No. 10-___

IN THE
Supreme Court of the United States

LISA M. ZURESS,

Petitioner,

v.

MICHAEL B. DONLEY, ACTING SECRETARY, UNITED STATES DEPARTMENT OF THE AIR FORCE

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances are dual-status technicians, who perform civilian roles within military departments, protected by federal statutes prohibiting employment discrimination?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lisa M. Zuress respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 606 F.3d 1249. The order and opinion of the district court (App. B, *infra*) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 8, 2010. Justice Kennedy subsequently extended the time to file a petition for certiorari to and until September 16, 2010. App. 10A239. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16(a), entitled "Employment by Federal Government," subjects the military to Title VII of the Civil Rights Act of 1964 (Title VII) by providing that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5, United States Code . . . [*i.e.*, the Army, Navy, and Air Force] shall be made free from any discrimination based on race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-16(d) provides that the federal government is subject to the same standards as private employers by providing that in cases against the government "[t]he provisions of section 2000e-5(f) through (k) of this title [which govern private suits

under Title VII], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties."

42 U.S.C. § 2000e-2(a)(1), entitled "Unlawful employment practices," prohibits employment discrimination by rendering it "unlawful . . . for an employer" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-3(a), entitled "Other unlawful employment practices," prohibits retaliation in response to claims under Title VII by providing that it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. § 2000e-5(f) authorizes civil actions under Title VII in claims against governmental entities by providing that if the federal government does not file suit after the conclusion of administrative proceedings before the EEOC on such a complaint, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved."

42 U.S.C. § 2000e-16(c) authorizes complainants to file civil suits under Title VII after the conclusion

of administrative proceedings by providing that "an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." *See also* 29 C.F.R. § 1614.310 (authorizing Title VII "complainant . . . to file a civil action in an appropriate United States District Court" upon conclusion of administrative proceedings).

A document entitled "Luke Air Force Base Discrimination Complaint System" (App. C, *infra*) provides that a complainant has "the right to go to U.S. District Court 180 days after filing a formal complaint or 180 days after filing an appeal."

10 U.S.C. § 10216(a) identifies the class of "dual-status" technicians employed by the government and specifies that they shall be deemed "civilian" employees by providing:

> (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who –
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected

Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

STATEMENT OF THE CASE

Petitioner served as a "dual-status" technician in the Air Force, providing human resource services. Federal law specifies that although dual-status technicians must also separately serve in the military reserves, they are, in their role as technicians, "[f]ederal civilian employee[s]" for purposes of "any . . . provision of law." 10 U.S.C. § 10216(a). The case arose when petitioner's supervisor retaliated against her in response to two protected acts: complaining of sexually inappropriate conduct in the Air Force unit in which she was employed, and assisting another civilian employee with his own employment discrimination complaint. Petitioner accordingly commenced proceedings under Title VII, which prohibits gender-based employment discrimination and retaliation in private and public employment, including "in military departments." 42 U.S.C. § 2000e-16(a). The applicable federal regulations and the policy applicable to petitioner's workplace specify that upon the conclusion of administrative proceedings, the complainant may file suit. The federal district court and the Ninth Circuit nonetheless ruled that petitioner's suit was barred under *Feres v. United States*, 340 U.S. 135 (1950), which held that a uniformed officer may not sue the military under the Federal Tort Claims Act (FTCA) for claims arising from military service. The court of

appeals acknowledged that its decision conflicts directly with the precedent of the Federal Circuit, which has held that, as "civilian" employees, dual-status technicians are not subject to the "*Feres* doctrine" and instead may invoke the protections of the federal employment laws.

1. In 2002, petitioner Lisa M. Zuress began employment as a GS-12 Operations Staff Specialist for the 944th Operations Group at Luke Air Force Base in Arizona. The official description of petitioner's position indicates that her role was "to serve as special assistant to the Operations Group Commander, and, as such, perform[] staff duties, special projects and taskings; and other administrative functions associated with the schoolhouse-training program." Civilian Personnel Position Description at 1 (Amend. Compl., Exh. C at 129). She specifically performed human relations and budget-management tasks. For example, Zuress was the primary monitor for officer and employment performance reports and also oversaw the group's contracting and budget issues. In addition, she served as a resource advisor, providing recommendations regarding the unit's $3 million budget.

Zuress's G-12 position fell within the category of "Air Reserve Technician" (ART), which is one of several classes of "dual-status military technicians." Dual-status technicians perform civilian roles in the military departments; they are also are separately required to maintain membership in the military reserve. By statute, Congress has defined dual-status technicians as "civilian" employees for purposes of "any . . . provision of law." 10 U.S.C.

§ 10216(a). Congress has provided that the minimum number of dual-status military technicians for 2010 shall be 68,335, including 10,417 in the Air Force Reserve. *See* National Defense Authorization Act for Fiscal Year 2010, H. R. 2647, 111th Cong. § 413 (2009).

In her separate reserve capacity, Zuress was an Air Force Reserve Captain, having served nearly twenty-five years in the military, beginning as an enlisted airman and later earning her commission as an Air Force officer. Fourteen of Zuress's years in the military were spent as a member of the Air Force Reserve. In that distinct role, she was typically required, one weekend per month and two weeks per year, to participate in Air Force Reserve activities such as training exercises.

2. In August 2003, Roger Marichalar, an employee at the base, filed an Equal Employment Opportunity ("EEO") complaint. Marichalar sought counsel from petitioner in her human-relations role regarding applicable personnel regulations and other matters related to his complaint. *See* Amend. Compl. ¶ 25. Zuress answered his questions. She subsequently also served as a witness supporting his complaint.

Petitioner's supervisor, Col. Binger, repeatedly and emphatically expressed displeasure that Zuress had assisted Marichalar, whom Binger suspected of circumventing the chain of command and – for unknown reasons – regarded as having created a "hostile and threatening environment." Binger E-Mail (May 4, 2004) (Amend. Compl., Exh. D). Binger also thought that Zuress's assistance to Marichalar was not "in the best interest of the wing or good order

and discipline." Binger Deposition (Dec. 5, 2006) (Binger Depo.) 35. In his notes summarizing feedback sessions with petitioner, Binger wrote that Zuress's "coaching [Marichalar] in his efforts to complain about perceived wing problems . . . was destructive," and that Zuress's actions "put [her] loyalty in question," as she was "[h]elping others in hurtful actions against the wing." Binger Depo. 45-49; Memo 1 for Record (June 4, 2004) (Amend. Compl. Exh. C at 144); Memo 2 for Record (June 4, 2004) (Exh. F-13 in Investigative File dated Nov. 9, 2005).

In September 2003, Zuress learned that male members of the unit in which she served as a human relations employee had conducted a "sex show." Several male fighter pilots hired strippers to come onto the base and perform sex acts on each other while the men watched and, in some instances, participated.

Deeply troubled and offended, Zuress sent an anonymous letter expressing her objections to the inappropriate sex show to the Chief of Staff of the Air Force, the Secretary of the Air Force, and other high-ranking officers, including then-Secretary of Defense Rumsfeld. The fallout was dramatic. Senior Air Force officials ordered an investigation, fired numerous participants, and imposed discipline upon others. Delgado Deposition (Dec. 8, 2006) 17-18. However, Zuress was unable to remain anonymous for long. Her immediate superiors, as well as others in her unit, determined that she had written the letter, and she and her husband (a fighter pilot) faced intense retaliatory pressure and hostility.

In June 2004, in the wake of both the Marichalar

complaint and the aftermath of the sex show, Binger held a required feedback session with Zuress as part of her ordinary review process. Binger subsequently sent an e-mail to his superiors, to which he attached an article he had drafted for an Air Force publication entitled "Are you a good leader?" Binger E-Mail (June 5, 2005) (Amend. Compl., Exh. C at 187). The article included several rhetorical questions, including "Do you allow your military chain of command to work problems and issues, or circumvent it in order to punish them from outside sources?" Amend. Compl., Exh. C at 174. The cover e-mail stated that Binger had "used [the article] in my counseling session with Capt Zuress and also in mentoring L Moya-Albee." Binger E-Mail (June 5, 2005) (Amend. Compl., Exh. C at 187). This e-mail was then forwarded to every officer and enlisted member of a subordinate squadron. *Id.* As several officers later acknowledged, the term "counseling" carries a negative connotation in the military; thus, Binger's mischaracterization of his feedback session with Zuress as "counseling" about her leadership skills constituted an "unfortunate" statement that reflected badly on her. Higgins E-Mail (Amend. Compl., Exh. C at 201); Binger Depo. 73.

Zuress complained directly to Binger via e-mail, stating that she had "continually dealt with reprisal in this unit," and that she considered Binger's e-mail to constitute "further reprisal from this unit and its leadership." Zuress E-Mail (June 15, 2004) (Amend. Compl., Exh. C at 146). Binger responded to Zuress's complaint by drafting a memorandum in which he described her e-mail as "another event in a long line of indiscretions, poor attitude and morale busting actions she has been involved in," and he indicated

that he intended to issue a letter of reprimand "for this breach of discipline and her accusatory tone." Binger Memo (June 16, 2004) (Amend. Compl., Exh. C at 146).

Binger subsequently prepared an Officer Performance Report evaluating Zuress's military performance. With regard to her performance of the tasks listed as her job responsibilities, the report described her as "Excellent," "Superb," "Highly organized and systematic," and "Effective."

Nonetheless, the report also asserted, without elaboration, that Zuress "needs additional work on officership issues." Officer Performance Report (Amend. Compl., Exh. E). Binger acknowledged that as a consequence the report was "not career enhancing," and "certainly wouldn't help" Zuress obtain a promotion. Binger Depo. 89-90. At the time, as Binger was aware, Zuress would soon be reviewed for promotion to the rank of Major in the Reserves. If she did not receive a promotion, she would lose her Reserves commission, thereby forcing her out of her position as an ART. Binger Depo. 88-89; *see* Air Force Instruction 36-3207, ¶ 3.4, Apr. 13, 2010 (specifying that officers passed over twice for promotion to the rank of Major must separate from the Air Force and Air Force Reserves); Air Force Instruction 36-2501, ¶ 3.10, July 16, 2004 (same); 10 U.S.C. § 10216(d) (providing that ARTs must maintain membership in the Special Reserves or lose their civilian positions).

Zuress understood the inevitable consequence of Binger's negative characterization of her "officership": she would not be promoted. In turn, her civilian employment as an ART would be

automatically terminated.[1]

To avoid that automatic termination, petitioner requested one year of leave without pay from her civilian ART position in the hope that she could find suitable replacement employment in the government, and she submitted paperwork stating her intention to retire from the military reserves in June of 2005. Request for Personnel Action (Amend. Compl., Exh. C at 165-67). Upon learning of petitioner's plans, Binger sent an e-mail informing his colleagues that the coming Friday would be Zuress's last day of work. After specifying "[y]our eyes only . . . please do not forward," Binger boasted that although "many questioned my methods with her . . . ultimately perseverance and pressure/accountability prevailed." Binger E-Mail (Dec. 27, 2004) (Amend. Compl., Exh. I) (first alteration in original).

Binger twice advised petitioner that she would receive the year's leave that she had requested. On January 12, however, Zuress learned that Binger had in fact only granted her 120 days of unpaid leave, thereby causing her civilian employee benefits to terminate much sooner than she had expected and causing her to have a break in her civil service. The truncation provided no savings to the unit, however.

That day, Zuress wrote to Binger that she wished to exercise her right to return to her position, effectively withdrawing her request for unpaid leave. Zuress E-Mail (Jan. 12, 2005) (Amend. Compl., Exh. C at 198). Binger promptly wrote to the Luke Air

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[1] Petitioner was indeed later informed that, as she had anticipated, she had not been selected for promotion to Major. Nonselection Letter (Mar. 31, 2005) (Amend. Compl., Exh. F).

Force Base civilian personnel officer to ask whether his receipt of the orders scheduling Zuress's retirement from the Reserves might "change things" – that is, enable him to stop Zuress from returning. Binger E-Mail (Jan. 13, 2005) (Amend. Compl., Exh. J). The personnel officer responded that "[t]he only way it would have helped you, would have been if the retirement date was already past or almost there." She advised Col. Binger to "[s]tart praying" that Zuress would not rescind her retirement request. Tennyson E-Mail (Jan. 13, 2005) (Amend. Compl., Exh. J).

Unable to prevent petitioner from returning, Binger instead transferred and demoted her. He asserted that during the week in which she had been on leave, her prior position had been permanently filled by another employee. He transferred her instead to a Medical Squadron, and required her to serve at a GS-7 level – a demotion of *five* civilian pay grades – until the dismissal resulting from her non-promotion took effect. *See* Binger E-Mail (Jan. 19, 2005) (Amend. Compl., Exh. H).

3. Zuress timely pursued her rights under Title VII, as specified by the statute and implementing regulations. The statute governing the application of Title VII to "[e]mployment by [the] Federal Government" provides that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5, [United States Code] . . . [*i.e.*, the Army, Navy, and Air Force] shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

Title VII's remedial provision provides that any

"person aggrieved" by a violation of the statute may invoke its protections. *Id.* § 2000e-5(f). A party proceeding under Title VII generally is required to first file an administrative "charge"; after those proceedings conclude, she may proceed to court. *Id.* In cases involving federal sector employment, a party may bring a Title VII action in federal district court following an agency's final action on a complaint or the EEOC's final decision on appeal. 29 C.F.R. § 1614.407.

Consistent with that regime, the "Luke Air Force Base Discrimination Complaint System" governing petitioner's charge provided that, after an initial mandatory effort at counseling, the employee "must file a formal complaint within 15 days" to proceed with her claim. App. C, at 28a. The employee then may "request a hearing before an Equal Employment Opportunity Commission Administrative Judge" after a period of "180 days or after completion of investigation, whichever comes first." *Id.* The Complaint System then expressly recognizes the employee's "right to go to U.S. district Court 180 days after filing a formal complaint or 180 days after filing an appeal." *Id.*

Petitioner timely satisfied these administrative prerequisites. In addition to complaining to the Air Force Inspector General, petitioner duly contacted her EEO counselor on March 17, 2005 to complain about the continuous pattern of discrimination, harassment, and retaliation that she had faced as a civilian ART. When informal attempts at resolution failed, Zuress timely filed an EEO complaint, which highlighted the fallout from the sex show, the retaliation she suffered for assisting Marichalar with

his own EEO complaint, and her demotion to a lower-graded position.

When the Air Force refused to grant Zuress relief, she properly pursued her claim before the EEOC by requesting a hearing before an EEOC Administrative Judge (AJ). After an amendment to her complaint, and ensuing remand for further investigation, the Air Force issued its final agency decision denying Zuress relief on February 25, 2008. The final decision expressly states that petitioner was authorized to file a civil action "in an appropriate United States District Court." *In re* Lisa M. Zuress, Dep't of Air Force, Final Agency Decision (Agency Docket No. 7I0J05008F07) (Feb. 25, 2008) at 26.

4. On March 28, 2008, Zuress timely exercised her right to file this suit under Title VII against the Secretary of the Air Force in the United States District Court for the District of Arizona. Her complaint, as amended, alleged that she suffered retaliation and reprisals for her role in reporting the sex show and for assisting Marichalar in pursuing his EEO complaint. Although the statute, regulations, and base policy all directed petitioner to complete the administrative process and then (if unsatisfied with the result) file suit, the Secretary nonetheless moved to dismiss Zuress's complaint as barred by *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, this Court held that the Government is not subject to state law suits by active-duty servicemembers under the FTCA "where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Applying the Ninth Circuit's prior extension of *Feres* to Title VII claims brought by dual-status technicians "when the challenged conduct is integrally related to

the military's unique structure," *see Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), the district court granted the Secretary's motion to dismiss. App. B, at 26a.

5. On appeal, the Ninth Circuit affirmed. The court of appeals rejected Zuress' argument that its prior ruling in *Mier* had been superseded by Congress's subsequent enactment of the National Defense Authorization Amendments of 1997, which provides that dual-status technicians are civilian employees "[f]or purposes of this section and any other provision of law." 10 U.S.C. § 10216(a). Petitioner argued that the statute deems dual-status technicians to be civilian employees, rather than active-duty servicemembers, for purposes of the federal civil rights laws. The Ninth Circuit disagreed, holding that the phrase "any other provision of law" did not constitute a sufficiently "clear statement" to overturn its prior decision in *Mier*. App. A, at 13a. The court of appeals acknowledged, however, that the circuits are divided over precisely that question, with the Federal Circuit reaching the opposite result in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006). App. A, at 12a-13a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals recognized that its decision squarely conflicts with the precedent of the Federal Circuit. That conflict produces an intolerable disparity in the treatment of employment-related claims by identically situated employees of the military. The judgment in this case is moreover

representative of a still broader array of other disagreements regarding the scope of *Feres* that has arisen as the courts of appeals have openly struggled with how to apply that decision – which does not rest on the Constitution or on the text of any law passed by Congress – to a wide range of statutory schemes. Only this Court can resolve the manifest uncertainty and inconsistency that presently reigns.

The ruling below moreover cannot be reconciled with this Court's precedents and with the laws and regulations governing the right of dual-status technicians to bring claims under Title VII. Contrary to the Ninth Circuit's holding, this Court has never extended the federal common law rule of *Feres* beyond the narrow confines of tort suits brought by uniformed servicemembers arising from the course of their military activities. In this case, by contrast, an employee acting in a civilian capacity seeks to pursue a claim that Congress has specifically authorized to be brought against the "military departments." 42 U.S.C. § 2000e-16(a). To the extent that *Feres* does in fact inevitably extend to civil rights claims by dual-status employees, it should be overruled.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE CIRCUMSTANCES IN WHICH THE UNITED STATES HAS MADE ITSELF AMENABLE TO SUIT BY EMPLOYEES OF MILITARY DEPARTMENTS

1. The Ninth Circuit in this case held on the basis of prior circuit precedent that a dual-status technician may not sue the Government under Title VII if her claim is "integrally related to the military's unique structure." App. A, at 11a (applying *Mier*). That ruling is consistent with the published

precedent of the Second, Fifth, Sixth, and Eighth Circuits. *See Wetherill v. Geren*, No. 09-3334, 2010 U.S. App. LEXIS 17004, at *20 (8th Cir. 2010); *Bowers v. Wynne*, No. 09-3566, 2010 U.S. App. LEXIS 14944, at *35 (6th Cir. 2010); *Williams v. Wynne*, 533 F.3d 360, 366-68 (5th Cir. 2008); *Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 95-96 (2d Cir. 2004); *see also Willis v. Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007) (unpublished decision).

But as the Ninth Circuit acknowledged, App. A, at 12a-13a, its holding is irreconcilable with the precedent of the Federal Circuit. In *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), a dual-status military technician filed suit under the Equal Pay Act, which (like Title VII) applies by its terms to the military. 29 U.S.C. § 203(e)(2)(A)(i) (defining "employee" to include any individual employed "as a civilian in the military departments"). The Federal Circuit acknowledged the holding of other circuits that such a suit must be dismissed under the *Feres* doctrine. *Jentoft*, 450 F.3d at 1349. But it rejected that position on the basis of the National Defense Authorization Amendments of 1997 (NDAA), which provide that dual-status military technicians are civilian employees "for any . . . provision of law." 10 U.S.C. § 10216(a). The NDAA, the Federal Circuit concluded, constitutes a "broad and unambiguous" statement of Congress's intent "that dual status technicians be treated in the same manner as other federal civilian employees," with full access to civilian remedies for employment discrimination. *Jentoft*, 450 F.3d at 1349. The holding of the Federal Circuit would compel the conclusion that a dual-status employee could similarly bring suit under Title VII.

The circuit split over the right of dual-status employees to bring suits under federal fair employment statutes creates a peculiar and acute conflict in the law. Identically situated employees will secure relief under the federal civil rights laws, or instead will have their claims deemed to be categorically barred under the *Feres* doctrine, based on which court of appeals happens to have jurisdiction.

The circuit split over the right of dual-status employees to bring suits under federal fair employment statutes creates a peculiar and acute conflict in the law. A dual-status technician in the Second, Fifth, Sixth, Eighth, and Ninth Circuits who suffers gender-based pay discrimination can file an Equal Pay Act claim in the Court of Federal Claims, because that court (which applies the law of the Federal Circuit) has nationwide jurisdiction over Equal Pay Act claims. 28 U.S.C. § 1491(a)(1). By contrast, the identical employee would be categorically barred from filing suit to remedy any other form of discrimination that is incident to her service in the military, because such a claim would fall within the jurisdiction of the district courts. *See* 42 U.S.C. § 2000e-5(f)(3). Thus, a *single* employee may have the right to bring an Equal Pay Act claim but no right to sue under Title VII, notwithstanding that the statutes are materially indistinguishable and the two claims arise from the *same* operative facts.

This inconsistency in the application of federal employment statutes is bizarre and utterly illogical. It effectively – and arbitrarily – privileges claims of gender-based pay discrimination above all other

forms of discrimination, subverting the intent of Congress, which intended Title VII and the Equal Pay Act to protect the same population, including employees in military departments. *See* 42 U.S.C. 2000e-16(a); 29 U.S.C. § 203(e)(2)(A)(i). Congress also intended for Title VII and the Equal Pay Act to provide a single comprehensive remedy for gender-based pay discrimination. *See Lavin-McEleney v. Marist College*, 239 F.3d 476, 483 (2d Cir. 2001) ("The Equal Pay Act and Title VII must be construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies."); 29 C.F.R. § 1620.27(b) ("Recovery for the same period of time may be had under both the EPA and title VII so long as the same individual does not receive duplicative relief for the same wrong. Relief is computed to give each individual the highest benefit which entitlement under either statute would provide."); *Marek v. Chesny*, 473 U.S. 1, 25 (1985) (Brennan, J., dissenting) ("[S]uits involving alleged gender discrimination are often brought under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.").

The status quo is moreover an unacceptable invitation to forum shopping. The district courts have concurrent jurisdiction with the Court of Federal Claims to hear Equal Pay Act claims requesting $10,000 or less in damages. *See* 28 U.S.C. § 1346(a)(2). But since such a claim would be barred by *Feres* in the Second, Fifth, Sixth, Eighth, and Ninth Circuits, no rational plaintiff in those jurisdictions would ever elect to sue in district court. The current circuit conflict thus guarantees efforts at manipulating the jurisdiction of the federal courts, even as it arbitrarily denies dual-status technicians

the full protection of the law.

The circuit conflict is entrenched and can only be resolved by this Court. There is no prospect that the Federal Circuit will reconsider its position, as it openly acknowledged that it was creating a circuit conflict from the outset. *Jentoft*, 450 F.3d at 1349. The United States notably declined to seek en banc review of the ruling in *Jentoft*. Nor is there a realistic prospect that the issue will again be presented to that court in the foreseeable future, as it would require the government to act in defiance of the holding of *Jentoft* to pursue the question before the court of appeals.[2]

2. This Court's intervention is further warranted because the decision below also contradicts the settled position of the EEOC, the agency charged with interpreting and enforcing Title VII. As discussed *supra*, petitioner pursued her complaint through the federal EEO process. The position of the EEOC is that dual-status technicians may invoke Title VII to the extent "the discriminatory action

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[2] The petition also implicates a further acknowledged conflict over the degree of relationship to military service that is required for a dual-status employee's claim to be barred under the *Feres* doctrine. As noted, the Ninth Circuit and other courts hold that a claim is barred to the extent it is "integrally related to the military's unique structure." App. A, at 11a. By contrast, two circuits hold that dual-status technicians *inherently* occupy a position that is "irreducibly military" in nature. *Bowers v. Wynne*, 2010 U.S. App. LEXIS 14944, at *26 (acknowledging the conflict); *cf. Wright v. Park*, 5 F.3d 586, 589 (1st Cir. 1993) (holding that claims by National Guard Technicians under 42 U.S.C. § 1983 are barred because their civilian and military roles are "inextricably intertwined").

arises from their capacity as civilian employees." *Muse v. Geren*, Appeal No. 0120083293, 2008 EEOPUB LEXIS 3497, at *8-*9 (EEOC Sept. 26, 2008). Applying that standard, the EEOC has recognized that when, as here, retaliation against a complainant takes the form of a demotion in her civilian role, Title VII applies. *See Brown v. Wynne*, Appeal No. 01A22198, 2007 EEOPUB LEXIS 1923, at *4 (EEOC May 16, 2007) ("The challenged action is complainant's reassignment/demotion from one position to another, and it is clear from the positions' titles, that they are both part of the Wage-Grade series designated for federal civilian employees.").

The EEOC has also held – in another case involving retaliation against an ART at Luke Air Force Base – that retaliation violates Title VII even when the protected conduct occurs in the course of military service. *See Snyder v. Roche*, Appeal No. 01A23583, 2003 EEOPUB LEXIS 1798, at *5 (EEOC Mar. 26, 2006). In *Snyder*, a dual-status technician on active military duty in Turkey witnessed and complained to his military superiors about sexual harassment of a woman who was also on active military duty. The complainant asserted that in reprisal for this action, he was subjected to a continuing pattern of harassment in his civilian position including denial of promotions, denial of transfer, assignment of janitorial duties, and verbal and physical threats. Notwithstanding the indisputably military context of the initial incident, the EEOC recognized that the reprisals against the complainant, like the reprisals against petitioner, were directed at his civilian employment as an ART and thus were actionable. *See id*. at *5.

Critically, in conflict with the Ninth Circuit, the EEOC has refused to bar an employee's claim when the discrimination implicated both her civilian role and her military role. In *Conley v. Widnall*, Appeal No. 01945532, 1995 EEOPUB LEXIS 262, at *2 (EEOC Feb. 15, 1995), the EEOC considered the claim of an ART who, like Zuress, "worked for the agency in a civilian capacity during the week and in a military capacity on weekends and when on active duty"; the ART also contended "that the discrimination was continuous, occurring while she was on both military and civilian duty." Rather than find her claim barred, the EEOC held that "the alleged discrimination affected [the ART] not only in her capacity as a military employee but also in her civilian capacity as well." *Id.* at *4. Therefore, the agency allowed the ART's complaint to proceed. *Id.*

This conflict pits a rule of federal common law against the expertise and considered view of the agency charged with enforcing almost all of the nation's antidiscrimination statutes. The contrast between the EEOC's settled position that civilian institutions may adjudicate claims like the one presented by this case and the Ninth Circuit's directly contrary holding demonstrates that the courts of appeals have substituted their judgment not just for that of Congress, but for the executive branch as well.

Equally important, the conflict places federal employees in an impossible dilemma that requires this Court's prompt intervention. As the facts of this case illustrate vividly, federal law in several circuits presently operates as an unjust bait and switch for dual-status technicians who have been the victims of

unlawful discrimination. Title VII, its implementing regulations, the decisions of the EEOC, and workplace-specific policies all direct individuals like petitioner to pursue their claims administratively. Those same sources specify that the administrative process, which can take years and impose a substantial financial and emotional toll, will culminate in a right to bring suit in federal district court. But those complainants now arrive at the courthouse only to have the rug pulled out from under them and their claims barred as a matter of law when the Government invokes the *Feres* doctrine.

Fortunately, this case presents an ideal vehicle with which to decide the question presented. The issue is dispositive, as the Ninth Circuit's holding that petitioner's claims must be dismissed rests entirely on the *Feres* doctrine. Petitioner properly presented the claims on which she brought suit at every stage of the administrative process. Further, petitioner's claims involve several acts that indisputably arise purely from her civilian role, such as her assistance to another ART in the course of her human relations responsibilities, as well as her significant demotion in GS grade. But in addition, the case implicates petitioner's military reserve status insofar as she complains about the failure to promote her to Major. Because the case illuminates both the civilian and military roles of dual-status technicians, it is an ideal vehicle in which to decide whether the *Feres* doctrine bars Title VII claims by such employees, a group of at least 68,335 civil servants. *See* National Defense Authorization Act for Fiscal Year 2010, H. R. 2647, 111th Cong. § 413 (2009) (providing that the "minimum" number of dual-status technicians shall be 8395 for the Army

Reserve, 27,210 for the Army National Guard, 10,417 for the Air Force Reserve, and 22,313 for the Air National Guard).

II. CERTIORARI IS WARRANTED BECAUSE THE RULING BELOW DISREGARDS THE PLAIN STATUTORY TEXT AND CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Title VII's Clear Authorization for Servicemembers To File Suit Is Not Superseded By the *Feres* Doctrine

1. Petitioner's suit was authorized by the plain text of Title VII. By its terms, Title VII applies to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments," 42 U.S.C. § 2000e-16(a), and prohibits both "discrimination based on" sex, *id.*, and retaliation for bringing or assisting others to bring claims under the statute, *id.* § 2000e-3(a).

Title VII expressly authorizes an aggrieved military employee, like other federal employees, to initiate a civil action, *id.* § 2000e-16(c), and provides that such suits shall be governed by the same enforcement mechanisms and remedies as those available in cases brought by private parties, *id.* § 2000e-16(d). *See also id.* § 2000e-5(f) (claim may be brought by any "person . . . aggrieved" by an employer's unlawful employment practice). This Court has recognized that the presence of the term "aggrieved" signals Congress's intention that the cause of action be "broad and inclusive." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (construing similar provision of Fair Housing Act);

see also, e.g., *Federal Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly . . . .").

Indeed, the extension of relief to all "aggrieved person[s]," 42 U.S.C. § 2000e-5(f), is a foundational element of Title VII's essential purpose, which is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). As this Court has long recognized, Congress in enacting those provisions "intended to accord federal employees" – including military employees – "the same right to a trial de novo as is enjoyed by private-sector employees and employees of state governments and political subdivisions." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976).

The procedures adopted by the United States to govern petitioner's rights under Title VII similarly direct an employee to file an administrative claim and then, if she so chooses, proceed in federal district court. An employee must first file a complaint with the agency where the discrimination took place, 29 C.F.R. § 1614.106, which is authorized to investigate the charges, *id.* § 1614.108. Following the issuance of the agency's final action, the employee may appeal to the EEOC, *id.* § 1614.401, or initiate an action in district court, *id.* § 1614.407.

The "Luke Air Force Base Discrimination Complaint System" thus instructs employees that there is a multi-stage administrative procedure for pursuing claims of discrimination: a counseling session; a formal complaint; and a hearing before the EEOC. App. C, at 27a-30a. At the conclusion of

those proceedings, the employee has the "right to go to U.S. district court." *Id.*, at 29a.

Congress in 1997 furthermore specified that dual-status technicians are "civilian" employees for purposes both of the National Defense Authorization Amendments and "any other provision of law." 10 U.S.C. § 10216(a). At the strong urging of the United States, this Court recently recognized that this precise phrase – "any other provision of law" – "[o]f course . . . has an 'expansive meaning.'" *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009). The Court held that in light of the broad terms of the statute in *Beaty*, which granted the President the power to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism," there was "no warrant to limit the class of provisions of law that the President may waive." *Id.*

Petitioner's right to pursue her claim under the text of Title VII and the government's own implementing regulations and policies is clear. Petitioner alleges that a "military department[]," 42 U.S.C. § 2000e-16(a), discriminated and retaliated against her in violation of Title VII. She properly followed all of the required administrative procedures to exhaust her claim, culminating in her right to proceed in federal district court. There was no justification for the Ninth Circuit to depart from the statutory text and hold that petitioner's claim is barred.

2. In dismissing petitioner's claims, the Ninth Circuit relied on its own precedent to hold that the *Feres* doctrine precludes Title VII claims by dual-

status employees against the military. App. A, at 15a. This Court, however, has applied the *Feres* doctrine only to claims under the Federal Tort Claims Act – where the source of substantive law is state tort law – and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) – which involves a judicially created cause of action. *See Chappell v. Wallace*, 462 U.S. 296 (1983). This Court has never gone further and there is no warrant for extending this entirely judicially created defense into a field such as federal fair employment litigation in which Congress has legislated extensively. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting) ("The *Feres* doctrine is a creature of federal common law that allows the Court much greater latitude to make rules of pleading" than in cases in which statute provides "explicit terms."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (noting the "'narrow areas' in which 'federal common law' continues to exist" (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981))).

That conclusion follows inexorably from the settled and ongoing role of the EEOC in deciding complaints brought by dual-status technicians. It is uncontested that if the EEOC had concluded its investigation in petitioner's favor, the Commission had the authority to order relief. *See* 29 C.F.R. § 1614.501(a) ("When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief . . . ."). There is no reasonable explanation for a remedial scheme that deems it appropriate for a general administrative agency such as the EEOC to award

relief on claims, while simultaneously holding that the federal courts must be deemed impliedly barred from adjudicating those *same* claims on the ground that a judicial ruling would unduly interfere with military affairs.

Furthermore, the justifications that this Court identified in its narrow application of the *Feres* doctrine do not justify overriding Title VII's clear textual command. *First*, the Court has justified application of the *Feres* doctrine by explaining that because "'[t]he relationship between the Government and members of its armed forces is distinctively federal in character,'" it "makes no sense" to subject the Government to state tort law claims for injuries incurred in the course of military service. *United States v. Johnson*, 481 U.S. 681, 689 (1987) (quoting *Feres*, 340 U.S. at 143, and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977)) (some internal quotation marks omitted). Such a result, the Court has reasoned, would "permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Id.* (quoting *Stencel*, 431 U.S. at 672).

The continued viability of this first rationale is uncertain even with respect to state law claims. *See United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) (describing factor as "no longer controlling"); *Johnson*, 481 U.S. at 695 (Scalia, J., dissenting). In any event, it has no application to Title VII, which exists precisely to provide a uniform federal cause of action to remedy unlawful employment practices.

Second, the Court has justified application of the *Feres* doctrine by noting that "the existence of . . . generous statutory disability and death benefits is an

independent reason why the *Feres* doctrine bars suit for service-related injuries." *Johnson*, 481 U.S. at 689. The Court has likewise noted that this second rationale is "no longer controlling." *Shearer*, 473 U.S. at 58 n.4. More fundamentally, in this case, application of the *Feres* doctrine would get things exactly backwards because it would bar the very Title VII suit through which the Government provides the "statutory" remedy that explains why common-law tort suits are unnecessary. And any notion that petitioner could have obtained relief through some alternative process within the military is incorrect. Petitioner *followed* the administrative procedures prescribed by the Air Force for the resolution of discrimination claims. The Luke Air Force Discrimination Complaint System provides for an initial effort at counseling, followed by the filing of a formal complaint and a hearing before the EEOC. App. C, at 27a-30a. It then expressly recognizes the employee's "right to go to U.S. district court" if the administrative process fails to provide redress. *Id.*, at 29a. Thus, the "alternative process" rationale underlying *Feres* is incoherent in the Title VII context. Whether the employee is classified as civilian or military, the review process expressly contemplates the filing of an action in federal district court.

Third, the Court has observed that *Feres* bars 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.'" *Johnson*, 481 U.S. at 690 (quoting *Shearer*, 473 U.S. at 59). The relevant "*type[s]*" of claims are tort suits seeking compensation for injuries incurred in "[p]erformance of the military function," which

"entails a '[s]ignificant risk of accidents and injuries." *Id.* at 689 (quoting *Stencel*, 431 U.S. at 672). It is because of "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty," *United States v. Brown*, 348 U.S. 110, 112 (1954), that the *Feres* doctrine reserves such claims to internal military adjudication.

There is no basis in law or logic for extending that rationale to the very different context of Title VII. There is nothing about employment in a military department that does, or should, create a "[s]ignificant risk" of unlawful sex or race discrimination. Actions seeking to remedy unlawful employment practices are not the type of claims that can be presumed to threaten "the habit of immediate compliance with military procedures and orders." *Chappell*, 462 U.S. at 300. Should Congress determine that such concerns are a sufficient justification for barring Title VII actions by servicemembers, it is free to accomplish that result through legislation exempting the "military department[s]" from its scope. But absent such action, vague policy suppositions about the effect of Title VII actions on military discipline cannot override Congress's explicit provision of a "broad and inclusive" cause of action to members of the military. *Trafficante*, 409 U.S. at 209.

Feres moreover limited its holding to those injuries that "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146; *see Johnson*, 481 U.S. at 686 ("This Court has never

deviated from [the 'incident to service'] characterization of the *Feres* bar."). Many of the acts of harassment and retaliation suffered by petitioner as a consequence of engaging in protected activity neither arose out of nor occurred in the course of activity incident to military service. To the contrary, those acts overwhelmingly occurred while petitioner was performing her civilian-capacity duties as a human relations administrator, which included responsibilities like developing administrative policies, performing budget formulation work, and administering the "schoolhouse student training program for the operations group." Civilian Personnel Position Description at 2 (Amend. Compl., Exh. C at 130).

To be sure, one of the retaliatory acts alleged by petitioner is the Air Force's refusal to promote her, a fact that the Ninth Circuit construed as reflecting petitioner's agreement that her claims were integrally related to military service. More relevant, the ultimate consequence of that action was the loss of her civilian employment. Moreover, the injury that petitioner suffered as a result of the Air Force's retaliatory denial of her request for a one-year leave of absence was undeniably civilian in nature, as that action deprived petitioner of the opportunity to maintain her civilian employee benefits and avoid a break in her civil service while she searched for other employment. To characterize these fundamentally civilian employment actions as conduct incident to military service would represent a sweeping and unwarranted expansion of the *Feres* doctrine, which this Court has consistently cabined to include only conduct performed in a military capacity.

B. Alternatively, the *Feres* Doctrine Should Be Overruled

If this Court concludes that *Feres* would preclude a Title VII action by a dual-status employee for injuries suffered in her civilian capacity, petitioner respectfully submits that the decision should be overruled. This Court has recognized that revisiting prior precedent is appropriate when a governing decision is "badly reasoned" or has proven to be "unworkable." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Each of those considerations abundantly supports the overruling of *Feres*.

1. Most of the reasoning underlying the decision in *Feres* itself has been disavowed in this Court's subsequent decisions. *See Shearer*, 473 U.S. at 58 n.4 (describing various factors as "no longer controlling"); *Johnson*, 481 U.S. at 695-697 (Scalia, J., dissenting). In the years following *Feres*, the Court cited another justification, reasoning that the decision "seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline.'" *United States v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *Brown*, 348 U.S. at 112); *see Chappell*, 466 U.S. at 299. Even that rationale, however, has been thoroughly discredited.

First, "the likely effect of *Feres* suits on upon military discipline is not as clear as we have assumed, but in fact has long been disputed." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting); *see also Taber v. Maine*, 67 F.3d 1029, 1047 (2d Cir. 1995) ("It is difficult to see how FTCA damage awards can, except in the rarest of cases, interfere with a disciplinary relationship between the government and the

military tortfeasor."). That criticism has only intensified since *Johnson*. Indeed, members of the military community have argued that, far from preserving military discipline, the denial of relief to servicemembers in cases where the Government would otherwise be liable actually has the opposite effect because of its sheer unfairness. Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 120-21; Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 Mil. L. Rev. 1, 4-5 (2007).

Second, the discipline rationale proves too much because it cannot logically be limited to suits by servicemembers for injuries based on activities incident to military service. "If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* such suit should be permitted, regardless of whether the 'injuries arise out of or are in the course of activity incident to service.'" *Costo v. United States*, 248 F.3d 863, 866-67 (9th Cir. 2001). But of course, soldiers are free to sue the military in such circumstances. *See Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). By the same token, "[i]f the fear is that civilian courts will be permitted to second-guess military decisions, then even civilian suits that raise such questions should be barred. But they are not." *Costo*, 248 F.3d at 867.

Third, the *Feres* doctrine lacks a textual basis in the FTCA or any other federal statute, but it is often improperly invoked to override the statutes that Congress has actually enacted and the President has signed into law. Indeed, the FTCA's express

exclusion of lawsuits arising out of "combatant activities . . . during time of war" demonstrates "that Congress specifically considered, and provided what it thought needful for, the special requirements of the military." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (citing 28 U.S.C. § 2680(j)). As a "judicially created exception," *Stencel*, 431 U.S. at 674 (Marshall, J., dissenting) – one that is entirely unmoored from the language of the FTCA – the doctrine provides a wholly inadequate basis for barring causes of action expressly provided for by Congress. *See Costo*, 248 F.3d at 871 (Furgeson, J., dissenting) ("When considering the *Feres* doctrine . . . we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute.").

2. The *Feres* doctrine also has proven thoroughly unworkable in the lower courts, where it has been the subject of "widespread, almost universal criticism." *Johnson*, 481 U.S. at 700-701 & n* (Scalia, J., dissenting) (citation omitted) (collecting cases). The First Circuit has said that *Feres* may "deserve[] reexamination by the Supreme Court" because "a few of *Feres*'s original reasons no longer seem so persuasive." *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999). The Ninth Circuit has described an application of *Feres* as "follow[ing] a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine." *Estate of McAllister v. United States*, 942 F.2d 1473, 1480 (9th Cir. 1991).

Numerous other cases are in accord. *E.g.*, *Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J.,

concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands."); *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999) ("It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, C.J., statement sur denial of petition for rehearing) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."); *Taber*, 67 F.3d at 1044 n.11 (suggesting that the Court "abandon the doctrine completely"); *Lombard v. United States*, 690 F.2d 215, 229 n.7, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting) (describing *Feres* as "problematic court precedent" and noting that "the soundness of the *Feres* Court's interpretation of the FTCA continues to be questioned").

That persistent and near universal criticism of the *Feres* doctrine among the courts of appeals amply demonstrates its unworkability and reinforces the need for review of the decision by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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