No. 19-690

In the Supreme Court of the United States

TINA NEVILLE, PETITIONER

v.

JANET DHILLON, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the doctrine of intra-military immunity described in *Feres* v. *United States*, 340 U.S. 135 (1950), a dual-status Air National Guard technician may file suit against her superiors under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on allegations of discrimination in connection with activities that are integral to the military mission.

2. Whether the lower courts should have issued a writ of mandamus requiring the Equal Employment Opportunity Commission (EEOC) to take additional steps to obtain relief on petitioner's behalf from other governmental agencies.

3. Whether the lower courts should have appointed separate counsel to represent the EEOC, rather than allowing representation by attorneys from the Department of Justice.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Neville v. *Yang*, No. 15-cv-1032 (Dec. 5, 2016)

United States District Court (W.D. Tex.):

Neville v. *Lipnic*, No. 16-cv-1231 (Mar. 29, 2018)

United States Court of Appeals (5th Cir.):

Neville v. *Lipnic*, No. 18-50438 (June 28, 2019)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is reprinted at 778 Fed. Appx. 280. The opinion of the district court (Pet. App. 22a-52a) is not published in the Federal Supplement but is available at 2018 WL 8131053.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2019. A petition for rehearing en banc was denied on August 30, 2019 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on November 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns an attempt by a military technician (dual status) in the Air National Guard to sue the Secretary of the Air Force and others under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to recover for alleged discrimination arising out of activity incident to her military service.

A. Legal Background

1. Congress has exercised its constitutional powers over matters of national defense by establishing the armed forces of the United States, including reserve components of the Army, Navy, Marine Corps, Coast Guard, and—as relevant here—Air Force. See 32 U.S.C. 101(2). The reserve components of the Air Force are the Air National Guard of the United States and the Air Force Reserve. See 10 U.S.C. 10101(6) and (7), 10110, 10111.

"The National Guard is the modern Militia reserved to the states by Art. I § 8, cl. 15, 16 of the Constitution." *Illinois Nat'l Guard* v. *Federal Labor Relations Auth.*, 854 F.2d 1396, 1397 (D.C. Cir. 1988) (citing *Maryland* v. *United States*, 381 U.S. 41, 46 (1965), reh'g granted, aff'd in part, modified in part, judgment vacated, 382 U.S. 159 (1965)). It "occupies a unique position in our country's federal structure: the day-to-day operation of National Guard units remains under the control of the states," but the Guard is "armed and funded by the federal government, and trained in accordance with federal standards." *Id.* at 1398.

At the federal level, the National Guard Bureau (Bureau) has been delegated the authority for developing and issuing "directives, regulations, and publications consistent with approved policies of the Army and Air Force,

as appropriate," 10 U.S.C. 10503(11), and "issu[ing] orders to organize, discipline and govern the National Guard," *Association of Civilian Technicians, Inc.* v. *United States*, 601 F. Supp. 2d 146, 152 (D.D.C. 2009) (citing 32 U.S.C. 110), aff'd, 603 F.3d 989 (D.C. Cir. 2010). Among other things, the Bureau may establish "policies and programs for the employment and use of National Guard technicians" like petitioner. 10 U.S.C. 10503(9).

The Secretary of the Air Force and the Chief of the Bureau, however, have no military command or control over the state National Guards by which to directly compel compliance with those policies and programs. 10 U.S.C. 10502(c), 10503. "Since passage of the federal Militia Act of 1792, each state has been required to have an Adjutant General to serve as the administrative head of that state's militia or, in more modern terms, the state's National Guard." *Walch* v. *Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 291 (5th Cir. 2008). Accordingly "[t]he governor and his or her appointee, the Adjutant General, command the Guard in each state." *Charles* v. *Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994). If a State refuses to follow Department of the Air Force or Bureau regulations or policies, the only federal remedy is withholding federal funds or privileges. 32 U.S.C. 108; *Knutson* v. *Wisconsin Air Nat'l Guard*, 995 F.2d 765, 767 (7th Cir.), cert. denied, 510 U.S. 933 (1993); *Charles*, 28 F.3d at 1315-1316.

2. 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 Maj. Michael J. Davidson & Maj. Steve Walters, *Neither Man nor Beast: The*

National Guard Technician, Modern Day Military Minotaur, Army Law 49, 51 (Dec. 1995). The National Guard technician program continued after 1933, when Congress created two overlapping but distinct organizations—the National Guard of the various States and the National Guard of the United States—and required all persons enlisted in a state National Guard to be simultaneously enlisted in the National Guard of the United States. See *Perpich* v. *Department of Def.*, 496 U.S. 334, 345 (1990). Under that congressional design, members of a state National Guard, including National Guard technicians, are also reserve members of the military. See *id.*; 10 U.S.C. 10143 (discussing the Selected Reserve, which includes National Guard members).

In 1968, Congress conferred federal civilian employee status on National Guard technicians. See National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755. Congress did so in order to aid recruitment for the positions by providing these "essentially state military personnel" with federal retirement and fringe benefits, while still preserving "the essential military requirements" of the positions. *American Fed'n of Gov't Emps.* v. *Federal Labor Relations Auth.*, 730 F.2d 1534, 1543 (D.C. Cir. 1984) (*AFGE*). The 1968 Act recognizes two types of National Guard technicians: dual-status, 32 U.S.C. 709(b), and non-dual-status, 32 U.S.C. 709(c). A dual-status technician must be a member of the National Guard, hold the military grade specified for that position, and wear a military uniform while performing his or her duties. See 32 U.S.C. 709(b). Dual-status technicians perform full-time work as civilians in their military units, but also serve as members of the military in the same or related units, and are available

at all times to be called into active service. See *AFGE*, 730 F.2d at 1545. They are assigned substantially equivalent duties in their civilian and military positions and usually report to the same military supervisor in both capacities.

3. Like other members of the military, dual-status technicians have numerous remedies for service-related discrimination claims. For example, a dual-status National Guard technician who believes that he or she has suffered service-related discrimination may seek assistance from a military Equal Opportunity advisor or any member of his or her unit chain of command and may file a formal or informal complaint. See Nat'l Guard Reg. 600-22, ¶¶ 2-1, 2-2 (Mar. 30, 2001). A formal complaint triggers a review, and, if appropriate, an investigation of the technician's allegations by the applicable level of command. See *id.* ¶ 2-2.c. If the complaint is not resolved to the technician's satisfaction, the complaint is automatically referred to successively higher levels of command. See *id.* ¶ 2-2.e and f. Dual-status National Guard technicians also may pursue relief from the Air Force Board for Correction of Military Records, see 32 C.F.R. 865.2(a), and 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).

Members of the military, however, are not covered by all of the same anti-discrimination programs as ordinary civilian employees. In particular, the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces, based on the doctrine of intra-military immunity described in *Feres* v. *United States*, 340 U.S. 135 (1950), and the principle that waivers of sovereign immunity are

strictly construed. See, *e.g.*, *Walch*, 533 F.3d at 298; *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.), cert. denied, 522 U.S. 815 (1997). And for those same reasons, the courts of appeals have 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 *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 96 (2d Cir. 2004); *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007); *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, 443-444 (6th Cir. 2001); *Hupp* v. *United States Dep't 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).

In 2017, Congress acted to clarify Title VII's limited application to dual-status military technicians. See National Defense Authorization Act for Fiscal Year 2017 (2017 NDAA), Pub. L. No. 114-328, Tit. V, Subtit. B, § 512, 130 Stat. 2112. Following Congress's 2017 amendments, it is now clear that where a dual-status military technician seeks to challenge an employment action that "concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components," any "right of appeal" with respect to that employment action "shall not extend beyond the adjutant general of the jurisdiction concerned." 32 U.S.C. 709(f)(4). If the employment action does *not* concern such activity, the dual-status military technician may, "with respect to an appeal," invoke "section 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16)." 32 U.S.C. 709(f)(5) (footnote omitted). Among other things, that provision allows the Equal Employment Opportunity

Commission (EEOC) to enforce prohibitions on discrimination "based on race, color, religion, sex, or national origin" through "appropriate remedies." 42 U.S.C. 2000e-16(a) and (b).

B. Factual And Procedural Background

1. At all relevant times, petitioner was employed as a dual-status National Guard Technician at Lackland Air Force Base in San Antonio, Texas. See Pet. App. 24a; see also 10 U.S.C. 10216(a); 32 U.S.C. 709. She was an aircraft mechanic working on F-16 fighter jets, and assigned to the 149th Fighter Wing, Flight Line Section. See Pet. App. 25a. Petitioner's job as an Air National Guard aircraft mechanic required her to "ensur[e] that very complex military aircraft are prepared to carry out the day to day training mission, as well as the world wide mobility mission as part of the Air Force and its Air Expeditionary Force (AEF) structure." C.A. ROA 852. Petitioner's employment as a dual-status National Guard technician also required her to maintain membership in the Texas Air National Guard, where she held the rank of Master Sergeant (MSgt.). See Pet. App. 24a-25a.

As a dual-status military technician, petitioner was considered to be in a civilian position during the regular work week, and in a military position while training and on weekends. See C.A. ROA 698. At all times, however, she had the same aircraft mechanic duties; reported to the same military supervisor (MSgt. Pedro Soriano); and wore her military uniform. See C.A. ROA 698, 723. Accordingly, as the EEOC administrative judge found, her civilian and military positions were "inextricably linked." C.A. ROA 708 n.11. As petitioner testified, "[t]he mission is the mission, whether it's during the week or on the weekend. You still have the same . . .

job, the same sense of urgency, the same responsibilities." C.A. ROA 723 (citation omitted).

In March 2006, petitioner had a hysterectomy, and endometrial tissue was removed from some of her internal organs. See Pet. App. 25a. Petitioner alleges that she notified her supervisors of her physicians' orders that she be placed on light duty, but that MSgt. Soriano nevertheless assigned her full-duty work because "guys don't have hysterectomies," *id.* at 26a (citation omitted), and that as a result, she suffered a serious injury when attempting to remove a twenty-pound ladder that was leaning against an airplane, *ibid.* That injury, petitioner alleges, required her to take almost a year of leave, and ultimately led to her medical retirement. See *id.* at 26a-27a. She also alleges that MSgt. Soriano gave her a "Fully Successful" performance appraisal in 2007, as opposed to the "Outstanding" appraisal she had received in previous years, and that MSgt. Soriano said he would not give an "Outstanding" rating to employees whom he and "the guys did not respect." *Id.* at 26a (citations omitted).

2. In November 2007, petitioner filed a complaint with the EEOC alleging that the order to full duty and her "Fully Successful" performance appraisal constituted illegal gender and disability discrimination. See Pet. App. 27a. An EEOC administrative judge found that petitioner had demonstrated illegal gender discrimination based on both allegations. See *id.* at 27a-28a. The administrative judge ordered that petitioner be granted back pay with interest and benefits, compensatory damages, and attorney's fees and costs. See *id.* at 28a. The administrative judge also ordered the Bureau to provide anti-discrimination training and to post a notice of discrimination for 12 months, and recommended

that the Bureau take disciplinary action against MSgt. Soriano. *Ibid.*

The Department of the Air Force and the Bureau appealed that decision to the EEOC's Office of Federal Operations (OFO), which upheld the administrative judge's finding of gender discrimination. See Pet. App. 28a-29a. As relief, the OFO ordered an increased award of $150,000; backpay, attorney's fees and other remedial actions; and an amendment of petitioner's 2006-2007 performance evaluation. *Id.* at 29a. The OFO also ordered the Bureau to provide training to all management officials at Lackland Air Force Base, to take disciplinary action against responsible government officials, and to post a notice of discrimination. *Ibid.*

The Texas Adjutant General subsequently advised petitioner that the OFO lacked jurisdiction over her complaint because her allegations "pertain to the military aspects of [her] employment and concern the manner in which military personnel within my command addressed your situation." C.A. ROA 814. The Adjutant General advised petitioner that instead, pursuant to National Guard policies, he would appoint a military investigating officer to review the matter and make recommendations, and that he would make a final decision regarding the matter, after allowing her an opportunity to respond. *Ibid.*

Petitioner then filed a petition for enforcement (PFE) with the EEOC under regulations set out at 29 C.F.R. 1614.503(a). The EEOC granted the PFE and, in addition to the relief it had previously granted, ordered the Texas National Guard to compensate petitioner for any overtime and provide at least sixteen hours of in-person training to all management officials

and employees at Lackland Air Force Base. See Pet. App. 30a-32a.

3. One day prior to the EEOC's order granting the PFE, petitioner filed a petition for a writ of mandamus in the United States District Court for the District of Columbia, naming as defendants the Chairperson of the EEOC, the Secretaries of the Department of Defense and the Air Force, the Chief of the Bureau, and the Adjutant General of the Texas National Guard. See Pet. App. 34a; C.A. ROA 17-29. Petitioner sought a writ of mandamus requiring the EEOC to enforce its OFO and PFE decisions; a new accounting of petitioner's back pay and benefits with accrued interest; and attorney's fees and costs. Alternatively, petitioner sought an order requiring the other defendants to comply with the OFO and PFE decisions. See C.A. ROA 633.

Petitioner also sought to disqualify the United States Department of Justice from representing both the EEOC and the other federal defendants, arguing that the interests of the EEOC and the other federal defendants conflict. See C.A. ROA 591. The district court rejected that request, concluding that the Attorney General has exclusive authority to represent the interests of the United States in litigation. *Ibid.* On venue grounds, the court then transferred this case to the United States District Court for the Western District of Texas. See C.A. ROA 1381-1394.

The Texas district court dismissed the petition for a writ of mandamus. Pet. App. 22a-52a. The court concluded that petitioner's mandamus claim against the EEOC failed because she had not established that the EEOC had a clear, non-discretionary obligation to continue attempting to obtain compliance with the OFO and PFE decisions after petitioner initiated judicial

proceedings. See *id.* at 38a-40a. As to petitioner's mandamus claims against the federal and state military defendants, the court found those claims barred under the intra-military immunity doctrine. *Id.* at 43a-52a; see *Feres*, 340 U.S. at 146 (holding that the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, does not cover injuries that "arise out of or are in the course of activity incident to [military] service * * * in the absence of express congressional command"); pp. 5-6, *supra* (collecting courts of appeals cases holding *Feres* applicable to Title VII claims). In doing so, the court noted that the actions underlying petitioner's claims occurred on an Air Force base; petitioner performed the same military tasks—servicing F-16 fighter jets—while working in both her civilian and military capacities; and adjudicating her claims and providing relief "would require the Court to conduct a highly intrusive inquiry into military affairs and personnel decisions that are integral to the military structure." Pet. App. 50a; see *id.* at 48a-51a.

4. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-17a. The court rejected petitioner's claim for mandamus relief against the EEOC on the ground that, under 29 C.F.R. 1614.107(a)(3) and 1614.409, an employee's decision to pursue Title VII claims in federal court "typically mandates dismissal of the EEOC complaint and 'precludes the EEOC from entertaining an appeal of that dismissal.'" Pet. App. 12a (quoting *Walch*, 533 F.3d at 304 n.7).

Turning to petitioner's claims for mandamus relief against the federal and state military defendants, the court of appeals emphasized that regardless of whether she was operating in her civilian or military capacity, the tasks petitioner performed "are military in nature

and integral to the military mission," and that petitioner's "petition for writ of mandamus sought to compel the defendants to, among other things, revise her performance appraisal, provide personnel training at Lackland [Air Force Base], take disciplinary action against various military personnel, and restore benefits including in-grade steps and promotions." Pet. App. 16a. "Based on all of that," it held, "the district court correctly concluded that adjudicating Neville's claims would require the court to review questions of military decision-making barred by the *Feres* doctrine." *Ibid.*

Finally, the court of appeals held that the District of Columbia district court did not abuse its discretion by declining to order separate counsel for the EEOC, because the Attorney General "has 'plenary power over all litigation to which the United States or one of its agencies is a party.'" Pet. App. 17a (citation omitted).

ARGUMENT

Petitioner contends that this Court's review is warranted to address three separate issues, but identifies no relevant division among the circuits regarding any of those issues or any error that merits further review. The court of appeals correctly held that petitioner's claims against the federal and state military defendants are barred by the doctrine of intra-military immunity because they arise out of activity integrally related to military service and seek relief that would interfere with military operations and decisionmaking. Petitioner identifies no court of appeals that would allow such claims to go forward in light of those findings. The court of appeals also correctly denied petitioner's request for mandamus relief directing the EEOC to take additional steps to enforce the relief it granted petitioner, because the EEOC's authority to seek further

enforcement of an administrative award ends once a petitioner seeks judicial relief. And petitioner's suggestion that the district court abused its discretion by refusing to appoint separate counsel to represent the EEOC is likewise incorrect, because the Department of Justice has exclusive authority to defend the EEOC in a suit like this one.

A. The Court Of Appeals Correctly Held That Petitioner's Tort Claims Are Barred By Intra-Military Immunity

1. This Court has long recognized that absent an "express congressional command," members of the military generally may not sue the government for injuries that "arise out of or are in the course of activity incident to [military] service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). See *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 667 n.1, 673-674 (1977) (applying *Feres* to bar a claim by a National Guard officer). That intra-military immunity doctrine is related to the more general principle 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).

Intra-military immunity has been applied to a wide range of potential claims. In *United States* v. *Stanley*, 483 U.S. 669 (1987), and *Chappell* v. *Wallace*, 462 U.S. 296 (1983), for example, this Court extended the doctrine to "nonstatutory damages actions for injuries arising out of military service," *Stanley*, 483 U.S. at 678. See *id.* at 709 (O'Connor, J., concurring in part and dissenting in part) ("*Chappell* and *Feres* must be read together; both cases unmistakably stand for the proposition that the special circumstances of the military man-

date that civilian courts avoid entertaining a suit involving harm caused as a result of military service."). And of particular relevance here, the courts of appeals have uniformly concluded that intra-military immunity precludes Title VII suits by uniformed members of the armed forces and dual-status military technicians whose claims are based on alleged discrimination that is sufficiently connected to their military service. See pp. 5-6, *supra* (citing cases). Instead, members of the military (including dual-status military technicians) are entitled to seek various administrative remedies for service-related discrimination claims. See p. 5, *supra*.

Petitioner contends (Pet. 13-17) that "[t]he law has always allowed Dual-Status Technicians access to the EEOC process" to pursue Title VII claims. Pet. 13 (emphasis omitted). Petitioner was not denied access to that administrative process here, however. See Pet. App. 3a-6a (describing petitioner's administrative proceedings). Instead, the relevant question is whether, after utilizing the EEOC's administrative process, petitioner had a further right to bring a Title VII suit *in federal court*. As to that issue, petitioner agrees (Pet. 18) that "the *Feres* doctrine of intra-military immunity bars civil claims which relate to military activity or a military decision."

2. Petitioner further contends (Pet. 18-21) that the courts of appeals have adopted meaningfully different tests to determine whether a discrimination claim is service-related for purposes of *Feres*, and that the discrimination claims she presents here are not related to her military service. Neither contention has merit.

a. Based on the principles of intra-military immunity reflected in *Feres* and other related cases, every court of appeals to have addressed the issue has held

that dual-status military technicians may not bring Title VII suits against the military based on service-related activity.

Some courts of appeals have applied that principle on a categorical basis, holding that because a dual-status technician's job is "irreducibly military," such technicians' claims will always be subject to *Feres*. *Bowers* v. *Wynne*, 615 F.3d 455, 459 (6th Cir. 2010) (citation omitted); *Wright* v. *Park*, 5 F.3d 586, 588 (1st Cir. 1993). Other courts of appeals, including the Fifth Circuit, have undertaken a "case-by-case approach when presented with this issue." Pet. 19. The precise wording those courts have used to articulate that approach varies slightly, but all focus on the core concept of service-related activity as announced in *Feres*.[1]

Based on these various formulations, petitioner argues (Pet. 18) that "the reach of *Feres* is uncertain in cases regarding national guard technicians." Petitioner

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[1] See, *e.g.*, *Wetherill* v. *Geren*, 616 F.3d 789, 798 (8th Cir. 2010) (applying the *Feres* "incident to military service" test as such, and noting that other circuits' formulations of that test are designed merely "to ask, as applied to a particular set of facts or a particular legal claim, whether the injury was incident to military service"), cert. denied, 564 U.S. 1037 (2011); *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007) (claim barred if it "arise[s] in whole or in part out of the military aspects of the claimant's job"); *Overton* v. *New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 95 (2d Cir. 2004) (claim barred if it challenges conduct "integrally related to the military's unique structure" or is not "purely civilian"); *Brown* v. *United States*, 227 F.3d 295, 299 (5th Cir. 2000) (claim permissible if it "aris[es] purely from an [Air Reserve Technician's] civilian position," but barred if it "originate[s] from [the technician's] military status"), cert. denied, 531 U.S. 1152 (2001); *Mier* v. *Owens*, 57 F.3d 747, 748 (9th Cir. 1995) (claim barred if challenged conduct is "integrally related to [the] military's unique structure"), cert. denied, 517 U.S. 1103 (1996).

does not identify, however, a single case in which a court of appeals has held that a Title VII claim by a dual-status technician did not arise out of activity incident to military service. Cf. *Bowers*, 615 F.3d at 459 ("[E]very court having occasion closely to consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature.") (quoting *Leistiko* v. *Stone*, 134 F.3d 817, 821 (6th Cir. 1998) (per curiam)).[2] That consensus reflects the fact that while a purely civilian claim involving a dual-status technician might "exist[] in theory," it does not necessarily "exist in practicality." *Norris* v. *McHugh*, 857 F. Supp. 2d 1229, 1234 n.5 (M.D. Ala. 2012); see *id.* at 1234 & n.5 (collecting cases applying the more plaintiff-friendly case-by-case approach of the Fifth Circuit and noting that "none found the dual-status technician's claim to be justiciable").

b. Even if there were a meaningful practical difference between the formulations of the service-relatedness test used in the lower courts, petitioner seeks review of an appellate decision that applies the case-by-case approach that is more favorable to her claims. See Pet. 19-20. Petitioner's arguments (Pet. 20-21) that the court of appeals erred in its application of that standard to this particular case are incorrect, and in any event do not warrant this Court's review.

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[2] In *Laurent* v. *Geren*, No. 2004-24, 2008 WL 4587290 (D. V.I. Oct. 10, 2008), the district court allowed a discrimination suit by a dual-status technician to proceed in an unpublished opinion. But in *Filer* v. *Donley*, 690 F.3d 643 (2012), the Fifth Circuit explained why allowing the kind of hostile-work-environment claim at issue in *Laurent* would substantially interfere with the military mission. See *id.* at 649-650.

As the court of appeals correctly held, petitioner's discrimination claims arose out of activity that was "military in nature and integral to the military mission." Pet. App. 16a. The underlying events all occurred on Lackland Air Force Base. *Ibid.* Petitioner reported to the same military officer, MSgt. Pedro Soriano, in both her military and civilian capacities; "performed the same mechanic tasks of servicing F-16 fighter jets in both her civilian and military capacities as a [dual-status technician]"; and was required to wear her military uniform at all times. *Ibid.*; see C.A. ROA 2036.

Petitioner argues (Pet. 20) that her Title VII claims are not related to her military status because she was working on a "civilian flight line" when her injury occurred; because she was not on drill at the time any of the actions about which she complains occurred; and because part of her requested relief is to rectify her civilian performance evaluations. As noted, however, the "civilian flight line" to which petitioner refers involved servicing F-16 fighter jets, the same job she had while working in her military capacity, under the same military supervisor, and while in her military uniform. The fact that she was not on drill while performing F-16 maintenance does not alter the fundamentally military nature of her employment.

The nature of petitioner's requested relief further demonstrates the applicability of *Feres* to her claims. If petitioner's mandamus claims were granted, a court "would have to issue an order compelling" the Secretary of Defense, Secretary of the Air Force, and Chief of the Bureau to (1) "revise [petitioner]'s 2006-2007 performance appraisal;" (2) "provide at least 16 hours of in-person training to all management officials and employees in the 149th Fighter Wing at Lackland Air Force

Base, regarding their responsibilities with respect to Title VII"; (3) "take appropriate disciplinary action against the responsible management officials and coworkers involved in the [alleged] harassment," including MSgt. Soriano; (4) "post a notice of discrimination" at Lackland Air Force Base; and (5) "restore [petitioner]'s benefits, including [petitioner]'s seniority, sick and annual leave, health and life insurance, any in-grade step(s) and/or promotion(s) to which she would have been entitled." Pet. App. 49a-50a. To engage in such extensive intervention—rather than permitting the military to address claims of unlawful discrimination through its own administrative processes—would threaten to disrupt the "peculiar and special relationship of the soldier to his superiors," to undermine military "discipline," and to interfere with the conduct of the military mission. *Chappell*, 462 U.S. at 299 (citations omitted); see *United States* v. *Shearer*, 473 U.S. 52, 58 (1985) (emphasizing that courts should not interfere with "the 'management' of the military" or "call[] into question basic choices about the discipline, supervision, and control of a serviceman").

c. Petitioner also suggests (Pet. 16-18) that amendments in the 2017 NDAA make *Feres* inapplicable to her claims. See 2017 NDAA § 512, 130 Stat. 2112 (32 U.S.C. 709(f)(4) and (5)). Those amendments state that "the provisions of * * * 42 U.S.C. 2000e-16 * * * shall apply" "with respect to an appeal" by a dual-status technician, unless the appeal "concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components." *Ibid.*

The 2017 NDAA amendments do not authorize petitioner's suit. The "appeal" to which those amendments refer is not the filing of a suit in district court, but

rather—as the Conference Report for the 2017 NDAA explains—an administrative appeal to the Merits Systems Protection Board or the EEOC. See H.R. Conf. Rep. No. 840, 114th Cong., 2d Sess. 1017 (2016) (stating that the amendment was intended to "clarify that military technicians, under certain conditions, may appeal adverse employment actions to the Merit Systems Protection Board and the Equal Employment Opportunity Commission"); see also Pet. 16 ("Congressional intent regarding a Dual-Status Technician's right *to utilize the EEOC* is further reflected in the NDAA 2017.") (emphasis added). There is thus no indication that Congress intended to displace the courts of appeals' consistent application of *Feres* to claims by dual-service technicians, see pp. 14-16 & n.1, *supra*—and certainly no clear statement to that effect, as would be necessary to find a waiver of the United States' sovereign immunity for Title VII *judicial* claims by dual-status military technicians. See, *e.g.*, *White Mountain Apache Tribe*, 537 U.S. at 472.

In any event, even if the 2017 NDAA had been intended to grant a right to bring those sorts of claims in federal court, that right would not apply in this suit. Petitioner sued in July 2015. See Pet. App. 6a n.1. The 2017 NDAA was not enacted until December 23, 2016, nearly eighteen months later. See 2017 NDAA, 130 Stat. 2000. And nothing in the 2017 NDAA suggests that the relevant amendments were intended to apply retroactively. See generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). Petitioner argues (Pet. 17) that the amendments merely "clarifi[ed]" existing law. But as discussed, see pp. 14-16 & n.1, *supra*, the courts of appeals have consistently rejected claims like petitioner's

for decades. Had Congress actually overruled that extensive body of precedent, its action doing so could not plausibly have been considered a "clarification." Indeed, petitioner's argument only drives home that Congress' amendment was meant to clarify access to an administrative appeal, not grant a new right of access to federal court.

B. The Court Of Appeals Correctly Rejected Petitioner's Mandamus Claims Against The EEOC

Petitioner separately contends (Pet. 25-27) that a writ of mandamus was necessary because the EEOC owed her a nondiscretionary duty to ensure that the administrative order granting her relief under Title VII was followed. The court of appeals correctly rejected that claim, see Pet. App. 9a-12a, and petitioner does not allege that the claim implicates any division in the lower courts.

1. As the district court noted, "[a] plaintiff who prevails at the EEOC level 'may petition the [EEOC] for enforcement' of its decision, if the plaintiff believes 'that the agency is not complying with the decision.'" Pet. App. 38a-39a (citation omitted). If the EEOC's OFO finds that the agency is not complying, "efforts shall be undertaken to obtain compliance." 29 C.F.R. 1614.503(b). If the OFO is unable to obtain satisfactory compliance, it is required to notify the Commission, see 29 C.F.R. 1614.503(d), which "*may* issue a notice [to the noncomplying agency] to show cause why there is noncompliance" or, where appropriate, "*may* refer the matter to the Office of Special Counsel for enforcement action." See 29 C.F.R. 1614.503(e) and (f) (emphases added). In addition, "[w]here the Commission has determined that an agency is not complying with a prior decision," the Commission must notify the complainant "of the right

to file a civil action for enforcement of the decision pursuant to Title VII * * * and to seek judicial review of the agency's refusal to implement the ordered relief." 29 C.F.R. 1614.503(g). The Commission lacks authority to itself bring suit against another federal agency, and the filing of a Title VII suit by the complainant requires the agency to dismiss his or her administrative complaint (as long as 180 days have passed since the filing of the complaint), see 29 C.F.R. 1614.107(a)(3), and "terminate Commission processing of [any] appeal," 29 C.F.R. 1614.409. The court of appeals correctly held that under these regulations, petitioner's filing of this suit terminated the EEOC's authority to take further action regarding her Title VII administrative complaint. See Pet. App. 12a.

2. Petitioner contends (Pet. 25-26) that the court of appeals erred by relying on 29 C.F.R. 1614.107(a)(3), which provides for the EEOC's dismissal of an administrative claim where the petitioner files a Title VII suit *prior to* the EEOC's ruling on her administrative claim. Here, petitioner filed her Title VII suit *after* the EEOC granted relief on her administrative claim. As noted, however, 29 C.F.R. 1614.409—which the court of appeals also cited, see Pet. App. 12a—provides that the EEOC "shall terminate Commission processing of [any] appeal" once the petitioner has elected to file a Title VII action in court. See Pet. App. 12a, 38a. That regulation required the EEOC to cease actions to enforce its awards once petitioner filed this suit. Petitioner does not argue otherwise, and certainly does not argue that the EEOC had a "clear and indisputable" obligation to continue its enforcement actions after she filed suit, as

would be necessary in order to warrant a writ of mandamus. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 381 (2004) (citations omitted).[3]

C. The Court Of Appeals Correctly Declined To Order That Separate Counsel Be Assigned To Represent The EEOC

Petitioner also contends (Pet. 27-30) that the lower courts erred in allowing the Department of Justice to represent both the EEOC and the other federal defendants in this case. That is incorrect. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party * * * is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. 516; see 28 U.S.C 519; 5 U.S.C. 3106. Representation of the EEOC in this case therefore could be provided only by Department of Justice attorneys acting under the direction of the Attorney General, unless some other authorization exists.

None does. While the EEOC has a limited grant of independent litigating authority in the lower courts to "bring a civil action against any respondent not a government, governmental agency, or political subdivision," 42 U.S.C. 2000e-5(f)(1), it lacks any such authorization to sue governmental defendants (such as the other defendants in this case) under Title VII or to represent itself in a suit in which it is named as a defendant.

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[3] Petitioner also contends (Pet. 27) that after she petitioned for mandamus, the EEOC "either continued or resumed responsibility to act on [her] case" by sending a letter to the National Guard regarding the 2017 NDAA amendments. This argument is misplaced: the letter did not address the merits of petitioner's administrative claim, much less purport to "resume[] responsibility" to act on it. *Ibid.*; see Pet. App. 9a (noting that this letter merely notified the defendants of what the 2017 NDAA requires).

Accordingly, it would have been inappropriate for the district court or court of appeals to appoint independent counsel to represent the EEOC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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