he does is show his face. This persistence is an exercise of judgment, made with the knowledge that Tyler is describing serious symptoms of illness and that he has chosen to drive while suffering from them; it is not a “rejection of a policy goal rather than a balancing of such goals.” *Id.* at 153. Their communications are unambiguous: Castner, a recruiter dealing with a poolee, told Tyler why getting to the event was important and urged him to get there, even to the point of letting Tyler think that he risked discharge if he did not appear. That was a pure exercise of discretion on his part. As such, the Court must conclude what he said falls within the discretionary function exception.

* * *

Finally, plaintiffs sued both the United States and the Secretary of the Navy, Carlos Del Toro, under the FTCA. But the only proper defendant under the

FTCA is the United States. 28 U.S.C. §§ 2674, 2679(a); *see also CNA*, 535 F.3d at 138 n.2. The Court's disposition makes it unnecessary to address this issue beyond observing that it is an independent, additional reason why the case cannot proceed against Del Toro.

V. Conclusion

For the reasons set forth above, the motion to dismiss will be granted, and the complaint will be dismissed for lack of subject matter jurisdiction. An appropriate order will follow.

25a

APPENDIX C

No. 22-2586

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Raynu CLARK and Jason Gergler,
Plaintiffs,

v.

The Honorable Carlos DEL TORO, in his official capacity as the Secretary of the Navy, and The United States of America,
Defendants.

March 31, 2023

ORDER

THIS MATTER having come before the Court on the motion (D.E. 6) of defendants to dismiss the complaint, and the Court having considered the parties' submissions; for the reasons set forth in the opinion filed herewith,

IT IS, on this 31st day of March, 2023,

ORDERED that the defendants' motion (D.E. 6) is GRANTED, and it is further

ORDERED that the Clerk of the Court is directed to close this case.

/s/ Katharine S. Hayden
Katharine S. Hayden, U.S.D.J.

APPENDIX D

Statutory provisions:

28 U.S.C. § 1346

United States as Defendant

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

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

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

considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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

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

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

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

Columbia) or section 7429 of the Internal Revenue Code of 1986.

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

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

28 U.S.C. § 2680**Exceptions**

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

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

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

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

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture);
and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..1

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

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

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

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

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

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

31a

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

(k) Any claim arising in a foreign country.

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

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

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

APPENDIX E

No. 22-2586

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Raynu CLARK and Jason Gergler,
Plaintiffs,

v.

The Honorable Carlos DEL TORO, in his official capacity as the Secretary of the Navy, and The United States of America,
Defendants.

[Filed: May 2, 2022]

COMPLAINT FOR RELIEF UNDER THE FEDERAL TORT CLAIMS ACT

COME NOW, Raynu Clark, the mother of Tyler M. Gergler, and Jason R. Gergler, the father of Tyler M. Gergler, on his own behalf and in his capacity as the Executor and on behalf of the Estate of Tyler M. Gergler, by and through counsel, and bring this Complaint against the United States of America (“United States”) pursuant to the Federal Tort Claims Act (“FTCA”) 28 U.S.C. §§ 2671 *et. seq.* and 28 U.S.C. § 1346(b)(1).

The parents of Tyler M. Gergler allege as follows:

I. INTRODUCTION

1. This action is brought against the Defendant for the wrongful death of Tyler M. Gergler and for the pain and suffering he endured prior to his untimely and wrongful death due to the acts of the Defendant, which occurred on July 26, 2019.

II. STATEMENT OF THE PARTIES

2. Plaintiffs at all times relevant to this Complaint were citizens of the United States who reside at the addresses in the caption for this Complaint.

3. Defendant the Honorable Carlos Del Toro is named in his official capacity as the Secretary of the Navy, which oversees the United States Marine Corps, whose employees committed the tortious acts in controversy here.

4. Defendant, UNITED STATES, is sued under the FTCA, 28 U.S.C. § 1346, for the tortious acts of its employees.

III. JURISDICTION

5. This is a civil action brought pursuant to 28 U.S.C. §§ 2671 *et. seq.* and 28 U.S.C. § 1346(b)(1).

6. This Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

7. This Court also has exclusive jurisdiction over the FTCA claims in this action pursuant to 28

U.S.C. § 1346(b) because Plaintiffs allege tort claims are against the United States for the acts of its employees.

8. The precise claims at issue are “claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employees of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. 1346(b)(1).

IV. VENUE

9. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs' claims occurred in this District and Defendant's agent committed the tort in Hackensack, New Jersey, which is part of this division.

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES

10. In May and June of 2021, pursuant to 28 U.S.C. § 2675(a), Plaintiffs presented written notice, specifically completed Standard Form 95s, together with addendums and all pertinent supportive documents, of their administrative tort claims to the appropriate federal agencies, the Department of the Navy, and the United States, through Plaintiff's legal representative.

11. Thereafter, a Claims Specialist provided written notice confirming receipt of Plaintiffs' notices.

12. The Department of the Navy issued a final rejection letter for the claim on March 9th, 2022.

13. The parents of Tyler Gergler have thus exhausted their administrative remedies for purposes of these claims under the FTCA. *See* 28 U.S.C. §§ 2675, 1346.

14. Consistent with 28 U.S.C. §. 2401(b), Plaintiffs are commencing this action within six months of the government's putative denial of the claim.

V. STATEMENT OF THE FACTS

15. Tyler M. Gergler was born at what was then National Naval Medical Center in Bethesda, Maryland and raised in suburban Maryland.

16. At the time of his death, he was living with his father Jason Gergler.

17. Like many young men, Tyler idolized his parents and wanted to follow his parents call to service as both had served in the United States Marine Corps.

18. Indeed, since Tyler was 9 years old, his goal was to enlist and serve honourably in the Marine Corps.

19. At the age of 18, having graduated from Clarksburg High School, Tyler enlisted in the Marine Corps Reserve for 8 years with a 4-year active duty obligation on June 11, 2019.

20. Less than two months later, Tyler would be dead as a result of the actions taken by Marine Corps personnel.

21. Tyler joined the Marine Corps through the delayed entry program.

22. As detailed in cell phone text records, Staff Sergeant Jeremy Blassingame, USMC, recruiter and Sergeant Mitchell Castner, were percipient witnesses, agents of the United States Marine Corps and both of their actions as detailed herein provide clear liability for the government for the tortious injuries suffered.

23. During the late days of July, his recruiter, Sergeant Castner, USMC ordered Tyler to attend a Marine recruiting event, which was scheduled to take place on July 27, 2019 at the Recruiting Station, New Jersey Naval Weapons Station Earle Highway 34 South, Colts Neck, NJ 07722.

24. Sergeant Castner sent these texts from the Reserve Center in Hackensack, New Jersey.

25. Unfortunately, Tyler had become extremely sick and was exhausted, something he had explicitly told Sergeant Castner.

26. The following damning text messages were recovered from Tyler's phone:

S 1044 – I got some type of stomach virus and have been throwing up for the past 16 hours... I'm really trying bc I need to be

there for the IST and MEPs.

R 1047 – You still got to come man, at least be there in person for

S 1047 – **I've been in bed with water, tea, and a bucket trying to flush it out so I can drive up for the IST**

S 1116 – **The throwing up isn't the problem I've got migraine and when I get up I get dizzy and lightheaded.**

R 1117 – **Fuck, you at least need to show cause they're making a big deal about people not showing.**

S 1119 – **I know Sir and I'm sorry but I'm trying to get it out of me**

R 1120 – **Do your best man**

S 1120 - **Give me an hour I'll see if I can get someone to drive me because I can't drive it's not safe for me or anyone else on the road.**

S 1312 - **It's not looking good sir... I really am sorry to be getting sick like this I know this screws a ton of crap up but maybe I'll be able to make it by the 30th for meps?**

R 1333 - **It ain't about meps man. this pool function and you not being there is the important. You need to be up here for the pool function. At least to show face.**

R 1336 - **And that's coming from ssgt blasingame. Cause they're gonna talk about discharging you if you dont**

S 1339 – **I guess I'm gonna try and drive then**

1339 - Phone call for 4 minutes w/ Sergeant Mitchell Castner

R 1401 - Just let me know when you leave and when you get up here.

S 1401 - Yes sir

S 1529 – Leaving—

Exhibit 1, Cell Phone Records Provided to Carroll County Sheriff's Office.

27. Less than 90 minutes later, Tyler was dead.

28. The car he was driving was involved in a single vehicle collision on I-70 just outside Ellicott City, Maryland.

29. According to a witness, David C. Collela, Tyler's car just veered from the road for no apparent reason.

30. That was corroborated by another witness, William Copenhagen.

31. Furthermore, according to the Maryland state police report, "[N]o pre-impact braking was evident for the entire 234 feet that the vehicle was driving on the grass prior to the impact with the guard rail end."

32. Road conditions were unremarkable that day.

33. At the time of the crash, the weather was clear. Visibility was clear. The ambient temperature was approximately eighty-eight degrees Fahrenheit with a dew point of fifty two degrees Fahrenheit.... Weather and environmental conditions were not a factor in this crash.

34. The road Tyler was traveling on was straight, relatively level with no significant elevation changes.

35. A black box within the vehicle clocked the vehicle as traveling at 86.4 MPH.

36. According to the autopsy performed on Tyler no drugs or alcohol were in his system.
37. With all probability, Tyler was most likely unconscious when the accident occurred—he made no attempt to break prior to striking the guard rail and he made no attempt to avoid the guard rail or to steer the vehicle back into the road.
38. The impact of the crash caused a guard rail to enter the vehicle, pass through Tyler’s body and exit the vehicle.
39. The guard rail effectively amputated Tyler’s left leg.
40. Tyler also suffered massive head injuries and injuries to his torso as described herein.
41. Even worse, Tyler survived the crash but was later pronounced dead at the scene.
42. Tyler’s last moments involved having to suffer incredible and unbearable pain and trauma.
43. Tyler had tragically predicted his own future.
44. He was in no condition to operate a vehicle given his sickness.
45. And he never should have been behind the wheel of his car.
46. The police report states that “[f]or unknown reason, it does not appear that Gergler reacted to leaving the roadway. Brakes were not applied prior to impacting the guard rail end.”
47. The reason is well known to the parties here: Tyler was sick, had been dizzy, lightheaded and he knew that it was unsafe for him to operate a vehicle.
48. More importantly, so did Sergeant Castner.

49. Instead of doing the right thing, Sergeant Castner ordered Tyler to drive to New Jersey for the recruiting event or face discharge.

50. The threat of a discharge is very serious, as it is much more than a mere firing.

51. Tyler would have been discharged for ostensibly failing to perform his duties as part of the Delayed Entry Program.

52. In his mind, he was facing a discharge characterization that could have been something other than purely Honorable—for him a bad conduct or even dishonorable discharge would destroy his life's ambition.

53. Sergeant Castner could have also pressed for a variety of other administrative actions.

54. These would have stained Tyler's record for future employers.

55. The Court must also consider the other consequences of a discharge.

56. Tyler had dreamed for nearly a decade of following in his parents', and maternal grandfather's (who retired from the Marine Corps after more than 20 years of service), footsteps, by joining the USMC.

57. He was now being ordered to either submit to the direct and uncompromising order of Sergeant Castner or give up on that dream.

58. But for the negligent acts of Sergeant Castner, who explicitly knew Tyler had been extremely ill and was exhausted and was in no condition to drive a vehicle, but nonetheless—under threat of discharge from the Marine Corps—ordered Tyler to drive from his home in Maryland in the late afternoon of Friday, July 26, 2019 to attend a Marine recruiting event the next day at the Marine Recruiting Center in Colts Neck,

New Jersey, Tyler Gergler would not have died.

59. Sergeant Castner, when he ordered Tyler to drive, was acting in his role as a U.S. Marine Corps sergeant and recruiter.

60. For that, the United States is liable for Tyler's injury to his body and for his wrongful death.

61. After Tyler's tragic, wholly preventable death, his parents attempted to ensure that Tyler received the honors due to those who have served in the United States Marine Corps.

62. But because he was not a Marine and was just a Poolee, no such benefits were forth coming: no flag, no life insurance, not even a letter of appreciation for Tyler's dedication to serve in the Marine Corps and his wish and desire to accomplish his life-long ambition to follow in his parents' footsteps.

63. The official position adopted by the Marine Corps was that Tyler did not qualify for any of those benefits or honors because he was driving to stay with family in New Jersey that evening and would then drive to the Poolee event the next morning. See Exhibit 2, Email from Capt. Corey Muller, USMC, to Lt. Col. Dena Lentz, USARMY NG, dated September 16, 2019.

VI. ARGUMENT

64. This action will be governed under the substantive law of the State of New Jersey

65. FTCA claims under 28. U.S.C. § 1346(b)(1) are judged based on the law of the place where the act occurred.

66. The Supreme Court has interpreted this to mean that the Federal Tort Claims Act "requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts of

negligence took place.” *Richards v. United States*, 369 U.S. 1, 10 (1962).

67. Sergeant Castner sent the texts which resulted in Tyler’s death from Colt’s Neck New Jersey.

68. However, Tyler’s accident occurred in Maryland.

69. New Jersey conflict of law procedure first considers whether an actual conflict exists between state substantive laws. *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008).

70. The District of New Jersey has previously found that New Jersey and Maryland tort laws conflict, on the grounds that “New Jersey has a strong interest in preventing tortious misconduct by its domicillaries.” *See Clawans v. United States*, 75 F. Supp. 2d 368, 372-3 (D. N.J. 1999) (holding that there is a conflict of laws between New Jersey and Maryland tort laws).

71. Secondly, the contributory and comparative negligence laws differ between the two states. *Id.*

72. New Jersey substantive law will control because it has a stronger relationship to the occurrence and to the parties.

73. New Jersey applies the Second Restatement of Conflict of Laws. *Camp Jaycee*, 962 A.2d at 140-1.

74. The Second Restatement, at § 145, states that the governing law for a tort should be determined by the local law of the state with the most significant relationship to both the occurrence and parties for the specific issue. Restatement (Second) Conflict of Laws § 145 (Am. Law Inst. 1971).

75. The most significant relationship is determined by qualitatively weighing the following contacts:

- (a) The place where the injury occurred;

- (b) The place where the conduct which caused the injury occurred;
- (c) The domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (d) The place where the relationship, if any, between the parties, is centered. *Id.* at (2)(a)-(d).

76. Here, factors (a) and (b) balance each other out, as the injury occurred in Maryland, but the conduct which caused the injury, Sergeant Castner's sending of texts ordering Tyler to appear at the pool event in New Jersey, occurred in Hackensack, New Jersey.

77. Factor (c) weighs in favor of New Jersey, as though Tyler was domiciled in Maryland, and Sergeant Castner in New Jersey, the New Jersey Supreme Court has clearly stated that it places a heavy weight on preventing tortious misconduct by its domiciliaries, including Sergeant Castner. *See Clawans*, 75 F. Supp. 2d at 372-3.

78. Factor (d) weighs strongly in favor of New Jersey, as the primary place where the parties' relationship was centered was Colt's Neck, New Jersey, the location of the Poolee event.

79. The secondary location where their relationship was centered was the USMC recruiting center in Hackensack, New Jersey.

80. Thus, on a qualitative basis, the factors weigh strongly in favor of New Jersey having the most significant relationship to the parties and occurrence. *See id.*; *see also* Restatement (Second) Conflict of Laws § 145(2)(a)-(d).

Claim I: Negligence (Wrongful Death and Survivorship Action)

81. The foregoing allegations are re-alleged and incorporated herein by reference.

82. There are three elements to a Federal Torts Claims Act claim, namely:

- (a) Death,
- (b) Caused by the negligent or wrongful act,
- (c) Of an employee or agent of the Federal government,
- (d) Acting within the scope of their office or employment. 28 U.S.C. § 1346(b)(1).

83. The first element is clearly satisfied here.

A. Sergeant Castner was negligent under New Jersey law.

84. A negligence claim under New Jersey law requires that the plaintiff show that the defendant breached a duty of reasonable care and that this breach constituted the proximate cause of the plaintiff's injuries. *Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3rd Cir. 1990).

85. Under New Jersey law, the fundamental question for determining whether a duty of care exists is "whether a plaintiff is entitled to legal protection against the defendant's conduct." *Kubert v. Best*, 75 A.3d 1214, 1223 (N.J. App. 2013) (citing *J.S. v. R.T.H.*, 714 A.2d 924, 928 (N.J. 1998)).

86. This must take into account generally applicable rules which govern societal behaviors. *Id.*

87. Under New Jersey law, defendants are considered culpable for damages caused by impaired driving if they substantially encourage the driver to drive while impaired. *Champion ex rel. Ezzo v. Dunfree*, 939 A.2d 825, 833 (N.J. App. 2008).

88. In addition, defendants are also culpable for the damages caused by a driver if they have a special relationship with said driver, such as parent-child, or employer-employee, and fail to exercise their duty to control the person they have a special relationship with. *Id.* at 830-1.

89. Most importantly, New Jersey law entitles plaintiffs to protection from a defendant who impairs them through negligently serving them alcohol when the defendant knows the plaintiff will be driving. *See* N.J. Stat. § 2A:22A-5 (imposing liability on commercial hosts for the damages caused to both first and third parties through the negligent service of alcoholic beverages); *see also* N.J. Stat. § 2A:15-5.7 (applying first party liability of social hosts to impaired drivers if the driver was an underage drinker).

90. It is clear that New Jersey statute seeks to protect plaintiffs from being pushed, or caused, to drive impaired, and also seeks to protect people from being harmed by impaired driving encouraged by someone else.

91. Under *Kubert*, and taking into account generally applicable rules governing societal behaviors, it is clear that Sergeant Castner was negligent when he compelled Tyler to drive while knowing Tyler was impaired. *See Kubert*, A.3d 1214, 1223 (N.J. App. 2013).

92. Tyler did not want to drive, and he told Sergeant Castner that he should not be driving due to his impairment.

93. He communicated this information clearly and unequivocally to Sergeant Castner.

94. In response, Sergeant Castner threatened him with discharge, carrying with it the colossal consequences laid out of above, unless Tyler drove.

95. This is a far more egregious case than a bartender negligently serving a party alcohol, conduct which already entitles a plaintiff to a cause of action, here one of a bartender's patrons was drunk and did not want to drive, and the bartender forced them under threat to drive. *Compare* N.J. Stat. § 2A:22A-5; *compare* N.J. Stat. § 2A:15-5.7.

96. Being compelled, under threat, to drive while impaired is clearly the kind of conduct against which New Jersey seeks to entitle plaintiffs with legal protections from. *See Kubert*, A.3d 1214, 1223 (N.J. App. 2013).

97. By compelling Tyler to drive, Sergeant Castner acted negligently, carelessly, recklessly, and unlawfully, breaching his duty to act as a reasonable person would under the circumstances and using his special relationship with Tyler in order to compel him to drive while impaired.

98. Sergeant Castner knew that his Poolee, Tyler Gergler, was so sick—so impaired—that he should not be driving a vehicle.

99. He knew that his Poolee had been vomiting for hours, was dizzy, and was lightheaded.

100. He knew that Tyler was deeply concerned about driving and did not want to drive.

101. Despite knowing that his Poolee was incapacitated, Sergeant Castner ordered him to drive to New Jersey, threatening him with discharge from the Marine Corps.

102. These threats were a clear proximate cause of Tyler's death, as, but for said threats, Tyler would never have driven, and would not have crashed. *See, e.g., Gilbert v. Stewart*, 255 A.3d 1101, 1114, (N.J. 2021) (citing *Komlodi v. Picciano*, 89 A.3d 1234, 1254-5 (N.J. 2014).

103.Sergeant Castner has thus clearly been established to have been negligent under New Jersey law. *See Keith*, 909 F.2d 743, 745 (3rd Cir. 1990).

104.As a result of the unlawful conduct of the Marine Corps recruiter, alleged above, and other undiscovered negligent conduct as to which the Gergler family cannot know the details in the absence of any disclosure by government authorities of the facts surrounding the incident, Tyler Gergler sustained fatal injuries that resulted in his death.

105.As a further result of the unlawful conduct of the Defendant, the Gergler family's only son struggled for life while suffering from what were fatal injuries, and thereby suffered extreme emotional distress, including grief, anxiety, worry, shock, apprehension, terror, and mental anguish.

106.As a final result of the unlawful conduct of the Defendant, the Gergler family suffered and continues to suffer loss of love, society, solace, companionship, comfort, care, assistance, protection, affection, and support by Tyler and will continue to be so deprived for the remainder of their natural lives.

B. Sergeant Castner was an agent or employee of the United States acting within the scope of his employment.

107.It cannot be disputed that Sergeant Castner, a Marine Corps sergeant, was an employee of the United States.

108.Scope of employment is determined under the state agency rules where the person is employed. *CNA v. U.S.*, 535 F.3d 134, 146 (3rd Cir. 2008).

109. New Jersey defines conduct to be within the scope of employment when:

- (1) It is the kind that the servant is employed to perform,
- (2) It occurs substantially within the authorized time and space limits of employment,
- (3) It is actuated, at least in part, by a desire to serve the master,
- (4) If force is intentionally used by the servant against another, that use of force is not unexpected by the master. *Di Cosala v. Kay*, 450 A.2d 508, 513 (N.J. 1982) (applying Restatement (Second) of Agency § 229 (Am. Law Inst. 1958)).

110. Here, factor (4) is not applicable, while factors (1) through (3) are firmly in favor of finding that Sergeant Castner's actions were within the scope of his employment.

111. First, ensuring that Poolees appeared at events, or making the decision to permit them to be absent, was the kind of act that Sergeant Castner was employed to perform.

112. Second, the texts occurred while Sergeant Castner was still "on duty," as DEP personnel would be expected to communicate with Poolees during reasonable hours and the texts occurred in the afternoon.

113. Third, and finally, his compulsion of Tyler to appear at the Poolee event was, at least in part, motivated by a desire to serve the Marine Corps via ensuring that recruits were properly following the DEP requirements.

114. It is thus clear that Sergeant Castner's acts were within the scope of his employment and satisfy the requirements necessary to waive the United States' sovereign immunity under the FTCA. *See id.*; see 28 U.S.C. § 1346(b)(1).

C. Conclusion.

115.As has been illustrated above, all the required elements of a claim pursuant to the Federal Torts Claims Act have been met.

116.As a result of Defendants' unlawful, egregious, conduct, which resulted in unnecessary and tragic death of Tyler on July 26, 2019, the Gergler family has been irreparably injured.

117.As the surviving parents of Tyler, the Gergler family seeks damages to compensate for, his wrongful death, *inter alia*:

- (a) Their sorrow and mental anguish;
- (b) Loss of Tyler's care, comfort, guidance, companionship, society, advice, and kindly offices;
- (c) Medical and hospital expenses related to Tyler's final injuries and death; and,
- (d) Reasonable funeral and burial expenses.

118.Most importantly, they seek to deter the Government from continuing such abusive practices by military recruiters, and to motivate change which will ensure that no other family undergoes the grief they have been forced to endure, and that no other Poolee loses their life as a result of the wrongful compulsion of their recruiters.

VII. Prayer for Relief

WHEREFORE, for the reasons stated above, the Gergler family respectfully requests that the Court enter a judgment against Defendant:

- (1) Awarding compensatory damages to Plaintiffs in the amount of \$18,015,000;
- (2) Awarding Plaintiffs attorneys' fees and costs pursuant to federal and state laws, including 28

U.S.C. § 2412; *and*

(3) Ordering such other and further relief as the Court considers just and proper.

Date: May 2, 2022

Respectfully submitted,

/s/CraigJ.Schultz

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