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

SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

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SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Lisa Zuress respectfully submits this Second Supplemental Brief to draw this Court's attention to two subsequently filed petitions for certiorari: No. 10-1185, *Ligon v. LaHood*; and No. 10-1330, *Jones v. United States*. The petition in this case bears a substantial relationship to the petitions in *Ligon* and *Jones*. Moreover, the position of the United States in *Ligon* and *Jones* cannot be reconciled with its position here.

Ligon and *Jones* involve the exclusivity of the federal-sector jurisdictional provision of Title VII, 42 U.S.C. § 2000e-16. Specifically, the question in those cases is whether the jurisdiction conferred by Title VII is displaced by a provision of the Federal Aviation Act (Aviation Act) granting the courts of appeals exclusive jurisdiction to review orders related "to aviation duties and powers designated to be carried out by the Administrator" of the FAA, 49 U.S.C. § 46110.

The petitioners in *Ligon* and *Jones* filed suit in federal district court under Title VII (*Jones*) and the parallel provisions of the Age Discrimination in Employment Act (*Ligon*). Rejecting the position of the United States, the Fifth Circuit held that although the petitioners' claims were within the terms of Title VII they were nonetheless barred by the Aviation Act because they were "inescapably intertwined" with a reviewable order of the Administrator. *See Jones v. United States*, 625 F.3d 827, 830 (5th Cir. 2010); *Ligon v. LaHood*, 614 F.3d 150, 157 (5th Cir. 2010).

The question presented by *Ligon* and *Jones* is substantially related to the question presented in this case. Here, petitioner contends that Title VII's federal-sector jurisdictional provision authorizes her discrimination claim. Pet. 23-24. Acknowledging a square circuit conflict, the Ninth Circuit held that petitioner's statutory Title VII claim was barred by the extra-statutory principle that military employees may not bring suits that are "integrally related" to their military service. Pet. App. 2a.

The petitioners in *Ligon* and *Jones* make an argument indistinguishable from Zuress's: that the statutory jurisdiction conferred by Title VII is not displaced by the Aviation Act, because Title VII provides an express and exclusive remedy. In *Ligon* and *Jones*, the Solicitor General embraces that argument. Importantly, the government's position rests on this Court's recognition of the broad sweep of Title VII's federal-sector jurisdictional provision. The Solicitor General argues:

> [T]he district court had subject matter jurisdiction over petitioner's discrimination and retaliation claims. This Court has held that the anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler v. Roudebush*, 425 U.S. 840, 864 (1976). The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal

> courts of appeals. 49 U.S.C. 46110(a). Such review is not a substitute for Title VII and does not preclude a proper Title VII plaintiff from pursuing his claims of employment discrimination.

BIO, No. 10-1330, *Jones v. United States* 11. The United States furthermore draws a stark "contrast" between the implied right of action conferred by *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), and a suit filed under Title VII, the latter of which is not displaced by other jurisdictional statutes because it "creates an express—and exclusive, see *Brown*, 425 U.S. at 835—cause of action for discrimination claims alleged by federal employees." *Jones* BIO 12-13. *See also* BIO, No. 10-1185, *Ligon v. LaHood* 9.

This Court's decision in *Brown*, the Ninth Circuit's decision in *Zuress*, and the Fifth Circuit's decisions in *Jones* and *Ligon* all involve the same federal-sector jurisdictional provision of Title VII, Section 2000e-16, through which Congress has provided "the exclusive judicial remedy for claims of discrimination in federal employment." *Brown*, 425 U.S. at 824. The position of the United States that Title VII confers jurisdiction in *Jones* and *Ligon* cannot be reconciled with its contrary argument in *Zuress* that this *"express"* statutory remedy is *impliedly* displaced by the extra-statutory principle of military immunity. Title VII draws no such distinction; it applies fully by its terms to all "employees . . . in military departments" such as petitioner Zuress. 42 U.S.C. § 2000e-16(a). *See also Zuress* Reply Br. 2-3 (explaining that the Solicitor General's brief in opposition did not attempt to

reconcile the government's position with the text of Title VII).

If anything, the argument that Title VII's grant of jurisdiction remains undisturbed is *stronger* in this case than it is in *Jones* and *Ligon*. In those cases, the Aviation Act explicitly granted jurisdiction to the courts of appeals, suggesting that Congress may have intended to displace Title VII's remedy in that context. Here, by contrast, no competing federal statute even potentially suggests a congressional intent to withdraw the jurisdiction expressly conferred by Title VII. This Court's decisions conferring immunity upon the military involve circumstances (as in *Bivens*) in which the cause of action underlying the plaintiff's claim does not rest on any federal statutory right. *See Zuress* Pet. 13-14 (discussing *Feres v. United States*, 340 U.S. 135 (1950) (plaintiff may not bring state common law tort claim under Federal Tort Claims Act)). As the Solicitor General forthrightly recognizes in *Jones* and *Ligon*, such claims are properly and easily "contrast[ed]" with suits brought under the explicit statutory provisions of Title VII. *Jones* BIO 12-13.

The petitions in *Jones* and *Ligon* and the position of the United States in response to those petitions substantially reinforce the bases for granting review in this case. The foundational question in all the cases is the same: does Title VII provide a statutory remedy for federal-sector discrimination claims that is not displaced by implication? A decision by this Court on that question will accordingly have significance beyond the already-important sphere of claims by dual-status technicians in the military. Furthermore, the concession of the United States

that jurisdiction exists in *Jones* and *Ligon* demonstrates that the Ninth Circuit erred when it held that the federal courts lack jurisdiction over petitioner Zuress's Title VII claim.

On the Court's ordinary schedule, the petitions in *Jones* and *Ligon* will not be considered until the conclusion of the Court's summer recess. In these circumstances, the appropriate and expeditious course is for the Court to grant the petition in this case (or the parallel petition in No. 10-638, *Wetherill v. McHugh*) and hold the petitions in *Jones* and *Ligon*. If the Court grants certiorari in this case and accepts petitioner's argument that the explicit Title VII remedy is not impliedly displaced, it can remand *Jones* and *Ligon* to the Fifth Circuit for further consideration in light of that principle, which the Solicitor General correctly recognizes should control the jurisdictional inquiry in those cases.[1]

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[1] The petitions in this case and No. 10-885, *Witt v. United States*, also present the additional important question whether this Court should overrule *Feres*, *supra*. *See* Petitioner's First Supp. Br. (discussing the relationship between *Zuress*, *Wetherill*, and *Witt*). We are providing this Brief to counsel for the petitioners in *Jones*, *Ligon*, *Wetherill*, and *Witt*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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