No. 20-19

In the Supreme Court of the United States

GARY L. JACKSON, PETITIONER

v.

KENNETH J. BRAITHWAITE, SECRETARY OF THE NAVY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner is barred from suing the Secretary of the Navy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on alleged employment discrimination while petitioner was a uniformed member of the United States Marine Corps.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 949 F.3d 763. The opinion of the district court (Pet. App. 32a-47a) is reported at 313 F. Supp. 3d 302.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on July 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, who was an active duty member of the United States Marine Corps during the events at issue, brought suit in the United States District Court for the District of Columbia under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* He alleged that his supervising officers discriminated against him on the basis of his race, color, and sex. The district court ruled that the relevant provisions of Title VII, which are administered through regulations promulgated by the Equal Employment Opportunity Commission (EEOC), do not apply to uniformed members of the armed forces. See Pet. App. 32a-47a. Petitioner appealed, and the court of appeals affirmed that judgment. *Id.* at 1a-31a.

1. Petitioner Gary Jackson served in the United States Marine Corps from 1977 until January 1991, when he was honorably discharged. Pet. App. 3a. Twenty-three years later, in 2014, petitioner filed a complaint of discrimination with the Equal Employment Opportunity Office of the Marine Corps (EEO Office), alleging that, during his period of service with the Marines, he experienced discrimination prohibited by Title VII based on his race, color, and sex. *Id.* at 4a; C.A. App. 217-218. Petitioner alleged that his supervising officers retaliated against him for refusing to approve a warehouse inventory inspection in 1988 and for requesting an investigation by the U.S. Marine Corps Inspector General. Pet. App. 33a. He further alleged that he experienced discrimination when he was assigned to a different position at the warehouse where he worked, and retaliation when he sought a remedy through his chain of command. *Id.* at 33a-34a. Petitioner alleged that his supervising officer stated that the officer "preferred that the number of

Blacks not exceed the number of whites in any one section of the Warehouse," and that another individual heard the supervising officer say about petitioner's discharge that "we finally got Staff Sergeant Jackson * * * . That's one less Black Staff Sergeant." *Id.* at 3a (citation omitted). Petitioner also alleged that unlawful discrimination prevented him from re-enlisting after he was honorably discharged. *Id.* at 34a-35a.

The EEO Office dismissed petitioner's complaint under 29 C.F.R. 1614.103(d)(1), which provides that Title VII "does not apply to * * * [u]niformed members of the military departments." See Pet. App. 4a. The EEOC affirmed that determination and denied petitioner's request for reconsideration. *Ibid.*

2. In 2016, petitioner filed a pro se complaint in the United States District Court for the District of Columbia. Pet. App. 4a, 32a. The district court granted the Secretary of the Navy's motion to dismiss the complaint. As relevant here, the district court ruled that "Title VII does not apply to uniformed members of the military." *Id.* at 41a. The district court noted that "every Circuit deciding the question has held" the same. *Ibid.* (citing cases).

3. The court of appeals affirmed. Pet. App. 1a-31a.

The court of appeals "join[ed] the unanimous rulings of [its] sister circuits" that Title VII is inapplicable to uniformed members of the military. Pet. App. 2a; see *id.* at 6a-7a, 16a-17a. Conducting its own textual analysis, the court determined that "the text, structure and context of [Section] 2000e-16(a) demonstrate that the Congress did not intend uniformed members of the armed forces to come within the protections of Title VII." *Id.* at 16a.

Title VII provides, in relevant part, that "[a]ll personnel actions affecting employees or applicants for employment * * * in military departments as defined in section 102 of title 5" and other federal departments "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). The court of appeals explained that Title 5 codifies laws related to "civilian officers and employees" of the government. Pet. App. 10a (quoting Act of Sept. 6, 1966 (1966 Act), Pub. L. No. 89-554, 80 Stat. 378) (emphasis omitted). Congress's decision to define the term "military departments" by reference to a title governing civilian employees, rather than to Title 10, which addressed uniformed members of the armed forces, "is one indication that the Congress was referring to civilian employees within the military departments." *Ibid.* Even "more importantly," Title 5 expressly excludes "'positions in the uniformed services'" from the civil-service protections generally afforded to government employees. *Ibid.* (quoting 5 U.S.C. 2101(1)) (emphasis omitted). That exclusion, the court explained, comports with "the broad general definition of employee under Title VII." *Id.* at 11a.

The court of appeals further reasoned that limiting Title VII to the civilian employees protected by Title 5 "comports with the unique nature of the armed forces," which "differs substantially" from civilian employment. Pet. App. 12a. The court found salient the parties' ability to terminate the employment relationship, their intent as to the relationship, and the government's expectation that military personnel "complete their duties and follow orders" with swift consequences in case of noncompliance. *Id.* at 12a-14a. The court also emphasized that individuals can be "forced to join the military" and that

"members of the armed forces are subject to a different set of laws and justice system from those governing civilian employees." *Id.* at 15a. Those distinctions further illustrate that "uniformed members of the armed forces are not employed by the government within the meaning of Title VII." *Ibid.* (citing *Johnson* v. *Alexander*, 572 F.2d 1219, 1223-1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978)). The court noted that its holding does not mean that "the military is free to discriminate." *Ibid.* To the contrary, the military has its own regulations that prohibit "unlawful discrimination, including in the employment context." *Id.* at 15a-16a (citing U.S. Dep't of Def., Marine Corps Order 5354.1E, Vol. 2, Ch. 1, ¶ 0108 (June 15, 2018) (MCO)).

The court of appeals also emphasized that "every circuit court of appeals to address this issue"—in a line of cases dating back to 1978—"has held that uniformed members of the armed forces are not included within the protections of Title VII." Pet. App. 16a-17a. Although the court generally considered "congressional acquiescence" to have "limited value" as an interpretive tool, it deemed Congress's failure to disturb the consistent judicial interpretation significant in this case because Congress had repeatedly "amended the specific provision" of Title VII at issue here, including to add other government agencies to Title VII's reach. *Id.* at 17a-18a & n.11. At the same time, while "aware of the growing body of circuit decisions" rendering Title VII inapplicable to uniformed servicemembers, Congress "legislated close and systematic oversight of the military's substitute system for addressing race and sex discrimination in the armed forces." *Id.* at 18a-19a (citing 10 U.S.C. 481). The court concluded that Congress's "engagement with" the mili-

tary's anti-discrimination programs "provides added assurance of its awareness and approval of the inapplicability of Title VII itself to the armed forces." *Id.* at 19a.

Given this textual analysis, the court of appeals explained that it need not rely on a doctrine of servicemember immunity that originated in *Feres* v. *United States*, 340 U.S. 135 (1950); nor did it need to rely on the EEOC's regulation interpreting Title VII to exclude uniformed members of the armed forces, because that interpretation was "compelled by the statutory text." Pet. App. 21a-22a.

4. Petitioner did not seek rehearing en banc.

ARGUMENT

The court of appeals held that Title VII does not apply to uniformed members of a military service. That decision is correct. Moreover, as petitioner himself acknowledges, all nine courts of appeals to have considered this question in a line of cases going back over 40 years have "reach[ed] the same outcome." See Pet. 4. Because the court of appeals' decision does not conflict with any decision of this Court or another court of appeals, further review is not warranted. And in any event, this case is a poor vehicle because petitioner's suit, filed more than twenty years after the events at issue, is untimely.

1. a. Title VII does not include the United States within the statute's general definition of an "employer." See 42 U.S.C. 2000e(b) (defining "employer" and excluding the "United States"). Congress instead prohibited discrimination in federal employment through 42 U.S.C. 2000e-16, which proscribes discrimination, 42 U.S.C. 2000e-16(a), and directs the EEOC to issue rules to implement and enforce that policy in the federal workplace, 42 U.S.C. 2000e-16(b).

Section 2000e-16(a) provides that "personnel actions affecting employees * * * in military departments as defined in section 102 of title 5 [of the United States Code] * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a). The EEOC has implemented that provision through regulations that allow civilian employees of the military departments to invoke prescribed remedies. 29 C.F.R. 1614.103(b). The regulations exclude "[u]niformed members of the military departments." 29 C.F.R. 1614.103(d).

b. The EEOC's regulations reflect a sound interpretation of Section 2000e-16(a). As the court of appeals explained, in providing that Title VII applies to "employees * * * in military departments," Congress invoked Section 102 of Title 5. 42 U.S.C. 2000e-16(a); see Pet. App. 9a. Title 5 specifically defines "employee" based on appointment in the "civil service," 5 U.S.C. 2105(a)(1), which excludes "positions in the uniformed services," 5 U.S.C. 2101(1). See Pet. App. 10a-11a. Similarly, in the title of the U.S. Code that specifically addresses the armed forces, Congress repeatedly referred to enlisted servicemembers as "members," see, *e.g.*, 10 U.S.C. 101(a)(13), (b)(6), and (b)(8)-(11), while using "employees" to reference civilians, see 10 U.S.C. Ch. 81. That confirms the EEOC's interpretation that uniformed servicemembers are "members" rather than "employees." 29 C.F.R. 1614.103(d)(1).

Offering further support for that interpretation, Congress did not invoke the definition of "military departments" in Title 10 of the U.S. Code. Title 5 codifies laws related to "civilian officers and employees" of the government. Pet. App. 10a (quoting 1966 Act, 80 Stat. 378) (emphasis omitted). Title 10, by contrast, "codif[ies] the

Congress's structuring of the military." *Id.* at 8a; see Act of Jan. 3, 1956, Pub. L. No. 84-1028, 70A Stat. 1. Congress's decision to reference Title 5, rather than Title 10 further illustrates that it was including only civilian employees.[1]

Additionally, the interpretation is sound because the term "military departments" in Section 2000e-16(a) itself excludes uniformed servicemembers. Section 102 of Title 5 of the United States Code defines "military departments" as "The Department of the Army," "The Department of the Navy," and "The Department of the Air Force." 5 U.S.C. 102. Title 5 separately defines the "armed forces"—which include uniformed servicemembers—as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 5 U.S.C. 2101(2) and (3); see 10 U.S.C. 101(a)(4). That difference in language indicates that—even setting aside the fact that uniformed servicemembers are excluded from Title 5's definition of "employee," see pp. 7-8, *supra*—"Congress intended the term 'military department' to include only civilian employees, and not enlisted personnel." *Roper* v. *Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1987) (citation omitted).[2]

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[1] Although Title VII generally defines an "employee" as "an individual employed by an employer," 42 U.S.C. 2000e(f), that definition is inapposite here, given Title 5's specific exclusion of uniformed servicemembers, Pet. App. 11a, as well as the fact that "the United States" is excluded from the definition of "employer," 42 U.S.C. 2000e(b); see p. 6, *supra*.

[2] The court of appeals did not adopt this analysis because Title 10 of the U.S. Code defines a military "department" to include "all * * * forces." 10 U.S.C. 101(a)(6); see Pet. App. 8a-9a. But the definition of "military departments" expressly incorporated in section

c. The doctrine of congressional ratification further supports the court of appeals' decision. See Pet. App. 16a-17a. In decisions dating back to 1978, every circuit court of appeals to address the question—nine in total—has held that Title VII does not apply to uniformed members of the armed forces. See *ibid.*; *Brown* v. *United States*, 227 F.3d 295, 298 n.3 (5th Cir. 2000) (collecting cases), cert. denied, 531 U.S. 1152 (2001). In the face of that unanimous and widespread precedent, Congress repeatedly amended Section 2000e-16(a), including to extend its reach to certain other groups, without altering the definition of "employees * * * in military departments." See Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 201, 109 Stat. 7-8; Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341, 112 Stat. 1092.

This Court has held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). And this Court has further held that where, as here, Congress "amend[s]" a statute, yet makes the "considered judgment to retain the relevant statutory text" in the face of "unanimous [circuit] precedent," that decision provides "convincing support for the conclusion that Congress accepted and ratified" the prevailing interpretation of that language. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015); see *Helsinn Healthcare S.A.* v. *TEVA Pharm. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019). That is especially true where, as here, Congress

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2000e-16(a) comes from Title 5, not Title 10. And Title 5 has no analogous provision. In any event, the result is the same under either rationale.

has separately addressed discrimination against uniformed servicemembers, engaging in "close and systematic oversight" of the military's system for addressing discrimination. Pet. App. 18a-19a (citing 10 U.S.C. 481).

As the court of appeals recognized, Section 2000e-16(a)'s distinction between uniformed members and civilian personnel does not leave petitioner without a remedy for discrimination. Pet. App. 15a-16a. The Department of Defense regards "equal opportunity as being critical to mission accomplishment, unit cohesiveness, and military readiness," and it has implemented a comprehensive antidiscrimination program. U.S. Dep't of Def., Directive No. 1020.02E, at 6 (June 8, 2015). Military members may pursue administrative remedies for discrimination through the military's equal opportunity programs. See, *e.g.*, MCO ¶ 0108. They may also pursue statutory remedies designed specifically for military members to remedy wrongs committed within the service. See 10 U.S.C. 938, 1552.

2. The court of appeals' decision in this case is consistent with the decisions of the eight other courts of appeals that have considered the question. Those courts have all held that Title VII does not provide uniformed members of the armed forces with a remedy for discrimination. See *Roper*, 832 F.2d at 248; *Randall* v. *United States*, 95 F.3d 339, 343 (4th Cir. 1996), cert. denied, 519 U.S. 1150 (1997); *Brown*, 227 F.3d at 299; *Coffman* v. *Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Johnson* v. *Alexander*, 572 F.2d 1219, 1224 (8th Cir.), cert. denied, 439 U.S. 986 (1978); *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 928-929 (9th Cir. 1983); *Salazar* v. *Heckler*, 787 F.2d 527, 530 (10th Cir. 1986); *Stinson* v. *Hornsby*, 821 F.2d 1537, 1539 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988).

Petitioner acknowledges that every court of appeals has reached "the same outcome" and that the courts "have unanimously rejected Title VII's application to the uniformed military." Pet. 4, 14. He nonetheless contends that this Court's review is warranted because the courts of appeals have found different arguments persuasive in reaching this uniform result. Pet. 14. This Court, however, "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). Petitioner's observation that different courts relied on different rationales to reach the same conclusion thus does not establish a conflict warranting this Court's intervention. To the contrary, the alternative rationales provide additional justification for the court of appeals' holding, and an additional reason to deny review.

Petitioner similarly suggests that the fact that different circuits have focused on different arguments in reaching this result has left the "intent and meaning of" Title VII "in a state of confusion." Pet. 13 (quoting Stephen M. Shapiro et al., *Supreme Court Practice* § 4.13, at 4-39 (11th ed. 2019)). To the contrary, every decision cited in the petition squarely adopts the same rule, namely that Title VII applies to civilian employees of the military departments, but not to uniformed members of the armed forces.

Looking beyond this case, petitioner contends that differences in the textual analysis could raise questions on otherwise "settled" issues in other contexts. Pet. 23-24. But if a conflict does emerge in those contexts, the Court can review it at that time. Because no such conflict currently exists—and because this case does not implicate any such conflict in any event—further review is not warranted.

3. Separately, petitioner asks this Court to grant review or "return the matter to the D.C. Circuit for reconsideration" on the ground that the court of appeals decision is "contrary to *Bostock v. Clayton County*, [140 S. Ct. 1731 (2020)]." Pet. 24-29, 34. In *Bostock*, this Court interpreted the phrase "discriminate against * * * because of sex" in 42 U.S.C. 2000e-2(a)(1), a different provision of Title VII, holding that that language prohibits discrimination on the basis of sexual orientation and gender identity. See 140 S. Ct. at 1738, 1741-1742. That holding, which does not interpret the terms "employee" or "military department," is plainly inapposite here.

Instead, petitioner tries in various ways to generate a conflict with *Bostock*'s reasoning, but his efforts are unavailing. First, petitioner contends that *Bostock* demands a focus on the "express terms of a statute." Pet. 25 (quoting *Bostock*, 140 S. Ct. at 1737). But that is precisely the approach the court of appeals undertook in this case, "begin[ning] [its] analysis with the text," focusing on the language of Section 2000e-16(a), and ultimately concluding that the text "compel[s]" the dismissal of petitioner's claim. Pet. App. 7a, 9a, 22a.

Second, petitioner suggests that *Bostock* demands a focus on individuals, not groups. But the point of that observation was that discrimination *against* certain individuals of a group on the basis of a protected trait could not be offset by discrimination *in favor of* other individuals of that group, see *Bostock*, 140 S. Ct. at 1740; that is in no way inconsistent with the conclusion that certain groups might fall outside the statutory coverage of protected "employees."

Third, petitioner contends that *Bostock* rejected the applicability of the congressional acquiescence doctrine recognized in this Court's prior cases. Pet. 28-29. But

Bostock did not address, let alone overrule *sub silentio*, this Court's precedents recognizing the congressional ratification doctrine. Instead, the Court merely reiterated its oft-expressed skepticism of "postenactment legislative history" in rejecting an argument based on the fact that Congress had "declined to adopt new legislation" that would have led to the same result reached by the Court. *Bostock*, 140 S. Ct. at 1747. In any event, the court of appeals itself viewed congressional ratification as an interpretive tool of "limited value," pointing to it only as further confirmation of its textual analysis in light of circumstances specific to Section 2000e-16(a). Pet. App. 17a.

4. In all events, petitioner's case would be a poor vehicle for addressing the question whether Title VII applies to uniformed servicemembers because, even if it did, petitioner's claim would be untimely. Petitioner asserts a Title VII violation based on conduct that occurred between 1988 and 1991, and he waited more than *20 years* to contact the EEO. See Pet. 5. Under the Title VII federal-sector regime that existed at the time of the alleged conduct, however, a federal employee was generally required to contact the Equal Employment Opportunity Office within 30 days of the allegedly discriminatory act. See 29 C.F.R. 1613.214(a)(1)(i) (1991); see also 29 C.F.R. 1614.105(a)(1) (current regulation generally requiring contact within 45 days). Although the Title VII deadlines can be equitably tolled, tolling is applied "only sparingly." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Petitioner's explanation for failing to act until 2014 was that "it did not occur to him [until that year] that he had been discriminated against." Pet. App. 39a (citation omitted). That is obviously insufficient; indeed, the court of appeals has already held that

petitioner "is not entitled to equitable tolling" in connection with another claim not at issue before this Court. See *id.* at 27a-30a.

Although the government has not yet raised a defense based on the timeliness of petitioner's Title VII claims, it would do so in the event of a remand. Because petitioner's claims are untimely, resolution of the question presented would have no practical significance in this case. Furthermore, addressing the question presented in the context of such outdated claims would require the Court to consider the details of the statutory and regulatory regime as it existed three decades ago. For those additional reasons, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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