No. 10-

IN THE

Supreme Court of the United States

NANCY J. WETHERILL,
Petitioner,

v.

PETE R. GEREN, SECRETARY OF THE ARMY; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY AS ADJUTANT GENERAL OF THE SOUTH DAKOTA NATIONAL GUARD; THEODORE JOHNSON, BRIGADIER GENERAL, IN HIS OFFICIAL CAPACITY; AND THE SOUTH DAKOTA ARMY NATIONAL GUARD,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The *Feres* doctrine bars suits by members of the military for injuries that "arise out of or are in the course of activity incident to" military service. By statute, Congress provides that certain employees of the National Guard, known as "dual-status technicians," are "[f]ederal civilian employee[s]" for "purposes of this section and any other provision of law." 10 U.S.C. § 10216(a)(1). Congress also has provided by statute that the protections of Title VII of the Civil Rights Act of 1964 apply to "employees . . . in military departments." The question presented, over which the federal courts of appeals are split, is as follows:

Whether the claims of a dual-status National Guard technician alleging employment discrimination under Title VII of the Civil Rights Act of 1964 are jurisdictionally barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950) and its progeny?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nancy J. Wetherill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.3d 789. App. A, at 1a. The order and opinion of the district court is reported at 644 F. Supp. 2d 1135. App. B, at 26a.

JURISDICTION

The court of appeals entered its judgment on August 11, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The petition involves the following provisions, set forth in the appendix, App. C, at 39a:

10 U.S.C. § 10216(a)

32 U.S.C. § 709(b)

42 U.S.C. § 2000e-2(a)

42 U.S.C. § 2000e-3(a)

42 U.S.C. § 2000e-5(f)

42 U.S.C. § 2000e-16(a)

42 U.S.C. § 2000e-16(b)

42 U.S.C. § 2000e-16(c)

42 U.S.C. § 2000e-16(d)

29 C.F.R. § 1614.407

STATEMENT OF THE CASE

This case presents the question whether a "dual-status" technician in the National Guard – defined by statute to be a position of "civilian employ[ment]" for the purposes of "any . . . provision of law" – may bring suit alleging employment discrimination under Title VII of the Civil Rights Act of 1964. The courts below noted a split among the federal courts of appeals on the issue and joined those courts holding that such suits are nonjusticiable because they challenge conduct "incident to military service." App. A, at 11a-13a.

Wetherill's Employment. Wetherill began her career with the South Dakota Army National Guard ("SDARNG") in 1974. From April 1, 2007 through July 31, 2008, she was the Director of Operations for the SDARNG – a dual-status technician position – in Rapid City, South Dakota. *Id.* at 3a. As a condition of her employment as a dual-status technician, federal law mandated that Wetherill maintain membership in the Selected Reserve. 10 U.S.C. § 10216(a)(1)(B).

Wetherill's responsibility as Director of Operations was her daily job, for which she was paid as a civilian employee under the Civil Service system. App. A, at 3a. By contrast, the military portion of her duties was limited – including "drilling" one weekend per month and attending an annual two-week Guard training. See, *e.g.*, 32 U.S.C. §§ 502, 709(b)(2); *Walch v. Adjutant General's Dep't of Tex.*, 533 F.3d 289, 291 (5th Cir. 2008) (recognizing that a dual-status technician has "an obligation simply to drill for a weekend every month and then to train for

two weeks in the summer" in addition to her "full-time civilian position").

Wetherill's Eligibility for Civilian Retirement Benefits. As a federal civilian employee, Wetherill was potentially eligible for full annuity payments under the Civil Service Retirement System ("CSRS"). But in order to achieve eligibility for such payments, Wetherill needed to keep her position until December 2010. App. A, at 3a. An earlier retirement date would not eliminate but would reduce Wetherill's annuity, as she would not have garnered the requisite number of civilian service years to warrant a full annuity. *Id.*

Pursuant to federal law, Wetherill's Mandatory Removal Date ("MRD") from the military was July 31, 2007. 10 U.S.C. § 14507(b). Once removed from the military, she would be required to quit her Director of Operations position. In May 2007, Major General Michael Gorman, then-Adjutant General of the SDARNG, requested that the National Guard Bureau ("NGB") "waive" Wetherill's MRD and retain her until December 30, 2010. The request was approved. App. A, at 4a.

In September 2007, Steven R. Doohen succeeded Gorman as Adjutant General. *Id.* In January 2008, Doohen requested revocation of Wetherill's MRD waiver. The NGB granted the request the next month, and Wetherill's removal date was set at July 31, 2008. Consequently, Wetherill would be forced to retire from her Director of Operations job on July 31, 2008. *Id.*

Wetherill's Termination. In February 2008, Theodore Johnson, another dual-status technician

and Wetherill's supervisor, told Wetherill she was being terminated from her technician position due to "force management" reasons, effective July 31, 2008. App. B, at 25a. Doohen's revocation of Wetherill's MRD waiver, meanwhile, already required her to leave the Director of Operations position on that date. App. A, at 5a.

No other technician in the SDARNG has ever had an MRD waiver denied, modified, or revoked. *Id.* at 4a. Wetherill, the only Asian-American female in the SDARNG, believed that Doohen's decision was based on animus towards her gender and national origin. *Id.* She also believed that Johnson's statements regarding her "termination" from the Director of Operations position were pretextual. App. D, at 47a.

EEO Proceedings and Subsequent Retaliation. Between February and May of 2008, Wetherill protested Doohen's revocation of her MRD waiver. *Id.* at 46a. She also informally complained to the Equal Opportunity and Civil Rights Office at the National Guard Bureau. App. A, at 4a. In May of 2008, after unsuccessful informal attempts at resolution with her Equal Employment Opportunity ("EEO") counselor, Wetherill submitted a formal EEO complaint. App. D, at 50a.

Shortly after voicing her protests and bringing her EEO complaint, Wetherill was reassigned to work in an isolated building with no other occupants. She was forced to perform tasks for which she was considerably over-qualified. App. A, at 4a. These actions were taken against her at Johnson's behest, and Wetherill believes that they were taken in retaliation for her protests of the revocation of her MRD waiver. App. D, at 47a.

On July 1, 2008, Wetherill received a notice of dismissal of her complaint from the NGB Office of Equal Opportunity and Civil Rights. App. D, at 44a. The notice specifically provided that Wetherill was "authorized under Title VII . . . to file a civil action in an appropriate United States District Court." App. D, at 59a.

As a result of Doohen's revocation of her MRD waiver, Wetherill was forced to retire from her military position on July 31, 2008. App. A, at 5a. Pursuant to federal law, she also was forced to retire from her civilian Director of Operations position with the SDARNG. *Id.*

District Court Proceedings. Wetherill brought suit alleging she was discriminated against on the basis of her gender and national origin and subsequently retaliated against after complaining about the discrimination. *Id.* Wetherill invoked 42 U.S.C. § 2000e-16 in her complaint. That statute specifically vests employees of "military departments" with the Title VII protections against "any [employment] discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). See App. D, at 39a, 43a.

Wetherill's complaint named several defendants: Pete R. Geren, Secretary of the Army, the Army National Guard ("ARNG") (collectively, the "federal defendants"); and Doohen, Johnson, and the SDARNG (collectively, the "state defendants"). App. D, at 44a. Both the federal and state defendants moved to dismiss Wetherill's complaint under Rules 12(b)(6) and 12(b)(1). App. B, at 29a-30a. The district court evaluated both as 12(b)(6) motions and granted the motions to dismiss, holding that Wether-

ill's claims were barred by the rule announced in *Feres v. United States*, 340 U.S. 135 (1950), because her injury was incident to military service. App. B, at 34a-37a. It reached this holding despite the fact that 10 U.S.C. § 10216(a)(1) expressly defines dual-status technicians as "Federal civilian employee[s]" for "purposes of this section and any other provision of law," and despite the fact that Title VII expressly extends its protections to "employees . . . in military departments," 42 U.S.C. § 2000e-16(a). App. B, at 37a.

Appellate Proceedings. The court of appeals affirmed, but it recognized two conflicts among circuits respecting the application of the *Feres* doctrine to claims brought by dual-status technicians. App. A, at 2a. First, the court addressed the interplay of *Feres* and 10 U.S.C. § 10216(a)(1). *Id.* at 9a-12a. The court acknowledged the Federal Circuit's conclusion in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), that *Feres* does not apply to dual-status technicians because they are defined to be "Federal civilian employees" by § 10216(a)(1). App. A, at 11a-12a. But the court declined to follow *Jentoft*. It believed that the statutory language could not literally mean that dual-status technicians are "civilian employee[s]" for all purposes because no such intent was revealed in the legislative history of the statute, and Congress does not "hide elephants in mouseholes." App. A, at 12a-15a (citation and internal quotation marks omitted). Thus, the court joined "the Fifth and Ninth Circuits in holding that the 1997 amendments to 10 U.S.C. § 10216 do not remove dual-status National Guard technicians from the strictures of the *Feres* doctrine." App. A, at 13a-14a.

The court of appeals next turned to the applicability of *Feres* to Wetherill's case. Once again, the court recognized a split among the circuits. It noted that the Sixth Circuit holds that claims by dual-status technicians are inherently incident to military service and therefore nonjusticiable under *Feres*. App. A, at 18a. Other circuits, in contrast, apply a variety of fact-specific inquiries designed to determine whether the claim at issue arose out of "activity incident to military service." App. A, at 18a. The court determined that Wetherill's claims were nonjusticiable because her supervisors claimed a "military motive" for the revocation of her MRD waiver, and her claims thus were incident to military service. App. A, at 19a. This petition timely followed.

REASONS FOR GRANTING THE WRIT

1. The Court should grant a writ of certiorari to resolve a question of national importance over which there are two acknowledged splits among the federal courts of appeals: whether, and, if so, how, the *Feres* doctrine applies to dual-status technicians alleging employment discrimination. First, there is a split over whether dual-status technicians are *ever* subject to *Feres*. Second, there is a split among those courts that do apply *Feres* to dual-status technicians over when it is appropriate to do so. This case presents an ideal vehicle to resolve these splits because the courts below resolved each adversely to petitioner, which was the sole basis of the final disposition of her claims.

2. The Court should also grant the writ because the decisions below were wrongly decided. Petitioner alleged that she was the victim of discrimination based on gender and national origin that deprived

her of a civilian vocation. *Feres* – a federal-common-law doctrine – cannot be applied to this claim because Congress has clearly stated that dual-status technicians are civilians. And even absent such a clear statement, *Feres* should not apply to such claims brought by dual-status technicians because they are far removed from core-combat functions of the military that *Feres* sought to protect and because Congress intended Title VII's protections to extend to civilian employees of the military departments.

I. Federal Courts Of Appeals Are Divided Over Whether And How The *Feres* Doctrine Applies To Dual-Status Technicians.

The federal courts of appeals are squarely divided over whether tort claims by dual-status technicians are justiciable. This division concerns the proper application of the *Feres* doctrine, which holds that "the Government is not liable under the Federal Tort Claims Act ['FTCA'] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to" military service. *Feres*, 340 U.S. at 146. This split has two dimensions, both of which are implicated in this case: (1) whether Congress's plain statement that dual-status technicians are "civilian employee[s]" for "any . . . provision of law" supersedes the common-law *Feres* doctrine; and (2) if not, whether claims by dual-status technicians are "incident to military service" within the meaning of *Feres*. These splits are mature and are unlikely to be resolved by the passage of time, and each operates to treat plaintiffs differently based solely on where they happen to bring suit.

First, the federal courts of appeals are split over whether the *Feres* doctrine applies at all to dual-

status technicians. The courts disagree over the effect of Congress's statement in 10 U.S.C. § 10216(a)(1) that a dual-status technician is "a Federal civilian employee" "[f]or purposes of this section and any other provision of law." The Federal Circuit holds that "the plain language of § 10216(a) makes clear that" dual-status technicians are civilians, and that courts must therefore "give priority to the statutory enactment of Congress" over the common-law doctrine announced in *Feres*. *Jentoft*, 450 F.3d at 1349. In contrast, the Fifth, Sixth, Eighth, and Ninth Circuits have expressly disagreed with the ruling in *Jentoft* and hold that § 10216(a) has no bearing on the applicability of *Feres*. These courts do not believe that the statute "constitutes clear direction from Congress" because of the lack of an indication in the legislative history of the statute that Congress intended to overrule prior cases that had barred claims by dual-status technicians under *Feres*. See, *e.g.*, *Zuress v. Donley*, 606 F.3d 1249, 1251 (9th Cir. 2010), *cert. filed*, No. 10-374, 79 U.S.L.W. 3149 (U.S. filed Sept. 16, 2010); see also *Bowers v. Wynne*, 615 F.3d 455, 467 (6th Cir. 2010); *Williams v. Wynne*, 533 F.3d 360, 366-67 (5th Cir. 2008). The effect of this split is to treat identically situated dual-status technicians differently based solely on where they file their lawsuits; and as to allegations over which the Court of Federal Claims has concurrent jurisdiction with the federal district courts, the split is an obvious invitation to forum shopping.

Second, the courts of appeals that do not treat § 10216(a)(1) as controlling are also split on the proper analytical framework for deciding whether a particular claim by a dual-status technician is justiciable under *Feres*. The Fifth Circuit espouses the

"purely civilian" approach, which holds that a technician's Title VII claim is cognizable if it challenges conduct taken purely in the civilian capacities of those involved. See *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000).[1] The Ninth Circuit asks whether "the challenged conduct is integrally related to the military's unique structure." *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). The Second Circuit apparently applies both the "purely civilian" and the "integrally related to military structure" approaches. *Overton v. N.Y. State Div. of Mil. & Naval Affairs*, 373 F.3d 83, 88 (2d Cir. 2004). And the Sixth Circuit simply applies a categorical bar on claims by dual-status technicians, concluding that technicians occupy a position that is, per se, "irreducibly military in nature" – even when an injury occurs in the course of the plaintiff's civilian employment. See *Bowers*, 615 F.3d at 468 (Air Reserve Technicians); *Fisher v. Peters*, 249 F.3d 433 (6th Cir. 2001) (National Guard Technicians). In the proceeding below, the Eighth Circuit declined to adopt the categorical bar utilized in the Sixth Circuit, but also staked out yet another approach by holding that any of the other approaches outlined above could be applied, depending upon the "particular set of facts or a particular legal claim." App. A, at 18a.

The courts of appeals have struggled at times even with the application of their own tests. In *Overton*, for example, Judge Pooler wrote separately to express his concern that the Second Circuit had

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[1] The characterization of the Fifth Circuit's approach as the "purely civilian" test was made by the Second Circuit in *Overton v. N.Y. State Div. of Mil. & Naval Affairs*, 373 F.3d 83 (2d Cir. 2004).

strayed from its own test in that case by focusing on the "general military nature of the complainant's employment" instead of "the challenged conduct itself." 373 F.3d at 98 (Pooler, J., concurring). And although he "reluctantly" agreed that the technician's claim was nonjusticiable under *Feres* in that case, *id.* at 99, he suggested that the application of *Feres* to dual-status technicians bringing suit under Title VII showed that *Feres* has been overextended, reaching matters "'far removed from core combat-related functions.'" *Id.* at 100 (quoting Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 34 (2003)).

This confusion among the circuits over the proper application of *Feres* to claims by dual-status technicians has, like the split over the meaning of § 10216(a)(1), proven to be outcome determinative, with some courts allowing Title VII claims to proceed, see *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008), and others, such as the Sixth Circuit, categorically barring such claims.

This Court's review and guidance is necessary to resolve these conflicts. The conflicts present a question of national importance, as they concern the availability of any remedy for employment discrimination for tens of thousands of dual-status technicians. And Wetherill's case presents the perfect vehicle to bring clarity to this area of the law. Petitioner properly exhausted all administrative remedies and timely filed suit in the district court. The lower courts' resolution of the issues presented by each of the splits over the application of *Feres* to dual-status technicians was necessary to the disposi-

tion of respondents' motions to dismiss. Accordingly, the Court should grant certiorari to resolve this entrenched division over a question of national importance.

II. The Court Should Grant Review To Clarify That The *Feres* Doctrine Does Not Bar Dual-Status Technicians From Suing For Discrimination Under Title VII.

This Court's review is also needed because the courts below reached the wrong outcome in this case. The Court should grant the writ to clarify that dual-status technicians are "civilian employee[s]" – as expressly stated by statute – and thus not subject to *Feres*. At a minimum, the Court should hold that claims of employment discrimination by dual-status technicians are not "incident to military service," and that *Feres* does not apply to such claims (even if it might apply to claims by dual-status technicians in other contexts).

A. The Court Should Give Effect To The Plain Statement In 10 U.S.C. § 10216(a) That Dual-Status Technicians Are "Civilians" For The Purpose Of "Any" Federal Law.

The courts below erred in denying effect to the plain language of 10 U.S.C. § 10216(a)(1), which expressly provides that dual-status technicians are "Federal civilian employee[s]" for purposes of "any . . . provision of law." Instead of adhering to black-letter rules of statutory construction, the courts below erroneously resorted to legislative history and deprived the statute of its clear and literal meaning.

"As in all cases involving statutory construction, [the] starting point must be the language employed by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal quotation marks and citations omitted). Moreover, when a clear statement by Congress conflicts with a common-law doctrine, the analysis should "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (internal quotation marks and footnote omitted). Accordingly, courts should "conclude that federal common law has been preempted as to every question to which the legislative scheme [has] spoke[n] directly, and every problem that Congress has addressed." *In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (quoting *City of Milwaukee*, 451 U.S. at 315)) (internal quotation marks and citation omitted).

The application of these principles here is straightforward. Congress has spoken clearly about the civilian nature of dual-status technician positions in the 1997 National Defense Authorization Amendments ("NDAA"). There it said, "For purposes of [the NDAA] *and any other provision of law*, a military technician (dual status) is a Federal *civilian* employee." 10 U.S.C. § 10216 (emphases added);[2] see

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[2] In 1999, Congress reinforced the civilian classification of dual-status technicians by adding the term "civilian" to the requirement found in § 10216(a)(1)(C). See Pub. L. No. 106-65, § 521(a)(2), 113 Stat. 512 (1999) ("For the purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who . . . (C) is assigned to a *civilian*

also 32 U.S.C. § 709(b) (stating that 10 U.S.C. § 10216 defines "military technician (dual status)").

The language "any other provision of law" indisputably portends a broad legislative sweep, as this Court and the courts of appeals have recognized. See, *e.g.*, *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning.'") (internal citation omitted); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (internal citation omitted); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 49 (2d Cir. 2010) ("[That] the operative language begins with the phrase '[n]otwithstanding any other provision of law,' . . . mak[es] plain that the force of the section extends everywhere."); *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998) ("[B]y using the expression 'any other provision of law' in the context it did here, Congress demonstrated its intent to encompass all law, whether it be statutory law, common law, or constitutional law."). The Federal Circuit correctly reached the same conclusion as to the use of these words in § 10216(a)(1), holding that the language was "broad and unambiguous." *Jentoft*, 450 F.3d at 1349.

The Eighth Circuit did not so find. Instead, it reached the flawed conclusion that "Congress did not

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position as a technician in the organizing, administering, instructing, or training of the Select Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.") (emphasis added).

intend for the 1997 amendments to affect the application of [the *Feres*] doctrine to dual-status technicians." App. A, at 13a (citation omitted). Notwithstanding the plain language of the statute, the court looked to the NDAA's legislative history. The court reasoned that, because the statute's history lacked any mention of the *Feres* doctrine, the broad statutory language could not be given its plain meaning.

The court of appeals's analysis ran contrary to this Court's precedent. As the Court recently explained, the plain meaning of the phrase "any other provision of law" – as "a generally phrased residual clause" – is not undermined because a statute's legislative history fails to mention a particular provision of law. *Beaty*, 129 S. Ct. at 2191. Moreover, when presented with a clear legislative statement – as is the case here – the court should not resort to legislative history to discern Congress's intent. See *Ex parte Collett*, 337 U.S. 55, 61 (1949) ("[T]here is no need to refer to the legislative history where the statutory language is clear.").

The Eighth Circuit believed that it could ignore the plain text of the statute because Congress does not "'hide elephants in mouseholes.'" App. A, at 15a (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). But the case from which that metaphor was drawn presented a statutory-construction argument that was the opposite of the one in this case: an interpretation of the Clean Air Act that had *no basis* in the text of the statute. See *Whitman*, 531 U.S. at 468. Here, Wetherill advanced an argument in harmony with statutory language.

Where statutory language is clear and unambiguous, only "the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on" that language. *Garcia v. United States*, 469 U.S. 70, 75 (1985) (internal quotation marks omitted); see also *Am. Tobacco*, 456 U.S. at 68 ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.") (internal quotation marks and citation omitted; alteration in original).

This is not such a case. The court of appeals found that the NDAA "addresses the details of obtaining funding for National Guard positions" and "eliminate[s] inconsistencies in the nomenclature used to refer to dual-status technicians." App. A, at 13a (internal quotation marks omitted). But the fact that these may have been among the goals Congress intended to achieve is not contrary to the statute's broad declaration that dual-status technicians are "civilian." A suggestion that statutory language has a broader effect than needed to accomplish the stated intent of Congress is not an "extraordinary showing" – a court may not ignore plain language simply because it believes "Congress may have painted with too broad a brush" or the plain, unambiguous language "has additional unintended consequences." *Olden v. LaFarge Corp.*, 383 F.3d 495, 505-06 (6th Cir. 2004) (citing *Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy – even assuming that it is possible to identify

that evil from something other than the text of the statute itself.")).[3]

Because Congress spoke broadly and unequivocally in § 10216, the courts below erred in applying *Feres* (which by its own terms is limited to military personnel) to Wetherill, "a Federal civilian employee."

B. The Court Should Hold That The *Feres* Doctrine Does Not Apply To Dual-Status Technicians Alleging Discrimination Under Title VII.

Even if *Feres* applies to claims by dual-status technicians notwithstanding the language of 10 U.S.C. § 10216(a)(1), the court of appeals nonetheless erred in holding that *Feres* should apply in a case like this one – which alleges employment discrimination against a dual-status technician in the civilian sphere of her employment. The court concluded that such claims are "incident to military service" and therefore nonjusticiable under *Feres* because they potentially call into question military justifications for personnel decisions. But the core concerns underly-

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[3] Furthermore, Wetherill's case directly implicates Congress's purpose in declaring dual-status technicians to be "civilian employee[s]" – to secure their access to civilian benefits. See *Jentoft*, 450 F.3d at 1347 (explaining that the National Guard Technician Act deemed technicians "civilian" for the explicit purpose of ensuring that they qualified for retirement and fringe benefits). Wetherill's basic allegation is that Doohen, harboring discriminatory animus toward Wetherill, revoked her MRD waiver in order to prevent her from receiving full civilian benefits upon retirement.

ing the *Feres* doctrine are not implicated by employment-discrimination claims, and judicial refusal to consider such claims is contrary to clear congressional intent. Accordingly, the Court should hold that *Feres* does not apply to Wetherill's claims.

In *Feres*, this Court adopted a doctrine of intramilitary immunity, which holds tort claims by members of the military nonjusticiable where the claims arise out of conduct incident to military service. The Court has articulated a number of different rationales in support of this doctrine. In *Feres* itself, the Court noted three concerns: (1) that there did not exist, vis-à-vis service members' claim against the military, "parallel liability" of "private individuals" in the civilian context; (2) that, in light of the nomad-like existence of the active-duty soldier, it made no sense for the "geography of an injury" to determine "the law to be applied to his tort claims"; and (3) that Congress could not have intended for soldiers, who receive veteran's benefits in compensation for injuries sustained during service, to be granted an additional remedy under the FTCA. See *Feres*, 340 U.S. at 142-45. In subsequent cases, the Court offered a different rationale: judicial reluctance to interfere with the "peculiar and special relationship of the soldier to his superiors" or "sensitive military affairs" because of the potential harm to "military discipline and effectiveness." See *United States v. Johnson*, 481 U.S. 681, 690 (1987) (internal quotation marks and citation omitted); see also *United States v. Muniz,* 374 U.S. 150, 162 (1963) (identifying these

considerations as justifications for the *Feres* doctrine within the FTCA context).[4]

The application of these principles to military servicemembers based on injuries sustained on the battlefield is straightforward enough. Accidents and casualties are endemic to combat. Military decision-making thus "entails balancing, among other things, the demands of the mission with the safety of the individual service member and the safety of the unit." Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine,* 192 Mil. L. Rev. 1, 3-4 (2007). According to one *Feres* advocate, military leaders thus "cannot afford to cloud their decisions with issues of potential governmental or personal tort liability." *Id.* at 4.

But none of these policy concerns is implicated in the context of Title VII claims brought by dual-status technicians. The concerns set forth in *Feres* itself

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[4] It should be noted that the legitimacy of several of these rationales – even when applied to the FTCA context – has been the subject of much criticism. First, the actual existence of adverse effects on military discipline by "*Feres* suits" has "long been disputed." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting) (citing Barry Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U. L.J. 383, 407-11 (1985)); see also Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members,* 48 Cal. W. L. Rev. 395, 422-31 (2010); Turley, *supra*, 71 Geo. Wash. L. Rev. at 17-18. Second, these rationales fail to respect or implement the text of the FTCA. *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting); see also App. A, at 6a, n.5 (recognizing that *Feres* could have construed the FTCA differently).

plainly are not relevant. There is no absence of "parallel private liability" because Title VII expressly provides federal government employees – including employees of the military departments – with the same rights and remedies under Title VII as those afforded to "nonpublic parties." 42 U.S.C. § 2000e-16(d). Nor is there any legitimate concern about varying legal standards because Title VII is a federal law and thus consistent nationwide. And there is no risk of double compensation because the principal harm inflicted by employment discrimination is not a physical one and thus not compensable through veterans benefits.

The courts of appeals have nonetheless extended *Feres* to the Title VII context due to the other policy grounds cited by this Court – i.e., reluctance to interfere with the special relationship of the soldier to his superiors and a concern about harming military discipline and effectiveness. But these, too, are not put at risk by judicial review of employment discrimination claims by dual-status technicians. For one thing, the notion that any military value could be threatened is dubious, as illegal discrimination is not a legitimate tool of military order. In fact, the Department of Defense maintains a policy that expressly *prohibits* "discrimination based on race, color, religion, sex, national origin, mental or physical disability or age." Department of Defense Directive 1440.1 § 4.5 (emphasis added), *available at* http://prhome.defense.gov/nofear/docs/DoDDirective1440%201.pdf. If anything, allowing Title VII claims to proceed in this context would further, rather than undermine, military objectives. That is particularly true as to civilian employees, like dual-status technicians, who perform largely "collateral functions far

removed from core combat-related functions." *Overton*, 373 F.3d at 100 (Pooler, J., concurring) (citation and internal quotation marks omitted). In this respect, the roles of dual-status technicians exemplify a broader "shift in the military's general function" since *Feres* was originally decided. *Id.* Thus, *Feres*'s theoretical concerns about military readiness are not directly implicated by judicial cognizance of claims by these civilian personnel. Finally, any theoretical concern that such claims might adversely affect military discipline or effectiveness has been definitively disproven in practice, as the EEOC can and does review military Title VII claims brought by dual-status technicians, with no demonstrable effect on military order. See *Walch*, 533 F.3d at 304 (noting that *Feres* has no application to administrative agencies).

And regardless of the concerns underlying the *Feres* doctrine, holding technicians' Title VII claims to be nonjusticiable also contravenes congressional intent. In Title VII, Congress plainly declared that military departments are covered employers prohibited from certain types of discrimination: "All personnel actions affecting employees . . . *in military departments* . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). Significantly, Congress provided "aggrieved" employees of military departments an express remedy for redressing conduct violating Title VII. *Id.* § 2000e-16(c) ("[A]n employee . . . , 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 . . . ."). The statute provides the same remedies to military employees that it provides to private employees, see *id.* § 2000e-16(d), including the right to a

trial *de novo*, *Chandler v. Roudebush*, 425 U.S. 840 (1976). This legislative clarity simply places Title VII in a different category from the other areas of substantive law to which this Court has previously extended *Feres* – all of which concerned judicially-made doctrines, such as state tort law and *Bivens* claims. See *Chappell v. Wallace*, 462 U.S. 296, 301-04 (1983).

In light of these extensive differences between Title VII claims asserted by dual-status technicians and other types of claims previously held to be non-justiciable under *Feres*, it is no surprise that at least one court has held that employment discrimination that culminates in a civilian demotion for a technician is *not* conduct incident to military service. See *Laurent v. Geren*, Civ. No. 2004-0024, 2008 WL 4587290 (D.V.I. Oct. 10, 2008). In *Laurent*, a National Guard technician brought a sexual harassment claim under Title VII, complaining that various acts of discrimination culminated in the denial of her access to certain educational opportunities that would have benefited her civilian position. On these facts, the court stated that it was free to "question the rationale" behind the challenged conduct without "interfering with military decision-making." *Id.* at *4. The court held, moreover, that the plaintiff enjoyed Title VII protection because "[c]reating a sexually hostile environment is not integrally related to the military's mission." *Id.* at *3.[5]

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[5] Similarly, the Equal Employment Opportunity Commission ("EEOC"), as the agency commissioned with the interpretation and enforcement of Title VII, has indicated that dual-status technicians enjoy the protection of Title VII where the "the discriminatory action arises from

The Court should reach the same conclusion here. Neither Congress nor this Court has ever expressed an intent that employment discrimination complaints should be nonjusticiable simply because the complained of discrimination affects an employee of a military department. Indeed, Congress has expressly stated the opposite. Similarly, *Feres*'s nonjusticiability doctrine could not have been intended to reach discrimination against a "civilian employee" like Wetherill. The facts of this case demonstrate conclusively that the extension of *Feres* in this context has radically overshot the legitimate reach of its policy justifications. Accordingly, the Court should grant review to clarify this important area of the law and hold, consistent with congressional intent, that dual-status technicians may bring employment discrimination claims under Title VII.

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their capacity as civilian employees." *Johnson v. Wynne*, Appeal No. 0120063810, 2007 EEOPUB LEXIS 1761, at *3 (EEOC May 7, 2007). For example, the EEOC determined that Title VII applied in a case where a dual-status technician alleged a discriminatory act involving a demotion of the plaintiff's civilian position. *Brown v. Wynne*, Appeal No. 01A22198, 2007 EEOPUB LEXIS 1923, at *4 (EEOC May 16, 2007) ("The challenged action is complainant's [] demotion from one position to another, and it is clear from the positions' titles, that they are both [positions] . . . designated for federal civilian employees.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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