No. 09-370

In the Supreme Court of the United States

WAYNE G. LOVELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the *Feres* doctrine to bar petitioner's claim for intentional infliction of emotional distress based on the actions taken by his Reserve Officers' Training Corps Battalion Commander relating to petitioner's incidents of plagiarism and alleged sexual assault of a female cadet.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 570 F.3d 778. The opinion of the district court (Pet. App. 18-60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2009. The petition for a writ of certiorari was filed on September 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. At all relevant times, petitioner was a Senior Army Reserve Officers' Training Corps (ROTC) Cadet and an ROTC scholarship student at the University of Dayton (University). Lieutenant Colonel Versalle Washington was the Professor of Military Science and

Director of the Department of Military Science at the University of Dayton. As such, he was the ROTC Battalion Commander for petitioner and all other cadets at the University, responsible for training them to attain a commission as an Army officer. Lt. Col. Washington was both a full professor on the faculty of the University and an active duty Army officer. Pet. App. 3, 20, 26.

As an ROTC scholarship recipient, petitioner entered into a contract with the Army governing his tenure at the University, the financial terms of the scholarship, and petitioner's continuing obligations to the Army. C.A. Record on Appeal 156-168 (C.A. ROA). The contract makes clear that "the sole purpose of the ROTC scholarship program is to produce officers for the United States Army." Pet. App. 3 (quoting C.A. ROA 156). Among other things, it required petitioner to enroll in and successfully complete the necessary courses for a degree by May 2005, and to "remain a full-time student" at the University until receiving that degree. *Id.* at 3, 27; C.A. ROA 156. Petitioner also agreed to enlist in the Army Reserves for a period of eight years, to maintain eligibility for enrollment in ROTC, and to successfully complete the ROTC program, including ROTC Advanced Camp and all required military training. Pet. App. 3, 27; C.A. ROA 156. Upon completion of his studies and all applicable ROTC training obligations and requirements for appointment, petitioner was to serve as a commissioned officer in the Army or the Army Reserves. C.A. ROA 159-160.

In exchange, the Army agreed to pay up to $17,000 per year for tuition and educational fees, to reimburse petitioner for textbooks, equipment, and other classroom supplies, to pay a subsistence allowance, and to

provide military pay for his attendance at ROTC Advanced Camp. Pet. App. 3, 28; C.A. ROA 164.

If petitioner failed to complete his educational requirements, or if he was disenrolled from the ROTC program for misconduct or failure to comply with any other terms of the contract, he could be ordered to active duty as an enlisted soldier for up to four years, or ordered to repay the financial assistance he had received under his ROTC scholarship. Pet. App. 3-4, 27-28; C.A. ROA 161.[1]

b. In December 2003, Dr. Mark Ensalaco, the Director of the Department of International Studies, discovered that petitioner had plagiarized a research paper. Petitioner did not dispute the charge and received a failing grade for that course. Dr. Ensalaco notified Lt. Col. Washington about the incident, and offered to prepare a written statement. Pet. App. 4, 20-21.

The following month, a female ROTC cadet reported to Lt. Col. Washington that petitioner had sexually assaulted her four months earlier. Lt. Col. Washington suggested that she contact the police, which she chose not to do, and then advised her to go to the University's counseling center, which she did do. Following the advice of the counselor, the female cadet decided to pursue University disciplinary proceedings against petitioner. See Pet. App. 4, 21.

The disciplinary hearing was held on February 17, 2004. Prior to that hearing, the female cadet, who knew about petitioner's plagiarism through other means, asked Lt. Col. Washington if he could get a statement

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[1] The contract terms discussed in the text are reflected in legislation Congress enacted to govern the ROTC program. See 10 U.S.C. 2104, 2105, 2107; see also Pet. App. 53-55 (setting forth terms of the relevant statutes and Army regulations pertaining to the responsibilities and benefits of accepting an ROTC scholarship).

from Dr. Ensalaco about the incident. Lt. Col. Washington contacted Dr. Ensalaco, and Dr. Ensalaco sent him an e-mail describing the relevant events. Lt. Col. Washington printed the e-mail and gave a copy to the female cadet, who presented it to the University's Disciplinary Board at the hearing. See Pet. App. 4-5, 21-23.

At the conclusion of the hearing, the Board found that petitioner had engaged in "non-consensual sexual intercourse" with the female cadet. Pet. App. 5, 23. The University's Judicial Review Committee denied petitioner's appeal, *id.* at 5, and petitioner was suspended from the University for "nonacademic disciplinary reasons" until May 2005, *id.* at 23; C.A. ROA 307.

On October 7, 2005, petitioner was disenrolled from the ROTC program based on his "undesirable character as demonstrated by [his] academic dishonesty." C.A. ROA 320 (disenrollment letter, noting the plagiarism incident as well as a previous incident in which petitioner had sought and received assistance on a Spanish composition project in violation of rules set out by the course instructor); see *id.* at 312-316. Petitioner was ordered to repay the ROTC scholarship money the Army had provided, in the sum of $35,191. *Id.* at 320.

2. After exhausting his administrative remedies, petitioner filed this action. Pet. App. 26. In his amended complaint, petitioner added a claim for intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680.[2] Petitioner alleged that Lt. Col. Washington violated the FTCA by (1) releasing the e-mail he received from Dr.

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[2] Petitioner's original and amended complaint also included a claim under the Privacy Act, 5 U.S.C. 552a. The district court dismissed that claim as time-barred, and petitioner did not appeal that ruling. See Pet. App. 2 n.1; *id.* at 30-44.

Ensalaco to the female cadet who charged that petitioner had sexually assaulted her; (2) falsely telling other ROTC cadets that petitioner had admitted at the hearing that he had sexually assaulted the female cadet; (3) telling other cadets that they should support the female cadet; and (4) intimidating one of petitioner's prospective witnesses for the University disciplinary hearing, causing that person not to testify. Pet. App. 5, 45.[3]

The district court dismissed petitioner's FTCA claim under *Feres* v. *United States*, 340 U.S. 135 (1950), holding that his allegations all arose out of activity that was related to his status as an enlisted Senior ROTC Cadet. Pet. App. 18-60. Relying on the uniform approach of other courts, the district court concluded that "the *Feres* doctrine applies to ROTC cadets and is to be applied, as in the case of other military personnel, to bar claims made by ROTC cadets for injuries sustained incident to military service." *Id.* at 50-51.

Turning to that test, the court reasoned that the alleged injury was related to petitioner's military service because the University disciplinary proceeding for sexually assaulting a female cadet, and the outcome thereof, was integrally related to petitioner's compliance with the ROTC scholarship contract. Pet. App. 56-57 (noting that suspension from the University would violate petitioner's obligation to remain a "full-time student" until

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[3] The complaint also alleged that Lt. Col. Washington wrongly interfered with the subsequent ROTC proceeding by (1) rejecting the University's suggestion that he should not be disenrolled from the ROTC program, and (2) using documents generated by the University as evidence to support his ROTC disenrollment. See Pet. App. 5-6, 45. The district court determined that petitioner abandoned those claims by failing to address them in his opposition to the government's motion to dismiss. *Id.* at 51-52. Petitioner did not challenge that determination.

completion of his degree). Additionally, the court noted, petitioner was "taking advantage of a privilege or enjoying a benefit conferred as a result of military service" at the time of the alleged injury. *Id.* at 57 (quoting *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996)). The court explained that all of the challenged actions "involved [Lt. Col.] Washington's interactions with the ROTC cadets at the University of Dayton," and would require the court "to question [Lt. Col.] Washington's interactions with the cadets assigned to his ROTC unit," "just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Id.* at 57-58 (explaining that "[i]t is not the judiciary's province to interfere with how the [Professor of Military Science] of a ROTC unit conducts the business of that organization"). For all of those reasons, the court held that *Feres* barred petitioner's FTCA claim.[4]

3. The Sixth Circuit affirmed. Applying this Court's decisions and prior Sixth Circuit precedent to the "unique circumstances" of the case, the court of appeals agreed that petitioner's intentional infliction of emotional distress claim was barred by the *Feres* doctrine.[5] Pet. App. 12.

The court noted that, "[a]s an ROTC cadet, [petitioner] was enlisted in the Army and was therefore a mem-

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[4] The district court also found that the documents petitioner provided did not support his assertion that Lt. Col. Washington intimidated and unlawfully influenced petitioner's prospective witnesses. See Pet. App. 52-53.

[5] Because it affirmed dismissal under the *Feres* doctrine, the court of appeals did not consider whether the "intentional-torts exception to the FTCA," 28 U.S.C. 2680(h), independently barred petitioner's intentional infliction of emotional distress claim. Pet. App. 9 n.3.

ber of the armed forces, even if not on active duty." Pet. App. 12. All of petitioner's injuries, explained the court, "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion," *id.* at 13, and "arose 'because of his military relationship with the Government,'" *id.* at 15 (quoting *United States* v. *Johnson*, 481 U.S. 681, 689 (1987)). See also *id.* at 15 (noting that all of the students involved in these incidents were ROTC cadets and that Lt. Col. Washington had access to the plagiarism details and to the University disciplinary proceedings because of his status as petitioner's commanding officer).

Moreover, the court found that petitioner's "attendance" at the University "was a requirement of [his] ROTC contract," and he "received an ROTC scholarship * * * in exchange for his performance under the contract." Pet. App. 16. Thus, the court concluded that, at the time of petitioner's alleged injury, he "was taking advantage of a privilege or enjoying a benefit conferred as a result of military service," *ibid.* (quoting *Wake*, 89 F.3d at 58)—he was "engaged in the activity of serving as an ROTC cadet and an ROTC scholarship student," *id.* at 17. Because petitioner "was engaged in activity incident to service," his claim was "barred by the *Feres* doctrine." *Id.* at 16-17.[6]

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[6] The court of appeals also observed that "[t]o the extent [petitioner] alleges that [Lt. Col.] Washington interfered in the ROTC disenrollment process, this injury even more clearly would seem to arise from an activity incident to military service." Pet. App. 15. As noted (p. 5 n.3, *supra*), the district court's finding that petitioner abandoned those allegations has not been challenged.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that in enacting the FTCA, Congress did not intend to authorize suits by service members that "arise out of or are in the course of activity incident to service." In subsequent cases, the Court "has never deviated from this characterization of the *Feres* bar," and has "consistently" applied the *Feres* doctrine "to bar all suits on behalf of service members against the Government based on service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987); *id.* at 689 (noting that a "service member is injured incident to service" when he is injured "because of his military relationship with the Government"). As the Court has emphasized, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules." *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). Rather, "each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Ibid.*

This Court has also articulated "three broad rationales underlying the *Feres* decision." *Johnson*, 481 U.S. at 688. First, because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character, * * * it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman." *Id.* at 689 (brackets in original; internal quotation marks and citations omitted). Second, there is an alternative compensation scheme in which "[t]hose injured during the course of activity incident to service not only

receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (internal quotation marks and citations omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* (internal quotation marks, emphasis, and citations omitted); see also *Shearer*, 473 U.S. at 57 (noting that "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of maintenance of such suits on discipline'") (citation omitted).

Under these principles, the court of appeals correctly concluded, based on the circumstances of this case, that petitioner's claim is barred. At all times relevant to this suit, petitioner was "enlisted in the Army and was therefore a member of the armed forces." Pet. App. 12. Petitioner was not a private college student. His attendance at the University of Dayton, which gave rise to his claim, was a direct and substantial benefit of service. Cf. *Johnson*, 481 U.S. at 689 n.10 (noting "educational benefits" as an example of "benefits unique to [service members'] service status").[7]

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[7] The courts of appeals have held that *Feres* disallows suits brought after a service member suffers an injury while receiving a military benefit or service to which he is entitled because of his military status, even if he is off duty at the time of the injury. See, *e.g.*, *Pringle* v. *United States*, 208 F.3d 1220, 1222, 1226-1227 (10th Cir. 2000) (per curiam) (claim by soldier beaten by gang members after he was ejected from military social club available to military personnel); *Jones* v.

As a Senior ROTC Cadet receiving a scholarship, petitioner's assignment was to attend classes (both civilian and military) at the University of Dayton, complete his studies and earn a degree by May 2005, and successfully fulfill all military training obligations. Petitioner was accused (and, after a University disciplinary hearing, ultimately found guilty of) sexually assaulting a female ROTC cadet. That hearing could have (and ultimately did) result in sanctions that would have prevented petitioner from fulfilling his ROTC contractual obligations to remain a "full-time" student and to graduate by a date certain. And the instances of plagiarism and academic dishonesty that did lead to petitioner's disenrollment from the ROTC program occurred in University

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United States, 112 F.3d 299, 301-302 (7th Cir.) (medical malpractice claim arising from injury suffered while service member was training for the Military Olympics), cert. denied, 522 U.S. 865 (1997); *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430 (1st Cir.) (claim by off-duty service member injured while walking on military-maintained road to off-post bar), cert. denied, 506 U.S. 1033 (1992); *Bon* v. *United States*, 802 F.2d 1092, 1093, 1095-1096 (9th Cir. 1986) (claim related to service member's injury inflicted while paddling canoe rented from military recreation center); *Bozeman* v. *United States*, 780 F.2d 198, 199, 201 (2d Cir. 1985) (claim related to service member's death in accident after drinking off duty at club available to military personnel); *Rayner* v. *United States*, 760 F.2d 1217, 1219 (11th Cir.) (per curiam) (medical malpractice claim arising out of elective surgery made available because of military status), cert. denied, 474 U.S. 851 (1985); *Woodside* v. *United States*, 606 F.2d 134, 141-142 (6th Cir. 1979) (claim related to military civil engineer's death while flying plane from base's recreational club), cert. denied, 445 U.S. 904 (1980); *Hass* v. *United States*, 518 F.2d 1138, 1139, 1142-1143 (4th Cir. 1975) (claim related to service member's injury while riding horse at military-owned stable); *Chambers* v. *United States*, 357 F.2d 224, 226-227 (8th Cir. 1966) (service member drowned in on-base swimming pool).

courses he was required to pass in order to uphold his end of the ROTC scholarship contract.

Petitioner's claims directly challenge Lt. Col. Washington's supervision and control of ROTC cadets and other official military acts. As the commander of the ROTC battalion at the University, Lt. Col. Washington was responsible for all aspects of the ROTC program. That required him, among other things, to counsel cadets and to address issues in their professional, academic, and personal lives that could affect their ability to accept a military commission. All of the actions complained of by petitioner were undertaken by Lt. Col. Washington in his military capacity. Thus, the "peculiar and special relationship of the soldier to his superiors," *Shearer*, 473 U.S. at 57 (quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)), is at the very core of petitioner's claims. See Pet. App. 13 (petitioner's alleged injuries all "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion").

The court of appeals correctly applied the *Feres* doctrine to bar petitioner's FTCA claim. Further review is not warranted.

2. a. Petitioner contends (Pet. 8-16) that the courts of appeals apply different legal tests to determine whether a service member's injury is incident to service under the *Feres* doctrine, and that the Sixth Circuit's approach is an outlier among the circuits. The varying approaches, however, largely represent differing verbal formulations that do not often result in conflicting results. And the Sixth Circuit is no exception.

Consistent with *Johnson* and *Shearer*, the courts of appeals apply a totality-of-the-circumstances approach, examining a number of factors to determine whether an

injury is "incident to service" under *Feres*. See *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627, 645 (5th Cir. 2008) ("The elements of the analysis—the *Feres* rationales and the factors for an activity being incident to service—are fairly uniform" in the case law). These factors include, among others, the service member's military status at the time of injury, the location of the injury, the activity in which the service member was involved at that time, whether the service member was subject to military control and/or discipline at that time, whether the activity arose out of military life, and whether the injury occurred while enjoying a privilege or benefit of military service. See, *e.g.*, *McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir.), cert. denied, 128 S. Ct. 649 (2007); *Schnitzer* v. *Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000) (per curiam); *Fleming* v. *USPS, Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Whitley* v. *United States*, 170 F.3d 1061, 1070 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Miller* v. *United States*, 42 F.3d 297, 301 (5th Cir. 1995); *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994).[8]

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[8] The only apparent departure from this settled law is *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). Instead of applying *Shearer*'s totality-of-the-circumstances approach, *Taber* focused on whether the plaintiff was "engaged in activities that fell within the scope of the plaintiff's military employment," as the scope of employment concept is understood under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8102. *Taber*, 67 F.3d at 1050 & n.21. No other court has adopted the *Taber* approach, and the Second Circuit has since

Contrary to petitioner's assertion (Pet. 14-15), the Sixth Circuit's analysis does not focus "entirely on the status of the claimant in the military." Although not setting forth a three-factor test as such, the Sixth Circuit (like other courts) examines the totality of the circumstances and analyzes factors such as the service member's military status at the relevant time, the location of the alleged injury, and the nature of the service member's activity when injured, including whether he or she was taking advantage of a benefit of service. See, *e.g.*, Pet. App. 10-17; *Fleming*, *supra*; *Irvin* v. *United States*, 845 F.2d 126 (6th Cir.), cert. denied, 488 U.S. 975 (1988); *Potts* v. *United States*, 723 F.2d 20 (6th Cir. 1983) (per curiam), cert. denied, 466 U.S. 959 (1984); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980).

Petitioner argues otherwise by quoting a formulation first expressed by the Sixth Circuit over two decades ago in *Major* v. *United States*, 835 F.2d 641 (1987), cert. denied, 487 U.S. 1218 (1988). Pet. App. 10-11 (quoting *Major*, 835 F.2d at 644-645) (noting that *Feres* bars all injuries suffered by military personnel that are "remotely related to the individual's *status* as a member of the military"). Far from conflicting with other courts of appeals (Pet. 14), that language has been cited favorably

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applied the traditional analysis to determine whether an injury is incident to service, stating that "*Taber* does not and could not * * * in any way alter the reach of the *Feres* doctrine." See *Wake* v. *United States*, 89 F.3d 53, 61 (1996). In *Wake*, the Second Circuit implicitly repudiated the *Taber* approach by applying *Feres* to bar the FTCA claim of a service member who was ineligible for FECA benefits because the Department of Labor concluded that her injury was outside the scope of her military employment. *Id.* at 56, 61; see also *Luckett* v. *Bure*, 290 F.3d 493, 497 (2d Cir. 2002) (applying the incident-to-service test in affirming dismissal of complaint as *Feres*-barred).

by several other circuits. See, *e.g.*, *Stewart*, 90 F.3d at 105; *Persons* v. *United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991); *Shaw* v. *United States*, 854 F.2d 360, 364 (10th Cir. 1988). More importantly, petitioner fails to identify any Sixth Circuit *Feres* decision that would have been decided differently in another circuit.

At bottom, petitioner's claimed discrepancy between the approaches adopted by the courts of appeals is a distinction without a difference.

b. Petitioner also contends (Pet. 6-7, 17-20) that this Court's decisions in *United States* v. *Stanley*, 483 U.S. 669 (1987), and *Shearer*, *supra*, provide conflicting directions as to whether or when lower courts should consider the military judgment rationale under *Feres*, and claims a "split in authority" (Pet. 19) on that issue. There is no split and, notably, petitioner fails to identify any court on either side of the purported conflict.

In *Stanley*, this Court did caution against analyzing *Feres*'s military judgment rationale in lieu of applying the "incident to service" test. 483 U.S. at 681-683 (holding that the *Feres* doctrine governs *Bivens* actions brought by service members and rejecting "less protective" military judgment rule in favor of "incident to service" test); see also *Johnson*, 481 U.S. at 684-687 (reaffirming "incident to service" test as the proper analysis in all *Feres* cases). Nothing in *Stanley* suggested that the Court viewed its opinion as being in tension with its decision in *Shearer*, which was issued two years prior. And the lower courts have properly applied both *Stanley* and *Shearer* by addressing *Feres*'s rationales only to confirm that the *Feres* doctrine is applicable under the "incident to service" test, or where the complaint alleges claims that mirror the negligent supervision or control claims at issue in *Shearer* itself. See, *e.g.*, *Regan*, 524

F.3d at 636-637 (explaining that since *Stanley* and *Shearer* were decided, "this and other Circuits * * * continue to examine the applicability of the rationales in specific cases" in addition to—not in place of—the incident to service inquiry); *Stephenson*, 21 F.3d at 163-164 (*Feres* bars actions that, like *Shearer*, allege negligent "choices about the discipline, supervision, and control of a serviceman.") (citation omitted).

3. Petitioner briefly suggests (Pet. 14 n.2) that his case would have been decided differently in another circuit. That is incorrect.

Contrary to petitioner's assertion (Pet. 14 n.2), the court of appeals did not dismiss his claim "solely" because of his status as a university ROTC student. Instead, the court concluded that petitioner's injury "ar[o]se from an activity incident to military service," Pet. App. 13, and occurred "because of his military relationship with the Government," *id.* at 15 (quoting *Johnson*, 481 U.S. at 689). As such, his claim would "involve the Court in just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Ibid.* (quoting *id.* at 58). That none of petitioner's injuries would have "occurred had [petitioner] not been an ROTC cadet under Washington's command" (*ibid.*) is surely true, but that is because of the asserted injury—*i.e.*, intentional infliction of emotional distress by a commanding officer in the course of disciplinary proceedings involving a fellow cadet, directly impacting compliance with an ROTC scholarship contract, and calling into question petitioner's ability to receive a military commission. Accordingly, petitioner's claim was not barred "solely" because of his status.

Finally, petitioner contends that ROTC students "do not have the proper duty status to apply the *Feres* bar" unless they are "on orders" or participating in military-related activity at the time of injury. Pet. 15 n.2. Petitioner fails to cite any supporting case law, and every court of appeals to have addressed the question has concluded that the *Feres* doctrine is applicable to ROTC cadets. See *Harrison* v. *United States*, 329 Fed. Appx. 179 (10th Cir. 2009); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996); see also *Morse* v. *West*, No. 97-1386, 1999 WL 11287, at *1 (10th Cir. Jan. 13, 1999) (*Feres* doctrine barred ROTC cadet's sexual harassment claim occurring while completing an ROTC "course of study"). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
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DECEMBER 2009

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1. a. At all relevant times, petitioner was a Senior Army Reserve Officers' Training Corps (ROTC) Cadet and an ROTC scholarship student at the University of Dayton (University). Lieutenant Colonel Versalle Washington was the Professor of Military Science and

Director of the Department of Military Science at the University of Dayton. As such, he was the ROTC Battalion Commander for petitioner and all other cadets at the University, responsible for training them to attain a commission as an Army officer. Lt. Col. Washington was both a full professor on the faculty of the University and an active duty Army officer. Pet. App. 3, 20, 26.

As an ROTC scholarship recipient, petitioner entered into a contract with the Army governing his tenure at the University, the financial terms of the scholarship, and petitioner's continuing obligations to the Army. C.A. Record on Appeal 156-168 (C.A. ROA). The contract makes clear that "the sole purpose of the ROTC scholarship program is to produce officers for the United States Army." Pet. App. 3 (quoting C.A. ROA 156). Among other things, it required petitioner to enroll in and successfully complete the necessary courses for a degree by May 2005, and to "remain a full-time student" at the University until receiving that degree. *Id.* at 3, 27; C.A. ROA 156. Petitioner also agreed to enlist in the Army Reserves for a period of eight years, to maintain eligibility for enrollment in ROTC, and to successfully complete the ROTC program, including ROTC Advanced Camp and all required military training. Pet. App. 3, 27; C.A. ROA 156. Upon completion of his studies and all applicable ROTC training obligations and requirements for appointment, petitioner was to serve as a commissioned officer in the Army or the Army Reserves. C.A. ROA 159-160.

In exchange, the Army agreed to pay up to $17,000 per year for tuition and educational fees, to reimburse petitioner for textbooks, equipment, and other classroom supplies, to pay a subsistence allowance, and to

provide military pay for his attendance at ROTC Advanced Camp. Pet. App. 3, 28; C.A. ROA 164.

If petitioner failed to complete his educational requirements, or if he was disenrolled from the ROTC program for misconduct or failure to comply with any other terms of the contract, he could be ordered to active duty as an enlisted soldier for up to four years, or ordered to repay the financial assistance he had received under his ROTC scholarship. Pet. App. 3-4, 27-28; C.A. ROA 161.[1]

b. In December 2003, Dr. Mark Ensalaco, the Director of the Department of International Studies, discovered that petitioner had plagiarized a research paper. Petitioner did not dispute the charge and received a failing grade for that course. Dr. Ensalaco notified Lt. Col. Washington about the incident, and offered to prepare a written statement. Pet. App. 4, 20-21.

The following month, a female ROTC cadet reported to Lt. Col. Washington that petitioner had sexually assaulted her four months earlier. Lt. Col. Washington suggested that she contact the police, which she chose not to do, and then advised her to go to the University's counseling center, which she did do. Following the advice of the counselor, the female cadet decided to pursue University disciplinary proceedings against petitioner. See Pet. App. 4, 21.

The disciplinary hearing was held on February 17, 2004. Prior to that hearing, the female cadet, who knew about petitioner's plagiarism through other means, asked Lt. Col. Washington if he could get a statement

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[1] The contract terms discussed in the text are reflected in legislation Congress enacted to govern the ROTC program. See 10 U.S.C. 2104, 2105, 2107; see also Pet. App. 53-55 (setting forth terms of the relevant statutes and Army regulations pertaining to the responsibilities and benefits of accepting an ROTC scholarship).

from Dr. Ensalaco about the incident. Lt. Col. Washington contacted Dr. Ensalaco, and Dr. Ensalaco sent him an e-mail describing the relevant events. Lt. Col. Washington printed the e-mail and gave a copy to the female cadet, who presented it to the University's Disciplinary Board at the hearing. See Pet. App. 4-5, 21-23.

At the conclusion of the hearing, the Board found that petitioner had engaged in "non-consensual sexual intercourse" with the female cadet. Pet. App. 5, 23. The University's Judicial Review Committee denied petitioner's appeal, *id.* at 5, and petitioner was suspended from the University for "nonacademic disciplinary reasons" until May 2005, *id.* at 23; C.A. ROA 307.

On October 7, 2005, petitioner was disenrolled from the ROTC program based on his "undesirable character as demonstrated by [his] academic dishonesty." C.A. ROA 320 (disenrollment letter, noting the plagiarism incident as well as a previous incident in which petitioner had sought and received assistance on a Spanish composition project in violation of rules set out by the course instructor); see *id.* at 312-316. Petitioner was ordered to repay the ROTC scholarship money the Army had provided, in the sum of $35,191. *Id.* at 320.

2. After exhausting his administrative remedies, petitioner filed this action. Pet. App. 26. In his amended complaint, petitioner added a claim for intentional infliction of emotional distress under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680.[2] Petitioner alleged that Lt. Col. Washington violated the FTCA by (1) releasing the e-mail he received from Dr.

[2] Petitioner's original and amended complaint also included a claim under the Privacy Act, 5 U.S.C. 552a. The district court dismissed that claim as time-barred, and petitioner did not appeal that ruling. See Pet. App. 2 n.1; *id.* at 30-44.

Ensalaco to the female cadet who charged that petitioner had sexually assaulted her; (2) falsely telling other ROTC cadets that petitioner had admitted at the hearing that he had sexually assaulted the female cadet; (3) telling other cadets that they should support the female cadet; and (4) intimidating one of petitioner's prospective witnesses for the University disciplinary hearing, causing that person not to testify. Pet. App. 5, 45.[3]

The district court dismissed petitioner's FTCA claim under *Feres* v. *United States*, 340 U.S. 135 (1950), holding that his allegations all arose out of activity that was related to his status as an enlisted Senior ROTC Cadet. Pet. App. 18-60. Relying on the uniform approach of other courts, the district court concluded that "the *Feres* doctrine applies to ROTC cadets and is to be applied, as in the case of other military personnel, to bar claims made by ROTC cadets for injuries sustained incident to military service." *Id.* at 50-51.

Turning to that test, the court reasoned that the alleged injury was related to petitioner's military service because the University disciplinary proceeding for sexually assaulting a female cadet, and the outcome thereof, was integrally related to petitioner's compliance with the ROTC scholarship contract. Pet. App. 56-57 (noting that suspension from the University would violate petitioner's obligation to remain a "full-time student" until

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[3] The complaint also alleged that Lt. Col. Washington wrongly interfered with the subsequent ROTC proceeding by (1) rejecting the University's suggestion that he should not be disenrolled from the ROTC program, and (2) using documents generated by the University as evidence to support his ROTC disenrollment. See Pet. App. 5-6, 45. The district court determined that petitioner abandoned those claims by failing to address them in his opposition to the government's motion to dismiss. *Id.* at 51-52. Petitioner did not challenge that determination.

completion of his degree). Additionally, the court noted, petitioner was "taking advantage of a privilege or enjoying a benefit conferred as a result of military service" at the time of the alleged injury. *Id.* at 57 (quoting *Wake* v. *United States*, 89 F.3d 53, 58 (2d Cir. 1996)). The court explained that all of the challenged actions "involved [Lt. Col.] Washington's interactions with the ROTC cadets at the University of Dayton," and would require the court "to question [Lt. Col.] Washington's interactions with the cadets assigned to his ROTC unit," "just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Id.* at 57-58 (explaining that "[i]t is not the judiciary's province to interfere with how the [Professor of Military Science] of a ROTC unit conducts the business of that organization"). For all of those reasons, the court held that *Feres* barred petitioner's FTCA claim.[4]

3. The Sixth Circuit affirmed. Applying this Court's decisions and prior Sixth Circuit precedent to the "unique circumstances" of the case, the court of appeals agreed that petitioner's intentional infliction of emotional distress claim was barred by the *Feres* doctrine.[5] Pet. App. 12.

The court noted that, "[a]s an ROTC cadet, [petitioner] was enlisted in the Army and was therefore a mem-

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[4] The district court also found that the documents petitioner provided did not support his assertion that Lt. Col. Washington intimidated and unlawfully influenced petitioner's prospective witnesses. See Pet. App. 52-53.

[5] Because it affirmed dismissal under the *Feres* doctrine, the court of appeals did not consider whether the "intentional-torts exception to the FTCA," 28 U.S.C. 2680(h), independently barred petitioner's intentional infliction of emotional distress claim. Pet. App. 9 n.3.

ber of the armed forces, even if not on active duty." Pet. App. 12. All of petitioner's injuries, explained the court, "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion," *id.* at 13, and "arose 'because of his military relationship with the Government,'" *id.* at 15 (quoting *United States* v. *Johnson*, 481 U.S. 681, 689 (1987)). See also *id.* at 15 (noting that all of the students involved in these incidents were ROTC cadets and that Lt. Col. Washington had access to the plagiarism details and to the University disciplinary proceedings because of his status as petitioner's commanding officer).

Moreover, the court found that petitioner's "attendance" at the University "was a requirement of [his] ROTC contract," and he "received an ROTC scholarship * * * in exchange for his performance under the contract." Pet. App. 16. Thus, the court concluded that, at the time of petitioner's alleged injury, he "was taking advantage of a privilege or enjoying a benefit conferred as a result of military service," *ibid.* (quoting *Wake*, 89 F.3d at 58)—he was "engaged in the activity of serving as an ROTC cadet and an ROTC scholarship student," *id.* at 17. Because petitioner "was engaged in activity incident to service," his claim was "barred by the *Feres* doctrine." *Id.* at 16-17.[6]

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[6] The court of appeals also observed that "[t]o the extent [petitioner] alleges that [Lt. Col.] Washington interfered in the ROTC disenrollment process, this injury even more clearly would seem to arise from an activity incident to military service." Pet. App. 15. As noted (p. 5 n.3, *supra*), the district court's finding that petitioner abandoned those allegations has not been challenged.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that in enacting the FTCA, Congress did not intend to authorize suits by service members that "arise out of or are in the course of activity incident to service." In subsequent cases, the Court "has never deviated from this characterization of the *Feres* bar," and has "consistently" applied the *Feres* doctrine "to bar all suits on behalf of service members against the Government based on service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987); *id.* at 689 (noting that a "service member is injured incident to service" when he is injured "because of his military relationship with the Government"). As the Court has emphasized, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules." *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). Rather, "each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Ibid.*

This Court has also articulated "three broad rationales underlying the *Feres* decision." *Johnson*, 481 U.S. at 688. First, because "[t]he relationship between the Government and members of its armed forces is distinctively federal in character, * * * it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman." *Id.* at 689 (brackets in original; internal quotation marks and citations omitted). Second, there is an alternative compensation scheme in which "[t]hose injured during the course of activity incident to service not only

receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (internal quotation marks and citations omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* (internal quotation marks, emphasis, and citations omitted); see also *Shearer*, 473 U.S. at 57 (noting that "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of maintenance of such suits on discipline'") (citation omitted).

Under these principles, the court of appeals correctly concluded, based on the circumstances of this case, that petitioner's claim is barred. At all times relevant to this suit, petitioner was "enlisted in the Army and was therefore a member of the armed forces." Pet. App. 12. Petitioner was not a private college student. His attendance at the University of Dayton, which gave rise to his claim, was a direct and substantial benefit of service. Cf. *Johnson*, 481 U.S. at 689 n.10 (noting "educational benefits" as an example of "benefits unique to [service members'] service status").[7]

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[7] The courts of appeals have held that *Feres* disallows suits brought after a service member suffers an injury while receiving a military benefit or service to which he is entitled because of his military status, even if he is off duty at the time of the injury. See, *e.g.*, *Pringle* v. *United States*, 208 F.3d 1220, 1222, 1226-1227 (10th Cir. 2000) (per curiam) (claim by soldier beaten by gang members after he was ejected from military social club available to military personnel); *Jones* v.

As a Senior ROTC Cadet receiving a scholarship, petitioner's assignment was to attend classes (both civilian and military) at the University of Dayton, complete his studies and earn a degree by May 2005, and successfully fulfill all military training obligations. Petitioner was accused (and, after a University disciplinary hearing, ultimately found guilty of) sexually assaulting a female ROTC cadet. That hearing could have (and ultimately did) result in sanctions that would have prevented petitioner from fulfilling his ROTC contractual obligations to remain a "full-time" student and to graduate by a date certain. And the instances of plagiarism and academic dishonesty that did lead to petitioner's disenrollment from the ROTC program occurred in University

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United States, 112 F.3d 299, 301-302 (7th Cir.) (medical malpractice claim arising from injury suffered while service member was training for the Military Olympics), cert. denied, 522 U.S. 865 (1997); *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430 (1st Cir.) (claim by off-duty service member injured while walking on military-maintained road to off-post bar), cert. denied, 506 U.S. 1033 (1992); *Bon* v. *United States*, 802 F.2d 1092, 1093, 1095-1096 (9th Cir. 1986) (claim related to service member's injury inflicted while paddling canoe rented from military recreation center); *Bozeman* v. *United States*, 780 F.2d 198, 199, 201 (2d Cir. 1985) (claim related to service member's death in accident after drinking off duty at club available to military personnel); *Rayner* v. *United States*, 760 F.2d 1217, 1219 (11th Cir.) (per curiam) (medical malpractice claim arising out of elective surgery made available because of military status), cert. denied, 474 U.S. 851 (1985); *Woodside* v. *United States*, 606 F.2d 134, 141-142 (6th Cir. 1979) (claim related to military civil engineer's death while flying plane from base's recreational club), cert. denied, 445 U.S. 904 (1980); *Hass* v. *United States*, 518 F.2d 1138, 1139, 1142-1143 (4th Cir. 1975) (claim related to service member's injury while riding horse at military-owned stable); *Chambers* v. *United States*, 357 F.2d 224, 226-227 (8th Cir. 1966) (service member drowned in on-base swimming pool).

courses he was required to pass in order to uphold his end of the ROTC scholarship contract.

Petitioner's claims directly challenge Lt. Col. Washington's supervision and control of ROTC cadets and other official military acts. As the commander of the ROTC battalion at the University, Lt. Col. Washington was responsible for all aspects of the ROTC program. That required him, among other things, to counsel cadets and to address issues in their professional, academic, and personal lives that could affect their ability to accept a military commission. All of the actions complained of by petitioner were undertaken by Lt. Col. Washington in his military capacity. Thus, the "peculiar and special relationship of the soldier to his superiors," *Shearer*, 473 U.S. at 57 (quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)), is at the very core of petitioner's claims. See Pet. App. 13 (petitioner's alleged injuries all "stemmed from the manner in which his commanding officer chose to conduct the affairs and discipline of his ROTC battalion").

The court of appeals correctly applied the *Feres* doctrine to bar petitioner's FTCA claim. Further review is not warranted.

2. a. Petitioner contends (Pet. 8-16) that the courts of appeals apply different legal tests to determine whether a service member's injury is incident to service under the *Feres* doctrine, and that the Sixth Circuit's approach is an outlier among the circuits. The varying approaches, however, largely represent differing verbal formulations that do not often result in conflicting results. And the Sixth Circuit is no exception.

Consistent with *Johnson* and *Shearer*, the courts of appeals apply a totality-of-the-circumstances approach, examining a number of factors to determine whether an

injury is "incident to service" under *Feres*. See *Regan* v. *Starcraft Marine, LLC*, 524 F.3d 627, 645 (5th Cir. 2008) ("The elements of the analysis—the *Feres* rationales and the factors for an activity being incident to service—are fairly uniform" in the case law). These factors include, among others, the service member's military status at the time of injury, the location of the injury, the activity in which the service member was involved at that time, whether the service member was subject to military control and/or discipline at that time, whether the activity arose out of military life, and whether the injury occurred while enjoying a privilege or benefit of military service. See, *e.g.*, *McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir.), cert. denied, 128 S. Ct. 649 (2007); *Schnitzer* v. *Harvey*, 389 F.3d 200, 203 (D.C. Cir. 2004); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000) (per curiam); *Fleming* v. *USPS, Postmaster Gen.*, 186 F.3d 697, 699-700 (6th Cir. 1999); *Richards* v. *United States*, 176 F.3d 652, 655 (3d Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Whitley* v. *United States*, 170 F.3d 1061, 1070 (11th Cir. 1999); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996); *Miller* v. *United States*, 42 F.3d 297, 301 (5th Cir. 1995); *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994).[8]

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[8] The only apparent departure from this settled law is *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). Instead of applying *Shearer*'s totality-of-the-circumstances approach, *Taber* focused on whether the plaintiff was "engaged in activities that fell within the scope of the plaintiff's military employment," as the scope of employment concept is understood under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8102. *Taber*, 67 F.3d at 1050 & n.21. No other court has adopted the *Taber* approach, and the Second Circuit has since

Contrary to petitioner's assertion (Pet. 14-15), the Sixth Circuit's analysis does not focus "entirely on the status of the claimant in the military." Although not setting forth a three-factor test as such, the Sixth Circuit (like other courts) examines the totality of the circumstances and analyzes factors such as the service member's military status at the relevant time, the location of the alleged injury, and the nature of the service member's activity when injured, including whether he or she was taking advantage of a benefit of service. See, *e.g.*, Pet. App. 10-17; *Fleming*, *supra*; *Irvin* v. *United States*, 845 F.2d 126 (6th Cir.), cert. denied, 488 U.S. 975 (1988); *Potts* v. *United States*, 723 F.2d 20 (6th Cir. 1983) (per curiam), cert. denied, 466 U.S. 959 (1984); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980).

Petitioner argues otherwise by quoting a formulation first expressed by the Sixth Circuit over two decades ago in *Major* v. *United States*, 835 F.2d 641 (1987), cert. denied, 487 U.S. 1218 (1988). Pet. App. 10-11 (quoting *Major*, 835 F.2d at 644-645) (noting that *Feres* bars all injuries suffered by military personnel that are "remotely related to the individual's *status* as a member of the military"). Far from conflicting with other courts of appeals (Pet. 14), that language has been cited favorably

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applied the traditional analysis to determine whether an injury is incident to service, stating that "*Taber* does not and could not * * * in any way alter the reach of the *Feres* doctrine." See *Wake* v. *United States*, 89 F.3d 53, 61 (1996). In *Wake*, the Second Circuit implicitly repudiated the *Taber* approach by applying *Feres* to bar the FTCA claim of a service member who was ineligible for FECA benefits because the Department of Labor concluded that her injury was outside the scope of her military employment. *Id.* at 56, 61; see also *Luckett* v. *Bure*, 290 F.3d 493, 497 (2d Cir. 2002) (applying the incident-to-service test in affirming dismissal of complaint as *Feres*-barred).

by several other circuits. See, *e.g.*, *Stewart*, 90 F.3d at 105; *Persons* v. *United States*, 925 F.2d 292, 296 n.7 (9th Cir. 1991); *Shaw* v. *United States*, 854 F.2d 360, 364 (10th Cir. 1988). More importantly, petitioner fails to identify any Sixth Circuit *Feres* decision that would have been decided differently in another circuit.

At bottom, petitioner's claimed discrepancy between the approaches adopted by the courts of appeals is a distinction without a difference.

b. Petitioner also contends (Pet. 6-7, 17-20) that this Court's decisions in *United States* v. *Stanley*, 483 U.S. 669 (1987), and *Shearer*, *supra*, provide conflicting directions as to whether or when lower courts should consider the military judgment rationale under *Feres*, and claims a "split in authority" (Pet. 19) on that issue. There is no split and, notably, petitioner fails to identify any court on either side of the purported conflict.

In *Stanley*, this Court did caution against analyzing *Feres*'s military judgment rationale in lieu of applying the "incident to service" test. 483 U.S. at 681-683 (holding that the *Feres* doctrine governs *Bivens* actions brought by service members and rejecting "less protective" military judgment rule in favor of "incident to service" test); see also *Johnson*, 481 U.S. at 684-687 (reaffirming "incident to service" test as the proper analysis in all *Feres* cases). Nothing in *Stanley* suggested that the Court viewed its opinion as being in tension with its decision in *Shearer*, which was issued two years prior. And the lower courts have properly applied both *Stanley* and *Shearer* by addressing *Feres*'s rationales only to confirm that the *Feres* doctrine is applicable under the "incident to service" test, or where the complaint alleges claims that mirror the negligent supervision or control claims at issue in *Shearer* itself. See, *e.g.*, *Regan*, 524

F.3d at 636-637 (explaining that since *Stanley* and *Shearer* were decided, "this and other Circuits * * * continue to examine the applicability of the rationales in specific cases" in addition to—not in place of—the incident to service inquiry); *Stephenson*, 21 F.3d at 163-164 (*Feres* bars actions that, like *Shearer*, allege negligent "choices about the discipline, supervision, and control of a serviceman.") (citation omitted).

3. Petitioner briefly suggests (Pet. 14 n.2) that his case would have been decided differently in another circuit. That is incorrect.

Contrary to petitioner's assertion (Pet. 14 n.2), the court of appeals did not dismiss his claim "solely" because of his status as a university ROTC student. Instead, the court concluded that petitioner's injury "ar[o]se from an activity incident to military service," Pet. App. 13, and occurred "because of his military relationship with the Government," *id.* at 15 (quoting *Johnson*, 481 U.S. at 689). As such, his claim would "involve the Court in just the sort of prying into military affairs, at the expense of military discipline and effectiveness, that the *Feres* doctrine cautions against." *Ibid.* (quoting *id.* at 58). That none of petitioner's injuries would have "occurred had [petitioner] not been an ROTC cadet under Washington's command" (*ibid.*) is surely true, but that is because of the asserted injury—*i.e.*, intentional infliction of emotional distress by a commanding officer in the course of disciplinary proceedings involving a fellow cadet, directly impacting compliance with an ROTC scholarship contract, and calling into question petitioner's ability to receive a military commission. Accordingly, petitioner's claim was not barred "solely" because of his status.

Finally, petitioner contends that ROTC students "do not have the proper duty status to apply the *Feres* bar" unless they are "on orders" or participating in military-related activity at the time of injury. Pet. 15 n.2. Petitioner fails to cite any supporting case law, and every court of appeals to have addressed the question has concluded that the *Feres* doctrine is applicable to ROTC cadets. See *Harrison* v. *United States*, 329 Fed. Appx. 179 (10th Cir. 2009); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996); see also *Morse* v. *West*, No. 97-1386, 1999 WL 11287, at *1 (10th Cir. Jan. 13, 1999) (*Feres* doctrine barred ROTC cadet's sexual harassment claim occurring while completing an ROTC "course of study"). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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