No. _____

In The
Supreme Court of the United States

WAYNE G. LOVELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "incident to service" test provided by the jurisprudence of this Court in *Feres v. United States*, 340 U.S. 135 (1950) and its progeny requires inquiry into the (1) duty status of the claimant, (2) the site of injury, and (3) the activity being performed by the claimant to determine whether a claim under the Federal Tort Claims Act ("FTCA") is barred by the *Feres* doctrine when the United States Court of Appeals for the Sixth Circuit extends the doctrine to *all* injuries suffered by any claimant that are even remotely related to the claimant's *status, relationship or affiliation* with the military service and where the standard adopted by the Sixth Circuit effectively abolishes FTCA actions in the Sixth Circuit and is in conflict with a wealth of decisions of this Court and other circuit courts.

2. Whether the Sixth Circuit Court properly bars a FTCA claim under the "incident to service" test provided by the jurisprudence of this Court in *Feres v. United States* and its progeny when the Sixth Circuit's analysis examines if the claim implicates military discipline and where the Sixth Circuit's analysis conflicts with this Court's most recent decision on the matter in *United States v. Stanley*, 483 U.S. 669 (1987).

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OPINIONS AND ORDERS BELOW

The decision by the Sixth Circuit Court of Appeals that gives rise to this Petition is reported at 570 F.3d 778 (6th Cir. 2009), *Lovely v. United States*. A copy of that decision is reprinted in the Appendix hereto, App. 1. The decision of the District Court granting the government's motion to dismiss was not reported. A copy of the decision is reprinted in the Appendix hereto, App. 18.

JURISDICTIONAL STATEMENT

On March 17, 2008, the District Court granted the government's motion to dismiss Wayne G. Lovely's ("Lovely") Complaint.

On March 31, 2008, Lovely initiated an appeal to the United States Court of Appeals for the Sixth Circuit.

On June 26, 2009, the Sixth Circuit affirmed the District Court's decision.

This Petition for Writ of Certiorari is being timely filed in accordance with Rule 13.1 of the Rules of the Supreme Court of the United States. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on Writ of Certiorari the Opinion of the Sixth Circuit Court of Appeals.

STATUTORY PROVISION INVOLVED

Lovely's claim arises under the Federal Tort Claims Act. 28 U.S.C. § 2674 provides, in part: "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE

On June 9, 2006, Lovely filed a Complaint against the Government in which he alleged that the Government violated his rights under the Privacy Act (5 U.S.C. § 552(a)) and Army Regulation ("AR" 340-21) by releasing a document or record of Lovely to a third party, which was maintained in the University of Dayton, Military Science Department files/records under these authorities. Lovely requested compensatory damages, costs and fees, and equitable relief arising from the Privacy Act violation.

The Government filed a Motion to Dismiss for Lack of Jurisdiction on August 18, 2006. Lovely was granted leave to amend his Complaint to add a claim for intentional infliction of emotional distress ("IIED") under the Federal Tort Claims Act ("FTCA"). In his Amended Complaint, Lovely alleged that Versalle Washington ("Professor Washington"), a professor of military science at the University of Dayton, Dayton,

Ohio, "wrongfully and intentionally inflicted emotional distress upon Lovely, by releasing the Privacy Act protected document, making false statements about Lovely to University of Dayton students, wrongfully interfering with the University of Dayton Non-Academic Disciplinary Board . . . and intimidating Lovely's intended witnesses before this proceeding."

The Government filed a Second Motion to Dismiss on November 20, 2006, which the District Court granted on March 17, 2008.

Lovely filed a Notice of Appeal with the Sixth Circuit on March 31, 2008. On June 26, 2009, the Sixth Circuit affirmed the District Court's decision. *Lovely,* 570 F.3d at 778-85. (A at p. A-1).

Senior Sixth Circuit Court Judge Karen N. Moore wrote the opinion for the Court. In support of its decision, the Court said:

> The language of the FTCA [Federal Tort Claims Act] exempts from this waiver of immunity claims "arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war". 28 U.S.C. § 2680(j). In *Feres v. United States,* 340 U.S. 135 (1950), the Supreme Court significantly broadened this exception and created the *Feres* doctrine, pursuant to which "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to

service." 340 U.S. at 146; *accord Fleming,* 186 F.3d at 699.

As this Court previously noted, subsequent Supreme Court cases have further extended this doctrine.

> Review of these Supreme Court precedents make it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose. *Major v. United States,* 835 F.2d 641, 644-45 (6th Cir. 1987).

In the most recent Supreme Court case examining the *Feres* doctrine, the Court explained that, "a service member is injured incident to service" if the injury is "because of his military relationship with the Government," *United States v. Johnson,* 481 U.S. 681, 689 (1987), and reiterated the three broad rationales underlining the doctrine, *id.* at 689-90; *see* also *United States v. Shearer,* 473 U.S. 52, 57 (1985); *Stencel*

Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-72 (1977). "First, '[t]he relationship between the Government and members of its armed forces is "distinctively federal in character."'" *Johnson,* 481 U.S. at 689 (alteration in original) (quoting *Feres,* 340 U.S. at 143 (quoting *United States v. Standard Oil Co.,* 332 U.S. 301, 305 (1947))). "Second, the existence of [] generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries." *Id.* "Third . . . suits brought by service members against the Government for injuries incurred incident to service . . . are the '*type*[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* at 690 (alteration in original) (quoting *Shearer*, 473 U.S. 59).

Although this is a close case presenting unique circumstances that do not fall directly in line with other cases applying the *Feres* doctrine, we conclude, in light of the doctrine's rationales and the Court's broad interpretation of the doctrine, that the district court properly dismissed Lovely's IIED [Intentional Infliction of Emotional Distress] claim as barred by the *Feres* doctrine. Initially, Lovely argues that his claims are not subject to the *Feres* doctrine because he was not on active duty or subject to military command or discipline while attending classes at UD or while involved in the UD disciplinary proceedings. We have

> noted, however, that "the *Feres* doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline." *Sidley v. United States,* 861 F.2d 988, 990 (6th Cir. 1988); *accord Skees v. United States,* 107 F.3d 421, 423 (6th Cir. 1997) ("[T]he term 'incident to service' . . . is not a term limited to military training and combat.")

Lovely, 570 F.3d at 782-83. (App. 1).

The Sixth Circuit Court supports its holding by citing to a limited number of other circuits' decisions concerning claims of other candidates for military service. As explained below, the Circuit Court's decision misconstrued the admittedly unique facts of Lovely's case and misapplied the *Feres* doctrine.

In *Feres v. United States*, this Court limited the applicability of the FTCA with respect to military personnel when it held that "the Government is not liable under the [FTCA] for injuries to [service members] where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. Accordingly, the answer to the question whether an activity or injury is "incident to military service" determines whether a service member may pursue an FTCA cause of action. *Parker v. United States*, 611 F.2d 1007, 1009 (5th Cir. 1980).

Feres and its progeny do not articulate a specific method for determining whether an injury is "incident to military service". This Court's decisions

in *United States v. Stanley*, 483 U.S. 669 (1987) and *United States v. Shearer*, 473 U.S. 52 (1985) conflict with respect to whether a court should examine the likelihood of disruption of military judgments in a particular case to determine if an activity is "incident to military service". Lower courts adopt varying approaches to determine whether an activity is incident to service and bars a FTCA claim under the *Feres* doctrine. *See Parker*, 611 F.2d at 1009 (noting "[t]he Supreme Court cases under the *Feres* doctrine . . . offer policy reasons for implying an exception [under the FTCA for injuries to service members], but do not provide many clear signposts to the parameters of 'incident to service'"); *see also Regan v. Starcraft Marine*, 524 F.3d 627, 636 (5th Cir. 2008) (noting "[t]he clarity with which *Shearer* stated that the likelihood of disruption of military judgments in a particular case was critical in determining whether to apply the *Feres* bar, despite the later *Stanley* decision's equally clear statement that it was not"). This Court should grant Petitioner, Wayne G. Lovely's ("Lovely"), Petition for Writ of Certiorari to clarify the *Feres* doctrine's proper application, foster uniformity among the circuit courts, and prevent the unjust decisions such as those that have resulted from the application of the circuit courts' varying standards.

REASONS FOR GRANTING THE PETITION

I. QUESTION ONE

This Court should grant Lovely's Petition for Writ of Certiorari to determine whether the "incident to services" test provided by the jurisprudence of this Court in *Feres* and its progeny requires inquiry into the (1) duty status of the claimant, (2) the site of injury, and (3) the activity being performed by the claimant to determine whether a claim under the FTCA is barred by the *Feres* doctrine where the United States Court of Appeals for the Sixth Circuit extends the doctrine to *all* injuries suffered by military personnel that are even remotely related to the claimant's *status* as a member of the military and where the standard adopted by the Sixth Circuit effectively abolishes FTCA actions in the Sixth Circuit and is in conflict with a wealth of decisions of this Court and other Circuit Courts.

It is well settled that "the Government is not liable under the FTCA for injuries to *servicemen* where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146 (emphasis added). In determining whether a particular claim is *Feres* barred, most lower courts apply a three-part "incident to service" test. *Schnitzer v. Harvey,* 389 F.2d 200, 203 (D.C. Cir. 2004). Jurisdictions that do not follow the majority approach continue to engage in an analysis of the claimant's purported military status or the scope of the claimant's employment in relation to the claimant's

injury. *See Borden v. Veterans Admin.*, 41 F.3d. 763 (1st Cir. 1994); *Taber v. Maine*, 67 F.2d 1029 (2nd Cir. 1995). However, the Sixth Circuit follows neither of these approaches. *See Major v. United States*, 835 F.2d 641, 644 (6th Cir. 1987).

The Sixth Circuit expands the *Feres* doctrine and applies it "at a minimum, [to] *all* injuries suffered by *military* personnel that are even remotely related to the individual's *status* as a member of the military." *Id.* at 644 (emphasis added). The Sixth Circuit Court's opinion in both this matter and in *Major* so broadly reads *Feres* that the Court effectively precludes *all* tort claims brought by *any* claimant who is in *any* way affiliated with the military service. *See Lovely*, 570 F.3d at 782-83. (App. 1). As such, the Sixth Circuit's approach to the *Feres* bar leads the Court to inconsistent results in relation to other circuits, starkly contrasts with the *Feres* doctrine's rationale, and leaves claimants such as Lovely with no cause of action under any set of circumstances.

A. Majority Approach

In determining whether a particular claim is *Feres* barred, the majority of courts apply a three-part "incident to service" test. *See Schnitzer*, 389 F.3d at 203; *Richards v. United States*, 176 F.3d 652, 655 (3rd Cir. 1999); *Stephenson v. United States*, 21 F.3d 159 (7th Cir. 1994); *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987); *Johnson v. United States*, 714 F.2d 1431, 1436-41 (9th Cir. 1983); *Miller v. United States*

643 F.2d 481, 483 (8th Cir. 1981); and *Parker*, 611 F.2d at 1013-15. These courts analyze (1) the injured service member's duty status, (2) the site of the injury, and (3) the nature of the activity engaged in by the service member at the time of his injury to determine whether a member of the military may bring a claim against the government under the FTCA. *Id.* In applying the three factor test, none of the three factors are itself dispositive and each factor contributes to the Court's assessment of the totality of the circumstances in determining whether the injury is properly understood as "incident to service" within the meaning of *Feres*. *Id.*

B. Minority Approaches

The minority of jurisdictions approach the *Feres* bar by focusing primarily on the claimant's status as a service member or the scope of the claimant's military service in relation to the claimant's injury. The results vary as to whether the minority approaches reach the same or similar result as the majority approach.

1. Military status in relation to claimed injury analysis

In the First Circuit, the Court examines the claimant's military status in relation to the injury suffered to determine whether the injury occurred incident to service. *Borden* at 763-64. Although not explicitly stated, it is clear that the Court determined

the claimant's military status by looking at the traditional indicia such as the claimant's orders to active duty, enlistment contract, military identification card, and witness testimony. *See id.* The First Circuit also determines whether the claimant's injury results from an activity that is the benefit of military service. *Id.*

2. Employment law analysis

In the Second Circuit, the Court first considers the claimant's purported status as a military service member and then examines the same traditional indicia used by the First Circuit to determine the claimant's military status. *Taber*, 67 F.2d at 1049-50. Further, the Second Circuit reviews the activity in which the claimant was involved at the time of the injury and applies the general principles found in employment law to determine whether the claimant was "engaged in activities that fell within the scope of the plaintiff's military employment." *Id.* at 1050. If the claimant's activity falls within the scope of the claimant's military employment, the Court bars the claim. *Id.* If the activity does not fall within that scope, the Court does not bar the claim "absent unusual circumstances that would call into play the *Feres* discipline rationale." *Id.* With regard to "discipline rationale" the *Taber* Court recognized that its authority extended to all cases except where its

exercise of authority constituted "significant interference" with military decisions.[1] *Id.* at 1046.

3. Duty status analysis

The Fourth Circuit uses a relatively mechanical test derived from *Feres* to determine whether an injury is incident to service. *Hass v. United States*, 518 F.2d 1138, 1140 (4th Cir. 1975). The Fourth Circuit notes that

> [t]he phrase "incident to service" was given context by Justice Jackson in *Feres* when, after setting out the facts of the three appeals there under review, he stated: "the common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others, in the armed forces."

Id. (citing *Feres*, 340 U.S. at 138). Noting that the *Feres* test has the virtue of simplicity and is supported by cogent policies, the Fourth Circuit places an emphasis on the claimant's duty status, ignores the subjective rationales of the *Feres* doctrine, and looks to the benefits the claimant was enjoying at the time of the suffered injury. *See Id.*

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[1] The Second Circuit's analysis of the "incident to service" test provides one example of how lower courts commingle the "incident to service" test with the third rationale behind the *Feres* doctrine as a result of the conflict between this Court's decisions in *Shearer* and *Stanley* discussed *infra*.

4. Status at time of injury analysis

The Tenth Circuit's analysis focus for "[w]hether a serviceman's injury arises out of activity 'incident to service' depends on whether it stems from an official military relationship between the negligent person and the serviceman." *Harten v. Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974). Put differently, the Circuit focuses on the military status of the claimant at the time the claimant suffers injury to determine if the *Feres* bar applies. *Id.* The Circuit also looks to whether the claimant is on leave or inactive at the time of injury, if the injury stems from a military relationship, and whether the benefits being enjoyed by the claimant at the time of injury were a result of the claimant's military status. *Id.* As such, the primary focus of the Tenth Circuit is on the claimant's military status at the time of injury. *See id.*

C. Sixth Circuit Approach

The Sixth Circuit's opinion in the case at bar affirms the Court's overly-broad stance with respect to the *Feres* doctrine and the "incident to services" test. *Lovely*, 570 F.3d at 782-83. The Court expands the *Feres* doctrine:

> to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, *without regard* to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the

> essential defense/combat purpose of the military activity from which it arose.

Id. (citing *Major*, 835 F.2d at 644-45) (emphasis added). The expansive approach taken by the Sixth Circuit conflicts with a wealth of decisions of this Court and other Circuit courts.

Unlike the majority approach, the Sixth Circuit analysis focuses entirely on the status of the claimant in the military rather than examining the claimant's duty status in relation to the location of the injury and activity being performed when the claimant suffered injury. This results in a claimant's suit being barred solely because of the claimant's status in the military. In addition, it ignores factual inquiries the majority of jurisdictions emphasize and provide an incomplete analysis of the totality of circumstances resulting in a serviceman's injury.[2]

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[2] In the case at bar, the Sixth Circuit's decision relies solely upon Lovely's status as a university ROTC student in deciding to bar Lovely's claim to the exclusion of the location of Lovely's injury and the nature of the activity Lovely participated in when injured. Effectively, the Court's decision acted as a blanket denial of Lovely's claim, simply because he was in the ROTC program. Using the majority approach's analysis, a university ROTC student cannot be a service member within the meaning and intent of *Feres*, absent some qualifying activity or additional authorization. *See, e.g.*, *Regan*, 524 F.3d at 636-38 (recognizing the necessity of analyzing both the *status* of an active duty service member on the continuum between performing tasks of an assigned mission to being on extended leave from duty and the *activity* in which the claimant was involved when injured as essential to a proper analysis under *Feres*). This holds true

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Although more analogous to the minority approaches, the Sixth Circuit's analysis differs from the minority approaches in that it is more expansive. In addition, the minority approaches analyze in depth the relationship between the status and scope of the military service and the activity in which the claimant was injured, which the Sixth Circuit does not do.

D. Question One Conclusion

Because the approach taken by the Sixth Circuit effectively abolishes FTCA actions by service members in the Sixth Circuit and conflicts with a wealth of decisions of this Court and other Circuit courts by reading the *Feres* doctrine too broadly, this Court should grant Lovely's Petition for Writ of Certiorari to

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because ROTC students have a *conditions precedent contract* and do not have the proper duty status to apply the *Feres* bar. *See Army Regulation 145-1*, Reserve Officer's Training Corps Program: Organization, Administration and Training, July 22, 1996 (under revision) (noting that before an ROTC student may be commissioned as an officer or enlisted in the service, the student has to meet certain conditions precedent, including completing certain educational requirements, passing a physical examination, passing drug screening and sexually transmitted diseases tests, undergoing a criminal background investigation, attending basic training, undergoing a background check for gaining access to classified information, and having physical, psychological, and mental ability tests administered) (emphasis added). Thus, unless the student is "on orders" or participating in military-related activity when injured, an ROTC student's role is too far removed from the core concerns of *Feres* to apply the *Feres* bar.

determine the reach of the *Feres* bar and the factors Circuit courts should employ in administering the "incident to service" test.

II. QUESTION TWO

This Court should grant Lovely's Petition for Writ of Certiorari to determine whether the Sixth Circuit Court properly bars a FTCA claim under the "incident to service" test provided by the jurisprudence of this Court in *Feres* and its progeny when the Sixth Circuit's analysis examines if the claim implicates military discipline and where the Sixth Circuit's analysis conflicts with this Court's most recent decision on the matter in *Stanley*. Although *Feres* and its progeny do not provide clear signposts to the parameters of "incident to service", the Supreme Court cases interpreting the doctrine offer policy reasons for implying an exception to a service member's FTCA cause of action. The policy reasons explain the Supreme Court's justifications for the *Feres* doctrine and provide as follows:

> [First], [t]he relationship between the Government and members of its armed forces is distinctively federal in character. This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service.

* * *

> Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres*, the Court observed that the primary purpose of the FTCA "was to extend a remedy to those who had been without; if it incidentally [benefitted] those already well provided for, it appears to have been unintentional."
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> * * *
>
> Third, *Feres* and its progeny indicate that suits brought by service members against the government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of the military discipline and effectiveness."

Johnson v. United States, 481 U.S. 681, 689-90 (1987). This Court addressed the application of the *Feres* doctrine's policy rationale in *Shearer* and *Stanley*.

A. *United States v. Shearer*

This Court handed down its decision in *Shearer* on June 27, 1985, finding the third *Feres* doctrine rationale critical in making a case-by-case analysis. *Shearer*, 473 U.S. at 57. In *Shearer*, the first two rationales were found to be "no longer controlling",

and the location of the incident was deemed less important in deciding whether *Feres* should apply. *Id.* The *Shearer* decision stood for the proposition that allegations going directly to the management of the military and litigation of that issue would impermissibly involve the courts in reviewing military judgments. *Id.* at 58-59. However, just as the *Shearer* court stated with such clarity that the likelihood of disruption of military judgments in a particular case was critical in determining whether to apply the *Feres* bar, this Court's subsequent decision in *Stanley* made it equally clear that such an inquiry was *not* critical. *See, e.g., Regan*, 524 F.3d at 635-36.

B. *United States v. Stanley*

The majority in *Stanley* sought a straightforward application of the "incident to service" test and set forth "an objective rule that did not examine whether specific litigation would interfere with military judgments, discipline, and management" under the third *Feres* rationale. *Id.* at 635. The *Stanley* court reasoned that the "incident to service" test "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Stanley*, 483 U.S. at 682-83. The Court explained that "discovery procedures such as depositions that would be needed to determine how disruptive a review of the military judgment would be, would themselves be disruptive." *Id.* As a result, the *Stanley* court highlighted a bright line rule that required a less extensive inquiry into military

matters and imposed the *Feres* bar only when the injury was incident to service. *Id.*

C. Question Two Conclusion

The conflicting direction provided by *Shearer* and *Stanley* creates uncertainty at the District and Circuit court levels and leads to inconsistent results. Pursuant to *Stanley*, this Court made the "incident to service" analysis controlling for the *Feres* bar, regardless of whether the particular litigation would intrude alarmingly on military judgments. *Stanley*, 483 U.S. 682-83; *see also Regan*, 524 F.3d at 646. As noted by the Fifth Circuit, the conflict between this Court's decision in *Shearer* and *Stanley* "may be what has caused this and other circuits since the date of both precedents to continue to examine the applicability and rationales in specific cases." *Reagan*, 524 F.3d. at 636. Certainly, if a claim is based on an injury that was incident to service and, if resolving that claim would also demand second-guessing of military judgment, an application of *Feres* is clear. *Id.* However, an application of Feres is not clear where the "incident to service" test and the military judgment rational conflict or are commingled. *See id.*

As a result of the *Stanley* and *Shearer* decisions, there exists a split in authority with respect to the analysis courts should conduct with respect to the "incident to service" test and the third *Feres* rationale. Courts remain unsure whether to make the straightforward and objective application of the

"incident to service" test provided in *Stanley* or to follow the Court's prior decision in *Shearer* by looking at the likelihood of disruption of military judgments in each particular case. As noted in *Regan*, courts often continue to examine the applicability of the rationales in specific cases, much like the Sixth Circuit did in the *Lovely* opinion. Following this Court's most recent opinion in *Stanley*, lower courts should not engage in an analysis of the *Feres* doctrine's third rationale.

The *Feres* test is the virtue of simplicity, always an important consideration, while examining the rationale behind the *Feres* test presents difficult fact questions in every instance. *Hass*, 518 F.2d at 1141. Consequently, the Sixth Circuit, by examining the impact allowing this suit to proceed would have on military command or discipline, turned the simplistic *Feres* test into a difficult fact question.

Although the Sixth Circuit notes that the *Lovely* case is a close case presenting unique circumstances that do not fall directly in line with other cases applying the *Feres* doctrine, a proper examination of the matter by applying the straightforward and mechanical approach highlighted in *Stanley* would have eliminated the difficulty in assessing Lovely's situation. Because the conflict between *Stanley* and *Shearer* has given rise to differences in application across the Circuits, this Court should grant Lovely's Petition for Writ of Certiorari to determine whether courts should apply the straightforward application of the "incident to services" test as provided in *Stanley*

or undertake the subjective inquiry into the likelihood of disruption of military judgments highlighted in *Shearer*.

CONCLUSION

For all the foregoing reasons herein, the Court should grant the Petition for Writ of Certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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