No. 20-19

IN THE

Supreme Court of the United States

GARY L. JACKSON,

Petitioner,

v.

KENNETH J. BRAITHWAITE, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In opposing the Petition, Respondent takes a minimalist approach incommensurate with the gravity of the Question Presented. Respondent nowhere addresses Petitioner's overarching point that Title VII's application to the uniformed military is critically important even assuming no Circuit conflict or inconsistency with this Court's prior precedent. And when it comes to the Circuit conflict, Respondent does little more than defend the D.C. Circuit's decision, rather than grapple with the divergent – and incompatible – approaches of the Courts of Appeals. On this Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), Respondent focuses on superficial distinctions between that case and the present one, not on the inherent incongruity between *Bostock*'s mode of construing Title VII's text and the D.C. Circuit's method.

Insofar as Respondent does seek to expand the discourse, he raises a red herring – *i.e.*, that this case supposedly is a poor vehicle for reaching the Question Presented because of a timeliness defense (akin to a statute-of-limitations defense) he intends later to press in the lower courts. Whatever defenses Respondent may later pursue, the reality is that the D.C. Circuit straightforwardly *has* decided the Title VII issue and no disputed facts or other complications burden this Court's review of the D.C. Circuit's determination. In any event, under well-settled case law, Respondent is foreclosed from later raising the timeliness defense that he conjures up here.

Instead of treating the Petition as he has, Respondent, as the government party in the case, could have taken the high road: he could have invited the Court to render the national decision that our

uniformed military men and women deserve, arguing then zealously on the merits for the result he deems to be in the public interest. But he took the easier, predictable route of requesting that the Court avoid the issue altogether. Because the question of Title VII's application to the uniformed military is of vital national importance, has engendered piecemeal, conflicting Circuit precedents, warrants plenary review in light of *Bostock*, and is well-presented in the context of this case, the Court should grant the Petition.

ARGUMENT

I. THE QUESTION PRESENTED IS OF VITAL NATIONAL IMPORTANCE

Missing from Respondent's opposition is any discussion of the importance of the Question Presented, especially to the uniformed military. Nowhere does Respondent reflect on the significance of determining, universally and unvaryingly, if uniformed servicemembers enjoy the same Title VII protections against racial, gender, ethnic, and religious discrimination as other working Americans. Nowhere does Respondent consider that there are hundreds of thousands of current uniformed military personnel affected by the potential application of Title VII to them, millions more veterans for whom a cause of action under Title VII would still be available, and millions of future military servicepersons for whom a decision by this Court in this case would have implication. Most regrettably, nowhere does Respondent comment on the appropriateness of the Court reaching the Title VII issue at *this* time, when the nation is engaged in a pivotal discussion on race discrimination in our institutions and how to remedy it.

Nor has Respondent addressed whether the military's current internal mechanisms for addressing and remedying racial discrimination are adequate. As well substantiated in the *amicus* brief of Protect Our Defenders and the Black Veterans Project, invidious racial discrimination within the uniformed military is longstanding and remains a pervasive problem, and the military's current systems for addressing and remedying it are inadequate; those systems involve no objective outsiders in the decision-making, and the military largely does not even collect data about race and ethnicity in its relevant databases. Additionally, Respondent has no response to the powerful testimonials of high-ranking military personnel that they and others were subject to racial discrimination during their times of service. *See* Pet. 3, 31.

With his silence, Respondent could be deemed to agree that the Title VII issue is "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). At a minimum, Petitioner has, respectfully, made a substantial and unrebutted showing that – given its significance for current, former, and future military servicepersons and the public at large – the Question Presented warrants the Court's review. And the issue remains important, even if there were no pertinent Circuit conflict (which there nonetheless is) and even if the D.C. Circuit had not breached *Bostock*'s subsequent teachings (which it did).

II. THE CIRCUITS ARE DIVIDED IN THEIR APPROACHES TO TITLE VII'S APPLICATION TO THE UNIFORMED MILITARY

In response to Petitioner's showing that the Circuits disagree in their analyses of Title VII's

application to the uniformed military, Respondent defends the D.C. Circuit's decision and then simply declares that the other Circuits agree in outcome with the D.C. Circuit. *See* Resp. Br. 6. But Respondent misses the point: the Circuits disagree in their *approaches* to the issue, with the D.C. Circuit openly disparaging the other Circuits' reasoning. *See* Pet. 9, 19-20. It is the Circuits' incompatibility in approach, and the chaos it creates for those seeking to construe Title VII in this and other settings, that invites this Court's attention.

As the Petition illustrated, in excluding the uniformed military from Title VII's scope, most Circuits have relied on a construction of "military departments" that follows from Title 10 of the U.S. Code. *See id.* at 14-15. The D.C. Circuit rejected that approach and found that the other Circuits' reasoning actually indicated the uniformed military *is* encompassed within the military departments. *See* Pet. App. 8a-9a & n.3. The D.C. Circuit instead turned to Title 5 of the U.S. Code to construe relevant Title VII terms – an approach that is irreconcilable with the other Circuits' analyses, since the terms of Title 5 and Title 10 are divergent in important respects. *See* Pet. 19-20. Respondent largely relegates this fundamental disagreement, and the discord it creates now and in the future for interpreting Title VII, to a footnote, where Respondent does not (because he cannot) seek to harmonize the competing "rationale[s]." Resp. Br. 8-9 n.2.

Moreover, Respondent pretends that the D.C. Circuit simply did "not rely" on the doctrine articulated in *Feres v. United States*, 340 U.S. 135 (1950), that other Circuits have adopted to exclude the uniformed military from Title VII's scope. Resp. Br. 6.

Unmistakably, the D.C. Circuit criticized reliance on *Feres*, much as Justices of this Court routinely have done in other settings. *See* Pet. 20-21 & n.8. Respondent also makes it seem like the D.C. Circuit indirectly endorsed the other Circuits' reliance on the EEOC's relevant regulation (*see* Resp. Br. 6), when, in fact, the D.C. Circuit "decline[d]" to follow the regulatory rationale. Pet. App. 21a.[1]

In reality, the various Circuits' approaches to Title VII's operation for the uniformed military cannot be reconciled. The conflict leaves lower courts, the uniformed military, military leaders, other parts of the federal government, and legal practitioners in the lurch on how properly to construe Title VII's various terms. Even Congress and the EEOC cannot comprehend their roles: If Congress wanted to alter the outcome of the current Circuit decisions, would it need to fix the text relied on by the D.C. Circuit or the text that the other Circuits cite? Would it be enough for Congress to fix the text, or would *Feres* then trump the text (as it does in the context of the Federal Tort Claims Act, *see* Pet. 12)? Is the EEOC to process Title VII claims for the agencies to which its regulations, on their face, apply, or just for the

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[1] Respondent later doubles down on the argument that the EEOC's regulation supports non-application of Title VII to the uniformed military, saying the regulation "reflect[s] a sound interpretation of Section 2000e-16(a)." Resp. Br. 7. Respondent here – in contrast to his candid assessment in the D.C. Circuit – fails to mention that this Court, after promulgation of the regulation, found the EEOC to have authority to issue regulations on the procedures for processing discrimination claims, not rules on Title VII's substantive coverage. *See* Pet. 16-17 (citing *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113-14 (2002), and Respondent's brief in D.C. Circuit acknowledging *Edelman*).

more limited list of agencies that follows from the D.C. Circuit's reading of the statutory text? *See* Pet. 23-24 (giving example of agency covered by EEOC regulations, but excluded from definition of civil service incorporated into Title VII by the D.C. Circuit). Respondent says the courts can deal with these questions when they "emerge" in "other contexts." Resp. Br. 11. But the conflicting decisions immediately and materially leave the statute's "intent and meaning . . . in a state of confusion," so as to warrant the Court's review now. Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.13 (11th ed. 2019); *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 551 (2005).

As to Respondent's defense on the merits of the D.C. Circuit's decision, the alleged abstract correctness of a particular Circuit's position is usually not sufficient to avoid certiorari when that decision's reasoning is irreconcilable with another Circuit's analysis. In any event, even focusing just on Respondent's main point about the D.C. Circuit ruling, he gets it very wrong in defending the D.C. Circuit's incorporation into Title VII of Title 5's various provisions regarding the persons covered by Title 5. *See* Resp. Br. 7-8. Title VII's § 2000e-16(a) references Title 5 when defining the term "military departments," leaving Title VII's definition of "employee" undisturbed, as even the D.C. Circuit recognized. *See* Pet. App. 11a. Had Congress also meant to incorporate into Title VII the limits in 5 U.S.C. §§ 2101 and 2105 as to a covered "employee," it would have done so, rather than expressly cross-referencing in Title VII's text just 5 U.S.C. § 102, which solely defines "military departments." Congress usually does not mean to include things implicitly when it has

taken care otherwise to speak expressly. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993). That conclusion especially should follow here, where deeming Congress implicitly to have incorporated into § 2000e-16 a limitation on persons covered from Title 5 would undermine the definition of "employee" actually in Title VII and that Congress did not revise when adding § 2000e-16 originally.[2]

III. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH *BOSTOCK*

Respondent addresses *Bostock* briefly and tries to distinguish it as different in context or otherwise "inapposite." Resp. Br. 12. Conspicuously, though, Respondent never contends that the D.C. Circuit acted consistently with *Bostock*. While the Petition already counters in detail Respondent's points regarding *Bostock*, two further comments are warranted.

First, Respondent appears to agree "that *Bostock* demands a focus on the 'express terms of the statute.'" *Id.* (quoting Pet. 25, quoting *Bostock*, 140 S. Ct. at 1737). But then Respondent erroneously suggests that the D.C. Circuit found Title VII's *text* to compel use of Title 5's definitional structure. *See id.* To the contrary, the D.C. Circuit found § 2000e-16's text required reference to Title 5 to determine the "military departments" covered. The D.C. Circuit then said that that express reference gave it "reason

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[2] Contrary to the D.C. Circuit's reasoning, the provisions from Title 5 (such as §§ 2101 and 2105) actually help to solidify that Title VII covers the uniformed military. Congress in Title 5 had to *specially* define covered "employee" to exclude the uniformed military (and therefore include only civil servants) because the generic use of the term "employee" – as it appears in Title VII – otherwise commonly would be understood to encompass military servicepersons.

to look to the definition of employee in Title 5." Pet. App. 12a. Again, as noted in the Petition, *Bostock* forecloses "Judges [from] . . . overlook[ing] plain statutory commands," such as Title VII's actual definition of "employee," "on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock*, 140 U.S. at 1754.

Second, in the face of *Bostock*'s derision of the use of "the congressional acquiescence doctrine," Respondent maintains that *Bostock*'s teachings on the subject left room for the D.C. Circuit still to find Title VII here not applicable because of implicit, subsequent "congressional ratification" of the outcomes of the other Circuits' decisions. Resp. Br. 12, 13. However, *Bostock*'s words against the doctrine are strong and seemingly absolute, at least where congressional acquiescence is utilized to limit the reach of a statute with such "rank in significance" as the Civil Rights Act of 1964. *Bostock*, 140 U.S. at 1737.

IV. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED

Respondent's final contention – that this case is a poor vehicle to address whether Title VII applies to the uniformed military (*see* Resp. Br. 13) – is meritless. Respondent does not suggest that this case involves facts or subsidiary issues unique to Petitioner. Respondent does not dispute that the D.C. Circuit's decision addressed a purely legal question. Nor does Respondent contest that a decision by this Court would rise (or fall) on the law alone.

Instead, Respondent argues, for the first time in the history of this case, that Petitioner's Title VII claim is "untimely." Resp. Br. 13. Yet, it is well-established that a timely charge of discrimination

with the EEOC is not a jurisdictional prerequisite to filing suit under Title VII. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Timeliness is a requirement that, like a statute of limitations, is subject to equitable tolling. *See id*. Here, the time for Petitioner initially to file a claim at the EEOC inarguably has been tolled.

Employers, including the federal government as an employer, are required to post notices of fair employment practices, including descriptions of pertinent provisions of Title VII and information relevant to the filing of a complaint. *See* 42 U.S.C. § 2000e-10; 29 C.F.R. § 1614.102(b)(5), (7). The Courts of Appeals have consistently held that unless an aggrieved employee had actual knowledge of his legal rights, equitable tolling applies when the employer has failed to post the requisite notice. *See Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 48 (1st Cir. 2005) ("where appellants have asserted that no informational notices were posted and that they had no knowledge of their legal rights until informed by their attorney, they have met the threshold requirements for avoiding dismissal of their Title VII suit"); *Hammer v. Cardio Med. Prods., Inc.*, 131 F. App'x 829, 831-32 (3d Cir. 2005) (same); *see also EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1094-95 (6th Cir. 1996) (same in context of Age Discrimination in Employment Act ("ADEA")); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir. 1983) (same); *see generally Harris v. Gonzales*, 488 F.3d 442, 445-46 (D.C. Cir. 2007) (reversing summary judgment where reasonable jury could

conclude that Title VII plaintiff lacked notice of time limits).[3]

Respondent does not contend that he (or the Navy or Marines) anywhere posted notice of Title VII rights for the uniformed military; indeed, such a posting would have been diametrically contrary to Respondent's position that Title VII does not apply to the uniformed military at all. In addition, Petitioner specifically pled that no such notice was provided to him. *See Amicus* Appendix in D.C. Cir. at AA31-AA33 (ECF #1776822) (complaint). Relatedly, Respondent does not contest that Petitioner was otherwise unaware of his rights under Title VII until October 2014 (because, again, Respondent asserts that Petitioner has no such rights at all). Petitioner's charge-filing period was, therefore, equitably tolled until then, and his administrative claim was timely filed only days later. At a minimum, Petitioner would be entitled to develop the facts of his tolling allegations, in the event the Court does hold that Title VII applies to the uniformed military. *See Harris*, 488 F.3d at 445-46; *Mercado*, 410 F.3d at 49; *Hammer*, 131 F. App'x at 831.

Still further, even if Petitioner's claim could, in theory, be found untimely, Respondent would be barred from invoking such a defense on remand. Because Respondent never raised timeliness as a defense during Petitioner's administrative proceedings – focusing there only on the supposed non-application of Title VII altogether – the objection has been waived. *See Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001) ("[W]hen an agency decides the

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[3] Title VII and the ADEA are read *in pari materia*. *See Smith v. City of Jackson*, 544 U.S. 228, 232-40 (2005).

merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit."); *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C. Cir. 1997) (where agency responds to a complaint in administrative proceedings "without ever questioning its timeliness," agency "has no legitimate reason to complain about a judicial decision on the merits"); *Brown v. Marsh*, 777 F.2d 8, 15 (D.C. Cir. 1985) (Army precluded from asserting timeliness objection in Title VII case because, at administrative stage, "Army had totally waived any timeliness objection").

Indeed, Petitioner suspects that Respondent purposefully never raised a timeliness objection concerning the Title VII claim: Respondent affirmatively *wanted* an updated decision from the EEOC and a court holding that Title VII does not apply to the uniformed military. Afterall, Respondent did raise a statute-of-limitations defense (and successfully so) at the pleadings stage with respect to Petitioner's claim under the Administrative Procedure Act ("APA"). *See* Resp. Br. 13-14; *see also* Pet. App. 27a-30a. Nothing prevented Respondent from making the same argument as to the Title VII claim, unless *either* he thought (correctly) that he was foreclosed from doing so due to the lack of the posted notice of rights and his failure to raise timeliness *or* he sought a decision on the merits. Having made those strategic determinations, he must live with them.[4]

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[4] Though the D.C. Circuit did reject equitable tolling on the APA claim, the APA has no requirement similar to Title VII concerning the posting of rights, meaning that different tolling principles apply. And, of course, Respondent *did* actually raise the statute-of-limitations defense in the APA context, which he failed to do at any point for the Title VII claim.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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