No. _____

In The Supreme Court of the United States

TINA NEVILLE,
Petitioner,

v.

VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commission; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau; JOHN F. NICHOLS, Major, Adjutant General-Texas Military,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Michael D.J. Eisenberg
Counsel of Record
LAW OFFICE OF MICHAEL D.J. EISENBERG
700 12th Street, NW, Suite 700
Washington, D.C. 20005
(202) 558-6371
michael@eisenberg-lawoffice.com

Counsel for Petitioner

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THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Contrary to Congress' clear intent, does the *Feres* Doctrine invalidate all remedies under Title VII for workplace discrimination experienced by a dual-status technician while performing her non-military duties as a civilian Aircraft Mechanic? Further, are some of the Circuits below, e.g., the Fifth Circuit, determining a dual-status technicians' ("DTS") EEOC access per 32 U.S.C. § 709 properly under the *incident to service* or *irreducibly military in nature* test which serves as a complete bar to civilian DTS discriminated in the civilian military workforce. Or are other Circuits correct in preventing EEO access to DTS where the cause of action is only *integrally related to military function* which does not serve as a complete bar to the EEO.

2. Faced with repeated refusals to comply by federal and state agencies, can the Equal Employment Opportunity Commission ("EEOC") shirk its duty to enforce its own decision that a federal employee experienced workplace discrimination?

3. Can multiple federal and state agencies be represented by the same counsel when clear conflicts of interest exist between these agencies?

PARTIES TO THE PROCEEDING

All the parties are listed out in the Caption on the cover.

STATEMENT OF RELATED CASES

United States District Court for the Western District of Texas (San Antonio Division)

TINA NEVILLE, Plaintiff v. VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commission; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau; JOHN F. NICHOLS, Major, Adjutant General-Texas Military, Defendant. (March 29, 2019)

United States Court of Appeals for the Fifth Circuit, No. 18-50438,

TINA NEVILLE, Plaintiff-Appellant v. VICTORIA LIPNIC, Acting Chair of the U.S. Equal Employment Opportunity Commission; PATRICK M. SHANAHAN, ACTING SECRETARY, U.S. DEPARTMENT OF DEFENSE; HEATHER WILSON, Secretary of the Air Force; GENERAL JOSEPH L. LENGYEL, Chief, National Guard Bureau; JOHN F. NICHOLS, Major, Adjutant General-Texas Military, Defendant-Appellee. (September 9, 2019)

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Neville v. Lipnic, 778 Fed. Appx. 280 (5th Cir. 2019), represents the Fifth Circuit's final decision on Ms. Neville's case and was decided on June 28, 2019. This decision appears at Appendix page 1a. Then the Fifth Circuit denied Ms. Neville's petition for rehearing *en banc* (Docket No. 5:16-CV-1231) on August 30, 2019. This denial appears at Appendix page 20a. *Neville v. Lipnic*, 2018 WL 8131053 (W.D. Tx. 2018), represents the decision from the Western District of Texas. Decided March 29, 2018, this decision appears at Appendix page 22a.

JURISDICTION

The United States Courts of Appeals for the Fifth Circuit issued its final decision on June 28, 2019. After this, on August 30, 2019, the Fifth Circuit denied Ms. Neville's petition for rehearing *en banc*. This Court has jurisdiction over Ms. Neville's claims under 28 U.S.C. §§ 1254 & 1331 (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Produced in the Appendix on Appendix Pages 53a-75a.

STATEMENT OF THE CASE

This petition arises from a more than decade old dispute between the EEOC, advocating for Ms. Neville's Title VII[1] rights, and the Department of Defense ("DoD"), United States Air Force ("USAF"), National Guard Bureau ("NGB"), and the Texas Air National Guard ("TXANG").[2] Discovering the origins of this dispute requires us to travel back to 2007, when Ms. Neville worked as a Dual-Status National Guard Technician ("dual-status technician") at Lackland Air Force Base in San Antonio, Texas. Appendix at 2a.[3] Specifically, Ms. Neville worked as a WG-12 Civilian Aircraft Mechanic; the record is void of any other female Aircraft Mechanic who worked in Ms. Neville's 25-member flight-line crew.

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[1] In this petition, Title VII refers to 42 U.S.C. § 2000e.

[2] Hereinafter the DoD, USAF, and NGB will be collectively referred to as "Federal Defendants", while TXANG will be referred to as "State Defendant". Collectively, all of the "defendants" will be referenced as "Respondents."

[3] During the weekdays, a dual-status technician works as a civilian federal employee, outside of the competitive service. *See* 32 U.S.C. § 709(e). However, on the weekends, dual-status technicians act as members of their state National Guard. § 709(b). This, as this Court has articulated in *Perpich v. Department of Defense*, 496 U.S. 334, 348 (1990), requires a dual-status technician to wear one of several hats at various times: as a Member of the National Guard, as a Member of the Federal Civilian Workforce and as a Member of the U.S. Military. See more detailed discussed in section I.e, *infra*.

I. Ms. Neville endured sexual harassment in her civilian role as a dual-status technician while working for the federal government and its agent.

a. Workplace Discrimination

Sadly, in 2007, Ms. Neville experienced workplace discrimination from her newly appointed immediate supervisor, Pedro Soriano. Appendix at 27-28a. The discrimination stemmed from Ms. Neville's March 2006 hysterectomy with a severe case of endometrioses[4] and subsequent complications. Because of her major surgery and Ms. Neville's ongoing recovery, Ms. Neville's doctors ordered her to be assigned to light-duty work. Ms. Neville promptly provided this documentation to her supervisors. Appendix at 25-26a. This light-duty modification had

[4] Endometrioses is "… an often painful disorder in which tissue that normally lines the inside of your uterus — the endometrium — grows outside your uterus. Endometriosis most commonly involves your ovaries, fallopian tubes and the tissue lining your pelvis. Rarely, endometrial tissue may spread beyond pelvic organs. With endometriosis, displaced endometrial tissue continues to act as it normally would — it thickens, breaks down and bleeds with each menstrual cycle. Because this displaced tissue has no way to exit your body, it becomes trapped. When endometriosis involves the ovaries, cysts called endometriomas may form. Surrounding tissue can become irritated, eventually developing scar tissue and adhesions — abnormal bands of fibrous tissue that can cause pelvic tissues and organs to stick to each other. Endometriosis can cause pain — sometimes severe — especially during your period. Fertility problems also may develop." Web MD, https://www.mayoclinic.org/diseases-conditions/endometriosis/symptomscauses/syc-20354656 (last viewed on November 15, 2019).

been honored in her civilian workplace for nearly a year until Mr. Soriano became her supervisor. *Id.*

Mr. Soriano refused to respect Ms. Neville's civilian medical light-duty slip and assigned her to strenuous work duties because "guys don't have hysterectomies." Appendix at 3a & 26a. On June 25, 2007, per Mr. Soriano's order, Ms. Neville was maintaining an aircraft. While lifting a 20-pound ladder from the plane, her medically unaccommodated lack of stomach muscle support from the surgery caused Ms. Neville to suffer and sustain a career-ending injury.[5] Ms. Neville is now 100% totally and permanently disabled.

On or about June 26, 2007, Ms. Neville received a performance evaluation from Soriano nearly identical in wording to her 2005-2006 evaluation with "Outstanding" ratings." However, on this appraisal, she only received a rating of "Fully Successful" instead of her previous ratings of "Outstanding." When Ms. Neville questioned Soriano about this rating, Soriano replied he would not give an "Outstanding" rating to employees who he and "the guys did not respect." Appendix at 3a.

On November 13, 2007, Ms. Neville filed on EEOC complaint alleging that the USAF and the NGB, in their civilian federal employee capacity, discriminated against her based on sex (female) and disability (complications from hysterectomy surgery).

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[5] On May 12, 2008, Ms. Neville returned to work in a light duty status. However, the modified position still exceeded her physical limitations. On August 26, 2008, Ms. Neville stopped reporting to work. Appendix at 3a.

Appendix at 3-4a. Ms. Neville's complaint eventually led to three important decisions by the EEOC, outlined below.

b. January 26, 2011, Administrative Law Judge Decision

On January 26, 2011, after several hearings, an EEOC Administrative Law Judge ("ALJ") decided ("2011 ALJ Decision") finding that Ms. Neville had established that she had been subjected to gender discrimination when: (1) on June 25, 2007, Soriano refused to honor her request for light duty (in her civilian capacity)[6], resulting in knee and back injuries; and (2) on June 26, 2007, Soriano issued a civilian annual performance appraisal rating of "Fully Successful" instead of "Outstanding" to Ms. Neville. Appendix at 4a.

In the 2011 ALJ Decision, because of the gender-based discrimination, the ALJ ordered relief in: (1) back pay with interest and benefits (to be calculated by the Agency); (2) non-pecuniary compensatory damages for the emotional and physical harm she suffered because of the gender discrimination for $92,500, and (3) attorneys' fees and costs of $63,675.03. *Id*. The ALJ also ordered the NGB to amend Neville's civilian 2006-2007 performance appraisal. *Id*. Finally, the ALJ ordered the NGB to provide EEO training, post a notice of discrimination for 12 months, and recommended that the NGB take disciplinary action against Soriano. *Id*.

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[6] Note the Military had already ordered Ms. Neville to be placed on light duty. *See* Appendix at 2-3a.

As of the time of this filing, the Federal and State Defendants, in their federal civilian capacity, have failed to carry out any of the remedies ordered by the EEOC.

c. August 1, 2013, Office of Federal Operations Decision.

The USAF and NGB subsequently issued a final order rejecting the ALJ's decision and appealed to the Office of Federal Operations ("OFO") at the EEOC.[7] Ms. Neville counter appealed to the OFO. The NGB did not contest the merits of the ALJ's findings of discrimination. Instead, it argued that the EEOC did not have jurisdiction over the matter because the personnel actions were military in nature despite the findings of the ALJ.

On August 1, 2013, nearly two and a half years after the Government filed its appeal, the EEOC's OFO issued a final decision ("2013 OFO Decision") regarding the appeal. Appendix at 5a; *see also* 29 C.F.R. § 1614.405. The 2013 OFO Decision, *inter alia*: (1) upheld the ALJ's decision finding of gender discrimination; (2) ordered an increased non-pecuniary award of $150,000 (an increase from the first award of $92,500) be paid to Neville within 60 days; (3) ordered the NGB to provide Neville back pay for the period between June 25, 2007, and August 26, 2008, as well as attorneys' fees and other remedial actions within 60 days; (4) ordered the NGB to amend Neville's civilian 2006-2007 performance within 60 days; (5) ordered the NGB to provide Title VII

[7] Appendix at 4-5a

training to all management officials at Lackland Air Force Base; (6) ordered the NGB to take disciplinary action against responsible civilian management officials; and (7) ordered the NGB to post a notice of discrimination. *Id.* .

The 2013 OFO Decision found that gender discrimination occurred while Ms. Neville operated in her civilian capacity, not during her weekend drill capacity in the National Guard nor while any U.S. Military active-duty Orders. *Id.* According to the 2013 OFO Decision, the EEOC found as a matter of fact that both the discriminatory performance appraisal and the gender-based harassment occurred while she was working as a *civilian* mechanic, and her supervisor and co-workers committed the discrimination in their *civilian* capacities. *Id.*

The decision instructed the NGB it had 60 days to comply with the decision. Appendix at 5a. On October 21, 2013, **81 days after** the 60-day compliance deadline imposed by the 2013 OFO Decision, Major General John F. Nichols, Adjutant General of the Texas National Guard, sent Ms. Neville a letter indicating that, under his authority under 32 U.S.C. § 709, the EEOC does not have jurisdiction over Ms. Neville's complaint. Appendix at 30a. His letter stated that the ALJ's and the OFO's determinations of jurisdiction were improper. *Id.* The letter stated that he would (now) order a military investigation and decide as to Ms. Neville's complaint, and allow Ms. Neville to respond, before he made "a

final decision from which no further appeal is authorized." *Id*..[8]

d. Petition for Enforcement

Due to the USAF's, NGB's, and TXANG's disregard of the 2013 OFO Decision, Ms. Neville filed a petition for enforcement ("PFE") of the order with the EEOC on December 17, 2013. Appendix at 6a (citing 29 C.F.R. § 1614.503(a)). A year and a half later, the OFO took no action against the Defendants. After giving the Agency ample time to act[9], *see Id*, Ms. Neville filed a *writ of mandamus*.

On July 2, 2015, one day after Neville filed her original petition for *writ of mandamus* in federal court, the EEOC issued its 2015 PFE Decision, and for the third time, found that: (1) at the time of the events underlying Ms. Neville's claims, she was acting as a federal civilian employee under the protection of Title VII; (2) the TXANG is a federal executive agency for Title VII; and (3) the TXANG

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[8] On March 20, 2015, after it conducted its "October 21,2013" investigation (which started six years after the incident [and four years after EEOC AJ made her initial decision]), MG Nichols found no fault by the military. Appendix at 30a. The record appears void of MG Nichols actually conducting an investigation – to the knowledge of Ms. Neville and her counsel, none of the witnesses were ever interviewed, including herself.

[9] Three-times over the 180-days this Court has determined for an agency to act in a reasonable amount of time. In *Wilson v. Pena,* 79 F.3d 154, 167 (D.C. Cir. 1996) (referencing *Grubbs v. Butz*, 514 F.2d 1323, 1328 (D.C. Cir. 1975) found no reason why a similar 180-day policy should not prevail for the petition for enforcement stage, "especially since any complainant who reaches that stage has necessarily already waited through at least the original agency complaint and one EEOC appeal."

discriminated against Ms. Neville based on her gender. S*ee* Appendix at 5-6a.

Besides the 2013 OFO Decision, the 2015 PFE Decision ordered the TXANG to: (1) pay Ms. Neville $150,000 in non-pecuniary compensatory damages, and $63,675.03 in attorneys' fees and costs, within 30 days; (2) compensate Ms. Neville for all back-pay, with interest and benefits, for the time between June 25, 2007 and August 26, 2008, within 30 days; (3) calculate and compensate Ms. Neville for any overtime; (4) amend Ms. Neville's 2006-2007 performance appraisal; and (5) provide at least 16 hours of in-person training to all management officials and employees at Lackland Air Force Base, 149th Fighter Wing, Flight Line Section, regarding Title VII responsibilities. *Id*.

Finally, the 2015 PFE Decision stated that, if the agencies failed to comply, then Ms. Neville has the right to file another PFE or "…file a civil action to enforce compliance with the Commission's order before or following [another] administrative petition for enforcement." *See* Appendix at 6a*(citing* 29 C.F.R. §§ 1614.407, 1614.408, 1614.503(g)). Throughout all proceedings in the EEOC and federal court, it remained undisputed that Respondents violated the 2011 ALJ Decision, the 2013 OFO Decision, and the 2015 PFE Decision.

REASONS FOR GRANTING THIS PETITION

I. Some Federal Circuits, including the Fifth Circuit, Refuse To Recognize Longstanding Principles Of The NGTA and Its Exception to *Feres*, Thereby Leaving Dual-Status Technicians Devoid Of Title VII Protection.

The Fifth Circuit erred in holding *Feres* barred Ms. Neville relief from the Respondents. Since 1968, Congress has allowed the NGB dual-status technicians ("DTS") access to the EEOC process. The Fifth Circuit's test of any activity a DTS performs that is *incident to service* would unilaterally deprive them EEOC access in their civilian capacity. Everything a DTS does in their civilian capacity would easily be deemed *incident to service* as the very nature of their civilian work provides technical assistance to the military. Thus, this *interpretation* would be contrary to Congress' intent as it effectively renders the EEO process a nullity regarding military technicians.

e. The Role of the National Guard Technicians.

The background of National Guard technicians can become confusing, as their roles relate to three areas of U.S. Code: Title 5 (Federal employees), Title 10 (the Federal military), and Title 32 (the National Guard). This relationship was well summarized by the Fifth Circuit in *Walch v. Adjutant General's Dept. of Texas*,

> The National Guard Technician Act, Pub.L. No. 90-486, 82 Stat. 755 (Aug. 13, 1968), created an unusual status, mixing state command with federal employment, combining civilian job positions with military leadership:

Congress has authorized the use of National Guard technicians since the National Defense Act of 1916. Previously defined as "caretakers and clerks" with duties limited to maintenance of National Guard supplies and equipment, technicians gradually expanded their role "to provide support in the administration and training of the National Guard military organization and for the day-to-day maintenance and repair of equipment which cannot be accomplished during normal military training periods."

Prior to 1968, all technicians, except those in the District of Columbia, were state employees paid with federal funds; approximately ninety-five percent of the technicians held Dual-Status as members of the National Guard. In the National Guard Technicians Act of 1968, **Congress converted technicians to federal employee status** to provide them a uniform system of federal salaries, retirement, fringe benefits, and to clarify their status under the Federal Tort Claims Act (FTCA). Further, this legislation sought to recognize both the military and state characteristics of the National Guard by providing administrative authority to the states over the technicians.

In *Perpich v. Department of Defense*, 496 U.S. 334, 348, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990), the Supreme Court noted that National Guard personnel "must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat-only one of which is worn at any

particular time." Similarly, Congress intended that National Guard technicians wear one of three different hats at any given moment. First, National Guard technicians wear a civilian hat as federal civilian employees. Specifically, technicians are "excepted service" civil servants employed under 32 United States Code § 709.

Second, as a condition precedent to the civilian position, the technician must separately obtain and maintain military membership in a state National Guard. Section 709(a) of [Title 32, U.S. Code] provides that individuals "may be employed as technicians only 'under regulations prescribed by the Secretary of the relevant military branch.'" Each technician "shall, while so employed, be a member of the National Guard and hold the military grade specified by the secretary concerned for that position." A technician must maintain membership in the National Guard or be terminated from the civilian technician position.

Third, the technician wears a "federal hat" as a member of either the Army National Guard of the United States or the Air National Guard of the United States, which are Reserve Components of the United States Army and Air Force. Because they are, respectively, components of the United States Army and United States Air Force, the Army and Air National Guard of the United States are part of the "Armed Forces" of the United States.

> State adjutant generals administer the National Guard Technician Act. Although normally state officers, when administering the National Guard Technician Act, they are considered agents of the federal government.

Walch v. Adjutant General's Dept. of Texas, 533 F.3d 289, 295-96 (5th Cir. 2008)(emphasis added).

f. The law has always allowed Dual-Status Technicians access to the EEOC process.

Since 1968, DTS are paid under the Civil Service payroll system just like other federal civilian employees. Appendix at 28a. They are given a civilian grade for their federal civilian position and a separate military grade for their military position. *Id.* DTS are entitled to the same fringe and retirement benefits as other federal civilian employees. And when they are in their civilian capacity, DTS are subject to Civil Service regulations (and not the Uniform Code of Military Justice). *Id.* DTS must simultaneously be a member of the National Guard and wear a military uniform during both their military and civilian duties. *Id.*

Generally, DTS act in their federal civilian capacity during the Monday through Friday workweek when performing the duties of their federal civilian technician positions. *Id.* DTS act in their military capacity when they report for drill practice one weekend a month or when called into active duty. *Id.* Further, while members of the military are not subject to federal furloughs, National Guard military technicians (including those of the Texas National Guard), like other civilian Department of Defense

civilian employees, are subject to being furloughed.[10] The record since Ms. Neville filed her EEOC matter with the Government is VOID of Ms. Neville being on any active-duty military or national guard orders during the time of the activities related to her claim, i.e., when Respondents failed to honor her light-duty slip[11] and when Respondents executed her federal employee work evaluation.

Section 717 of Title VII explicitly covers personnel actions affecting employees or applicants for employment in civilian positions within military departments. 42 U.S.C. § 2000e-16(a-b). EEOC Regulations thus provide that while the federal sector EEO process does not apply to uniformed members of military departments, the process does apply to civilian employees in military departments. *See* 29 C.F.R. §§ 1614.103(b)(l), (d)(l). . . and Congress did choose to specifically exempt certain categories of employees from EEOC jurisdiction under 717(a), such as the Library of Congress and the General Accounting Office. See 42 U.S.C. § 2000e-16(b). But DTS **were not included** in this list!

g. Congress has always intended the EEOC process to extend to Dual-Status Technicians.

Since the 1968 Amendment, a National Guard Technicians is a "federal civilian employee" that is "an employee…of the Department of the Air Force."

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[10] Texas Military Forces to be Affected by Federal Furlough Policy, Texas Military Forces News (Aug. 9, 2013). https://tmd.texas.gov/txmf-to-be-affected-ny-federal-furlough.

[11] Yet interestingly, the TXANG honored her light-duty slip in her military capacity. *See* Appendix at 25-26a.

32 U.S.C. §709(e) and again *clarified* by the 2017 NDAA in 2016. The EEO process does apply to the civilian employees in military departments. Congress intended to extend EEOC review to National Guard Technicians, Congress itself has actually **twice rejected** a proposition to the contrary.

First, in 2013, as the Senate Armed Services Committee was preparing the National Defense Authorization Act for Fiscal Year 2014 (which allocates military technician positions to state National Guards), there was language proposed which would explicitly limit all discrimination complaints to National Guard review (and remove any EEOC or judicial review).[12] This amendment was **rejected** and never even made it out of the Senate Armed Services Committee.[13]

Further, while Respondents has attempted to argue that Ms. Neville should have used the National Guard Military Discrimination Complaint System, that very system directs National Guard technicians to follow the EEOC program. This reaffirms that the National Guard (and several state guards)[14] agree

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[12] *See* Public Comments by Laborers' international Union of North America Comments on DOD/NGB Draft Language to Eliminate Discrimination Protections for National Guard Dual-Status Technicians. http://liunangdc.org/LIUNA%20Objections%20to%20Discrimination%20Claim%20Proposal%20Final.pdf.

[13] *See* Senate Committee On Armed Services, National Defense Authorization Act for Fiscal Year 2014 Report. Available at https://www.congress.gov/congressional-report/113thcongress/senate-report/44/1.

[14] For example, several state national guard handbooks direct their dual-status technicians to file with the EEOC. See

that the EEOC is an appropriate venue for Dual-Status Technician discrimination cases. On the Air National Guard's Equal Opportunity web page, (dual-status) technicians are directed to follow Title VII procedures.[15]

Congressional intent regarding a Dual-Status Technician's right to utilize the EEOC is further reflected in the NDAA 2017. In December 2016, Congress *clarified* the Dual-Status Technician Act.[16]

New Jersey National Guard EEO/EO Complaint Procedures (http://www.nj.gov/military/hro/eeo/forms/EEO%20COMPLAINT%20PROCEDURES.pdf); Missouri National Guard Tech Handbook (http://www.moguard.com/Assets/Pages/78/images/TechnicianHandbook2015.pdf), New York (http://www.goer.ny.gov/employee_resources/employee_handbook/2011employee_handbook.pdf).

[15] See http://www.nationalguard.mil/Leadership/JointStaff/J1/OfficeofEqualOpportunity/AirNationalGuard.aspx (last reviewed prior to June of 2016); Form NGB 333, 20000701 (version as of 2007); Form NGB 713-5-R, 20110705: National Guard Bureau Formal Complaint of Discrimination (version as of 2007).

[16] Congress clarified § 709 in 2016 with the 2017 NDAA. *See* Pub. L. No. 114-328, § 512, 130 Stat 2000, 2112. Specifically, § 512 of the NDAA added the following language to the Nation Guard Technicians Act ("NGTA"),

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, *and section 717 of the Civil Rights Act of 1991* (42 U.S.C. 2000e–16) *shall apply*;

Id. at 2112 (emphasis added).[16]

Congress clarified that Title VII's anti-discrimination protections apply to DTS, *as long as*, the matter is not covered by § 709(f)(4). Subsection (f)(4) states,

Congress wanted to express its clear intent it has always wanted DTS to be covered under Title VII and have appellate rights in the civilian chain-of-command. The Government has argued, incorrectly, this is somehow a creation of a new right made after the clarification language provided in 2017. Access to the EEO by DTS was not the creation of a new right. The legislative history defeats any Government

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a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components…

§ 709(f)(4). Paragraphs (1), (2), and (3) referred to above deal with conditions of employment facing a dual-status technician. Additionally, § 709(f)(3) relates to suspension, pay or rank reduction, and discharge of DTS. None of subsection of § 709(f), or any other part of the NGTA, would prohibit a dual-status technician from receiving relief (in the form of compensatory damages) under Title VII if the damages relate to the technician's civilian position.

§ 709(f) operates to keep DTS from bringing certain types of employment disputes to civil courts. Subsection (f)(3) specifically states the types of employment disputes that cannot be adjudicated by civil courts,

> a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned…

Id. at (f)(3). When issues pertaining to discharge, furlough, reduction in rank, come up, *only* the adjutant general of the relevant jurisdiction can adjudicate them. Any other employment disputes arising from the technician's civilian work fall under "the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991…" *Id*. at (f)(5).

argument this Congressional *clarification* is a new right that is just now available to DTS. Legislative history notes that Congress intended for the EEOC process to be open to DTS. *See* 162 Cong. Rec. H6376-03, H6691 ("The House recedes with an amendment that would **clarify** that military technicians, under certain conditions, may appeal adverse employment actions to the Merit Systems Protection Board and Equal Employment Opportunity Commission.") (Emphasis added).

h. The *Feres* Doctrine Does Not Bar Ms. Neville's Title VII Claim Because It Arose From Her Civilian Position

As outlined in *Rouleau v. D.C. National Guard*,[17] the *Feres* doctrine of intra-military immunity bars civil claims which relate to military activity or a military decision. However, the reach of *Feres* is uncertain in cases regarding national guard technicians, especially cases that involve fringe benefits and retirement issues. *See Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 92 (2d Cir. 2004).[18]

The standard used in several Circuits does not ask whether what guard technicians do is *irreducibly military in nature*. Instead, Title VII encompasses

[17] EEOC Case No. 531-2012-00204X.

[18] The Respondents themselves have admitted that National Guard technicians were intended to receive not just federal civilian pay but also benefits. Moreover, these benefits include filing Equal Pay Act claims (a right not available to active duty service members). *See Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006).

actions brought by civilian DTS unless the challenged conduct is integrally related to the military's unique structure. See *Meir v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995); *Luckett v. Bure*, 290 F. 3d 493, 499 (2d Cir. 2002); *Willis v. Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007); *Brown v. United States* 227 F.3d 295, 299 (5th Cir. 2000), and *Wetherill v. Geren*, 616 F.3d 789, 798 (8th Cir. 2010). The Federal Circuit created a useful listing of those claims DTS employees could not pursue as those "that relate to enlistment, transfer, promotion, suspension and discharge or that otherwise involve the military 'hierarchy.'" *Jentoft v. United States*, 450 F.3d 1342, 1345 (Fed. Cir. 2006).

Some Circuits require that Title VII claims arise "purely" from a dual-status technician's civilian position. 277 F.3d at 299. If the notion of a military duty even *brushes* against the technician's civilian job, the *Feres* Doctrine bars all civil relief. These Circuits follow the exact reasoning laid out in *Brown*. *See e.g. Overton*, 373 F.3d at 95 (using the "purely civilian" test found in *Brown*); *Bowen v. Oistead*, 125 F.3d 800, 805 (9th Cir. 1997) ("We have no trouble concluding that the personnel decisions contested by Bowen were made 'incident to service.'") (internal citations omitted).

i. Each DTS EEO matter must be looked at case-by-case.

Most federal courts have adopted a similar case-by-case approach when presented with this issue. Specifically, the Fifth Circuit has found that claims of discrimination from DTS must be analyzed case-by-case to determine if the alleged discriminatory act arose in the individual's military

capacity or civilian capacity, and that DTS may bring forth a Title VII claim if the discrimination arose in the technician's civilian capacity. *Brown v. United States*, 227 F.3d 295 (5th Cir. 2000) (accepting that claims arising purely from a Dual-Status Technician's civilian employment are cognizable under Title VII, but finding that plaintiff's claim only involved decisions impacting his military retention status).

The argument that Ms. Neville was working in a capacity so integral to the military mission she was wholly military falls short. Indeed, the PFE outlines even further than the OFO Decision, the analysis of Ms. Neville's civilian employment. Ms. Neville was working on a civilian flight line when her injury occurred, and witnesses concurred it was a civilian flight line. Part of Ms. Neville's claim was to rectify her civilian performance evaluations. In her military capacity, Ms. Neville's medical condition was respected.[19] It was only in her civilian capacity that discrimination resulted in Ms. Neville's harm. *See* Appendix at 5a

Conversely speaking the (lacking) records are quite clear: Ms. Neville was not on military drill or an active-duty status when her light duty was denied, she was not on military drill or an active duty status when she was working the civilian flight line when the subsequent injury occurred and she not on military drill or an active duty status when her supervisor discriminated against her in filling out her SF-50, a civilian federal employment form. (If we continued the extreme illogical thinking of the military, then all the while she was working in a

[19] See fn 11, supra.

"non"-civilian capacity, but instead on military drill or an active duty status, Ms. Neville is past due her military pay, military promotions, military retirement, etc. All DTS would need the same reevaluation.) *Id.* However, Congress is quite clear about not wanting to go down this rabbit hole.[20]

j. The Texas Air National Guard is a Federal Agent in this matter.

Recall, the Texas Air National Guard is a Federal Agency in all matters relevant to this case. Substantive federal law governs the National Guard and the state adjutant generals. The National Guard must be trained under federal standards and must be armed and funded by the United States Government. 39 Stat. 166; 32 U.S.C. §§ 501-505. And as this Court noted in *Perpich*, that "[t]he Federal Government provides virtually all of the funding, the material, and the leadership for the State Guard units." 496 U.S. at 351.

Federal courts have addressed whether the state National Guard and the state adjutant general are executive agencies. For example, the Fifth Circuit found in *Lipscomb v. Federal Labor Relations Authority,* 333 F.3d 611 (5th Cir. 2003), that National Guard Dual-Status Technicians were clearly federal employees by virtue of the National Guard Technicians Act (32 U.S.C. § 709(d)), and therefore, had the right under the Federal Service Labor-

[20] The law when passed more fifty-years ago does NOT exclude the EEOC from reviewing these employment actions. *See* Pub. L. 103–337, 108 Stat 2663. When Congress had an opportunity to change the law, it did not. See discussion in I.g, *supra*.

Management Relations Act (FSLMRA)(5 U.S.C. § 7101 *et. seq*.) to choose union representation. Specifically, the court found that because the Mississippi Adjutant General, the Mississippi National Guard, and the Mississippi Army National Guard were an employer of these federal employees and had the authority to direct the day-to-day work of these federal employees, they were effectively a federal executive agency subject to jurisdiction of the Federal Labor Relations Authority (FLRA) and the FSLMRA. *Id*. Because the TXANG acts as a federal agency when employing Ms. Neville, the EEOC process is open to her.

Rather than recognizing Congress' clear intent found in the NGTA, the Fifth Circuit refused to give Title VII relief to DTS. Federal circuits already recognize that Congressional commands overrule courts' interpretation of the *Feres* Doctrine. *Overton*, 373 F.3d at 93 ("the application of the *Feres* doctrine to Title VII actions such as the one before us is not straightforward. '[*Feres*] is a judicial doctrine leaving matters incident to service to the military' but only '*in the absence of congressional direction to the contrary*.'") (quoting *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988)) (emphasis added). Since 2016, Congress has given direction contrary to what federal circuits believe the *Feres* Doctrine requires. But the Fifth Circuit refuses to recognize how the *legislative history* behind the 2017 amendments to the NGTA clarified the relationship between the NGTA and the *Feres* Doctrine. § 709 mandates that courts give Title VII relief to DTS if the employment dispute does not trigger subsections (f)(1)-(4).

k. Discrimination is never conducted integrally related to military function.

Under either test, military duties cannot protect actions that are discriminatory.

In *Rouleau*, the ALJ was particularly persuaded by *Overton*, where Overton was an Aircraft Electrician who was passed over for promotion and harassed—while the promotion was related to specific military matters, *Feres* did not apply to the racial harassment claim because that is not "'integrally related to the military's unique structure." *Overton,* 373 F.3d at 97 (Pooler, Judge, concurring) (quoting *Luckett v. Bure,* 290 F.3d 493, 499 (2d Cir. 2002)).

Similarly, in *Laurent v. Green*, a sexual harassment case, the District Court stated:

> Laurent alleges that all of the conduct of which she complains occurred in the course of her civilian duties. Any failure of the Defendants to address such conduct affected Laurent in her capacity as a civilian. Creating a sexually hostile environment is not integrally related to the military's mission. *Overton* at 99. The Court would not be treading in an area that it does not belong by allowing Laurent to pursue a civil remedy for sexual harassment.

Laurent v. Green, 2008 WL 4587290 (D.V.I 2008) (unpublished). Here, the environment created that resulted in Ms. Neville's injuries was not furthering the military mission—the constant sexism, harassment, and mistreatment did not further the mission any more than it did in *Laurent* and thus is not subject to *Feres*.

l. The lower courts' decisions must be overturned and ordered to comply with the laws passed by Congress.

Congress directed the lower courts to apply the *Feres* Doctrine differently per Title VII. Congress identified the exact employment disputes it considered part of one's military status; as detailed in § 709(f)(1)-(4), employment disputes arising from military status are: (1) failure to meet military security standards, (2) separation, (3) reduction in force, (4) removal, (5) discharge, (6) suspension, (7) furlough without pay, or (8) reduction in rank or compensation. If an employment dispute *does not* fit into one of these eight categories, then Title VII applies. § 709(f)(5).

Because Ms. Neville's EEOC complaint does not fit into any of these eight categories, she had the benefits of Title VII. Ms. Neville's request for relief under Title VII arises from sex discrimination experienced while acting as a federal civilian. Appendix at 5a. Compensatory damages for workplace discrimination (and attorney's fees related to the case) involve none of the eight enumerated military status concerns outlined in § 709(f)(1)-(4).

Because Ms. Neville experienced workplace discrimination while acting as a federal civilian employee, the Texas National Guard and its Adjunct General were federal *civilian* employers at all times relevant and because an order to provide monetary compensation to a dual-status technician for the discrimination does not undermine military structure, this Court should grant Ms. Neville's Petition for Cert. Without clarification from this

Court, federal circuits will continue to blatantly ignore Congressional clarified commands found in the newly amended NGTA, which leaves DTS utterly unprotected by Title VII.

II. The EEOC Owes A Duty To Ms. Neville To Enforce Its Own Judgments.

According to the Fifth Circuit, "[t]he EEOC must vigorously enforce" anti-discrimination statutes. *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 473 (5th Cir. 2009). The EEOC owed a clear duty to Ms. Neville to enforce its decision; however, the Fifth Circuit decided this duty ended as soon as Ms. Neville filed a civil action in federal court. *Neville v. Lipnic*, 778 Fed.Appx. 280, 286 (5th Cir. 2019).

The Fifth Circuit relied on *Walch v. Adjutant General's Dept. of Texas*, 533 F.3d 289, 304 n. 7 (5th Cir. 2008) and 29 C.F.R. § 1614.107(a)(3) when it decided that the EEOC no longer owed a duty to enforce its own decision. *Neville*, 778 Fed. Appx. at 286. The 5th Circuit misuses *Walch* and § 1614.107; these authorities do not apply to Ms. Neville's specific situation. In *Walch*, the claimant sought judicial review *before* he received a final agency adjudication. Here, Ms. Neville seeks judicial assistance years *after* completing the EEOC process. *See* Appendix at 6a.

And § 1614.107 deals with dismissal of EEOC complaints that should occur *before* "a request for a hearing in a case[.]" § 1614.107(a). This section of the CFR instructs the EEOC to dismiss complaints early in the proceedings to protect employers from meritless or unnecessary complaints, *see Agro Distribution, LLC*, 555 F.3d at 473 ("the EEOC owes duties to employers as well: a duty reasonably to

investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit."). One ground for early dismissal arises when the complainant begins a proceeding in a civil court based on the situation. § 1614.107(a)(3).

§ 1614.107 directs the EEOC to terminate a complaint before a hearing if certain conditions are met. *Walch* understood this directive stating, "Major Walch invoked this [EEOC] process but then abandoned it." 533 F.3d at 303. Ms. Neville did not abandon her EEOC process; instead, the EEOC ALJ issued a full decision explaining why TXANG had responsibility under Title VII for workplace discrimination. The EEOC completed Ms. Neville's administrative appeals seeking enforcement against the Federal Defendants. *See* Appendix at 2-6a.

The EEOC enforces its own decisions, and when a PFE is made the EEOC must take all necessary action to ensure that the OFO's order is being followed. The PFE Decision now says Ms. Neville may either seek civil enforcement of the PFE Decision or file yet another PFE. Appendix at 6a. For over a year and a half, the EEOC had taken no further steps to enforce its own orders. The Petitioner who prevailed in her EEOC matter, three times, should not be further victimized because the EEOC will not enforce its own orders within a reasonable amount of time. This is a barrier to justice, which is capable of repetition yet evading review.

The EEOC claims any obligation it owed to Ms. Neville terminated when she filed her *Writ* back in March 22, 2016. Despite the EEOC's "claim", the

EEOC later either continued or resumed responsibility to act on Ms. Neville's case. On January 25, 2017, the EEOC Director of the Office of Federal Operations, Carlton M. Hadden, sent a letter to military, General Joseph L. Lengyel, Chief, National Guard Bureau and Colonel Stephen Mizak, Director, Equal Opportunity National Guard Bureau, the National Guard Bureau. In it, the EEOC reminded NGB that the NDAA of 2017 clarifies that federal employment discrimination claims arising from activities occurring when National Guard members are in civilian pay status are covered by Title VII. Appendix at 5-6a. If the EEOC's obligation to Ms. Neville terminated in 2016, it reassumed an obligation to Ms. Neville when it continued to act on her case.

The EEOC retained its duty to enforce its own order granting Ms. Neville damages because, in this circumstance, filing for a writ of mandamus versus a petition of enforcement in civil court did not extinguish such a duty.

III. Separate Counsel Should Have Been Ordered for the EEOC Because State Rules of Professional Conduct Apply to Cases In Federal Court, And the EEOC Had A Conflict Of Interest With The Other Defendants

When operating in federal court, lawyers retain the duty to follow state professional rules of conduct. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) ("The Texas Disciplinary Rules of Professional Conduct do not expressly apply to sanctions in federal courts, but a federal court may nevertheless hold attorneys accountable to the state

code of professional conduct.") (internal citation omitted). Thus, the Fifth Circuit specifically recognizes that state bar rules on attorney conduct can and do regulate conduct in federal courts.

Similarly, this Court holds attorneys responsible for violating state rules of conduct. *See In re Snyder*, 473 U.S. 634, 646 n. 6 (1985). Specifically, this Court said,

> The Court of Appeals was entitled, however, to charge petitioner with the knowledge of and the duty to conform to the state code of professional responsibility. The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court…

Id. In essence, a violation of the state rule on professional conduct in federal court makes an attorney subject to discipline by the federal court. So, an attorney in federal court *must* abide by state rules of professional conduct while operating in federal court.

The proceedings for Ms. Neville began in federal district court in Texas; therefore, the Texas rules of professional conduct apply to all attorneys. Under Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, an attorney cannot represent opposing parties to the same litigation and cannot represent two parties whose interests are materially and directly adverse to each other. The Comment to that same rule further explains that an impermissible

conflict develops where parties' positions are incompatible regarding an opposing party.

Such a conflict exists in the present case. The same attorney representing the EEOC is also representing the USAF and DoD. The EEOC is seeking to enforce the judgment for Ms. Neville and the USAF and DoD are arguing that the EEOC never had jurisdiction to decide the matter. To quote another Comment from the Texas Rules,

> [t]he representation of one client is 'directly adverse' to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.

Texas Disciplinary Rules of Professional Conduct, Rule 1.06, comment 6. Under this rule and guided by these comments, it would be impossible for this attorney to argue both this Court should enforce the EEOC decision, and, that the EEOC never had the authority to decide this matter. The EEOC should have been a co-petitioner with Ms. Neville.

The only reasonable conclusion is that the same attorney cannot ethically represent both the EEOC, and the USAF, DoD, and the TXANG. The

EEOC should have been given separate counsel from the other Federal defendants, and the TXANG.

CONCLUSION

This Petition for a *Writ of Certiorari* should be granted because (1) federal circuits are ignoring Congressional commands thereby making Title VII protections unviable to DTS in their civilian capacity, (2) the EEOC retained its duty to enforce its own judgment, and (3) the Federal and State Defendants could not be represented by the same counsel without violating rules of professional conduct.

Respectfully submitted,

/s/ Michael D. J. Eisenberg
Michael D. J. Eisenberg
Counsel of Record
Law Office of Michael D.J. Eisenberg
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 558-6371
michael@eisenberg-lawoffice.com

Attorney for Petitioner