No. 10-374

# In the Supreme Court of the United States

LISA M. ZURESS, PETITIONER

*v.*

MICHAEL B. DONLEY, SECRETARY OF THE AIR FORCE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a), 111 Stat. 1734 (10 U.S.C. 10216(a)), authorizes a military technician (dual status) to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination incident to the technician's military service.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page



Statutes, regulations and rules:

Statutes, regulation and rules—Continued: Page



Miscellaneous:

Miscellaneous—Continued: Page

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 606 F.3d 1249. The order of the district court (Pet. App. 16a-26a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 8, 2010. On September 10, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 16, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress has exercised its extensive constitutional powers over matters of national defense by estab-

lishing the armed forces of the United States. Those forces consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 32 U.S.C. 101(2). The armed forces each have a reserve component in order to provide trained military units as a supplement "in time of war or national emergency, and at such other times as the national security may require." 10 U.S.C. 10102. The reserve components of the Air Force are the Air National Guard of the United States and the Air Force Reserve. 10 U.S.C. 10101(5) and (6), 10110, 10111. This case concerns an attempt by a military technician (dual status) in the Air Force Reserve to sue the Secretary of the Air Force under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination incident to her military service.

a. Military technician programs originated during the World War I era, when state National Guard organizations created hybrid positions, held by state employees who were also Guard members, to perform maintenance and clerical duties. See Michael J. Davidson and Steve Walters, *Neither Man Nor Beast: The National Guard Technician, Modern Day Military Minotaur*, 1995 Army Law 49, 51 (Dec. 1995). In 1968, Congress conferred federal civilian employee status on National Guard technicians. See National Guard Technician Act of 1968, Pub. L. No. 90-486, 82 Stat. 755 (codified principally at 32 U.S.C. 709). In so doing, Congress sought to aid recruitment for the positions by providing those "essentially state military personnel" with federal retirement and fringe benefits while preserving "the essential military requirements" of the positions. *American Fed'n of Gov't Employees* v. *FLRA*, 730 F.2d 1534, 1543 (D.C. Cir. 1984). Thus, the 1968 Act gave National

Guard technicians a dual status, under which they perform full-time work as a civilian in their military unit but also serve as members of the military with the same unit and are available at all times to be called into active service. *Id*. at 1545. By statute, a National Guard technician must be a member of the National Guard, must hold the military grade specified for that position, and must wear a military uniform while performing his or her duties. 32 U.S.C. 709.

In 1957, the Air Force created its own technician program, the Air Reserve Technician (ART) program. See *American Fed'n of Gov't Employees* v. *Hoffman*, 543 F.2d 930, 932-936 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977). Like National Guard technicians, ARTs have dual civilian and military status and are available for military mobilization. *Id*. at 933. "The primary goal of the [ART program is] to increase the combat readiness of Air Force Reserve units, as well as their effectiveness in the event of mobilization." *Id*. at 932-933.

In 1996, Congress provided express statutory authority for the ART program. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 305-306. That legislation, which required ARTs and other military technicians hired thereafter to maintain membership in the armed forces reserves as a condition of their federal employment, alternately referred to the technicians as "military technicians" and as "dual-status military technicians." *Ibid*. Appropriations legislation used still different terminology, referring to the technicians as "military (civilian) technicians." Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8087, 109 Stat. 668.

In a separate law enacted later in 1996, Congress provided a military-wide definition for the "military technician" position:

> Military technicians are Federal civilian employees hired under title 5 and title 32 who are required to maintain dual-status as drilling reserve component members as a condition of their Federal civilian employment. Such employees shall be authorized and accounted for as a separate category of dual-status civilian employees, exempt as specified in subsection (b)(3) from any general or regulatory requirement for adjustments in Department of Defense civilian personnel.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1214, 110 Stat. 2695 (10 U.S.C. 10216).

In 1997, Congress adopted a new title for the position—"military technician (dual status)"—and sought to amend every provision of the United States Code that mentions the position to use that nomenclature. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a) and (g)-(i), 111 Stat. 1734, 1735-1736. The House Report accompanying the amendments explained that clarification was needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105 Cong., 1st Sess. 358 (1997). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.*

As amended in 1997, the definition of "military technician (dual status)" provides as follows:

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

10 U.S.C. 10216(a) (2000).

b. Air Force Instructions (AFI) reiterate that "dual-status" ARTs "are full-time civilian employees who are also active members of the Air Force Reserve unit in which they are employed." Air Force Reserve Command Instruction 36-114, at 2 (Aug. 10, 2001). "In addition to their civilian assignments, [ARTs] are assigned to equivalent positions in the reserve organization with a reserve military rank or grade." *Ibid*. ARTs "play vital roles in the combat readiness of their reserve unit by training other reservists and serving as mobilization assets when the unit is mobilized." *Ibid*. The ART workforce "provides stable, continuous full-time management, administration, and training of the Ready Reserve and oversees the transition from a peacetime to a wartime or national emergency situation to ensure mobi-

lization readiness is maintained." AFI 36-108, at 1 (July 26, 1994).

ARTs answer to a nominally civilian chain of supervision during the week, but often those civilian supervisors are also military technicians, and they frequently are the very same people who compromise the chain of command for the ARTs in their military status. See, *e.g.*, Pet. App. 17a. ARTs are required to wear their military uniforms while they are carrying out their civilian functions, as well as while they are acting in their military status. See *id.* at 7a.

c. Based on the principle that waivers of sovereign immunity are strictly construed and the doctrine of intra-military immunity derived from *Feres* v. *Unites States*, 340 U.S. 135 (1950), the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals have also uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See, *e.g.*, *Overton* v. *New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 96 (2d Cir. 2004); *Brown* v. *United States*, 227 F.3d 295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher* v. *Peters*, 249 F.3d 433, 443 (6th Cir. 2001); *Hupp* v. *Department of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier* v. *Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); see also *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007).

Uniformed members of the military (including dual-status military technicians) have numerous alternative

remedies for service-related discrimination claims. For example, a uniformed member of the Air Force, including a dual-status military technician, who believes that he or she has suffered service-related discrimination can file an administrative complaint with the Air Force Equal Opportunity (EO) Office. AFI 36-2706, §§ 3B, 3C (Oct. 5, 2010). A formal complaint triggers an investigation by the EO Office, *id.* § 3.20, and a service member who is dissatisfied with the results of that investigation is entitled to at least two levels of appeal, *id.* § 3.38. Under certain circumstances, a service member can also pursue relief from Air Force Inspector General. AFI 90-301 (Aug. 10, 2010). In addition, a service member who believes that he or she has been discriminated against by his or her commanding officer can file a complaint under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938. Service members may also pursue relief from the Air Force Board for Correction of Military Records. See 10 U.S.C. 1552 (2006 & Supp. III 2009); *Chappell* v. *Wallace*, 462 U.S. 296, 302 (1983). Finally, service members may bring federal court actions seeking injunctive relief for alleged violations of the Constitution. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

2. From July 3, 2000, until June 30, 2005, petitioner was a dual-status ART at Luke Air Force Base in Arizona. Her civilian position was as a GS-12 Operations Staff Specialist for the 944th Operations Group, and her military position was as a Captain in the Air Force Reserve. She performed similar duties in both capacities and was supervised in both by the same military commander. Pet. App. 17a.

Beginning in November 2003, and until petitioner retired, Colonel William Binger served as petitioner's military commander. Petitioner alleges that, after she sent an anonymous letter to senior Department of Defense officials describing inappropriate sexual behavior following a "naming" ceremony on the base, Col. Binger subjected her to unfair treatment in various ways, such as by failing to address her former military commander's refusal to return her salute in December 2003 and by giving her two "average" military Officer Performance Reports in 2004. First Am. Compl. ¶¶ 16-17, 20-23, 33; Pet. App. 7a.

In December 2004, petitioner saw a copy of her Officer Performance Report, which questioned her officership and judgment. Petitioner alleges that she knew the report would prevent her from being promoted to Major, which would mean that she would be ineligible to remain in the Air Force Reserve. Because she had to be in the Reserve to maintain her civilian position, petitioner would also lose her civilian job if she were not promoted. Pet. App. 18a.

In January 2005, petitioner requested a military retirement, went on leave, and asked for a one-year leave of absence. Col. Binger granted her a four-month leave instead. Petitioner then cancelled her request for a leave of absence and returned to work, after having been on leave for approximately two weeks. At that point, she was detailed to a GS-7 position in the Medical Squadron (with no loss of pay) because Col. Binger had detailed another person to fill her original position. See Pet. App. 18a; Final Agency Decision, Air Force Docket No. 7I0J05008F07, at 6 (Feb. 25, 2008).

In March 2005, petitioner contacted an Equal Employment Opportunity counselor and alleged gender discrimination and retaliation. Some time later, after she was officially informed that she had not been promoted to Major, plaintiff retired from the Air Force Reserve and was separated as a civilian employee. Pet. App. 19a.

3. In March 2008, petitioner sued the Secretary of the Air Force in his official capacity, alleging that the Air Force had violated her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). First Am. Compl. ¶¶ 5, 49; Pet. App. 19a.

The Air Force filed a motion to dismiss, arguing that petitioner had failed to exhaust her administrative remedies with respect to certain claims and that all of her claims were barred under the Ninth Circuit's decision in *Mier*, *supra*. See Pet. App. 20a-21a. The district court granted the Air Force's motion, holding that the case was controlled by *Mier*. *Id*. at 16a-26a.

*Mier*, the district court explained, held that "Title VII does not apply to dual status employees if their claims are based on personnel actions 'integrally related to the military's unique structure.'" Pet. App. 21a (quoting *Mier*, 57 F.3d at 750). Noting that petitioner had conceded "that the timely events which support her Title VII claim are all based on actions integrally related to the military's unique structure," the district court concluded that *Mier* required dismissal of her suit. *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that *Mier* had been superseded by the 1997 amendments to 10 U.S.C. 10216(a). Pet. App. 22a-25a. Because petitioner conceded that no Ninth Circuit precedent questioned *Mier*'s continued vitality, and because the Fifth Circuit in a recent decision had rejected the

argument petitioner advanced, see *Williams* v. *Wynne*, 533 F.3d 360, 364 (2008), the district court "decline[d] to depart" from *Mier*. Pet. App. 25a.

4. The court of appeals affirmed. Pet. App. 1a-15a. The only question petitioner presented on appeal was whether the 1997 amendments to Section 10216(a) abrogated the court's earlier ruling in *Mier* that dual-status military technicians cannot bring Title VII suits based on actions that are integrally related to the military's unique structure. See *id.* at 2a; Pet. C.A. Br. 2, 3, 16-23. On appeal, as in the district court, petitioner "concede[d] that the personnel actions that she challenges are integrally related to the military's unique structure." Pet. App. 11a.

Deciding only the narrow legal issue that petitioner raised, the court of appeals held that the 1997 amendments do not provide the clear statement necessary to waive the United States' sovereign immunity and subject the military to Title VII suits based on alleged discrimination that is incident to a dual-status technician's military service. Pet. App. 11a-15a. As the court explained, petitioner relied on language in the 1997 amendments stating that the new definition of "military technician (dual status)" applies "[f]or purposes of this section and any other provision of law" and that "a military technician (dual status) is a Federal civilian employee." *Id.* at 12a. Petitioner argued that this language indicates that Congress intended that dual-status military technicians would thereafter have the same rights to sue under Title VII as civilian employees with no military affiliation. *Ibid.* The court noted that the Federal Circuit, in *Jentoft* v. *United States*, 450 F.3d 1342 (2006), had relied on similar reasoning to conclude

that the 1997 amendments authorized dual-status technicians to bring claims against the military under the Equal Pay Act of 1963, 29 U.S.C. 206(d). Pet. App. 12a. The court rejected petitioner's argument, however, reasoning that, even before the 1997 amendments, dual-status technicians had long been recognized as civilian employees whose positions require that they also serve in the military reserves. *Id.* at 13a. Because "[b]oth before and after the 1997 Amendments, dual-status Air Force Reserve Technicians held 'a hybrid job entailing both civilian and military aspects,'" the court concluded that the amendments do not clearly evince Congress's intent to treat dual-status technicians as purely civilian employees for purposes of suits under Title VII. *Ibid.* (citations omitted).

The court of appeals further observed that the legislative history of the 1997 amendments "demonstrates that Congress employed the phrase 'for any provision of law' to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity." Pet. App. 13a. By contrast, the court noted, "[t]here is no mention of Title VII in the legislative history of the 1997 Amendments, nor is there any indication that Congress intended to authorize any cause of action that was previously unavailable to a dual status technician." *Id.* at 14a-15a (citation omitted).

**ARGUMENT**

The court of appeals correctly held that the 1997 amendments to 10 U.S.C. 10216(a) do not waive the United States' sovereign immunity and authorize Title VII suits by dual-status military technicians based on

actions that are integrally related to the military's unique structure. That ruling accords with the decision of every other court of appeals that has addressed the issue and, contrary to petitioner's contention, this Court's review is not warranted to resolve any purported conflict with *Jentoft* v. *United States*, 450 F.3d 1342 (Fed. Cir. 2006), which involved a suit under the Equal Pay Act, not Title VII. None of the other issues raised in the petition for a writ of certiorari was preserved in the courts below or otherwise merits this Court's review. Accordingly, the Court should deny the petition.[1]

1. It is well settled that "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); accord *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33 (1992). In addition, in *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that members of the armed forces may not bring suits under the Federal Torts Claims Act (FTCA) for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146. The Court later held that the concerns underlying its decision in *Feres* also require the conclusion that service members may not bring actions under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to recover damages for violations of their civil rights or other constitutional torts

[1] The question presented by this petition is also presented, in the context of a National Guard dual-status military technician, by the petition for a writ of certiorari in *Wetherill* v. *McHugh*, No. 10-638 (filed Nov. 9, 2010).

arising from activities incident to their military service. *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court explained that its decisions were driven primarily "by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'" *Id.* at 299 (citations omitted).

As noted above, see p. 6, *supra*, based on these principles of sovereign and intra-military immunity, the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). And the courts of appeals have also uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See p. 6, *supra* (citing cases). In such circumstances, dual-status military technicians, like uniformed members of the military, may instead pursue various alternative remedies for service-related discrimination claims. See pp. 6-7, *supra*.

Petitioner nonetheless argues that the 1997 amendments to 10 U.S.C. 10216(a) authorized dual-status military technicians to bring Title VII actions on the same terms as purely civilian employees. Petitioner relies on the amendments' statement that the definition of "military technician (dual status)" applies for purposes of Section 10216 "and any other provision of law," coupled with the definition's statement that a "military technician (dual status) is a Federal civilian employee." 10 U.S.C. 10216(a)(1). See Pet. 25. The court below correctly rejected petitioner's argument, as has every other court of appeals that has considered the issue. See Pet.

App. 12a-15a; *Wetherill* v. *Geren*, 616 F.3d 789, 796-797 (8th Cir. 2010), petition for cert. pending, No. 10-638 (filed Nov. 9, 2010); *Bowers* v. *Wynne*, 615 F.3d 455, 466-468 (6th Cir. 2010); *Walch* v. *Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 299 (5th Cir. 2008); see also *Williams* v. *Wynne*, 533 F.3d 360, 366-368 (5th Cir. 2008).

The 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. That fact alone requires the conclusion that the amendments do not waive the sovereign immunity of the United States for Title VII claims by dual-status military technicians that are related to their military service.

The absence of any clear statement creating a cause of action or waiving immunity is particularly fatal to petitioner's argument because, before the 1997 amendments, it was well settled that dual-status military technicians did not have the same rights to bring Title VII actions as purely civilian employees. As discussed above, the courts of appeals had consistently held that uniformed members of the military have no right to sue under Title VII, and the only court of appeals that had addressed the ability of dual-status technicians to sue under Title VII had held that they may not bring suits based on "personnel actions integrally related to the military's unique structure." *Mier* v. *Owens*, 57 F.3d 747, 751 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996). Moreover, numerous other courts had held that principles of intra-military immunity bar dual-status military technicians from bringing damages actions under other statutes based on alleged violations of their civil rights that are incident to their military service. See, *e.g.*,

*Wright* v. *Park*, 5 F.3d 586, 586-591 (1st Cir. 1993); *Wood* v. *United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004, 1005-1008 & n.1 (8th Cir. 1989); *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107-108 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Congress is presumed to be familiar with established case law and to expect that its enactments will be interpreted as consistent with that law unless those enactments provide otherwise. Pet. App. 9a (citing *United States* v. *Wells*, 519 U.S. 482, 495 (1997)). If Congress intended the 1997 amendments to effect the "radical departure from past practice" asserted by petitioner, Congress surely would have "ma[de] a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

Even if a clear statement were not necessary, Section 10216(a)(1)'s definition of "military technician (dual status)" would not indicate that dual-status technicians have the same rights as purely civilian employees to sue under Title VII, regardless of the nature of their claims. The definition "does not end with the statement that dual status technicians are federal civilian employees. It [goes on to] state[] that National Guard technicians and ARTs are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces." *Bowers*, 615 F.3d at 467 (emphasis in original) (citation omitted). As explained above, dual-status technicians play a critical role in our nation's military defense, often report to the same military supervisor in both their military and civilian positions, must wear their military uniform while working in their civilian

jobs, and must maintain their military status in order to keep their civilian jobs. Nothing in Section 10216 suggests that those facts should be ignored when dual-status technicians attempt to sue the military for alleged Title VII violations that are incident to their military service.

As the court below recognized, the 1997 amendments added the phrase "for any provision of law" to the definition in Section 10216(a)(1) "to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intramilitary immunity." Pet. App. 13a. The House Report accompanying the amendments explained that they were needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105th Cong., 1st Sess. 358 (1997). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.* The legislative history thus confirms that Congress did not intend the 1997 amendments to waive the United States' sovereign immunity for service-related Title VII suits by dual-status military technicians. See Pet. App. 13a; *Wetherill*, 616 F.3d at 797; *Bowers*, 615 F.3d at 467.

2. a. Contrary to petitioner's contention (Pet. 14-19), this Court's review is not warranted to resolve any purported conflict with the Federal Circuit's decision in *Jentoft*. *Jentoft* involved the right of a dual-status technician to sue under the Equal Pay Act, not Title VII. See 450 F.3d at 1348; *id.* at 1345 n.2 (noting that Jentoft had abandoned her Title VII claims). Moreover, in concluding that Section 10216(a)'s definition of dual-status

technicians as "civilian" employees entitles them to bring service-related Equal Pay Act suits, the Federal Circuit relied on "the plain language of the Equal Pay Act," which defines a covered employee to include "any individual employed by the Government of the United States . . . as a *civilian* in the military departments." *Id.* at 1348 (emphasis added) (quoting 29 U.S.C. 203(e)(2)(A)(i)). Title VII contains no such language. See also *Bowers*, 615 F.3d at 467 (distinguishing *Jentoft* because it involved the Equal Pay Act); *Walch*, 533 F.3d at 300-301 (same).

Petitioner's assertion that the status quo is an "unacceptable invitation to forum shopping" (Pet. 18) is also incorrect. Petitioner notes that 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, *ibid.* (citing 28 U.S.C. 1346(a)(2)), and she argues that no rational dual-status military technician would file an Equal Pay Act suit in district court in the Second, Fifth, Sixth, Eighth, and Ninth Circuits because the claim would be barred by the case law of those circuits regarding Title VII claims, *ibid.* That argument is mistaken because the Federal Circuit has exclusive jurisdiction over any appeal in a case that involves a claim against the federal government under the Equal Pay Act, even if the complaint requests $10,000 or less. Equal Pay Act claims against the federal government are authorized by the Tucker Act, 28 U.S.C. 1491(a)(1), or the Little Tucker Act, 28 U.S.C. 1346(a)(2) (claims seeking $10,000 or less), and there is "exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *United States* v. *Hohri*, 482 U.S. 64, 73 (1987). Thus, there is no incen-

tive for forum shopping because an Equal Pay Act claim is governed by the Federal Circuit's decision in *Jentoft* wherever the claim is filed. See *Golan* v. *Pingel Enter. Inc.*, 310 F.3d 1360, 1368 (Fed. Cir. 2002) ("Federal Circuit law applies to causes of action within the exclusive jurisdiction of the Federal Circuit."); accord *Doe* v. *Goss*, No. CIV. A. 04-2122, 2007 WL 106523, at *10 n.16 (D.D.C. 2007); *Jarrett* v. *White*, No. CIV. A. 01-800-GMS, 2002 WL 1348304, at *4 n.4 (D. Del. 2002), aff'd, 80 Fed. Appx. 107 (Fed. Cir. 2003); *Ward* v. *Aspin*, No. CIV. A. 92-7280, 1993 WL 379181, at *4 n.4 (E.D. Pa. 1993).

Finally, to the extent that *Jentoft* is in tension with the Title VII decisions of the other courts of appeals, the Federal Circuit may reconsider its decision in *Jentoft*. The Federal Circuit did not consider the legislative history of the 1997 amendments in reaching its decision, nor did it have the benefit of the analysis of the four circuits that have since held that the 1997 amendments do not authorize service-related Title VII actions by dual-status military technicians. See pp. 13-14, *supra* (citing cases). Contrary to petitioner's contention (Pet. 19), nothing would prevent the government from asking the Federal Circuit to reexamine *Jentoft* in light of those considerations in an appropriate case. See Fed. R. App. P. 35(b) (authorizing petitions for initial hearing en banc); Fed. Cir. R. 35(a)(1) (authorizing arguments to a panel that circuit precedent should be overruled).[2]

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[2] Petitioner also notes (Pet. 19 n.2) that although some circuits, such as the court below, have held that dual-status military technicians may not bring Title VII claims that are service-related, at least one circuit has indicated that those employees may not bring *any* Title VII claims because all of their job-related functions are integrally related to the

b. Petitioner also errs in contending (Pet. 19-23) that the decision below conflicts with the position of the Equal Employment Opportunity Commission (EEOC) on when dual-status military technicians may bring a Title VII claim. The EEOC's cases recognize that dual-status military technicians may not bring a Title VII action based on any personnel decision that "affect[s] their capacity as uniformed military personnel." *Muse* v. *Geren*, EEOC Doc. 0120083293, 2008 WL 4463514, at *3 (E.E.O.C. 2008); accord *Brown* v. *Wynne*, EEOC Doc. 0420050011, 2007 WL 1523917, at *2 (E.E.O.C. 2007); *Snyder* v. *Roche*, EEOC Doc. 01A23583, 2003 WL 1791143, at *2 (E.E.O.C. 2003); *Conley* v. *Widnall*, EEOC Doc. 01945532, 1995 WL 81271, at *1 (E.E.O.C. 1995). That standard is not materially different from the standard articulated by the court of appeals, which is whether the employee's claim is based on "personnel actions integrally related to the military's unique structure." Pet. App. 11a.

Petitioner contends (Pet. 19-21) that the EEOC has, in various cases, applied the standard for when dual-

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military's unique structure. That issue is not properly presented by this case because it was neither pressed in nor passed on by the court of appeals. The only issue that petitioner raised in the court below was whether the 1997 amendments to Section 10216(a) authorize service-related suits by dual-status technicians. See Pet. App. 2a; Pet. C.A. Br. 2, 3, 16-23. And the court of appeals expressly stated that was the only issue it was addressing. Pet. App. 15a. Moreover, this case would not be an appropriate vehicle to address the standard for when (if ever) dual-status technicians can sue under Title VII because petitioner conceded in both courts below that her Title VII claim is integrally related to the military's unique structure. *Id.* at 11a, 21a. Petitioner therefore would not be entitled to maintain her suit under the rule of any circuit.

status technicians may sue under Title VII differently than the court below. Even if any purported difference between how the EEOC and the Ninth Circuit apply the standard to the facts of different cases otherwise merited this Court's review, this case would not be an appropriate vehicle, because petitioner gave neither the court below nor the EEOC the opportunity to apply the standard here. Petitioner could have appealed the rejection of her claim by the Air Force to the EEOC, see 29 C.F.R. 1614.401, but she chose not to do so and instead exercised her right to proceed directly to court, see 29 C.F.R. 1614.407. Petitioner also did not give the district court or the court of appeals the occasion to apply the standard, because she conceded in both courts that her claims are integrally related to the military's unique structure. See Pet. App. 11a, 21a.[3]

Petitioner is also mistaken in asserting that she has been subjected to an "unjust bait and switch" (Pet. 21) because EEOC regulations and Air Force guidance indicate that she had a right to go to court if she was dissatisfied with the administrative resolution of her complaint. The statements that petitioner had the right to go to court were entirely accurate. Petitioner had the right to ask the court to determine that her Title VII claims (in whole or in part) could proceed to judicial resolution because they were not integrally related to the military's unique structure. Petitioner chose not to exercise that right, and she cannot complain now about the consequences.

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[3] Petitioner's concessions in the courts below foreclose her current assertion in the petition for a writ of certiorari that her "claims involve several acts that indisputably arise purely from her civilian role." Pet. 22.

3. The other arguments that petitioner makes in her petition (Pet. 23-34) were neither raised in the courts below nor addressed by those courts, and they therefore have not been preserved for review by this Court. See Pet. C.A. Br. 2, 3, 16-23 (raising only the Section 10216(a) issue); Pet. App. 15a (expressly declining to address any other issue). In any event, none of petitioner's other arguments warrants the Court's review.

a. Petitioner argues (Pet. 23-30) that the courts of appeals have erred in relying on principles of intra-military immunity derived from *Feres* to conclude that service members may not bring Title VII claims based on actions incident to their military service. As discussed above, however, all of the courts of appeals that have addressed the question have concluded that Title VII does not apply to uniformed members of the military. See p. 6, *supra*. EEOC regulations reflect the same position. See 29 C.F.R. 1614.103(d). The courts of appeals have also uniformly concluded that principles of intra-military immunity bar service-related Title VII claims by dual-status military technicians. See p. 6, *supra*. Although petitioner contends that the courts of appeals have extended *Feres* beyond its proper scope, this Court itself has applied the principles animating that decision outside the context of the FTCA. See, *e.g.*, *Stanley*, *supra*; *Chappell*, *supra*. Petitioner also argues (Pet. 27-30) that the rationales behind *Feres* do not apply in Title VII actions like this one. But petitioner acknowledges that one of those rationales is the need to bar 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." Pet. 28 (citation omitted). Petitioner's assertion that her

claims are not of that type is foreclosed by her concessions below (Pet. App. 11a, 21a) that her claims are integrally related to the military's unique structure.

b. Finally, petitioner contends (Pet. 31-34) that if this Court is unwilling to accept any of her other arguments, the Court should overrule *Feres*. It would not, however, be appropriate for the Court in this Title VII case to decide whether *Feres* correctly held that service members may not bring service-related suits under the FTCA, or whether the Court has correctly applied principles of intra-military immunity in other contexts, such as *Bivens* suits.

Moreover, in its most recent FTCA decision concerning the *Feres* doctrine, this Court expressly reaffirmed the vitality of the doctrine. See *United States* v. *Johnson*, 481 U.S. 681 (1987). In *Johnson*, the Court noted that it had never deviated from *Feres* in the decades since that case was decided, and that Congress, which had been on notice of this Court's decisions in the area, had not amended the FTCA to overturn *Feres*. See *id.* at 686. Twenty-three years after *Johnson*—and with more than 60 years of precedent now supporting *Feres*—this Court should be even more reluctant to reexamine that settled statutory ruling. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (holding that *stare decisis* has special force in the area of statutory interpretation).

The Court concluded when it decided *Johnson* that the rationales underlying the decision in *Feres* remained applicable, 481 U.S. at 688-691, and those rationales have just as much force today. Moreover, contrary to petitioner's contention, *Feres* has not proven "unworkable" in practice. Pet. 33. Petitioner cites various lower

court opinions that criticize the *Feres* doctrine in the FTCA context (see *ibid.*), but none of those opinions contends that *Feres* is difficult to apply. All of the courts of appeals apply the same fact-based approach in determining whether an FTCA claim by a service member resulted from service-related activity, and all focus on similar factors, including the service member's duty status at the pertinent time, the nature of the service member's activity, and its location (*i.e.*, on or off base). See, *e.g.*, *McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir.), cert. denied, 552 U.S. 1038 (2007); *Speigner* v. *Alexander*, 248 F.3d 1292, 1298 (11th Cir.), cert. denied, 534 U.S. 1056 (2001); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Wake* v. *United States*, 89 F.3d 53, 57-61 (2d Cir. 1996). There is nothing unworkable about that kind of analysis, which is no more difficult to apply than any other fact-based test.

In the years since *Johnson*, the Court has repeatedly denied petitions for writs of certiorari urging that *Feres* be reexamined. See, *e.g.*, *Matthew* v. *Department of the Army*, 130 S. Ct. 101 (2009); *McConnell* v. *United States*, 552 U.S. 1038 (2007); *Costo* v. *United States*, 534 U.S. 1078 (2002); *O'Neill* v. *United States*, 525 U.S. 962 (1998); *George* v. *United States*, 522 U.S. 1116 (1998); *Bisel* v. *United States*, 522 U.S. 1049 (1998); *Schoemer* v. *United States*, 516 U.S. 989 (1995); *Hayes* v. *United States*, 516 U.S. 814 (1995); *Forgette* v. *United States*, 513 U.S. 1113 (1995); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991). The Court should follow the same course here.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2011