No. 10-374

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

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit in this case reaffirmed its settled holding that *Feres v. United States*, 340 U.S. 135 (1950), generally precludes a Title VII claim by a dual-status technician. The court of appeals correctly acknowledged that its decision squarely conflicts with the precedent of the Federal Circuit. The petition for certiorari moreover demonstrated that the decision below conflicts with the EEOC's adjudication of indistinguishable claims by dual-status technicians across the nation. Further, the Ninth Circuit's decision both significantly misreads this Court's decisions in *Feres* and its progeny and also squarely conflicts with the plain text of Title VII, which forbids employment discrimination against military employees. As *amici curiae* supporting the petition note (Br. 4), the right of the women and men supporting the military in civilian roles to pursue civil rights claims presents a recurring question of great importance, as it is often litigated and determines the ability of nearly 70,000 dual-status technicians to vindicate their rights under the nation's civil rights laws. *See also, e.g.*, *Wetherill v. McHugh*, No. 10-638 (pet. for cert. filed Nov. 9, 2010). Because the arguments of the United States against review by this Court are not persuasive, certiorari should be granted.

1. Petitioner filed this suit under Title VII, which specifically applies to "all personnel actions affecting employees or applicants for employment . . . in military departments." 42 U.S.C. § 2000e-16(a). Any "person aggrieved" by a violation of the statute has a right to bring "a civil action . . . against the respondent named in the charge." *Id.* § 2000e-5(f)(1).

Jurisdiction is vested in "[e]ach United States district court" with specified connections to the alleged unlawful employment practice. *Id.* § 2000e-5(f)(3).

The United States cannot muster a word in defense of the Ninth Circuit's holding that the claim brought by petitioner – obviously an "aggrieved" "employee" in a military department – is excluded from these statutory provisions. Indeed, the government's brief tellingly omits *any* mention of the operative provisions of Title VII. If the "statutory text is plain and unambiguous," then the Court "must apply the statute according to its terms." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-1064 (2009).

Lacking any answer to the plain text of Title VII, the United States resorts to misdirection. It argues that when Congress enacted the 1997 National Defense Authorization Amendments, 10 U.S.C. § 10216, it did not intend to thereby grant dual-status technicians the right to sue under Title VII. The government reasons (BIO 11) that Section 10216(a) did not change anything because, "even before the 1997 amendments, dual-status technicians had long been recognized as civilian employees." Indeed, it notes (*id.* 2) that Congress has formally designated these employees as holding "civilian status" since at least 1968 – just four years after the enactment of Title VII and well before it extended Title VII to the "military departments."

Obviously, that argument only undermines the Ninth Circuit's decision. It proves that dual-status technicians are now, and have been for more than four decades, deemed to be civilian employees. Thus, even if one accepted the government's submission (BIO 13) that Title VII implicitly excludes *soldiers*

from its sweep, dual-status technicians are protected "civilian" employees.

The government notes that "[t]he 1997 amendments do not mention Title VII, purport to authorize any new cause of action against the United States, or contain any language that expressly waives the United States' sovereign immunity." BIO 14. But that work is done by Title VII *itself*. *See* 42 U.S.C. § 2000e-16(a). Section 10216(a) simply deems dual-status technicians to be civilian employees, who are in turn protected by Title VII.

The government finally contends that the proper interpretation of Title VII's text is not properly presented here because petitioner only argued to the Ninth Circuit that Congress's 1997 enactment of Section 10216(a) overturned its 1995 decision in *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995). That is a bad argument. In litigating before the Ninth Circuit, petitioner advanced the only theory available to her in light of the court of appeals' firmly settled precedent: that *Mier* had been superseded by the later adoption of Section 10216(a). Petitioner was not required to do more because she *could not* do more. This Court's precedents do not require a litigant to go through the futile exercise of asking an appellate panel to violate bedrock principles of *stare decisis* and ignore prior circuit precedent. If it did, then the United States would constantly be in a world of trouble, as the Solicitor General regularly seeks review in this Court after the government loses cases on the basis of the court of appeals' prior precedent. *See, e.g.*, Pet. for Cert., No. 10-324, *United States v. Praylow* 4 ("The court of appeals agreed [its prior decision in] *Williams* was controlling, vacated

respondent's sentence, and remanded for resentencing.").

The jurisdictional rule that the government seemingly imagines – that once a court of appeals decides a legal question, this Court generally cannot review that question in any *later* case from that circuit – is obviously wrong. Instead, this Court's well-established and oft-quoted rule – designed for cases just like this one – is that this Court has "broad discretion" to review "[a]ny issue pressed *or* passed upon" by the court of appeals. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks omitted) (emphasis added). Here, the Ninth Circuit passed upon the petitioner's right to file suit under Title VII, relying expressly on *Mier*. Pet. App. 15a. This Court's jurisdiction is beyond doubt.

2. Certiorari is also warranted because the petition presents two conflicts that warrant this Court's intervention. *First*, the Ninth Circuit (Pet. App. 13a) expressly recognized that its ruling conflicts with the precedent of the Federal Circuit. The United States' attempt to distinguish *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), on the ground that it involved a claim "under the Equal Pay Act, not Title VII" (BIO 16) is unpersuasive. *Jentoft*'s holding rested not on the text of the Equal Pay Act but instead on "language contained in 10 U.S.C. § 10216(a), which states that 'a military technician (dual status) is a Federal civilian employee.'" 450 F.3d at 1346. The Federal Circuit explained:

> In our view, given the broad and unambiguous language contained in § 10216(a), Congress articulated its intention

> that dual status technicians be treated in the same manner as other federal civilian employees, including having rights under the Equal Pay Act. Moreover, given the plain language of § 10216(a), we have no discretion not to adjudicate Jentoft's rights under the Equal Pay Act, even under the *Feres* doctrine, which is a judicially created doctrine.

Id. at 1349. Because Section 10216(a) is not limited to the Equal Pay Act (which it does not mention) but instead expressly defines dual-status technicians' status for purposes of "any" statute, the holding of *Jentoft* is equally applicable to claims under Title VII.

To be sure, the Federal Circuit did note that the Equal Pay Act's text applies to "a civilian in the military departments." 450 F.3d at 1348. But it did so only to establish that "Jentoft has a justiciable claim against the government *provided that* she is a qualified employee, *viz.*, a federal civilian employee." *Id.* (emphasis added). The Federal Circuit then turned to Section 10216(a) to determine that the plaintiff held "civilian" status.

Although the text of Title VII does not precisely match that of the Equal Pay Act (*see* BIO 17), that is only true in the sense that Title VII is a *broader* statute. The Equal Pay Act is limited to "civilian" employees of the "military departments," 29 U.S.C. § 203(e)(2)(A)(i), whereas Title VII applies to *all* employees of the "military departments," 42 U.S.C. § 2000e-16(a). The logic of *Jentoft* – that a plaintiff can proceed under the narrower provisions of the Equal Pay Act – thus *a fortiori* compels the

conclusion that petitioner could pursue her Title VII claim.

The conclusion that the holding of *Jentoft* applies equally to this case is significantly reinforced by the undisputed fact that Title VII and the Equal Pay Act are complementary, indeed often overlapping, statutes. *See* Pet. 18. As the petition explains and the government does not dispute, the current conflict between the Federal Circuit and the regional courts of appeals produces a profound inconsistency that Congress could not have intended: the same plaintiff may state a claim under the Equal Pay Act but not Title VII, even though the claims arise from the identical operative facts.

The government disputes (BIO 17) that the conflict in the circuits is an invitation to forum shopping, but its argument actually proves the opposite. We now recognize that all cases in which the plaintiff states an Equal Pay Act claim are appealed from a district court to the Federal Circuit, notably including if the plaintiff *also* alleges a claim under Title VII. BIO 17; 28 U.S.C. § 1295(a)(2); *United States v. Hohri*, 482 U.S. 64, 75-76 (1987); *Rothe Development Corp. v. United States Dep't of Defense*, 194 F.3d 622, 625 & n.5 (5th Cir. 1999). Thus, the current state of the law is an open invitation for a dual-status technician alleging gender discrimination to accompany her Title VII claim in the district court with an allegation of an Equal Pay Act violation under the Little Tucker Act. The appeal in such a case will be heard not by the regional court of appeals but instead by the Federal Circuit, which will apply its decision in *Jentoft* to hold that the claim is not barred by *Feres*. Plaintiffs

who do not play this game, or who cannot because their claim does not implicate gender-based pay disparities, will find their claims barred by *Feres* in regional courts of appeals.

The United States finally notes (BIO 18) that it is hypothetically possible that "the Federal Circuit may reconsider its decision in *Jentoft*" in a later case, perhaps to consider the "legislative history" of Section 10216(a). That is surpassingly unlikely. The Federal Circuit no doubt was aware of the statute's legislative history but concluded that its decision was compelled by the plain text, and it forthrightly acknowledged that it was creating a circuit split. *See* 450 F.3d at 1349. Furthermore, the United States declined to seek rehearing en banc in *Jentoft* itself, and the Solicitor General does not suggest that that the government in the future intends to take the extraordinary step of defying *Jentoft*'s holding in the thin hope of creating a vehicle for en banc review.

Second, and just as important, certiorari is warranted because the ruling below conflicts with the military's own policies on the right of dual-status technicians to bring suit and the EEOC's *nationwide* disposition of Title VII claims brought by those employees. The governing Air Force procedures specify that ARTs "are full-time civilian employees." BIO 4 (quoting Air Force Reserve Command Instruction 36-114, at 2 (Aug. 10, 2001)). The EEO policy of the facility at which petitioner worked specifically stated that she had the right to pursue her claim in district court. App C, at 28a. Petitioner herself received a Final Agency Decision stating that she had the right to sue. Pet. 13.

The EEOC – which is the body charged by Congress with enforcing Title VII and which adjudicates innumerable such claims – thus has definitively ruled that dual-status technicians' Title VII claims may initially be adjudicated administratively and may later proceed to litigation in district court so long as those claims do not rise *exclusively* from the complainant's military role. Pet. 21 (citing *Conley v. Widnall*, Appeal No. 01945532, 1995 EEOPUB LEXIS 262, at *2 (EEOC Feb. 15, 1995)). The EEOC specifically permits claims to proceed to litigation if (as in this case) the complainant was demoted or otherwise subject to retaliation in her civilian role, even when the acts giving rise to the retaliation arose from her military responsibilities. *Id.* 20 (citing cases). The government thus does not dispute that the EEOC has repeatedly "applied the standard for when dual-status technicians may sue under Title VII differently than the court below." BIO 19-20.

The government's passing suggestion that that the EEOC and Air Force merely intend to tell complainants that they have the right to go to court *to ask whether* their claims may be adjudicated is plainly wrong. The agencies themselves adjudicate such claims (*see supra*), and their only authority to do so arises from Title VII itself. There would be no ground for holding that the federal judiciary has a narrower authority to apply Title VII's protections.

The current state of the law is unsustainable and requires this Court's intervention. At present, the *same* individual presenting the *same* Title VII claim may have that claim adjudicated by the EEOC, but that claim inexplicably will be barred when

subsequently presented to a federal district court at the EEOC's own invitation. This legal regime is not only a trap for the unwary and contrary to the plain text of Title VII (which recognizes no such dichotomy), but it presents a more significant basis for this Court's review than an ordinary conflict between two or more regional courts of appeals, with respect to which at least the parties are themselves subject to a single consistent standard.

The government's final assertion (BIO 20) that "this case would not be an appropriate vehicle" to address that conflict "because petitioner gave neither the court below nor the EEOC the opportunity to apply the [EEOC's] standard here" makes no sense. The Ninth Circuit's decision was controlled by *Mier*. And not even the Solicitor General disputes that under the EEOC's precedent petitioner's claim was subject to being adjudicated.

3. The government's remaining argument is that petitioner has conceded that her claims are "integrally related" to her military service. BIO 2. Preliminarily, the government never explains the relevance of any purported concession to this Court's determination whether to grant certiorari. Neither the text of Title VII, nor this Court's decision in *Feres*, nor the Federal Circuit's ruling in *Jentoft*, nor the EEOC's settled precedent look to whether the plaintiff's claim is "integrally related" to the plaintiff's military service. The legal conflicts created by the Ninth Circuit's precedent are accordingly squarely presented here.

But in any event, the United States dramatically overstates the significance of petitioner's acknowledgment – wrenching it entirely from its

factual and legal context. Throughout this litigation, petitioner has maintained that petitioner suffered discrimination and retaliation in her civilian role. *See, e.g.*, *infra* (recounting allegations of the complaint); Pet. C.A. Br. 9 (petitioner provided assistance "in her civilian capacity" leading to retaliation); *id.* 12 (retaliation took form of Col. Binger causing petitioner "to lose her civilian job"). At the commencement of oral argument, counsel for petitioner did acknowledge that if *Mier v. Owens* remained good law it would preclude petitioner's claim. The court characterized that acknowledgment as a recognition that petitioner's claim was "integrally related" to the military's structure because that is a term of art in the Ninth Circuit, in which almost every claim brought by a dual-status technician will be *ipso facto* barred as "integrally related" to her military service. Under the Ninth Circuit's case law, the *Feres* doctrine bars *every* suit by an employee against her "superior officer" (as opposed to a colleague) because the Ninth Circuit believes that the "relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the Military Establishment." *Mier*, 57 F.3d at 750. Further, that court holds as a matter of law that "decisions relating to the 'promotion [or] suspension' of civilian employees of the National Guard, including technicians, are 'integrally related to the military's unique structure.'" *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). Because petitioner claimed unlawful behavior by her direct superior (Col. Binger) and that claim moreover related to her demotion, *see* Pet. 11, she had no choice but to

concede that it was barred under the Ninth Circuit's "integrally related" standard.

The key point is that the United States does not dispute that petitioner's claims in many respects in fact relate exclusively to her civilian role. As such, she would have the right to proceed under either the Federal Circuit's rule (holding that civil rights claims by dual-status technicians are not subject to the *Feres* doctrine at all) or the EEOC's rule (holding that dual-status technicians may pursue such claims so long as they do not exclusively relate to the plaintiff's military service). The United States flatly concedes that petitioner's "civilian position was as a GS-12 Operations Staff Specialist" was distinct from "her military position . . . as a Captain in the Air Force Reserve." BIO 7. It furthermore does not dispute that petitioner's civilian role was "providing human resource services," Pet. 4, and that she monitored "performance reports and also oversaw the group's contracting and budget issues," *id.* 5. The formal document specifying her responsibilities – the aptly named *Civilian* Personnel Position Description – states that she would "perform[] staff duties, special projects and taskings; and other administrative functions associated with the schoolhouse-training program." Compl., Exh. C at 129.

Nor does the United States dispute that the retaliation that petitioner suffered arose from her assistance to another employee "in her human-relations role," Pet. 6, and from her complaints about a "sex show" that did not involve her military role, *id.* 7. The retaliation manifested itself in her supervisor refusing to permit her to take "one year of leave without pay from her *civilian* ART position," "causing

her *civilian* employee benefits to terminate much sooner than she had expected and causing her to have a break in her *civil* service." *Id.* 10 (emphases added). When petitioner then withdrew her leave request, the retaliation took the form of a transfer to an entirely different squadron and a dramatic demotion in her civilian responsibilities. *Id.* 11.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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