No. __

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, apply to the uniformed military?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner is Gary L. Jackson. Respondent is the Secretary of the Department of the Navy, Kenneth J. Braithwaite. Prior Secretaries or Acting Secretaries of the Department of the Navy have been named as Defendant or Appellee in the courts below, since November 2, 2016 (the date of the complaint's filing): James E. McPherson (Acting), Thomas B. Modly (Acting), Richard V. Spencer, Sean G.J. Stackley (Acting), and Raymond Edwin "Ray" Mabus, Jr. Pursuant to Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c)(2), as the Secretary changed, the new one was substituted.

The U.S. Court of Appeals for the District of Columbia Circuit appointed Anthony F. Shelley as *amicus curiae* to present arguments on Jackson's behalf. In this Court, he is Jackson's counsel.

LIST OF ALL PROCEEDINGS IN THE TRIAL AND APPELLATE COURTS THAT ARE DIRECTLY RELATED TO THIS CASE

Gary L. Jackson v. Thomas B. Modly, Acting Secretary, U.S. Department of Navy, U.S. Court of Appeals for the District of Columbia Circuit, No. 18-5180. Judgment entered February 14, 2020.

Gary L. Jackson v. Richard V. Spencer, Secretary, U.S. Department of Navy, U.S. District Court for the District of Columbia, No. 1:16-cv-02186. Judgment entered May 15, 2018.

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The February 14, 2020 opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 949 F.3d 763 (D.C. Cir. 2020) and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-31a. The opinion of the U.S. District Court for the District of Columbia is reported at 313 F. Supp. 3d 302 (D.D.C. 2018) and is reproduced at Pet. App. 32a-47a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the D.C. Circuit's February 14, 2020 decision and judgment that affirmed the dismissal of his complaint. By Order dated March 19, 2020, this Court extended the time for filing any petition for certiorari due on or after that date "to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing," which in Petitioner's case means until July 13, 2020. Miscellaneous Order (U.S. Mar. 19, 2020). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

In relevant part (with the full text contained in Petitioner's Appendix), Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e-16, states as follows:

> (a) **Discriminatory practices prohibited; employees or applicants for employment subject to coverage.** All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in

> military departments as defined in section 102 of Title 5, United States Code, in executive agencies as defined in section 105 of Title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

The text of 29 C.F.R. § 1614.103, which is a regulation of the Equal Employment Opportunity Commission ("EEOC") that implements 42 U.S.C. § 2000e-16, is also contained in Petitioner's Appendix.

INTRODUCTION

> *"I am thinking about wearing the same flight suit with the same wings on my chest as my peers, and then being questioned by another military member: 'Are you a pilot?' . . . I'm thinking about the pressure that I felt to perform error free, especially for supervisors that I perceived expected less of me as an African-American. . . . I am thinking about having to . . . work twice as hard, to prove that their expectations and perceptions of African-Americans were invalid. I'm thinking about the airmen that have lived through similar experiences and feelings as mine or who were either consciously or unconsciously unfairly treated."*
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> – General Charles Q. Brown, Jr., June 5, 2020, in a video posted by U.S. Pacific Air Forces in response to the death of George Floyd and just prior to the Senate's vote to confirm General Brown as Air Force Chief of Staff[1]

* * *

Every American deserves a meaningful remedy for racial discrimination, including those serving in the uniformed military. Petitioner Gary L. Jackson, an African-American, was a Marine working as a manager in a military supply warehouse in suburban Washington, D.C., when he endured harassment, belittlement, and mistreatment on the basis of his race from Caucasian civilian and military

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[1] @PACAF, Twitter (June 5, 2020, 2:39 AM), https://twitter.com/PACAF/status/1268794618461618177.

superiors. The discrimination ultimately took the form of denying him promotions and training opportunities and a successful scheme to prevent him from reenlisting in the Marines or any other of the uniformed services upon his honorable discharge. After suffering personal and financial ruin as a result of emotional trauma caused by the discrimination and the loss of his livelihood in the military, Jackson brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, to challenge the racial discrimination. In the decision below, the D.C. Circuit joined the "unanimous circuit precedent on the issue" to hold that Title VII applies only to civilian employees in the military, not uniformed servicemembers, such as Jackson. Pet. App. 22a-23a. In so doing, however, the D.C. Circuit expressly rejected or declined to follow the various lines of reasoning used by the other Circuits, instead inaugurating a new basis for excepting the uniformed military from Title VII.

The Court should grant the Petition. Though the relevant Circuit decisions reach the same outcome, they vary widely in their approaches to determining whether Title VII covers the uniformed military. Some of the approaches are in direct conflict with others, and most have already well-identified weaknesses. The end product is an area of the law replete with confusion and incoherence. In addition, since the D.C. Circuit ruled, this Court issued its landmark Title VII decision in *Bostock v. Clayton County*, Nos. 17-1618, 17-1623, and 18-107, 2020 U.S. LEXIS 3252 (U.S. June 15, 2020). The D.C. Circuit's new ground for finding uniformed servicepersons unprotected by Title VII is directly at odds with *Bostock*. Finally, the issue presented – *i.e.*, whether millions

of uniformed servicepersons are protected by a law that safeguards nearly every other American against discrimination – is of grave importance, now more than ever, as General Brown intimated. On the seminal issue of Title VII's application to the uniformed military, this Court, not the Circuits, even if consistent in outcome, should deliver the verdict.

STATEMENT OF THE CASE

A. Summarizing succinctly Jackson's allegations giving rise to his lawsuit, the D.C. Circuit stated:

> Jackson served [in the U.S. Marine Corps] from 1977 until his honorable discharge on January 15, 1991. His complaint alleges that in 1988, while he was stationed at Henderson Hall, Marine Corps Headquarters in Arlington, Virginia, assigned to the Warehouse Chief position, he began to experience discrimination, harassment and retaliation from his superiors. For example, Jackson alleges that one of his superiors relocated him to another section of the warehouse stating that he "preferred that the number of Blacks not exceed the number of whites in any one section of the Warehouse." He also alleges that, among other things, his superiors intentionally delayed responding to his request to attend a training academy, placed false accusations in his military record and went to extraordinary lengths to prevent his reenlistment. Jackson alleges that, upon his discharge, one of his superiors said to another, "we finally got Staff Sergeant Jackson . . . That's one less Black Staff Sergeant." After his discharge, Jackson alleges that he filed

> applications with the Board for Correction of Naval Records multiple times from 1990 until 2000 to remove derogatory material from his fitness record and thus make him eligible for reenlistment but his attempts were unsuccessful [also due to racial animus from decisional officials].

Pet. App. 3a; *see Amicus* Appendix in D.C. Cir. ("D.C. Cir. *Amicus* App.") at AA20-AA38 (ECF #1776822) (complaint). During the relevant period, Jackson's superiors at Henderson Hall included both civilians and uniformed officers. *See* D.C. Cir. *Amicus* App. AA26 (complaint).[2]

In the ensuing years, as a result of his superiors' mistreatment of him, Jackson suffered debilitating mental anguish and the loss of his financial livelihood. His inability to reenlist "was a painful, humiliating revelation, because [he] profoundly counted on a military career"; his "[s]tatus as a Marine was [his] life-blood." *Id.* at AA31, AA21. He was "[d]eprived of military retirement," became "[d]ivorce[d] from his wife caused by [his] difficult emotion[al], mental state," suffered "[l]oss of enjoyment of life," "[a]nger, bewilderment," "[i]nsomnia, distrust, depression, anxiety," and "[f]inancial hardship." *Id.* at AA37.

In 2014, Jackson filed with the EEOC a charge of discrimination against the Marine Corps, with the EEOC then sending him initially to the Equal Employment Opportunity ("EEO") Office of the Marine

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[2] Because Jackson's case is properly treated as dismissed pursuant to Fed. R. Civ. P. 12(b)(6), *see* Pet. App. 5a-6a & n.2, the complaint's allegations must be deemed true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Corps. The EEO Office dismissed his complaint under 29 C.F.R. § 1614.103(d)(1), which is an EEOC regulation providing that the uniformed military personnel of any branch of the armed forces are not covered by Title VII. *See* Pet. App. 4a. Jackson appealed to the EEOC. In July 2016, the EEOC affirmed the EEO Office's decision, also relying on the EEOC regulation, and denied Jackson's subsequent request for reconsideration. *Id.*[3]

B. In November 2016, Jackson filed a *pro se* complaint in the U.S. District Court for the District of Columbia "alleging employment discrimination against the Secretary [of the Navy] under Title VII." *Id.* The district court dismissed the claim, holding that "Title VII does not apply to uniformed members of the armed forces." *Id.* at 41a. The extent of the district court's analysis was: although the D.C. Circuit "has not addressed the issue," "every Circuit deciding the question has held that Title VII does not apply to uniformed members of the military." *Id.* (citing *Fisher v. Peters,* 249 F.3d 433, 438 (6th Cir. 2001); *Brown v. United States,* 227 F.3d 295, 298 (5th Cir. 2000); *Hodge v. Dalton*, 107 F.3d 705, 707-12 (9th Cir. 1997); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir. 1978));

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[3] The EEO Office and the EEOC did not invoke any statute of limitations; Respondent did not raise such a defense in the proceedings below; and the district court and the D.C. Circuit made no mention of any limitations issue. *See United States v. Mitchell*, 518 F.3d 740, 748 (10th Cir. 2008) ("In general, a statute of limitations may not be raised sua sponte and all circuits to consider this issue have held so explicitly.").

accord Gonzalez v. Dep't of Army, 718 F.2d 926, 928-29 (9th Cir. 1983).

C. On appeal, in a lengthy decision, the D.C. Circuit affirmed. "[A]t the outset," the Court of Appeals noted that "every one of [its] sister circuits to address" whether Title VII "applies to uniformed members of the armed forces of the United States" has "concluded – albeit based on varying rationales and depths of analysis – that the answer is 'no.'" Pet. App. 6a-7a. Nevertheless, the D.C. Circuit then "began [its] analysis [of] the text" by "clarify[ing] – and ultimately reject[ing] – a textual hook other courts . . . erroneously rely upon to reach the conclusion that Title VII does not include uniformed members of the armed forces – namely, the term 'military departments.'" *Id.* at 7a. In pertinent part, the text of Title VII states that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5, 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.[4]

The other Circuits' "textual hook," the D.C. Circuit said, comes from "Title VII's reference to the definition of military departments in section 102 of Title 5 of the United States Code, which organizes the federal government." Pet. App. 7a. "Title 5 defines

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[4] As the D.C. Circuit noted, "[a]s originally enacted, Title VII did not apply to the federal government." Pet. App. 6a. "In 1972, however, the Congress extended the protections of Title VII to federal as well as state and local employees in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111-13 (1972) (codified at 42 U.S.C. [§] 2000e-16))," resulting in the statutory text at issue in this case. Pet. App. 6a.

'military departments' as 'The Department of the Army. The Department of the Navy. The Department of the Air Force.'" *Id.* at 8a (quoting 5 U.S.C. § 102). Title 10 of the U.S. Code – "codifying the Congress's structuring of the military – has the same definition of 'military departments.'" *Id* (citing 10 U.S.C. § 101(a)(8)). In turn, "[b]oth Title 5 and Title 10 separately define the '*armed forces*' as 'the Army, Navy, Air Force, Marine Corps, and Coast Guard.'" *Id.* (quoting 5 U.S.C. § 2101(2); 10 U.S.C. § 101(a)(4)). "Thus, other courts . . . conclude that, because the Congress treats 'military departments' and 'armed forces' as distinct terms, uniformed members of the armed forces are not covered by Title VII." *Id.* (citing *Gonzalez*, 718 F.2d at 928).

Rejecting that reasoning, the D.C. Circuit stated that even a "quick review of the Congress's structuring of the military in Title 10 shows that uniformed members of the armed forces are within the umbrella of the military departments." *Id.* at 8a. Definitional and other provisions in Title 10 "make clear that the term 'armed forces' refers to the uniformed fighting forces *within the three 'military departments*.'" *Id.* at 8a-9a (citing 10 U.S.C. §§ 101(a)(6), 7062(b), 8061(4)) (emphasis added). As an "example," "the 'Department of the Army' contains both civilian employees as well as the 'Army' – defined as 'combat and service forces.'" *Id.* at 9a (quoting 10 U.S.C. §§ 101(a)(6), 7062(b)).

But the D.C. Circuit then identified a different textual reason – never previously mentioned by other Circuits – for excluding the uniformed military from Title VII: "The Congress specifically chose to say '*employees* . . . in military departments *as defined in section 102 of Title 5.*'" *Id.* (quoting 42

U.S.C. § 2000e-16(a)) (emphases added by D.C. Circuit). The reference to section 102 of Title 5 when defining "military departments" is "significant" and should, the D.C. Circuit reasoned, assist in defining "employees" within Title VII's compass. *Id.* Title 5, as a whole, was "enacted to codify 'the general and permanent laws relating to the organization of the Government of the United States and to its *civilian officers and employees*.'" *Id.* at 10a (quoting Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (1966)) (emphasis added by D.C. Circuit). "More importantly," another provision in Title 5 "define[s] 'employee' as 'an officer and an individual who is . . . appointed in the civil service,'" and "'civil service'" encompasses various "'appointive positions in the executive, judicial, and legislative branches of the Government of the United States, *except positions in the uniformed services*.'" *Id.* (quoting 5 U.S.C. §§ 2105(a), 2101(1)) (emphasis added by D.C. Circuit). Borrowing, then, from Title 5, the D.C. Circuit determined that Congress meant "employees" as used in Title VII to include "only . . . federal civilian employees within the military departments, not members of the armed forces that it considered to be outside the definition of employees in the federal civil service." *Id.* at 11a.

The D.C. Circuit recognized "that Title VII has its own definition of 'employee,' which it generally defines as 'an individual employed by an employer.'" *Id*. (quoting 42 U.S.C. § 2000e(f)). It also acknowledged that its prior decisions had insisted on interpreting "employee" in Title VII via "'application of general principles of the law of agency'" and, in the non-military context, had rejected use of "the definition of employee found in the civil service laws of

Title 5." *Id.* at 12a (quoting *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979)). However, it found Title VII's own definition of "employee," and the traditional master-servant relationship (from agency law) that the term conjures up, to be inapt, because Congress "explicitly directed us" to "the definition of employee in Title 5" through the reference to section 102 of Title 5 in connection with "military departments." *Id.*

Buttressing its holding that Title VII excludes the uniformed military due to "Congress's incorporation of the civil service definition of employee in Title 5" was, according to the D.C. Circuit, "the unique nature of the armed forces as composed of 'individual[s]' not 'employed by an employer' within the meaning of Title VII." *Id.* at 12a (quoting 42 U.S.C. § 2000e(f)). Unlike "traditional civilian employment," the "[u]niformed members of the armed forces are not free to leave their position in the military in most instances," and they "are subject to a different set of laws and justice system from those governing civilian employees." *Id.* at 12a, 13a, 15a (citing *Johnson*, 572 F.2d at 1223-24).

The D.C. Circuit additionally found its holding confirmed by "congressional acquiescence" in the face of uniform Circuit precedent. *Id.* at 17a. "[E]very circuit court of appeals to address this issue since 1978 has held that uniformed members of the armed forces are not included within the protections of Title VII," and, yet, "Congress has never amended Title VII to add uniformed members of the armed forces to the statute." *Id.* at 16a, 17a.

"Before concluding," the Court of Appeals "note[d] that some courts . . . reach[ing] the same conclusion . . . have done so based on [two other]

rationales that we decline to use." *Id.* at 21a. "First, some courts have based their Title VII conclusion on the '*Feres* doctrine,' which doctrine originated in *Feres v. United States*, 340 U.S. 135 (1950)." Pet. App. at 21a (citing *Hodge*, 107 F.3d at 710). *Feres* held that

> the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service, 340 U.S. at 146, despite language in the FTCA defining "employee of the government" to include "members of the military or naval forces of the United States." 28 U.S.C. § 2671.

Pet. App. 21a. The D.C. Circuit emphasized that *Feres* "has been severely criticized" and that it was not obliged to "extend the doctrine to Title VII." *Id.* at 22a.

"Second, some courts have relied on the EEOC's regulation interpreting Title VII to exclude uniformed members of the armed forces to deny such members' claims under Title VII, basing their decision on the EEOC's authority to promulgate rules interpreting 42 U.S.C. § 2000e-16(a)." *Id.* (citing *Hodge*, 107 F.3d at 707-08; *Brown*, 227 F.3d at 298). Given its finding that "the statutory text" required the same result as the regulation, the D.C. Circuit found it unnecessary to examine the regulation. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS' APPROACHES ON THE TITLE VII ISSUE ARE IN CONFLICT AND PROBLEMATIC, CREATING INTOLERABLE CONFUSION

The Court should grant the Petition because the Courts of Appeals' approaches for determining if Title VII covers the uniformed military not only are in conflict with one another, but also are replete with weaknesses identified already in the case law and elsewhere. The Court has often granted certiorari where the Circuits "conflict in approach" on an issue, notwithstanding agreement among them on the issue's ultimate outcome. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974).[5] In such situations, this Court's intervention is particularly warranted "when the lower court decisions are so inconsistent in theory as to leave the intent and meaning of [a] statute in a state of confusion." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.13 (11th ed. 2019) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 550-51 (2005)). That is the case regarding the Courts of Appeals' reasoning on Title VII's supposed non-application to the uniformed military.

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[5] *Accord Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (certiorari granted to review Seventh Circuit preemption analysis of Illinois statute that "conflicted with the Fifth Circuit's treatment of a similar provision of Texas law"); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998) (certiorari granted because "[t]he Fifth Circuit's analysis represents one of the varying approaches adopted by the Courts of Appeals in assessing a school district's liability under Title IX"); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*,

A. The Circuits Have Adopted at Least Five Different Theories for Excluding the Uniformed Military from Title VII

Though the Courts of Appeals have unanimously rejected Title VII's application to the uniformed military, they have done so under widely divergent theories. At least five approaches have surfaced.

First, the most prevalent theory for excluding uniformed servicepersons from Title VII's coverage is the one the D.C. Circuit expressly rejected – namely, that somehow the uniformed military is not encompassed within the term "military departments" as used in § 2000e-16(a). *E.g.*, *Brown v. United States*, 227 F.3d 295, 298 & n.3 (5th Cir. 2000); *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Roper v. Dep't of Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Stinson v. Hornsby*, 821 F.2d 1537, 1539-41 (11th Cir. 1987); *Salazar v. Heckler*, 787 F.2d 527, 530 (10th Cir. 1986); *Gonzalez v. Dep't of Army*, 718 F.2d 926, 928 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978); *see* Pet. App. 8a-9a & n.3 (rejecting these decisions). *Gonzalez* offers the most detailed explanation of this approach; indeed, "the other courts" accepted *Gonzalez* "at face value without conducting their own textual analysis." Pet. App. 8a n.3.

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473 U.S. 753, 764 (1985) ("appeared to conflict in principle"); *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted on claimed "conflict in principle" with a district court opinion that had been summarily affirmed by Court of Appeals).

In *Gonzalez*, starting with the Title VII language prohibiting discrimination "in military departments as defined *in section 102 of Title 5*" (42 U.S.C. § 2000e-16(a) (emphasis added)), the Ninth Circuit quickly then moved to Title 10's definition of "military departments," because "a revision note to 5 U.S.C. § 102" cited to Title 10's definition as a guide. 718 F.2d at 928. Looking to Title 10, the Ninth Circuit there found "a separate definition for 'armed forces'": "'Armed Forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.' 10 U.S.C. § 101(4) (1976)." 718 F.2d at 928. Supposedly, "[t]he two differing definitions [in Title 10 regarding 'military departments' and 'Armed Forces'] shows that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel." *Id.*[6]

Second, the next most prevalent theory is not that the statutory language indicates exclusion of the uniformed military from Title VII, but that *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, *see Chappell v. Wallace*, 462 U.S. 296 (1983), necessitate it. *E.g.*, *Coffman*, 120 F.3d at 59; *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997); *Roper*, 832 F.2d at 248; *Stinson*, 821 F.2d at 1541-42 (Henderson, J., concurring); *id.* at 1543 (Hill, J., dissenting). As noted earlier (*see supra* p. 12), the *Feres* doctrine provides that the Federal Tort Claims Act is unavailable "for injuries to [military] servicemen

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[6] Even while discrediting *Gonzalez* and the other Circuits' similar precedents, the D.C. Circuit – charitably – described the decisions without noting perhaps their most dubious aspect: they tenuously rest on elevating a reviser's note associated with the U.S. Code. *See* Pet. App. 8a-9a.

where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. While the D.C. Circuit declined to endorse the other Circuits' expansion of *Feres* to the new context of Title VII (*see* Pet. App. 22a), the Courts of Appeals to have invoked *Feres* have said it stands, broadly, as a barrier "whenever a legal action 'would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.'" *Hodges*, 107 F.3d at 710 (quoting *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989)).

Third, in another theory the D.C. Circuit declined to endorse, some Courts of Appeals have rested on the EEOC's regulation as a basis for excluding the uniformed military from Title VII. *E.g.*, *Hodge*, 107 F.3d at 707-08; *Brown*, 227 F.3d at 298. The regulation, 29 C.F.R. § 1614.103, lays out the general prohibition against discrimination stated in Title VII, including in the military departments, but then provides that the prohibition "does not apply to . . . [u]niformed members of the military departments." *Id.* § 1614.103(d)(1). Finding the regulation binding on it, the *Hodge* court stated:

> This regulation affects "individual rights and obligations," and thus constitutes a substantive rule. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 [(1979)]. . . . [B]ecause this substantive rule was promulgated under a specific grant of congressional authority, it has the "force and effect of law." *Id.* at 301-02.

107 F.3d at 708. Respondent, below, acknowledged that this Court's "later decision in [*Edelman v. Lynchburg College*], 535 U.S. 106, 113-14 (2002), casts substantial doubt on the Ninth Circuit's

reasoning," but he urged adherence under other administrative-law standards. Appellee's Br. in D.C. Cir. at 30 (ECF #1794712); *see Edelman*, 535 U.S. at 113 (noting that Congress in 42 U.S.C. § 2000e-12(a) limited the EEOC to adopting procedural, not "substantive," rules).

Fourth, the Eighth Circuit found Title VII inapplicable to the uniformed military on the hypothesis that "the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force or Coast Guard" is different than the typical "employer-employee" relationship. *Johnson*, 572 F.2d at 1223-24 (footnote omitted). Delineating in a footnote the basis for that conclusion, *Johnson* states: "While military service possesses some of the characteristics of ordinary civilian employment," a military serviceperson "is not free to quit his 'job,' nor is the Army free to fire him from his employment," and "the soldier is subject not only to military discipline but also to military law." *Id.* at 1223 n.4.[7]

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[7] Soon after *Johnson*, a powerful counterpoint emerged in *Hill v. Berkman*, 635 F. Supp. 1228, 1236-37 (E.D.N.Y 1986), where Judge Weinstein – after reviewing the "compensation package," "health care," "housing," "generous retirement annuities," and "training courses" offered to the uniformed military – determined that "membership in the armed forces is a form of employment." *Hill* characterized *Johnson* as "offer[ing] little explanation for [its] holding." *Id.* at 1236. *Hill* held, therefore, that "members of the armed forces are federal employees who share in all Americans' . . . right to equal protection under the law," including through Title VII. *Id.* at 1238. The Second Circuit in *Roper* later disagreed with *Hill*, reciting *Johnson*'s conclusions, as well as listing other decisional grounds based on *Gonzalez* and *Feres*. *Roper*, 832 F.2d at 248. Still, the Second

Fifth, the D.C. Circuit created a new ground for excepting the uniformed military from Title VII: Congress purportedly "incorporate[ed into Title VII] . . . the civil service definition of employee in Title 5," and that definition "does not cover uniformed members of the armed forces." Pet. App. 12a. The D.C. Circuit reasoned that § 2000e-16(a)'s language referencing "military departments as defined in section 102 of Title 5" not only controls the definition of the covered military departments, but also constitutes a direction to inject into Title VII the definition of employee in 5 U.S.C. § 2105, as well as limiting language concerning the uniformed military found in 5 U.S.C. § 2101(1). *See* Pet. App. 9a-10a. The D.C. Circuit took that approach, despite Title VII "ha[ving] its own definition of 'employee.'" *Id.* at 11a. And while the D.C. Circuit found the Eighth Circuit's general discussion in *Johnson* regarding the qualities of employment to help confirm the outcome (*see id.* at 15a), the dispositive – and new, among the Circuits – factor for the D.C. Circuit was its belief that Congress engrafted Title 5's definition of employee onto Title VII. Last, according to the D.C. Circuit, Congress's failure to upend prior Circuit decisions excluding the uniformed military from Title VII's scope further confirmed its conclusion, though no prior Circuit had ever cited Title 5's employee definition similarly as a ground for decision on the issue. *See id.* at 18a-19a.

Circuit described Judge Weinstein's analysis as "cogent" and "carry[ing] weight." *Id.*

B. The Circuits' Approaches Conflict and Have Well-Identified Shortcomings

The D.C. Circuit's decision spawns a Circuit split on the proper approach for determining whether Title VII covers the uniformed military. The D.C. Circuit took direct aim at, and overtly rejected, the theory that the term "military departments" embraces just the military departments' civilian employees. *See id.* at 8a-9a. That theory is the prevailing ground for decision among the other Courts of Appeals; and, after scrutinizing the provisions of Title 10 (to which the reviser's note steered the other Courts of Appeals), the D.C. Circuit declared: "that term [*i.e.*, 'military departments'] on its own, contrary to what other courts have concluded, in fact supports an interpretation that Title VII covers the uniformed members of the armed forces." *Id.* at 9a.

No less, the other Circuits' decisions are irreconcilable with the D.C. Circuit's view that Title VII incorporates Title 5's limiting definition of employee. Again, the backbone for "military departments" meaning only civilians is that § 2000e-16(a)'s reference to "military departments as defined in section 102 of Title 5" purportedly sends one eventually to Title 10 (not Title 5), due to the reviser's note; in turn, the definitional section of Title 10 (*i.e.*, 10 U.S.C. § 101) supposedly distinguishes between military departments and the armed forces. *See Gonzalez*, 718 F.2d at 928. Yet, for the D.C. Circuit, in incorporating Title 5's employee definition, it is key that Congress in § 2000e-16(a) referenced Title 5, not Title 10. As it said: "The Congress could have chosen to define 'military departments' with reference to section 101 of Title 10 that organized the United States military several years earlier, . . . but

instead it chose to reference the title [*i.e.*, Title 5] that was codified to organize the civilian officers and employees of the United States government." Pet. App. 10a. Whereas the D.C. Circuit eschewed Title 10 as a reference, which includes the uniformed military in its regulatory population, in favor exclusively of Title 5, which does not, the other Circuits deem Title 10's framework to be controlling (again, because of the reviser's note). It follows that, if the other Circuits are right that § 2000-16(a)'s reference to Title 5 really is an invitation to turn to Title 10's definitions, the other Circuits logically could not conclude that Title VII excludes individuals based on Title 5, when the individuals (*i.e.*, the uniformed military) instead are included in Title 10's definitional scheme.

Separately, there is tension between the D.C. Circuit's decision and the Circuits that rely on *Feres*. Although the D.C. Circuit did not outright reject the application of *Feres* to the Title VII setting, saying it was just "declin[ing] to use" that rationale, it unmistakably showed disdain for the theory, quoting fully criticisms of the doctrine from Justices of this Court and then saying it was choosing "*not* [to] extend the doctrine to Title VII." Pet. App. 21a (emphasis added).[8] The D.C. Circuit was also dismissive of the

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[8] The D.C. Circuit cited criticisms and comments regarding *Feres* from Justices Thomas, Ginsburg, and Scalia. *See* Pet. App. 21a-22a; *see also Lanus v. United States*, 570 U.S. 932 (2013) (Thomas, J., dissenting from denial of certiorari) ("There is no support for [*Feres*'s] conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of any remedy when they are injured by the negligence of the Government or its employees."); *United States v. Johnson*, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost

other Courts of Appeals' reliance on the EEOC regulation, though less disparaging of that rationale than *Feres*. *See id.* at 22a.

Not only is there division among the Circuits on the proper bases for deciding if Title VII applies to the uniformed military, all of the various rationales have already-identified shortcomings, at least other than the D.C. Circuit's approach, being that it (after all) is brand new. The D.C. Circuit laid bare the problems with interpreting "military departments" to include just civilian portions of the departments (*see supra* pp. 8-9); *Feres* has been "severely criticized," including by members of this Court (Pet. App. 21a); even Respondent does not defend the Ninth Circuit's reasoning in *Hodges* that the EEOC's regulation poses a barrier to Title VII encompassing the uniformed military; and *Johnson*'s footnote observations that "military service" is not "ordinary" employment (572 F.2d at 1223 n.4) are subject to "cogent," "weight[y]" counter-arguments. *Roper*, 832 F.2d at 248 (describing *Hill*'s analysis). As to the D.C. Circuit's new ground, it at a minimum begs an obvious question: if the statute "explicitly directs"

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universal criticism it has received.'") (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)); *Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) ("While lower courts are bound by the Supreme Court's decision in *Feres*, they are hardly obliged to extend the limitation . . . ."); *see generally* Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 83 n.565 (2003) ("[I]t remains a mystery why Title VII claims should be barred under *Feres*, even in cases involving service members. . . . There is no reason why a judge-made doctrine like *Feres* should be viewed as trumping a federal statute like Title VII.").

incorporation of Title 5's civil-service limitation (Pet. App. 12a), why has that feature never been noticed in the case law in the prior forty-eight years of § 2000e-16's existence?

C. The Circuits' Division and the Infirmities in Their Approaches Cause Confusion

What we have, then, is an area of the law that, put bluntly, is incoherent.[9] That is, on the question of the uniformed military's ability to rely on Title VII, the Courts of Appeals are warring over legal theories, invoking U.S. Code reviser notes, relying on rationales criticized elsewhere and abandoned by the government, engaging in a sort of "group think" whereby one Circuit states a reason and the others accept it "at face value" (Pet. App. 8a n.3), and exploring novel approaches five decades after the statute's enactment. In effect, given the sheer volume of theories that the Circuits have sequentially utilized for finding the uniformed military unprotected by Title VII, the decisions have a throw-the-spaghetti-against-the-wall-and-see-what-sticks quality.

Nor does the D.C. Circuit's newly minted approach ameliorate the confusion. Because it borrows definitions from Title 5 of the U.S. Code, and the other Circuits' analyses depend on Title 10's framework, with the two being incompatible in pertinent part (*see supra* pp. 19-20), the D.C. Circuit's theory

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[9] *See, e.g.*, https://www.cadc.uscourts.gov/recordings/recordings2019.nsf/A48A899F0D7A901F852584C6006BE11D/$file/18-5180.mp3 (Judge Pillard at oral argument, below, stating: "one of the curious things is that the doctrine in this area seems somewhat under-explanatory") (audio recording at minute 16:28).

cannot nationally prevail absent *en banc* proceedings in each of the other Circuits.

If anything, the D.C. Circuit's decision adds more questions to the mix. For instance, one issue frequently arising is whether contractors to the military departments are "employees" covered by Title VII, when the facts actually reveal them to satisfy common-law employment standards. Courts currently hold that, assuming such facts, these individuals *are* protected by Title VII. *E.g.*, *Moret v. Harvey*, 381 F. Supp. 2d 458, 465-67 (D. Md. 2005); *Sibbald v. Johnson*, 294 F. Supp. 2d 1173, 1175-76, 1179 (S.D. Cal. 2003); *King v. Dalton*, 895 F. Supp. 831, 837-38 (E.D. Va. 1995). With the D.C. Circuit's decision, these settled precedents come under a cloud, for military contractors satisfying common-law employment tests unquestionably are not appointed in the civil service as required under the employee definition in 5 U.S.C. § 2105 that the D.C. Circuit deems the benchmark.

Similarly, the EEOC's Title VII regulations provide a listing of personnel associated with the federal government to which the agency's procedures "appl[y]." 29 C.F.R. § 1614.103(b). But some on that listing are expressly excluded from Title 5's delineation of employees in the civil service (again, the governing standard for Title VII's coverage, according to the D.C. Circuit). *Compare*, *e.g.*, *id.* § 1614.103(b)(5) (providing that "[t]his part applies to . . . [t]he National Oceanic and Atmospheric Administration Commissioned Corps"), *with* 5 U.S.C. § 2101 (defining as part of the "uniformed services" rather than the civil service "the commissioned corps of the National Oceanic and Atmospheric Administration"). Under these circumstances, the EEOC might have

jurisdiction in some Circuits that do not rely on Title 5's employee definition, but not in the D.C. Circuit (where the EEOC is headquartered).

At this juncture, this Court's intervention is badly needed. Given the Circuits' current division in approach and the confusion the differing rationales beget, the Court should grant the Petition to decide – once, and for all – if Title VII applies to the uniformed military.

II. THE D.C. CIRCUIT'S DECISION CONTRAVENES *BOSTOCK*

The Court, additionally, should grant the Petition because the D.C. Circuit's decision is contrary to *Bostock v. Clayton County*, Nos. 17-1618, 17-1623, and 18-107, 2020 U.S. LEXIS 3252 (U.S. June 15, 2020), the pathmarking Title VII precedent the Court delivered subsequent to the D.C. Circuit's decision. In *Bostock*, the Court held that Title VII's prohibition on private-employer discrimination against "any individual . . . because of such individual's . . . sex" (42 U.S.C. § 2000e-2(a)(1)) includes discrimination "for being gay or transgender." 2020 U.S. LEXIS 3252, at *58. Specifically, the D.C. Circuit's decision is incompatible with the Court's instructions in *Bostock* on how to interpret Title VII.

A. In *Bostock*, the Court directed that Title VII be "interpret[ed] . . . in accord with the ordinary public meaning of its terms at the time of its enactment." *Id.* at *12. The Court added:

> [O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our

> own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.

Id. Hence, "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Id.* at *10.

Contrary to that command, the D.C. Circuit, in interpreting the term "employees" in § 2000e-16(a) turned to extratextual sources – namely, Title 5's definition of employee – rather than construing Title VII according to its ordinary public meaning. Congress defined "employee" in Title VII as originally enacted in 1964, and the D.C. Circuit conceded that Congress did not amend that definition when it extended Title VII to the federal government (including military departments) in 1972. *See* Pet. App. 11a. Title VII states, in relevant part, that "[t]he term 'employee' means an individual employed by an employer." 42 U.S.C. § 2000e(f). Containing no technical terms, Title VII's "employee" definition is ripe for *Bostock*'s rule that its ordinary public meaning at the time of enactment (1972 for § 2000e-16(a), and 1964 for § 2000e(f)) controls.

To be sure, the D.C. Circuit's response would be that § 2000e-16(a) mandates deviation from the ordinary public meaning, because it references "'military departments *as defined in section 102 of Title 5*'" a few words after mentioning "employees." Pet. App. 9a (quoting 42 U.S.C. § 2000e-16(a) (emphasis added by D.C. Circuit)). But that is not a direction *in the text* to apply Title 5's definition of employee. It would be one thing if the text stated it applied to employees "in the military departments *as defined*

in section 2105 of Title 5," as then Congress would have overtly incorporated a section that has an alternative definition of employee. Instead, it mentioned only section 102 of Title 5, which says nothing about employees and merely establishes a tripartite configuration of the military departments (Army, Navy, and Air Force). The best the D.C. Circuit could say is that, because of Congress's reference to § 102 of Title 5, "*we have reason* to look to the definition of employee in Title 5." Pet. App. 12a (emphasis added). *Bostock* rejects such interpretational leaps: "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." 2020 U.S. LEXIS 3252, at *58.[10]

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[10] Rather than representing some implicit invitation by Congress to incorporate the portions of Title 5 into § 2000e-16(a) that judges might deem useful, Congress's reference to "military departments as defined in section 102 of Title 5" is easily explained as providing direction on the critical issue of *who* is to process Title VII claims. Oftentimes, there are thought to be five, not three, parts to the military: Army, Navy, Air Force, Marines, and Coast Guard. *Cf.* 10 U.S.C. § 101(a)(4). But the Marines are really under the auspices of the Navy; and the Coast Guard is part of the Navy during times of war and was part of the Treasury Department, and is now part of the Department of Homeland Security, during non-war times. *See Johnson v. Alexander*, 572 F.2d 1219, 1224 n.5 (8th Cir. 1978). Whether, for Title VII purposes, to house the Marines and Coast Guard within the Navy, treat them as their own independent entities, or – with respect to the Coast Guard – place it in the Treasury Department (now Homeland Security) had consequence because, in subsections (b) though (f) of § 2000e-16, Congress delineated the administrative aspects of processing discrimination claims. The incorporation of § 102 of Title 5 clarifies that there are only three places for processing: the Army, the Navy, and the Air Force (signaling that both the Marines and the Coast Guard are to be within the Navy).

Had the D.C. Circuit looked to the ordinary public meaning of employee at the time of enactment, it would have concluded that the uniformed military are employees covered by Title VII. In *Bostock* (*id.* at *17), the Court cited two dictionaries existing at the time of Title VII's enactment, and both contain definitions of employee readily covering military servicepersons. *E.g.*, "Employee," Webster's New Collegiate Dictionary (1975) ("one employed by another usually for wages or salary and in a position below the executive level") [hereinafter "Webster's Collegiate"]; "Employee," Webster's New International Dictionary (2d ed. 1953) ("[o]ne employed by another; one who works for wages or salary in the service of an employer") [hereinafter "Webster's International"]; "Employ," Webster's Collegiate ("to use or engage the services of"); "Employ," Webster's International ("To make use of the services of; to give employment to; to entrust with some duty or behest; as, to *employ* an envoy").

These definitions focus on an individual providing *services* or entrusted with *duties* typically for wages, which the uniformed military do for the military departments. *See Hill v. Berkman*, 635 F. Supp. 1228, 1236-37 (E.D.N.Y 1986). In fact, the D.C. Circuit repeatedly characterized the uniformed military as engaged in "military *service*." Pet. App. 12a, 15a, 16a (emphasis added). The definitions nowhere suggest that employee status is dependent on the ability to leave employment at will or on refusing to be subject to harsh discipline on the job. *But see id.* at 15a (citing *Johnson*, 572 F.2d at 1223-24). To the contrary, the employer-employee rubric historically was synonymous with the master-servant relationship under agency law, where the *greater* the

control exercised by the superior the more likely a master-servant relationship existed. *See* Restatement (Second) of Agency § 2 cmt. d (Am. Law Inst. 1958); *id.* § 220(1).

B. *Bostock* also found Congress's use of the word "individual" at various points in Title VII's text to be significant. "It tells us . . . that our focus should be on individuals, not groups." 2020 U.S. LEXIS 3252, at *18 (citing 42 U.S.C. § 2000e-2(a)(1)). "And the meaning of 'individual' was as uncontroversial in 1964 as it is today: 'A particular being as distinguished from a class, species, or collection.'" *Id.* (quoting "Individual," Webster's International).

Breaching this command too, the D.C. Circuit treated all uniformed servicepersons as a class and excluded them from Title VII's scope, notwithstanding Title VII's definition of covered employee being "an *individual* employed by an employer." 42 U.S.C. § 2000e(f) (emphasis added). The D.C. Circuit should have centered on the characteristics of Jackson's individual relationship with the military departments, not – as it did – on broad, class-wide notions of military service. *See* Pet. App. 14a-15a. The facts are that Jackson's allegations involve discrimination not on the battlefield in a foreign land, but as a warehouse manager in suburban Washington, D.C., where he was overseen, in part, by civilians; he also alleges discrimination in prohibiting his ability to reenlist – *i.e.*, in his rehiring. Rather than showing circumstances "unique from traditional employment," they are equivalent.

C. A final pertinent aspect of *Bostock* is the Court's strong rejection of "postenactment legislative history." 2020 U.S. LEXIS 3252, at *37. In the face of "many federal judges long accept[ing]

interpretations of Title VII that excluded" homosexuals from the statute's anti-discrimination protections, proponents of continuing the exclusion argued in *Bostock* that "Congress has enacted other statutes addressing other topics that do discuss sexual orientation" without amending Title VII, suggesting acquiescence with the exclusionary court decisions for Title VII. *Id.* at *53, *37. The Court said these "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote." *Id.* at *38 (internal quotation marks and citation omitted).

Contrary to that directive, the D.C. Circuit found persuasive that, with uniform case law excluding military servicepersons in the backdrop, "Congress has never amended Title VII to add uniformed members of the armed forces to the statute." Pet. App. 17a; *see Bostock*, 2020 U.S. LEXIS 3252, at *48 (viewing filing of cases – irrespective of their outcome – "[n]ot long after" statute's enactment as, in reality, indication that "some people foresaw . . . potential application" of Title VII to judicially excluded parties).

III. THE QUESTION PRESENTED IS IMPORTANT

The Court should grant the Petition because the Question Presented is of vital importance. Determining whether Title VII applies to the uniformed military could impact potentially hundreds of thousands of uniformed servicemembers, is needed given the questionable efficacy of the military departments' current systems for addressing discrimination, and gains even greater urgency at this unique inflection point in our nation's dialogue on race and racial justice.

A. The Question Presented implicates the rights of many. Roughly 1.4 million men and women serve in the active duty military. *See* Dep't of Defense, *Defense Manpower Data Center, Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned*, cell H242 (Mar. 31, 2020), https://tinyurl.com/yb83n9gq. As of 2017, racial and ethnic minorities constituted 43% of the active duty force. *See* Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, Pew Research Center (Sept. 10, 2019), https://www.pewresearch.org/fact-tank/2019/09/10/the-changing-profile-of-the-u-s-military/. Further, 18.6 million veterans live in the United States, of whom 23% are minorities. Dep't of Veterans Affairs, *Profile of Veterans: 2017 Highlights*, https://www.va.gov/vetdata/docs/QuickFacts/2017_Veterans_Profile_Fact_Sheet.PDF.

B. Confirming the need for the Court to determine the reach of Title VII is uncertainty about the sufficiency of the military's current systems to remedy racial discrimination. The D.C. Circuit touted internal policies under which "the military is prohibited from engaging in unlawful discrimination, including in the employment context." Pet. App. 15a-16a.

Nonetheless, "[t]he scourge of racism continue[s] to plague the military." David Barno & Nora Bensahel, *Reflections on the Curse of Racism in the U.S. Military*, War on the Rocks (June 30, 2020), https://warontherocks.com/2020/06/reflections-on-the-curse-of-racism-in-the-u-s-military/ [hereinafter "Barno & Bensahel"]. That point, in just the past few weeks, has been highlighted by several high-ranking African-American military leaders,

including General Brown (*see supra* p. 3) and General (Retired) Vincent Brooks, who recalled experiencing "many episodes, painful to remember," in his career – even as an Army general. Vincent K. Brooks, *Dismay and Disappointment – A Breach of Sacred Trust*, Harvard Kennedy School Belfer Center (June 4, 2020), https://www.belfercenter.org/publication/dismay-and-disappointment-breach-sacred-trust. Lieutenant General (Retired) Vincent Stewart, the former director of the Defense Intelligence Agency, recently spoke of the pain of "being described as the best black officer in a unit – never described as the best officer in the unit – or never being the first choice for visible prominent assignments, despite a superior record of performance than my peers." Vincent Stewart, *Former DIA Director: Please, Take Your Knee Off Our Necks So We Can Breathe*, Task & Purpose (June 10, 2020), https://taskandpurpose.com/opinion/vincent-stewart-racism-black-lives-matter. And Major General Dana Pittard recounted being passed over for company-level commands by a former squadron commander who "just couldn't see past my color." Michael Hirsh, *Q&A: 'He Just Couldn't See Past My Color'*, Foreign Policy (June 4, 2020), https://foreignpolicy.com/2020/06/04/dana-pittard-interview-army-pentagon-institutional-racism-black-lives-matter-protests/.

Commentators contend that, at a structural level, "[h]idden and insidious forms of racism" keep "sizable numbers of African-American officers from reaching the highest ranks of the service." Barno & Bensahel. In addition, Black personnel are at least 1.29 times, and as much as 2.61 times, more likely than their white counterparts to be subjected to

courts martial and disciplinary action, with "racial disparities . . . present at every level of military disciplinary and justice proceedings." Protect Our Defenders, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities within the United States Military Justice System* at i-ii (May 5, 2017), https://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf.

The evidence indicates, therefore, that "the important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity," *Ricci v. DeStefano*, 557 U.S. 557, 580 (2009) – has not been fully realized in the military. True, the military's top leaders have recently pronounced that improvements must be made to internal procedures for remedying racial discrimination.[11] However, those remedial schemes

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[11] *E.g.*, Statement by Gen. Joseph L. Legyel, Chief, Nat'l Guard Bureau, *We Must Do Better*, @ChiefNGB, Twitter (June 3, 2020, 8:42 PM), https://twitter.com/ChiefNGB/status/1268335177484419073; Statement by Michael A. Grinston, Sergeant Major of the Army, Gen. James C. McConville, Chief of Staff of the Army, & Ryan D. McCarthy, Sec'y of the Army, *A Message to the Army Community About Civil Unrest* (June 3, 2020), https://www.jbsa.mil/News/News/Article/2207032/a-message-to-the-army-community-about-civil-unrest/; Statement by Adm. Mike Gilday, Chief of Naval Ops. (June 3, 2020), https://www.navy.mil/management/videodbdata/transcript/CNOMsg20200603.txt; Statement by Adm. Karl L. Schultz, Coast Guard Commandant, Facebook (June 2, 2020), https://www.facebook.com/CommandantUSCG/photos/a.554008241366166/2583695248397445/?type=3&theater; Statement by Gen. John W. Raymond, Chief of Space Operations, U.S. Space Force, & Roger A. Towberman, Chief Master Sergeant, U.S. Space Force (June 2, 2020), https://www.airforcemag.com/app/uploads/2020/06/Letter-to-the-US-Space-Force.pdf; Statement by Gen. David L. Goldfein, Air Force

are administered without the involvement of objective outsiders, making the adequacy of any such systems largely unknowable and unquantifiable. On that score, some of the military departments do not collect data concerning racial or ethnic background at all, limiting their ability to identify racial disparities in the first instance, much less to remedy race-based discrimination. *See* Protect Our Defenders, *Federal Lawsuit Reveals Air Force Cover Up: Racial Disparities in Military Justice Part II*, at 2, 5 (May 2020), https://www.protectourdefenders.com/wp-content/uploads/2020/06/Racial-Disparity-Report-Part-II.pdf; *see also* U.S. Gov't Accountability Office, *Military Justice: DOD & the Coast Guard Need to Improve Their Capabilities to Assess Racial & Gender Disparities* (GAO-19-344), at 22 (May 30, 2019), https://www.gao.gov/products/GAO-19-344.

C. The Question Presented has special urgency today, because it involves the scope of the country's paramount civil rights law at a time when racial justice is at the forefront of the national discourse. "In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964." *Bostock v. Clayton Cty.*, 2020 U.S. LEXIS 3252, at *9 (U.S. June 15, 2020). Moreover, the military's "long-running problems with racism" reflect "the society it serves," and recent events in our nation "have forced the United States into a long-overdue reckoning." Barno & Bensahel. "The wave of protests that have swept the nation" are "illuminating the extent to which race and racism is still built into the fabric of the American experience." *Id*.

Chief of Staff (June 1, 2020), http://cdn.cnn.com/cnn/2020/images/06/02/air.force.goldfein.letter.george.floyd.pdf.

It is within this national environment that Jackson seeks the Court's review of the Circuits' divergent theories for excluding the uniformed military from the protections of Title VII. Respectfully, the nation's military men and women deserve a decision from this Court, not piecemeal lower-court opinions supported with unconvincing reasoning, to resolve Title VII's application to them. If the Court holds that Title VII applies, then the uniformed military will enjoy the same protections as the rest of working America. If the Court holds against Title VII's application, then the stage will at least be set for Congress to fix the problem.

IV. IF THE COURT DOES NOT GRANT PLENARY REVIEW, IT SHOULD REMAND FOR RECONSIDERATION IN LIGHT OF *BOSTOCK*

If the Court does not grant plenary review, it should grant the Petition, vacate the decision below, and return the matter to the D.C. Circuit for reconsideration in light of *Bostock*. At a minimum, as already noted, *Bostock* addresses numerous points pertinent to the D.C. Circuit's determination in this case, warranting renewed examination below.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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July 10, 2020

APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 4, 2019

Decided February 14, 2020

No. 18-5180

GARY L. JACKSON,
APPELLANT

v.

THOMAS B. MODLY, ACTING SECRETARY, THE UNITED STATES DEPARTMENT OF THE NAVY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-02186)

Anthony F. Shelley, appointed by the court, argued the cause as *amicus curiae* in support of appellant. With him on the briefs was *Dawn E. Murphy-Johnson*.

Gary L. Jackson, *pro se*, was on the briefs for appellant.

Jane M. Lyons, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Jessie K. Liu*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney. *Rhonda L. Campbell*, Assistant U.S. Attorney, entered an appearance.

Before: HENDERSON and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Gary L. Jackson served in the United States Marine Corps from 1977 to 1991. Almost thirty years after his honorable discharge from the Marine Corps, Jackson filed a pro se complaint against the Secretary of the Navy (Secretary) alleging that toward the end of his military career, his supervising officers discriminated against him because of his race and sex (he is a black male) in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. In addition to Jackson's Title VII claim, the district court inferred other claims from his pro se complaint, including one under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and another under the Military Pay Act, 37 U.S.C. § 204. The district court ultimately dismissed all of Jackson's claims and Jackson now appeals.

As detailed below, we join the unanimous rulings of our sister circuits, concluding that Title VII does not apply to uniformed members of the armed forces, and therefore affirm the dismissal of Jackson's Title VII claim. We also affirm the dismissal of Jackson's APA claim because it is untimely and the facts alleged in the complaint are insufficient to apply equitable tolling. In so holding, we also recognize that our long-standing interpretation of the six-year statute of limitations in 28 U.S.C. § 2401(a) as jurisdictional is no longer correct in light of the United States Supreme Court's decision in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015). And, last, we conclude

that we lack jurisdiction to review the dismissal of Jackson's Military Pay Act claim.

I. BACKGROUND

This case involves Jackson's claims of discrimination that he allegedly suffered toward the end of his service with the United States Marine Corps. Jackson served from 1977 until his honorable discharge on January 15, 1991. His complaint alleges that in 1988, while he was stationed at Henderson Hall, Marine Corps Headquarters in Arlington, Virginia, assigned to the Warehouse Chief position, he began to experience discrimination, harassment and retaliation from his superiors. For example, Jackson alleges that one of his superiors relocated him to another section of the warehouse stating that he "preferred that the number of Blacks not exceed the number of whites in any one section of the Warehouse." Compl. 9. He also alleges that, among other things, his superiors intentionally delayed responding to his request to attend a training academy, placed false accusations in his military record and went to extraordinary lengths to prevent his reenlistment. Jackson alleges that, upon his discharge, one of his superiors said to another, "we finally got Staff Sergeant Jackson . . . That's one less Black Staff Sergeant." *Id.* After his discharge, Jackson alleges that he filed applications with the Board for Correction of Naval Records multiple times from 1990 until 2000 to remove derogatory material from his fitness record and thus make him eligible for reenlistment but his attempts were unsuccessful.

On November 19, 2014, Jackson filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against the Marine Corps. The EEOC responded that it lacked

jurisdiction because Jackson's complaint was against a branch of the military and therefore had to be filed initially with the Marines Corps. On December 9, 2014, Jackson filed his employment discrimination claim with the Equal Employment Opportunity Office of the Marine Corps (EEO Office). The EEO Office dismissed his complaint under 29 C.F.R. § 1614.103(d)(1), stating that uniformed military personnel of any branch of the armed forces are not covered by Title VII. Jackson then appealed to the EEOC. The EEOC affirmed the EEO Office's decision on July 19, 2016, also relying on § 1614.103(d)(1), and denied Jackson's subsequent request for reconsideration.

On November 2, 2016, Jackson filed a pro se complaint in district court, alleging employment discrimination against the Secretary under Title VII. The Secretary moved to dismiss Jackson's complaint under Federal Rule of Civil Procedure 12(b)(1) and Rule 12(b)(6). The district court granted the motion, dismissing Jackson's claims under Rule 12(b)(1) for lack of subject matter jurisdiction. *Jackson v. Spencer*, 313 F. Supp. 3d 302, 311 (D.D.C. 2018). Construing Jackson's pro se complaint in the most favorable light, the district court inferred additional claims under the Military Whistleblower Protection Act, the Administrative Procedure Act (APA), the Military Pay Act and the Federal Tort Claims Act (FTCA). *Id.* at 308. The district court dismissed all of Jackson's claims, holding that Title VII did not apply to uniformed members of the armed forces, that the Military Whistleblower Protection Act does not contain a private right of action and that his other claims were untimely. *Id.* at 308–11.

Jackson appealed pro se. We appointed counsel as amicus to address whether Title VII applies to uniformed members of the armed forces. Amicus for Jackson (Amicus) raises arguments supporting Jackson's Title VII, APA and Military Pay Act claims.[1]

II. ANALYSIS

A. Title VII

We begin with the district court's dismissal of Jackson's Title VII claim. Although the district court dismissed Jackson's Title VII claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the district court should have dismissed the case for failure to state a claim pursuant to Rule 12(b)(6).[2] We review the district court's

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[1] We thank Amicus for the outstanding effort—both on brief and in argument—and have found it to be of great assistance.

[2] In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514–16 (2006), the Supreme Court held that Title VII's threshold requirement that an "employer" have at least fifteen employees is not jurisdictional but instead relates to the substance of the plaintiff's claim for relief. The Court reasoned that Title VII's jurisdictional provision merely requires that a claim be "brought under" that Title and held that, if a restriction like the fifteen-employee threshold for employers under Title VII is not "clearly state[d]" as jurisdictional, "courts should treat the restriction as nonjurisdictional in character." *Id.* at 515–16. Here, just as the issue of whether a person is an "employer" subject to the requirements of Title VII is nonjurisdictional, so is the issue of whether a person is a covered "employee." Nothing about Title VII's definition of employee or its provision extending protection to federal employees "clearly states" that such provisions are intended to be jurisdictional. *See id.* at 515; 42 U.S.C. §§ 2000e(f), 2000e-16(a). The Secretary's argument that Jackson is not entitled to the protections of Title VII as a uniformed member of

dismissal for failure to state a claim under Rule 12(b)(6) de novo, "taking as true the allegations of the complaint." *True the Vote, Inc. v. IRS*, 831 F.3d 551, 555 (D.C. Cir. 2016).

"Title VII of the Civil Rights Act of 1964 reflects the American promise of equal opportunity in the workforce and shields employees from certain pernicious forms of discrimination." *Figueroa v. Pompeo*, 923 F.3d 1078, 1082– 83 (D.C. Cir. 2019) (citation omitted). As originally enacted, Title VII did not apply to the federal government. *Barnes v. Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977). In 1972, however, the Congress extended the protections of Title VII to federal as well as state and local employees in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, § 11, 86 Stat. 103, 111–13 (codified at 42 U.S.C. §§ 2000e–16). As a result, Title VII now provides, as relevant here, 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 issue before us is whether Title VII, specifically, the provision covering federal employees, § 2000e-16(a), applies to uniformed members of the armed forces of the United States military. We have never squarely addressed this issue. *But see Milbert v. Koop*, 830 F.2d 354, 358 (D.C. Cir. 1987) (assuming *arguendo* Title VII does not apply to members of armed forces). But we note at the outset that every

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the armed forces amounts to an argument that Jackson's complaint fails to state a claim for relief.

one of our sister circuits to address this question has concluded—albeit based on varying rationales and depths of analysis—that the answer is no. *See, e.g.*, *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000); *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Stinson v. Hornsby*, 821 F.2d 1537, 1539 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Salazar v. Heckler*, 787 F.2d 527, 530 (10th Cir. 1986); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 928–29 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir.), *cert. denied* 439 U.S. 986 (1978).

With this unanimous precedent from our sister circuits in mind, we begin our analysis with the text. *See S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 55 (D.C. Cir. 2014) (per curiam) ("In addressing issues of statutory interpretation, the court must begin with the text, turning as need be to the structure, purpose, and context of the statute."); *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014). Here, the relevant text of Title VII provides that "employees or applicants for employment . . . in military departments as defined in section 102 of Title 5. . . shall be made free from" unlawful discrimination. 42 U.S.C. § 2000e-16(a).

At the outset of our textual analysis, we clarify—and ultimately reject—a textual hook other courts and the Secretary here erroneously rely upon to reach the conclusion that Title VII does not include uniformed members of the armed forces—namely, the term "military departments." The argument is based on Title VII's reference to the definition of military departments in section 102 of Title 5 of the United States Code, which organizes the federal government.

See 5 U.S.C. §§ 101, *et seq*. Title 5 defines "military departments" as "The Department of the Army. The Department of the Navy. The Department of the Air Force." *Id.* § 102. Title 10 of the United States Code—codifying the Congress's structuring of the military—has the same definition of "military departments." 10 U.S.C. § 101(a)(8). Both Title 5 and Title 10 separately define the "*armed forces*" as "the Army, Navy, Air Force, Marine Corps, and Coast Guard." 5 U.S.C. § 2101(2); 10 U.S.C. § 101(a)(4). Thus, other courts and the Secretary here conclude that, because the Congress treats "military departments" and "armed forces" as distinct terms, uniformed members of the armed forces are not covered by Title VII. *See, e.g.*, *Gonzalez*, 718 F.2d at 928 ("The two differing definitions show that Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel.").[3]

In fact, a quick review of the Congress's structuring of the military in Title 10 shows that uniformed members of the armed forces are within the umbrella of the military departments. Several Title 10 provisions make clear that the term "armed forces" refers to the uniformed fighting forces within the three "military departments." *See* 10 U.S.C. § 101(a)(6) (defining "'department,' when used with respect to a military department" as including, inter alia, "the executive part of the department and

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[3] It appears that other courts took the Ninth Circuit's erroneous textual distinction in Gonzalez, 718 F.2d at 928, at face value without conducting their own textual analysis and based their decisions at least in part on that reasoning. *See, e.g., Roper*, 832 F.2d at 248; *Brown*, 227 F.3d at 298 n.3; *Randall*, 95 F.3d at 343.

all . . . forces"); *id.* § 7062(b) ("[T]he Army, within the Department of the Army, includes land combat and service forces and such aviation and water transport as may be organic therein."); *id.* § 8061(4) ("The Department of the Navy is composed of . . . [t]he entire operating forces, including naval aviation, of the Navy and of the Marine Corps, and the reserve components of those operating forces."). For example, the "Department of the Army" contains both civilian employees as well as the "Army"—defined as "combat and service forces."[4] *See id.* §§ 101(a)(6), 7062(b). Thus, the military departments contain both civilian employees and the armed forces, *see Johnson*, 572 F.2d at 1224 ("The great 'military departments'. . . referred to in 5 U.S.C. § 102 include not only uniformed personnel of various ranks and grades but also of thousands of men and women employed in civilian capacities."), and, accordingly, that term on its own, contrary to what other courts have concluded, in fact supports an interpretation that Title VII covers uniformed members of the armed forces.

Nevertheless, our analysis does not stop with the term "military departments." The Congress specifically chose to say "*employees* . . . in military departments *as defined in section 102 of Title 5*." 42 U.S.C. § 2000e-16(a) (emphases added). The reference to section 102 of Title 5 is significant. First, the Congress explained that the civil-service legislation

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[4] "The Marine Corps is an organization within the Department of the Navy, which is one of the 'military departments' which Congress has defined. The Coast Guard is a military service and one of the armed forces of the United States which serves as a component of the Navy in time of war or when the President so directs." *Johnson*, 572 F.2d at 1224 n.5.

creating section 102, along with the rest of Title 5, was enacted to codify "the general and permanent laws relating to the organization of the Government of the United States and to its *civilian officers and employees*." Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (emphasis added). The Congress could have chosen to define "military departments" with reference to section 101 of Title 10 that organized the United States military several years earlier, *see* Act of Aug. 10, 1956, Pub. L. No. 1028, 70A Stat. 1, 3–4, 84 Cong. Ch. 1041, but instead it chose to reference the title that was codified to organize the civilian officers and employees of the United States government. This choice, albeit not conclusive, is one indication that the Congress was referring to civilian employees within the military departments by referencing Title 5.

Second, and more importantly, in the same legislation that defined "military departments" under section 102 of Title 5, the Congress also defined "employees" under that title. *See* § 2105, 80 Stat. at 409. It defined "employee" as "an officer and an individual who is—(1) appointed in the civil service" by one of the various persons listed under that provision. 5 U.S.C. § 2105(a). It defined "civil service" as consisting of "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, *except positions in the uniformed services*." *Id.* § 2101(1) (emphasis added). "[U]niformed services" means "*the armed forces*, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration." *Id.* § 2101(3) (emphasis added). Putting all of these provisions together, we believe the Congress provided that "employees" in the "civil service" of the United States do not include the "armed forces." Therefore,

when the Congress amended Title VII against this backdrop six years later, § 11, 86 Stat. at 111–13, and specifically referenced section 102 of Title 5, it extended Title VII protections only to federal civilian employees within the military departments, not members of the armed forces that it considered to be outside the definition of employees in the federal civil service.

It is true that Title VII has its own definition of "employee," which it generally defines as "an individual employed by an employer." 42 U.S.C. § 2000e(f). The Congress did not amend that definition in 1972 when it added federal employees to Title VII. But it likely saw no need to make a change. As manifested by Title 5's definitions, it did not consider members of the armed forces to be federal employees within the civil service. Moreover, looking to Title 5's definition of employee to determine whether the Congress intended to include uniformed members of the armed forces under Title VII does not change the broad general definition of employee under Title VII; rather, it indicates that the Congress did not consider a uniformed member of the armed forces to be "an individual employed by an employer" within that general definition in setting Title VII's scope. *Id.*

Amicus argues that our reliance on Title 5's definition of employee is barred by our decision in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979). Not so. In *Spirides*, we considered whether the plaintiff, who worked as a foreign language broadcaster for the Greek Service (a division of the United States International Communication Agency), was an "employee" covered by Title VII or an independent contractor. *Id.* at 827–30. In doing so, we rejected the defendant's exclusive reliance on the

definition of employee found in the civil service laws of Title 5 because independent-contractor status "calls for application of the general principles of the law of agency." *Id.* at 831. There is no assertion here, however, that Jackson is an independent contractor, nor was Spirides a member of the armed forces. In this case, we look to the definition of employee in Title 5 not to displace the test for distinguishing independent contractors from employees but to determine whether "employees" in § 2000e-16(a) encompass uniformed servicemembers. Crucially, the Congress specifically chose to reference the civil service laws for "employees or applicants for employment . . . in military departments." 42 U.S.C. § 2000e-16(a). Thus, Title VII defines military departments by express reference to the civil service laws. Put differently, unlike in *Spirides*, here we have reason to look to the definition of employee in Title 5 because the Congress explicitly directed us there.

The Congress's incorporation of the civil service definition of employee in Title 5, which does not cover uniformed members of the armed forces, comports with the unique nature of the armed forces as composed of "individual[s]" not "employed by an employer" within the meaning of Title VII. 42 U.S.C. § 2000e(f). When compared to traditional civilian employment, military service differs substantially. Those differences show that, at least in the context of Title VII, uniformed members of the armed forces are not "employees" as defined by the statute. *See id.*

First, the manner in which uniformed members of the armed forces and the military terminate the work

relationship is different from normal employment.[5] Uniformed members of the armed forces are not free to leave their positions in the military in most instances. *See Johnson*, 572 F.2d at 1223 n.4 ("An enlisted man in the Army, for example, is not free to quit his 'job,' nor is the Army free to fire him from his employment."). If an enlisted serviceman or a commissioned officer attempts to leave the military or refuses to work before the required time of service is completed, he can be punished by court-martial. *See, e.g.*, 10 U.S.C. §§ 886, 890, 892. Such a court-martial can result in imprisonment, *see e.g.*, *Ortiz v. United States*, 138 S. Ct. 2165, 2168 (2018) ("Courts-martial try service members . . . and can impose terms of imprisonment . . . ."); *United States v. Sanchez-Cortez*, 530 F.3d 357, 358–59 (5th Cir. 2008) (per curiam) (criminal defendant had previously been convicted and imprisoned by court-martial for 114 days' confinement for being absent without leave in violation of 10 U.S.C. § 886 (Art. 86 of the Uniform Code of Military Justice)), and, during times of war, desertion or attempted desertion can even result in the death penalty,[6] 10 U.S.C. § 885(c). We can think of no other

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[5] In this discussion, we borrow two factors we have previously used to distinguish between employees and independent contractors—the manner in which the work relationship is terminated and the intention of the parties—to emphasize the uniqueness of military service when compared to civilian employment. *See Spirides*, 613 F.2d at 831. Of course, for the reasons explained *supra*, the employee versus independent contractor analysis in *Spirides* is different from the issue before us. Nevertheless, we find two of the factors from that analysis particularly helpful here to highlight how military service differs from the typical employment relationship.

[6] The last time the United States executed a soldier for desertion was 1945. *See* Lieutenant Commander Rich Federico, *The*

occupation in which these types of restrictions are placed upon terminating the work relationship.[7] *See Brown v. Glines*, 444 U.S. 348, 354 (1980) ("The military is, 'by necessity, a specialized society separate from civilian society.'" (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974))).

Second, the parties here—service members and the government—intend their relationship to be distinct from traditional employment. Members of the armed forces volunteer to serve in the military, understanding that they must complete their service with all of its burdens, sacrifices and duties or face possible loss of liberty. Likewise, the government expects that uniformed members will complete their duties and follow orders and will not hesitate to enforce the consequences of members failing to do so. *Id.* ("To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty

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Unusual Punishment: A Call for Congress to Abolish the Death Penalty Under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses, 18 Berkeley J. Crim. L. 1, 21 (2013) ("The last soldier executed for desertion was Private Eddie Slovik in 1945."). Still, the fact remains that unlike other jobs, if a soldier attempts to leave the military in certain contexts, the consequence can be loss of freedom or even life.

[7] Amicus argues that professional basketball star LeBron James is not free to leave one team and play for another under the National Basketball Association's rules and that federal employees can be required to work during government shutdowns. But Amicus misses the point. It is the threatened loss of liberty—or even life—that makes the relationship between uniformed members and the government in military service unique. LeBron James may be contractually barred from joining another team but he will not be jailed for walking off the court.

and a discipline without counterpart in civilian life.'" *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757, (1975))).

Other aspects of military service make it unique from traditional employment. Although uniformed members currently volunteer to serve, were the government to reinstitute the draft pursuant to the Selective Service Act, individuals could be forced to join the military. *See United States v. Nugent*, 346 U.S. 1, 9 (1953) ("The Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men."). Additionally, members of the armed forces are subject to a different set of laws and justice system from those governing civilian employees. *See Johnson,* 572 F.2d at 1223 n.4 ("[T]he soldier is subject not only to military discipline but also to military law."); *Parker*, 417 U.S. at 751–52 (discussing "very significant differences between military law and civilian law and between the military community and the civilian community" under Uniform Code of Military Justice). We therefore agree with the Eighth Circuit's reasoning that, because military service "differs materially" from "ordinary civilian employment," uniformed members of the armed forces are not employed by the government within the meaning of Title VII. *Johnson*, 572 F.2d at 1223–24.

We do not, of course, hold today that, because military service is distinct from traditional employment, the military is free to discriminate. Indeed, pursuant to Marine Corps Order (MCO) 5354.1E, the military is prohibited from engaging in

unlawful discrimination, including in the employment context.[8] *See* MCO 5354.1E vol. 2, ¶ 0108 (June 15, 2018). Likewise, we do not hold that, because military service is unique, uniformed members of the armed forces can never be considered "employees" of the federal government. The Congress is free to so define them. Here, it has not done that. In fact, it has done the opposite—the text, structure and context of § 2000e-16(a) demonstrate that the Congress did not intend uniformed members of the armed forces to come within the protections of Title VII.

Apart from the text and structure of Title VII, we also must take into account that every circuit court of appeals to address this issue since 1978 has held that uniformed members of the armed forces are not

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[8] MCO 5354.1E provides in relevant part:

> 0108 UNLAWFUL DISCRIMINATION
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> Any conduct whereby a Service member or DOD employee knowingly and wrongfully and without proper authority but with a nexus to military service treats another Service member or DOD employee adversely or differently based on race, color, national origin, religion, sex (including gender identity), or sexual orientation [constitutes unlawful discrimination]. Unlawful discrimination includes actions or efforts that detract from equal opportunity, with respect to the terms, conditions, or privileges of military service including, but not limited to, acquiring, assigning, promoting, disciplining, scheduling, training, compensating, discharging, or separating. This definition excludes justifiable conduct that discriminates on the basis of characteristics (including, but not limited to, age, height, and weight) that serve a proper military or other governmental purpose as set forth in other military policies.

MCO 5354.1E vol. 2, ¶ 0108 (June 15, 2018).

included within the protections of Title VII,[9] *see, e.g.*, *Brown*, 227 F.3d at 298 n.3 (collecting cases); in addition, the Congress has never amended Title VII to add uniformed members of the armed forces to the statute. The Supreme Court has held that "Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Sw. Ry. Co. v. Morgan,* 486 U.S. 330, 338 (1988) (quoting *Cannon v. Univ. of Chicago,* 441 U.S. 677, 703 (1979))). This indication is particularly strong if evidence exists of the Congress's awareness of and familiarity with such an interpretation. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 599–602 (1983).

Although we recognize the limited value of congressional acquiescence as an interpretive tool, *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994), we nevertheless find the Congress's inaction for over forty years particularly significant for a couple of reasons. First, the Congress has amended various parts of Title VII over the years, including the specific provision at issue here, 42 U.S.C. § 2000e-16(a), *see* Pub. L. No. 104–1, § 201, 109 Stat. 3 (1995); Pub. L. No. 105–220, § 341, 112 Stat. 936 (1998), but has never sought to override our sister circuits' determination that uniformed members of the armed forces are not

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[9] The only court to conclude otherwise was the Eastern District of *New York in Hill v. Berkman*, 635 F. Supp. 1228, 1238 (E.D.N.Y. 1986). That decision was later reversed by the Second Circuit. *See Roper*, 832 F.2d at 248.

included under Title VII.[10] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (quoting *Lorillard v. Pons*, 434 U.S. 575, 580–581 (1978))).[11]

Second, aware of the growing body of circuit decisions consistently holding Title VII inapplicable to uniformed servicemembers, the Congress has legislated close and systematic oversight of the military's substitute system for addressing race and

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[10] We also note that our sister circuits have interpreted other federal anti-discrimination laws in addition to Title VII not to apply to uniformed members of the armed forces. *See Coffman*, 120 F.3d at 59 (Americans with Disabilities Act); *Baldwin v. U.S. Army*, 223 F.3d 100, 101 (2d Cir. 2000) (same); *Spain v. Ball*, 928 F.2d 61, 63 (2d Cir. 1991) (Age Discrimination in Employment Act); *Helm v. California*, 722 F.2d 507, 509 (9th Cir. 1983) (same); *Kawitt v. United States*, 842 F.2d 951, 953–54 (7th Cir. 1988) (same); *Doe v. Garrett*, 903 F.2d 1455, 1461–62 (11th Cir.1990) (Rehabilitation Act).

[11] We have recognized that this interpretive canon based on the Congress's ratification of an interpretation is of limited usefulness if the Congress has neither re-enacted a statute nor amended the specific provision at issue. *See Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 668 (D.C. Cir. 2003). Here, however, the Congress has amended the specific provision to make clarifications and add specific government agencies such as the Government Printing Office and the Smithsonian Institution. *See* Pub. L. No. 104–1, § 201, 109 Stat. 3 (1995); Pub. L. No. 105–220, § 341, 112 Stat. 936 (1998). We have also noted that for the canon to carry any weight, there must be "some evidence of (or reason to assume)" that the Congress is familiar "with the . . . interpretation at issue." *Pub. Citizen*, 332 F.3d at 669. As explained *infra*, we have reason to assume the Congress's awareness.

sex discrimination in the armed forces. *See* 10 U.S.C. § 481. In 1994 it required the Department of Defense to conduct a biennial survey and report to include "the effectiveness of current processes for complaints on and investigations into racial and ethnic discrimination" in the armed forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 554(a), 108 Stat. 2773 (1994). Through four amendments, the Congress has intensified its attention to the special Equal Employment Opportunity processes and standards that apply to the armed forces. It acted first to add gender discrimination and make the surveys annual, Pub. L. No. 104-201, § 571(c), 110 Stat. 2532 (1996), second, to create four separate quadrennial surveys on race and sex discrimination in the active and reserve forces, Pub L. No. 107-314, § 561(a), 116 Stat. 2553 (2002), third, to add "harassment" and "assault" as subjects of interest in addition to "discrimination," Pub. L. No. 112-239, § 570, 126 Stat. 1752 (2013), and, last, to further define "assault" as "(including unwanted sexual contact)," Pub. L. No. 116-92, § 591, 133 Stat. 1198 (2019). The Department of Defense is required periodically to submit "Armed Forces Workplace and Equal Opportunity Surveys" to the Congress. 10 U.S.C. § 481(d)-(e). The Congress's engagement with the efficacy of the military's internal systems to combat sex and race discrimination provides added assurance of its awareness and approval of the inapplicability of Title VII itself to the armed forces.[12]

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[12] We also find significant the Congress's efforts to clarify whether members of the Public Health Service Commissioned Corps (PHSCC) were covered by Title VII. *See Middlebrooks v. Leavitt*, 525 F.3d 341, 345 (4th Cir. 2008) (explaining that courts

Nevertheless, Amicus argues that our conclusion here is controlled by our decision in *Cummings v. Department of the Navy*, 279 F.3d 1051 (D.C. Cir. 2002). We disagree. In *Cummings* we held that members of the armed forces could sue the military for damages under the Privacy Act. *Id.* at 1054. Amicus relies on the fact that we construed the term "military department" in the Privacy Act to include uniformed members of the armed forces, *see id.*, to argue that we must likewise interpret Title VII's use of that term to include uniformed members. First, the Privacy Act's language does not refer to employees of the military departments like Title VII; it defines the term "agency" to include, among other things "any . . . military department" for the purpose of the Privacy Act. *See* 5 U.S.C. § 552(f)(1). Second, in *Cummings*, we noted that the Privacy Act contained specific exemptions that "would be unnecessary if military servicepersons were excluded from the Privacy Act

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disagreed about whether the PHSCC was covered under Title VII and that "Congress responded to this debate by enacting the [HPEPA of 1998], which added subsection (f) to 42 U.S.C. § 213 (2000)"). To effect this clarification, the Congress chose the following language: "Active service of commissioned officers of the [PHSCC] shall be deemed to be active military service in the *Armed Forces* of the United States *for purposes of all laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability*." 42 U.S.C. § 213(f) (emphasis added). The Congress could have simply said that the PHSCC officers are not covered by anti-discrimination laws but, instead, it specifically chose to ground the amendment in the term "Armed Forces" to delineate that such forces are not covered by the nation's anti-discrimination laws. This legislation appears not only to recognize what circuit courts have held but also to go further, explicitly ratifying the view that uniformed members of the armed forces are not covered by anti-discrimination statutes like Title VII.

altogether." 279 F.3d at 1054 (quoting *Cummings v. Dep't of the Navy*, 116 F. Supp. 2d 76, 78 n.5 (D.D.C. 2000)). For example, it included one exemption for "evaluation material used to determine potential for promotion *in the armed services*." *Id.* (emphasis added) (quoting 5 U.S.C. § 552a(k)(7)). Title VII contains no such provision demonstrating an intent to protect uniformed members of the armed forces. Thus, *Cummings* is distinguishable and does not control our decision here.

Before concluding, we also note that some courts that reached the same conclusion we reach today have done so based on rationales that we decline to use. First, some courts have based their Title VII conclusion on the "*Feres* doctrine," which doctrine originated in *Feres v. United States*, 340 U.S. 135 (1950). *See, e.g.*, *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997). In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," 340 U.S. at 146, despite language in the FTCA defining "employee of the government" to include "members of the military or naval forces of the United States." 28 U.S.C. § 2671. Although *Feres* remains good law, it has been severely criticized. *See United States v. Johnson*, 481 U.S. 681, 700–01 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism it has received.'" (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984))); *Lanus v. United States*, 570 U.S. 932 (2013) (Thomas, J., dissenting from denial of certiorari) ("There is no support for [*Feres*'s] conclusion in the text of the statute, and it has the unfortunate consequence of depriving servicemen of

any remedy when they are injured by the negligence of the Government or its employees."). Because we find sufficient independent bases to conclude that Title VII does not apply to uniformed members of the armed forces, we do not rely on *Feres* to reach our conclusion. For this reason, we do not extend the doctrine to Title VII. *See Lombard v. United States*, 690 F.2d 215, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) ("While lower courts are bound by the Supreme Court's decision in *Feres*, they are hardly obliged to extend the limitation . . . .").

Second, some courts have relied on the EEOC's regulation interpreting Title VII to exclude uniformed members of the armed forces to deny such members' claims under Title VII, basing their decision on the EEOC's authority to promulgate rules interpreting 42 U.S.C. § 2000e-16(a). *See Hodge*, 107 F.3d at 707–08; *Brown*, 227 F.3d at 298. The EEOC regulation states that its general prohibition against discrimination under Title VII, the ADEA, the Rehabilitation Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act "does not apply to: (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section." 29 C.F.R. § 1614.103(a), (d)(1). Amicus raises procedural and substantive challenges to the EEOC's regulation treating Title VII as inapplicable to "uniformed members of the military departments" but we do not credit those arguments because the Commission's reading is compelled by the statutory text. *See Hodge*, 107 F.3d at 712.

Therefore, based on the text, structure and context of 42 U.S.C. § 2000e-16(a) as well as the Congress's subsequent actions in light of the unanimous circuit

precedent on the issue, we hold that Title VII does not apply to uniformed members of the armed forces. As such, we affirm the district court's dismissal of Jackson's Title VII claim.

B. APA Claim

Amicus also appeals the district court's dismissal of Jackson's APA claim. The district court inferred an APA claim challenging the decisions of the Board for Correction of Naval Records regarding Jackson's fitness records and his reenlistment code. *Jackson*, 313 F. Supp. 3d at 309. We first note that, despite the Secretary's arguments to the contrary, the APA claim is properly before us. The district court liberally construed Jackson's pro se complaint to include claims beyond Title VII. Indeed, the Secretary himself suggested in his motion to dismiss that Jackson could be raising an APA claim. Def.'s Mem. Supp. Mot. Dismiss 18. Moreover, although we appointed Amicus principally to address the Title VII claim, we did not otherwise limit the arguments or claims he could raise on appeal on Jackson's behalf. Order No. 1762275 at 1 (No. 18-5180) (D.C. Cir. Nov. 30, 2018).

1.

The parties do not dispute that Jackson's APA claim is time-barred by the six-year statute of limitations in 28 U.S.C. § 2401(a) for all civil actions commenced against the United States. Instead, they dispute whether § 2401(a)'s statute of limitations is a jurisdictional bar—thereby divesting the court of jurisdiction as well as its ability to consider an equitable tolling argument—or whether it is non-jurisdictional.

The long-held rule in our circuit has been "that section 2401(a) creates 'a jurisdictional condition

attached to the government's waiver of sovereign immunity.'" *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (quoting *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)). Recently, however, especially after the Supreme Court's decision in *Kwai Fun Wong*, which held the two-year statute of limitations in § 2401(b) to be nonjurisdictional, 575 U.S. at 407, the soundness of our precedent has been called into doubt. *See, e.g.*, *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 37 n.7 (D.D.C. 2018) ("Given the Supreme Court's clear strictures on this issue, which have undermined the foundations of *Spannaus* and similar cases, the D.C. Circuit ought to reconsider its § 2401(a) precedents."). Since *Kwai Fun Wong*, the Sixth and Tenth Circuits have held that, based on the Supreme Court's opinion in that case, § 2401(a) is not jurisdictional.[13] *Chance v. Zinke*, 898 F.3d 1025, 1033 (10th Cir. 2018); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 817–18 (6th Cir.

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[13] Even before *Kwai Fun Wong*, the Ninth Circuit held that § 2401(a) is not jurisdictional. *Cedars–Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770–71 (9th Cir. 1997). The Fifth Circuit did the same, *see Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) ("[T]he doctrine of equitable tolling has potential application in suits . . . governed by the statute of limitations codified at 28 U.S.C. § 2401(a)."), but subsequent Fifth Circuit precedent is less clear, *compare Doe v. United States*, 853 F.3d 792, 802 (5th Cir. 2017), *as revised* (Apr. 12, 2017) ("Although courts may equitably toll § 2401(a), they do so 'sparingly.'" (citation omitted) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002))), *and Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016) ("Timeliness [under § 2401(a)] does not raise a jurisdictional issue in this court."), *with Gen. Land Office v. U.S. Dep't of the Interior*, 947 F.3d 309, 318 (5th Cir. 2020) ("[Section 2401(a)'s] timing requirement is jurisdictional, because it is a condition of the United States' waiver of sovereign immunity.").

2015). Although we have previously "questioned the continuing viability" of our rule without addressing the issue directly, *see Mendoza v. Perez*, 754 F.3d 1002, 1018 n.11 (D.C. Cir. 2014) (citing *P & V Enters.*, 516 F.3d at 1027 & n.2; *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007); *Harris v. F.A.A.*, 353 F.3d 1006, 1013 n.7 (D.C. Cir. 2004)), we now do so. Accordingly, we hold today that the Supreme Court's decision in *Kwai Fun Wong* overrules our precedent treating § 2401(a)'s statute of limitations as jurisdictional.[14]

"In recent years," the Supreme Court has "repeatedly held that procedural rules, including time bars, cabin a court's power" to hear a case—i.e., subject matter jurisdiction—"only if Congress has 'clearly state[d]' as much." *Kwai Fun Wong*, 575 U.S. at 409 (alteration in original) (quoting *Sebelius v. Auburn Reg'l Med. Cent.*, 568 U.S. 145, 153 (2013)). Applying this "clear statement rule," the Court has "made plain that most time bars are nonjurisdictional." *Id.* at 410. In *Kwai Fun Wong*, the Supreme Court explained that "Congress must do

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[14] "[W]e cannot overrule a prior panel's decision, except via an Irons footnote or en banc review . . . ." *United States v. Emor*, 785 F.3d 671, 682 (D.C. Cir. 2015). "In an *Irons* footnote, named after the holding in *Irons v. Diamond*, 670 F.2d 265, 267–68 & n. 11 (D.C. Cir. 1981), the panel 'seek[s] for its proposed decision the endorsement of the en banc court, and announce[s] that endorsement in a footnote to the panel's opinion.'" *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 n.1 (D.C. Cir. 2013) (alteration in original) (quoting Policy Statement on En Banc Endorsement of Panel Decisions at 1 (Jan. 17, 1996)). Our resolution here—recognizing the overruling of our precedent by the Supreme Court's decision in *Kwai Fun Wong*—has been approved by the en banc court and thus constitutes the law of the circuit.

something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." 575 U.S. at 410. Based on that rule, the Court held that the FTCA's statute of limitations in § 2401(b) was "not a jurisdictional requirement." *Id.* at 412.

Applying the Court's ruling in *Kwai Fun Wong* to § 2401(a), we reach the same conclusion. First, our precedent treating § 2401(a) as a jurisdictional bar was grounded in the belief that the provision is "attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Spannaus*, 824 F.2d at 55. In *Kwai Fun Wong*, the Court flatly rejected this reasoning. 575 U.S. at 420 ("[I]t makes no difference that a time bar conditions a waiver of sovereign immunity, even if the Congress enacted the measure when different interpretive conventions applied . . . ."). Second, like § 2401(b), § 2401(a) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"; rather, it "'reads like an ordinary, run-of-the-mill statute of limitations,' spelling out a litigant's filing obligations without restricting a court's authority." *Id.* at 411 (first quoting *Arbaugh*, 546 U.S. at 515; then quoting *Holland v. Florida*, 560 U.S. 631, 647 (2010)); *see* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). Also like § 2401(b), § 2401(a)'s filing deadline appears in a section separate from the general jurisdictional grant of civil actions against the federal government, *see* 28 U.S.C. § 1346; *Herr*, 803 F.3d at 817, which the Supreme Court found to be an indication "that the time bar is not jurisdictional." *Kwai Fun Wong*, 575 at 411.

Third, we conclude that § 2401(a)'s origins in the Tucker Act do not make it otherwise jurisdictional. We find the in-depth analyses and reasoning of the Sixth and Tenth Circuits on this point—differentiating between the separate provisions of the Big Tucker Act and the Little Tucker Act—particularly cogent and persuasive. *See Herr*, 803 F.3d at 815–17; *Chance*, 898 F.3d at 1031–33. As those courts explained, although the Supreme Court has affirmed the jurisdictional nature of the Big Tucker Act's statute of limitations, *see* 28 U.S.C. § 2501, its affirmance was grounded solely in the doctrine of stare decisis; further, the Congress altered the Little Tucker Act's statute of limitations—the provision from which § 2401(a) is derived— by separating it from the jurisdictional grant and expanding its reach. *See Chance*, 898 F.3d at 1032–33; *Herr*, 803 F.3d at 816–17. As the Sixth Circuit explains, this alteration "demonstrates that § 2401(a) was designed to serve as a standard, mine-run statute of limitations without jurisdictional qualities. That leaves us with a statute (§ 2401(a)) that does not clearly impose a jurisdictional limit." *Herr*, 803 F.3d at 817.

Accordingly, we hold that § 2401(a)'s time bar is nonjurisdictional and subject to equitable tolling. Our decisions to the contrary, *see, e.g.*, *Spannaus*, 824 F.2d at 55, are thus overruled.[15]

2.

Having determined that § 2401(a)'s statute of limitations is not jurisdictional, we turn to Jackson's equitable tolling argument in support of his APA claim. The district court considered the merits of

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[15] *See supra* note 14.

Jackson's equitable tolling argument and we review its dismissal of Jackson's APA claim de novo.[16] *See Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003). To demonstrate that he is entitled to the benefit of equitable tolling, Jackson must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005). We have described the remedy of "equitable tolling as appropriate only in 'rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.'" *Head v. Wilson*, 792 F.3d 102, 111 (D.C. Cir. 2015) (quoting *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014)).

On appeal, Amicus argues that equitable tolling is warranted because Jackson's "debilitating mental anguish as a result of the government's misconduct prevented his timely filing of the APA claim." Amicus Br. at 49. Amicus relies on our holding in *Smith-Haynie v. D.C.*, 155 F.3d 575 (D.C. Cir. 1998), to argue that Jackson was "*non compos mentis*," which ordinarily means "incapable of handling [one's] own affairs or unable to function [in] society." *Id.* at 580 (second alteration in original).

Amicus's equitable tolling argument does not meet the high threshold for applying this rare remedy. *See id.* at 579–80 ("The court's equitable power to toll the statute of limitations will be exercised only in

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[16] Because we hold that § 2401(a)'s statute of limitations is not jurisdictional, the dismissal of Jackson's APA claim should be reviewed pursuant to Rule 12(b)(6) for failure to state a claim rather than Rule 12(b)(1) for lack of subject matter jurisdiction.

extraordinary and carefully circumscribed instances." (quoting *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988))). Although Jackson's allegations, if true, indicate that he suffered mental and emotional harm as a result of being discriminated against, they do not rise to the level of *non compos mentis*. As we explained in *Smith-Haynie*, "[i]mpaired judgment alone is not enough to toll the statute of limitations." 155 F.3d at 580 (quoting *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 665 (D.C. 1997)). "The disability of a person claiming to be *non compos mentis* must be 'of such a nature as to show [he] is unable to manage [his] business affairs or estate, or to comprehend [his] legal rights or liabilities.'" *Id.* (quoting *Decker v. Fink*, 47 Md. App. 202, 422 A.2d 389, 392 (Md. 1980)). *Smith-Haynie* references various facts indicative of *non compos mentis*, including being "[un]able to engage in rational thought and deliberate decision making sufficient to pursue" a legal claim whether "alone or through counsel" or diagnosed with schizophrenia, "adjudged incompetent," or appointed a caretaker or power of attorney. *Id.* (first quoting *Nunnally v. MacCausland*, 996 F.2d 1, 5–6 (1st Cir. 1993); and then quoting *Speiser v. U.S. Dep't of Health & Human Servs.*, 670 F. Supp. 380, 385 (D.D.C. 1986), *aff'd*, 818 F.2d 95 (D.C. Cir. 1987)). Jackson's allegations of "pain, anger, depression, hopelessness and bewilderment," the "divorce from [his] wife caused by [his] difficult emotion [and] mental state," "[l]oss of enjoyment of life," "insomnia, distrust, depression, anxiety" and "financial hardship" as a result of the discrimination he suffered, Compl. 12, 17, although serious, do not rise to the level of *non compos mentis* such that he was unable to manage his own affairs or comprehend his rights or liabilities.

Indeed, the allegations in his complaint demonstrate that Jackson was able to manage his affairs and comprehend his rights quite well. Jackson alleges that at the time of the alleged discrimination, he knew that he "had been subjected to wrongdoing and strongly desired justice." *Id.* at 12. He alleges that "[f]or an extended period of time, I sought help from the Department of the Navy, Department of Justice, Attorneys, congressmen, news media, etc." *Id.* at 12–13. He describes these efforts as a "massive undertaking." *Id.* at 13. Indeed, after being discharged from the military, he filed applications with the Board for Correction of Naval Records regarding his fitness record and reenlistment code in 1990, 1991, 1992, 1993, 1994 and 2000. During this time, he sought legal assistance as well as assistance from others, including a United States Senator, to reenlist in the Marines. This conduct indicates that he was capable of filing a timely APA claim. He is not entitled to equitable tolling, then, and the district court correctly dismissed his claim.

C. Military Pay Act

Finally, we briefly address Jackson's Military Pay Act claim. The district court construed Jackson's request for reenlistment with back pay as a claim under the Military Pay Act, 37 U.S.C. § 204, but held that it lacked jurisdiction of that claim. Amicus initially appealed the dismissal of the claim but in its reply brief abandoned the claim on the ground raised by the Secretary—namely, we lack jurisdiction to hear the appeal of a Military Pay Act claim because the Court of Appeals for the Federal Circuit has exclusive jurisdiction of such claims. Having considered that argument, we agree that we lack jurisdiction to review the claim pursuant to 28 U.S.C. § 1295(a)(2).

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GARY L. JACKSON, *Plaintiff*, v. RICHARD V. SPENCER, Secretary, UNITED STATES DEPARTMENT OF THE NAVY, *Defendant*.	Civil Action No. 16-2186 (DLF) [**Filed: May 15, 2018, ECF #15**]

MEMORANDUM OPINION

In this action, pro se plaintiff Gary L. Jackson asserts employment discrimination claims based on race, color, and sex against his former employer, the Secretary of the United States Department of the Navy.[1] Compl. at 13, Dkt. 1; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Jackson seeks injunctive and declaratory relief, as well as damages and attorney's fees, for alleged "retaliation, harassment, and constructive discharge because of

[1] At the time Jackson filed his complaint, Ray Maybus was Secretary of the Navy. Richard V. Spencer has since been confirmed as Secretary and was automatically substituted as the defendant in this case pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

[his] race (Afro-American), color [(]Dark Brown), and sex (Male)." Compl. at 13, 17–18. Before the Court is the defendant's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 8. For the reasons that follow, the Court will grant the defendant's motion pursuant to Rule 12(b)(1).

I. BACKGROUND

Jackson, an African-American male, enlisted in the Unites States Marine Corps on June 1, 1977. Compl. at 1. During his Marine Corps career, Jackson received numerous decorations, letters of appreciation, and commendations. *Id.* He was honorably discharged on January 15, 1991. *Id.*

Jackson's discrimination claims stem from his final Marine Corps assignment to Henderson Hall, Marine Corps Headquarters in Arlington, Virginia. *Id.* at 3. While there, his superiors allegedly retaliated against him for refusing to approve a warehouse inventory inspection in August 1988 and subsequently requesting an investigation by the U.S. Marine Corps Inspector General. *Id.* at 2–4. Thereafter, the Inspector General allegedly failed to investigate Jackson's allegations, and Jackson's chain of command threatened to discharge him from the Marine Corps. *Id.* at 4–5. Jackson's superiors also discussed ordering him to appear before a competency review board but were dissuaded by a gunnery sergeant who expressed concerns about Jackson's harsh treatment. *Id.* at 5. Additionally, Jackson's superiors delayed for a short time, but eventually granted, Jackson's request to attend the Non-Commissioned Officer Academy. *Id.* When Jackson returned to Arlington in late 1988, he was removed from the warehouse chief assignment and placed in a

special services storefront manager assignment, one he viewed as inconsistent with his military operational specialty and rank. *Id.* at 6.

As a result of his reassignment and his alleged continued mistreatment, in September 1990,[2] Jackson made a request through his chain of command for "mast"—an opportunity to express his concerns to his commanding officer. *Id.*; *see also* Navy Marine Corps Dir. 1700.23F; Def.'s Mem. at 4 n.7. Although his superiors allegedly threatened to demote and discharge him for this demand, Jackson persisted. Compl. at 7. In January 1990, Brigadier General Gail M. Reals reassigned Jackson to the warehouse position. *Id.* Later that year, Captain Jeffrey Nelson, Jackson's former commander, allegedly placed "an unsubstantiated page 11" in his military record for a violation of security procedure, lodged an adverse fitness report against him, and requested a Technical/Incompetence Review Board. *Id.* Jackson filed a rebuttal and requested, without success, to have the adverse fitness report removed. *Id.*

In June 1990, Jackson applied for re-enlistment in the Marine Corps. *Id.* at 9. According to Jackson, his superiors held his application until January 15, 1991, the expiration date for his re-enlistment, and then rushed him through medical discharge processing so that he would be deemed physically fit for discharge, despite his respiratory ailment and other health issues. *Id.* at 9-10. Jackson also alleges that his superiors modified his re-enlistment code—contrary

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[2] According to Jackson's complaint, he first requested mast in September 1990, but this date appears to be inaccurate given Jackson's earlier September 1989 letter requesting mast. *See* Def.'s Mot. to Dismiss, Ex. 1 at 6, Dkt. 8-2.

to the Office of the Commandant of the Marine Corps' instructions—to reflect a code of RE-4 (ineligible to re-enlist), rather than RE-3C (eligible to re-enlist). *Id.* at 10-11.

Before his discharge, Jackson's supervisors leveled a wide range of criticisms against him. Among other things, Captain Nelson reported that Jackson did not work well with his peers or supervisors and demonstrated inadequate leadership, poor performance, and antisocial and discriminatory behavior. Dkt. 8-3 at 6. While First Lieutenant Jeffrey Baldyga gave Jackson a favorable review and indicated that he was "ready for promotion," he also noted that Jackson was "not always willing to accept responsibility of his section" and "had difficulty communicating with others." *Id.* at 13. Based on the criticisms of these and other officers, as well as his own personal knowledge, Colonel R. R. Buckley "strongly recommend[ed], for the best interests of the U.S. Marine Corps, that . . . Jackson's request for reenlistment be disapproved." Dkt. 8-8 at 5 (emphasis in original). Colonel Buckley concluded that Jackson was "totally unprofessional, absolutely unqualified to be promoted and should never be considered for reenlistment/retention. He is one of the poorest examples of a [Senior Non-commissioned Officer] . . . ." *Id.*

Before leaving the Marine Corps, Jackson applied to the Board for Correction of Naval Records (the Board) to have derogatory material removed from his fitness records. Dkt 8-2 at 1– 3. Jackson's December 4, 1990 application alleged that he had become the target of "retaliation and continual harassment" as a result of his requests to speak to his commanding officer. *Id.* at 1. In support, he included a September

1989 letter in which he requested mast and referred to his change in duties as "an act of discrimination and retaliation" by his superiors who "are prejudiced against blacks who stand up to them." *Id.* at 7.

On January 15, 1991, Jackson was honorably discharged from the Marines. Dkt. 1-2 at 9. Jackson alleges that, thereafter, Captain Nelson blocked Jackson from receiving a Navy Achievement Award for his performance while serving in the warehouse inspection position, as well as a commendation for securing top secret documents discovered in a rental vehicle. Compl. at 8.

In March 1991, Jackson filed a second application with the Board requesting "to have [his] reentry code upgraded." Dkt. 8-3 at 1. In April 1991, the U.S. Marine Corps Performance Evaluation Review Board issued an advisory opinion finding that Jackson's fitness report was appropriate and should remain in his record, and separately determined that the reenlistment code was correctly assigned. Dkt. 8-3 at 4–7. And on April 14, 1992, the Board issued an adverse decision denying both of Jackson's 1990 and 1991 applications. Dkt. 8-5 at 1. The Board concluded that the "evidence submitted was insufficient to establish the existence of probable material error or injustice." *Id.* The Board found no basis for removing the fitness reports or the adverse page 11 counseling. *Id.* at 2. The Board also determined that the reenlistment code was properly assigned. *Id.*

Following the denial of his two applications, Jackson filed four additional applications with the Board. On October 27, 1992, Jackson alleged that "there was a concerted effort on the part of my superiors to prevent me from re-enlisting" based on "negative generalities" and requested that his reentry

code be upgraded from "4" to "1." Dkt. 8-6 at 3. On March 23, 1993, Jackson filed another application requesting the removal of the RE-4 code and raising various other "negative generalities." *Id.* at 1. While Jackson's 1992 and 1993 applications contained new statements relating to his honorable service, the Board consolidated his applications, concluded that the statements did not constitute material evidence warranting reconsideration, and denied Jackson relief. Dkt. 8-7 at 1.

On August 29, 1994, Jackson filed a fifth application with the Board requesting an upgrade of his reentry code. Dkt 8-8 at 1–2. As new evidence, Jackson included his chain of command's recommendation denying his request for reenlistment and a message from the Commandant of the Marine Corps that had not been included in his previous application. *Id.* at 5–7. On October 14, 1994, the Board again refused to reconsider Mr. Jackson's case for lack "any new and material evidence or other matter not previous considered by the Board." Dkt 8-9 at 1.

In a sixth and final May 15, 2000 application to the Board, Jackson alleged that his reentry code was "unjustly entered" and that he did not sign his form for release as required. Dkt. 8-10 at 1. On July 17, 2000, the Board again concluded that Jackson had failed to include any new material evidence and denied Jackson relief. Dkt. 8-11 at 1.

Over fourteen years later, on May 15, 2014, Jackson filed a formal employment discrimination complaint against the Marine Corps. Dkt. 1-2 at 124. On June 19, 2015, the Marine Corps issued a final agency decision dismissing Jackson's complaint on the ground that Title VII does not cover uniformed

members of the military. *Id.* at 124–126. On July 19, 2016, the Equal Employment Opportunity Commission (EEOC) affirmed the Marine Corps' decision dismissing Jackson's complaint. *Id.* at 112–115. On September 21, 2016, the EEOC denied Jackson's request for reconsideration. *Id.* at 99–100.

On November 2, 2016, Jackson filed this action against the Secretary of the United States Department of the Navy. Compl. at 1. In his complaint, Jackson sets forth general allegations of race, color, and sex discrimination.[3] As specific evidence of discrimination, Jackson alleges that Captain Nelson openly expressed his preference that the "number of Blacks not exceed the number of whites in any one section of the Warehouse." *Id.* at 9. He further alleges, relying on a written statement provided in 1992 by Corporal Wayne Grice, that Corporal Grice overheard Captain Nelson say that Jackson's separation from the Marine Corps "took us a while, but we finally got him. That's one less Black Staff Sergeant." Dkt. 1-2 at 3.

Following his discharge, Jackson sought relief from various sources, including high-level officers in the Marine Corps, Dkt. 1-2 at 28, 74, attorneys, *id.* at 19, members of Congress, *id.* at 29, 71, and the Department of Justice, *id.* at 66. Nonetheless, Jackson claims that he waited more than fifteen years after his

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[3] For example, Jackson alleges that "[his superiors'] actions constituted employment discrimination, (based on my race, color, and sex)," Compl. at 2; "I was subjected to retaliation, harassment, and constructive discharge because of my race, color, and sex," *id.* at 2; "I sensed that my refusal to sign the inspection report angered the chain-of-command, because of my race, color, and sex," *id.* at 4; "Because of my race, color, and sex, I was constantly harassed by [my civilian supervisor]," *id.* at 6.

honorable discharge to file this action because his chain of command refused to offer him assistance and blocked his efforts to redress the retaliation. Compl. at 13. Jackson further asserts that he was unaware of his legal rights. *Id.* at 12–13. According to Jackson, "it did not occur to him that he had been discriminated against" until October 18, 2014, when he revealed the wrongdoing to a friend. *Id.* at 12.

This case was reassigned to the undersigned judge on December 4, 2017. The Secretary now moves for dismissal under Rules 12(b)(1) and 12(b)(6).

II. LEGAL STANDARD

Under Rule 12(b)(1), a party may move to dismiss an action when the court lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A motion to dismiss under Rule 12(b)(1) "presents a threshold challenge to the court's jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). Federal district courts are courts of limited jurisdiction, and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Thus, to survive a Rule 12(b)(1) motion, the plaintiff must demonstrate that the court has jurisdiction by a preponderance of the evidence. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

When deciding a Rule 12(b)(1) motion, the court "assume[s] the truth of all material factual allegations in the complaint and construe[s] the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged, and upon such facts determine jurisdictional questions." *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal citation and quotation marks omitted). Those factual allegations, however, receive "closer

scrutiny" than they would in the Rule 12(b)(6) context. *Jeong Seon Han v. Lynch*, 223 F. Supp. 3d 95, 103 (D.D.C. 2016). Also, unlike when evaluating a Rule 12(b)(6) motion, a court may consider documents outside the pleadings to evaluate whether it has jurisdiction. *See Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). If the court determines that it lacks jurisdiction, the court must dismiss the claim or action. Fed. R. Civ. P. 12(b)(1), 12(h)(3).

III. ANALYSIS

In his complaint, Jackson alleges that Marine Corps officials unlawfully discriminated against him based on his race, color, and sex, in violation of Title VII. Jackson requests the following relief: (1) immediate reinstatement in the Marine Corps with back pay, bonuses, and cost of living allowances; (2) retirement, after one month's reinstatement; (3) compensatory damages in the amount of $300,000; (4) expungement of adverse statements in his military record; (5) attorney's fees; (6) a letter of apology; (7) training for all civilian and military personnel on "MAST, Chapter 138, EEO" procedures; and (8) no future retaliation as a result of this action. Compl. at 17–18.

Although Jackson only asserts claims under Title VII, construing his pro se complaint in the most favorable light, *see Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999), the Court will also consider whether Jackson asserts a viable claim for relief under the Military Whistleblowers and Protection Act, the Administrative Procedure Act (APA), or other federal statutes.

A. Title VII

Jackson's Title VII claims fail because Title VII does not apply to uniformed members of the armed forces. While this Circuit has not addressed the issue, *see Veitch v. England*, 471 F.3d 124, 127 (D.C. Cir. 2006), every Circuit deciding the question has held that Title VII does not apply to uniformed members of the military. *See, e.g.*, *Fisher v. Peters,* 249 F.3d 433, 438 (6th Cir. 2001); *Brown v. United States,* 227 F.3d 295, 298 (5th Cir. 2000); *Hodge v. Dalton*, 107 F.3d 705, 707–12 (9th Cir. 1997); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Johnson v. Alexander*, 572 F.2d 1219, 1223–24 (8th Cir. 1978); *see also Collins v. Sec'y of Navy,* 814 F. Supp. 130, 132 (D.D.C. 1993) (dismissing a former Navy lieutenant's Title VII complaint for lack of jurisdiction). There is no dispute that Jackson was a uniformed member of the Marine Corps when the alleged discriminatory acts took place. Compl. at 1–2. Thus, the Court lacks jurisdiction to consider Jackson's Title VII claims.

B. Military Whistleblower Protection Act

Jackson fares no better under the MWPA because the statute does not "provide . . . any private cause of action, express or implied." *Acquisto v. United States*, 70 F.3d 1010, 1011 (8th Cir. 1995) (per curiam); *accord Penland v. Mabus*, 78 F. Supp. 3d 484, 495 (D.D.C. 2015) (stating that a violation of the MWPA "cannot be rectified by this court because the MWPA does not provide a private right of action"). "Indeed, no judicial review is available under the MWPA because Congress precluded alternative fora by providing a specific form of redress in the statute." *Bias v. United States*, No. 17-2116, 2018 WL 566415,

at *3 (Fed. Cir. Jan. 26, 2018); *see also Rana v. Dep't of the Army*, No. 15-cv-0957, 2015 WL 3916361, at *1 (D.D.C. June 22, 2015) (dismissing service member's MWPA claims for lack of subject-matter jurisdiction). Accordingly, to the extent that Jackson alleges a claim under the MWPA, this Court lacks jurisdiction to consider it.

C. Administrative Procedure Act

Applying "familiar principles of administrative law," however, this Court has the authority to review decisions rendered by the Board in Jackson's case. *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) (*Kreis I*); *see also Rodrigues v. Penrod*, 857 F.3d 902, 906 (D.C. Cir. 2017) ("[D]istrict courts have routinely reviewed these board decisions in the first instance."). "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence." *Chappell v. Wallace*, 462 U.S. 296, 303 (1983); *see also* 5 U.S.C. § 706(2)(A). Courts are equipped to determine whether a board of correction "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 686 (D.C. Cir. 2005) (quotation marks omitted) (*Kreis II*). But because "courts are particularly unfit to review the substance of military decisions," decisions of boards of corrections are entitled to an "unusually deferential application of the arbitrary and capricious standard." *Kreis I,* 866 F.2d at 1514 (internal quotation marks omitted).

While any such claims that Jackson can assert under the APA are reviewable by this Court, they are untimely. *See* 28 U.S.C. § 2401(a) (civil actions

against the United States must be commenced "within six years after the right of action first accrues"). "Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity and, as such, must be strictly construed." *Spannaus v. DOJ,* 824 F.2d 52, 55 (D.C. Cir. 1987); *see also Lewis v. Sec'y Navy,* 892 F. Supp. 2d 1, 5 (D.D.C. 2012) (same). Section 2401 applies to "all civil actions whether legal, equitable, or mixed," and "likewise applies to claims seeking to correct or upgrade the discharge of former service members." *Kendall v. Army Bd. for Corr. of Military Records*, 996 F.2d 362, 365 (D.C. Cir. 1993). Thus, a challenge to military board of corrections decision must be filed within six years of an adverse review board decision. *See Nihiser v. White*, 211 F. Supp. 2d 125, 128–29 (D.D.C. 2002) (citation omitted). But where a board of correction "reconsiders" a decision, some courts have held that "the reopening doctrine allows an otherwise stale challenge to proceed," *Peavy v. United States,* 128 F. Supp. 3d 85, 99 (D.D.C. 2015) (quotations omitted), "provided that the application for reconsideration is filed within six years of the adverse review board decision," *Nihiser*, 211 F. Supp. 2d at 129.

In Jackson's case, the Board issued its initial adverse decision on April 14, 1992. Dkt 85. Thereafter, in 1993, 1994, and again in 2000, Jackson applied for reconsideration, but on each occasion the Board refused to reconsider its decision, citing a lack of new and material evidence. On each occasion, Jackson listed the date of discovery as May 18, 1990. Dkt. 8-6; Dkt. 8-7; Dkt. 8-8; Dkt. 8-9; Dkt. 8-10; Dkt. 8-11. Regardless of whether the Board's most recent decision is deemed an "adverse review decision" or a "reconsideration," Jackson's APA claims are time

barred because he did not file this action until November 2, 2016, more than twenty-three years after the Board's initial decision and more than sixteen years after the Board's July 17, 2000 final decision.

In an attempt to keep his claims alive, Jackson invokes the equitable tolling doctrine. Compl. at 13. Equitable tolling is an extraordinary remedy that courts apply sparingly. *Norman v. United States,* 467 F.3d 773, 776 (D.C. Cir. 2006). "[M]ere excusable neglect is not enough to establish a basis for equitable tolling; there must be a compelling justification for delay, such as 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass,'" *Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)), or where a plaintiff has been unable "despite all due diligence . . . to obtain vital information bearing on the existence of [his] claim," *Holland v. Florida.*, 560 U.S. 631, 649 (2010) (citations omitted). In Jackson's case, no such extraordinary circumstance stood in his way.

Jackson suggests that the statute of limitations should be tolled because he was unaware of the laws that applied to his claims. That reason falls well short of the high bar for equitable tolling. *See Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014) ("The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstanding of the law."). Even accepting that Jackson was unaware of his legal rights, he was acutely aware of the alleged underlying acts of discrimination, and the record reveals "no

extraordinary circumstances" that prevented Jackson from timely filing suit.

Jackson also claims that he did not realize that he had been subjected to racial discrimination until October 18, 2014 when a friend suggested that he read about employment discrimination law under Title VII, *see* Compl. at 12. But Jackson's initial request for mast in 1989 establishes that he was less unaware than he now claims. *See* Dkt. 8-2 at 7 ("It was an act of discrimination and retaliation. Mr. Rix and Major Walsh are prejudiced against blacks who stand up to them."); Dkt. 1-2 at 3 (alleging that Captain Nelson, Jackson's then-commanding officer, reportedly said, "It took us awhile, but we finally got rid of him. That's one less black staff sergeant."). Jackson claims that officials in his chain of command blocked and frustrated his attempts to obtain assistance in redressing his alleged wrongdoings, *see* Compl. at 11, but his repeated filings and appeals to the Board demonstrate that he was undeterred by his superiors' actions. As Jackson acknowledges, following his discharge, he sought redress not only from the Department of Navy, but also from "the Department of Justice, attorneys, congressmen, new media, etc." *Id.* at 12–13. Therefore, the Court dismisses any APA claims that Jackson can raise as time barred.

D. Jackson's Remaining Inferred Claims

To the extent that Jackson's request for reenlistment with back pay can be construed as asserting a claim under the Military Pay Act, 37 U.S.C. § 204, and the Tucker Act, 28 U.S.C. §

1346(A)(2),[4] based on an alleged wrongful discharge, this Court lacks jurisdiction. "Absent other grounds for district court jurisdiction, a claim is subject to the Tucker Act and its jurisdictional consequences if, in whole or in part, it explicitly or 'in essence' seeks more than $10,000 in monetary relief from the federal government." *Kidwell v. Dep't of Army, Bd. for Correction of Military Records,* 56 F.3d 279, 284 (D.C. Cir. 1995). Although it is not clear what portion of Jackson's $300,000 demand for damages constitutes a claim for back pay and related benefits, any such claim likely exceeds $10,000. And even assuming Jackson has a viable claim for back pay less than $10,000, it is barred by the six-year statute of limitations that applies to suits against the United States. Courts "have long held that the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003). Jackson separated from active duty on January 15, 1991, more than twenty-five years before he filed this action.[5]

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[4] The Tucker Act vests original jurisdiction in the U.S. Court of Federal Claims for civil actions against the United States "founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Little Tucker Act gives federal district courts concurrent jurisdiction over such civil actions that do not involve claims over $10,000. 28 U.S.C. § 1346(a)(2).

[5] The Court does not address whether Jackson was required to seek further administrative review before seeking back pay under the Military Pay Act. *Compare Martinez v. United States*, 333 F.3d 1295, 1308 (Fed. Cir. 2003) (service member was not required to exhaust board of correction of navy records remedies before filing a Military Pay and Act Tucker Act suit for back pay and related relief), *with Santana v. United States*, 127 Fed. Cl. 51, 58-59 (2016) (court lacked jurisdiction over Military Pay Act

To the extent that Jackson bases his demand for damages on a tort claim arising out of his emotional distress, it too fails. The Federal Tort Claims Act grants federal courts jurisdiction over claims arising from certain torts committed by federal employees in the scope of their employment. 28 U.S.C. § 1346. The Court lacks jurisdiction here too because any such claim is untimely and Jackson failed to exhaust his administrative remedies. *See Aguilar Mortega*, 520 F. Supp. 2d 1 (rejecting former service member's Federal Tort Claims Act claim for failure to exhaust administrative remedies).

CONCLUSION

For the foregoing reasons, the Court will grant the defendant's Motion to Dismiss. Dkt. 8. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

Date: May 15, 2018

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claims that were based on allegations of whistleblower retaliation because service member did not first pursue claims administratively by challenging the decision of special selection and continuation boards), *aff'd in part and vacated in part on other grounds*, No. 16-2435, 2017 WL 5632685 (Fed. Cir. 2017).

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5180 **September Term, 2019**
FILED ON: FEBRUARY 14, 2020

GARY L. JACKSON,
APPELLANT
v.
THOMAS B. MODLY, ACTING SECRETARY,
THE UNITED STATES DEPARTMENT OF THE NAVY,
APPELLEE,

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-02186)

Before: HENDERSON and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: February 14, 2020

Opinion for the court filed by Circuit Judge Henderson.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GARY L. JACKSON, *Plaintiff*, v. RICHARD V. SPENCER, Secretary, UNITED STATES DEPARTMENT OF THE NAVY, *Defendant*.	Civil Action No. 16-2186 (DLF) [**Filed: May 15, 2018, ECF #14**]

ORDER

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that Defendant's Motion to Dismiss, Dkt. 8, is **GRANTED**. Accordingly, this action is **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction. It further is

ORDERED that the Motion for Leave to File Defendant's Reply in Support of Defendants' Motion to Dismiss, Dkt. 13, is **DENIED** as **MOOT**. Finally, it is

ORDERED that the Clerk of the Court shall close this case.

SO ORDERED.

This is a final appealable order.

/s/ Dabney L. Friedrich
DABNEY L. FRIEDRICH
United States District Judge

Date: May 15, 2018

APPENDIX E

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office [Government Publishing Office], the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties;

compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and

instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of

this section, Executive Order 11478 [42 USCS § 2000e note] or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)–(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[.]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 [42 USCS § 2000e note] relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination. Section 706(e)(3) [42 USCS § 2000e-5(e)(3)] shall apply to complaints of discrimination in compensation under this section.

APPENDIX F

29 C.F.R. § 1614.103. Complaints of discrimination covered by this part

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), the Equal Pay Act (sex-based wage discrimination), or GINA (discrimination on the basis of genetic information) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority;

(4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act;

(5) The National Oceanic and Atmospheric Administration Commissioned Corps;

(6) The Government Printing Office except for complaints under the Rehabilitation Act; and

(7) The Smithsonian Institution.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section:

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).