No. 10-1546

In The Supreme Court of the United States

DEREK CARDER, MARK BOLLETER, DREW DAUGHERTY, and ANDREW KISSINGER, on behalf of themselves and others similarly situated,

Petitioners,

v.

CONTINENTAL AIRLINES, INC., a Delaware Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

BRIAN J. LAWLER*
PILOT LAW, P.C.
101 W. Broadway, Ste. 1050
San Diego, CA 92101
(619) 255-2398
blawler@pilotlawcorp.com

GENE J. STONEBARGER
STONEBARGER LAW
A PROFESSIONAL CORPORATION
75 Iron Point Cir., Ste. 145
Folsom, CA 95630
(916) 235-7140

CHARLES M. BILLY
THE LAW OFFICES OF CHARLES M. BILLY, A PROFESSIONAL CORPORATION
22706 Aspan St., Ste. 305
Lake Forest, CA 92630
(949) 357-9636

MICHAEL L. FOREMAN
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
Lewis Katz Building
University Park, PA 16802
(814) 865-3832

*Counsel of Record

Attorneys for Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

RULES

TREATISES

I. THE SIGNIFICANCE OF THIS ISSUE TO OUR SERVICEMEMBERS WARRANTS REVIEW BY THIS COURT NOW.

Respondent's Brief in Opposition to the Petition for Writ of Certiorari[1] minimizes both the importance of this issue as well as the need for it to be addressed by this Court. The Brief in Opposition is a transparent effort to divert the Court away from why it should hear this case: now more than ever, servicemembers, as well as employers, need to know the extent of the protections afforded by the Uniformed Services Employment and Re-employment Rights Act ("USERRA").

Congress intended for USERRA to provide job security and protections; the purpose of USERRA was to ensure that military personnel could "fulfill military commitments without fear of discrimination or retaliation in their normal employment."[2] USERRA's protections from discrimination are most crucial in times of war. It is during times of war when greater numbers are called to serve our country; it is during times of war when individuals in the Reserves and National Guard are mobilized more often and for greater lengths of time; it is during times of war

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[1] Continental's Brief in Opposition to Petition for Writ of Certiorari will be referenced as "Br. Opp. at ___." The Petition for Writ of Certiorari will be referenced as "Pet. at ___."

[2] Konrad S. Lee, "When Johnny Comes Marching Home Again, Will He Be Welcome at Work?", 35 PEPP. L. REV. 247, 254 (2008) (citing Cong. Rec. H2210 (statement of Rep. Penny)).

when large numbers of servicemembers rotate back to civilian life following their military service.

Millions of men and women have served this country since the terrorist attacks in September 2001, while approximately 100,000 troops remain active in Afghanistan alone.[3] President Obama announced in June 2011 that a significant number of currently deployed troops will return home by the end of summer 2012.[4] Over time, we have seen and will continue to see individuals enter the armed services; eventually, most of these individuals return to or enter the civilian job market. Many of these returning servicemembers will remain affiliated with the armed services through the Reserves and National Guard due to both voluntary and mandatory commitments. Many of these military-affiliated civilian employees may be mobilized again, and this reality creates tension with civilian employers.

During times of mobilization, employers may be forced to make difficult decisions regarding how to effectively manage their businesses during the absence of their military-affiliated employees while simultaneously maintaining job security for those same employees while they are deployed. This operational tension is heightened during the difficult

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[3] *See* Pet. at 10.

[4] *Obama Will Speed Pullout From War in Afghanistan*, http://www.nytimes.com/2011/06/23/world/asia/23prexy.html (last accessed August 22, 2011).

economic times this country currently faces, and it is this tension that causes some employers to harass, intimidate and discriminate against employees based on their military service.[5]

It is during this perfect storm of wartime commitments and challenging economic times when deployments and USERRA's job security protections have the most direct and significant impact on employers. This is why now is the time for the Court to define the scope of the protections provided by USERRA.

In order to direct attention away from the stark reality that this issue should be resolved now, Respondent argues that the Court should delay hearing this case because hearing it now would elevate USERRA above other laws that are aimed at eliminating discrimination in the workplace. Br. Opp. at 22. Respondent's allegation is misplaced. The scope of individuals protected by USERRA is far more limited than those covered under other anti-discrimination laws: USERRA does not apply to every employee but only to those who serve in our country's military. It follows that USERRA protections are the most vital when the greatest number of individuals are called to serve.

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[5] This is precisely the type of harassment Petitioners allege in their complaint. Pet. Br. at 5-8.

Other anti-discrimination statutes – statutes that protect employees from discrimination based upon race, sex, age, or disability, for example – are consistently relied upon by all citizens and not just those who serve the country in the military. Unlike USERRA, those statutes are not susceptible to drastic, unpredictable increases in the number of people who rely upon protections provided in the anti-discrimination legislation. Additionally, unlike other protected classes, military affiliation is a status that can change. A servicemember can resign from military obligations if his or her commitment has been fulfilled, but this decision should be the servicemember's, not that of his or her civilian employer. The harassing or hostile behavior displayed by employers often makes military affiliation so difficult for the employee that the employee is ultimately forced to consider terminating his or her affiliation with the military. However, if the servicemember is still contractually obligated to the military, terminating his or her military affiliation is not a viable choice, forcing that servicemember to either endure the harassment and discrimination or quit his or her civilian job. This result is directly at odds with the purposes of USERRA.

II. THE COURT SHOULD RESOLVE WHAT THE DEPARTMENT OF LABOR, THE AGENCY EMPOWERED TO ENFORCE USERRA, HAS ALREADY CONCLUDED.

The Department of Labor ("DOL") is the federal agency charged with the primary authority in the implementation of USERRA's protections.[6] The Fifth Circuit's flawed analysis in this case included a reference to the lack of regulatory guidance from the Department of Labor. *See Carder v. Continental Airlines, Inc.*, 636 F.3d 172, 181 (5th Cir. 2011). In an illogical leap, the Fifth Circuit determined that because the DOL's regulations do not explicitly indicate that USERRA provides protection from harassment, the DOL must believe that hostile work environment claims are not covered under USERRA. *Id.*

The lack of a regulation regarding a hostile work environment claim simply reflects the well-established understanding that the definition of discrimination in the workplace includes harassment of an employee on the basis of his or her protected status.[7] There was no need for the DOL to provide an explicit reference to harassment in its USERRA regulations as the widely accepted conclusion was that harassment is included within a prohibition of employment discrimination.

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[6] 38 U.S.C. § 4331.

[7] *See* Pet. at 25-32.

Indeed, the DOL reaffirmed its interpretation of USERRA in its most recent report to Congress.[8] In that report, the DOL recognized the Fifth Circuit's flawed analysis regarding the lack of a DOL interpretation of discrimination and clarified its actual position.[9] The DOL Annual Report provides:

> In the Department of Labor's view these terms include the right not to suffer workplace harassment or the creation of a hostile working environment because of an individual's membership in the uniformed service or uniformed service obligations.[10]

The DOL identifies the Fifth Circuit's *Carder* decision and explains that the DOL "believes that the statute currently supports" a reading that USERRA prohibits workplace harassment.[11] The DOL issued this clarification "in light of the risk of contrary interpretations by the courts."[12]

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[8] 2010 Veterans' Emp't and Training U.S. Dep't of Labor, USERRA Fiscal Year 2010 Ann. Rep. to Congress, at [17-19] (available at http://www.dol.gov/vets/programs/userra/FY2010%20USERRA%20Annual%20Report.pdf) (last accessed Aug. 25, 2011).

[9] *Id.* at 18.

[10] *Id.*

[11] *Id.* at 19.

[12] The DOL also suggested that Congress consider revising the statute to explicitly set forth that USERRA prohibits harassment based on military status. *Id.* at 19.

This Court has the power to clarify what the Petitioners and the DOL believe to be the proper interpretation of the language and legislative history of USERRA – that harassment based upon military status is unlawful.[13] Having Congress reiterate what USERRA's language and purpose already make clear would resolve the matter; however, given the lengthy legislative process, this resolution would take too long and would do too little to clarify the rights of those who are currently serving our country. This Court has the power to resolve this issue now.

At a minimum, this Court should request the views of the Solicitor General as to whether the Court should address the important issue in this case.

III. THIS ISSUE HAS BEEN SUFFICIENTLY ANALYZED BY THE LOWER COURTS TO WARRANT A FINAL DETERMINATION BY THE COURT.

Respondent focuses much of its opposition on a lack of a well-defined circuit split[14] – a point conceded

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[13] Even if the Court were to interpret USERRA in a manner consistent with the 5th Circuit, it is essential that the Court decide this issue now in order to give Congress a chance to take legislative action (should it disagree with this interpretation) in time to be of assistance to those tens of thousands of American soldiers who are about to return home.

[14] Br. Opp. at 6-11.

in Petitioners' Petition for Writ of Certiorari. Pet at 19-20.[15]

Supreme Court Rule 10 provides some of the types of compelling reasons the Court will consider when granting certiorari. A circuit split in authority is one of these compelling reasons but it is not the *only* justification. Put another way, the absence of a distinct circuit split does not, as Respondent insists, compel a conclusion that review by the Court is not warranted. This case presents a compelling reason for the Court to grant certiorari because it posits an "important question of federal law that has not been, but should be, settled by this Court."[16]

Allowing this issue – whether harassment based upon military status is prohibited by USERRA – to percolate through the circuit courts will do little to further define or to resolve the issue. Perhaps it would add a few circuit approvals of the plain meaning interpretation viewpoint and maybe a few circuit affirmations of the congressional intent approach. However, a mere tallying of the number of circuits on either side of the issue has never been the way the Court has made decisions. Indeed, as Justice Roberts

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[15] Even though there is no distinct circuit split present, lower courts have nevertheless "sufficiently defined the issue" to warrant the Court's review. Pet. at 19.

[16] Supreme Court Rule 10 provides that a case that involves an "important question of federal law that has not been, but should be, settled by this Court" is a compelling reason for the Court to grant certiorari. SUP. CT. R. 10. *See also*, Pet. at 14.

recently noted, the Court's job is not to simply "resolve questions . . . before [it] by a show of hands." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2650 (2011) (explaining that the Court should not decide a case based on what the majority of the lower courts have done).

Waiting for a distinct circuit split will serve no purpose other than to delay the process, possibly providing a resolution to this issue long after our servicemembers have returned home where they could potentially face harassment upon their reentry into the job market or upon their notice of deployment. Our servicemembers should know their rights now, when they will rely on them the most. It is important that the Court decide the issue in this case.

IV. THE COURT SHOULD GRANT REVIEW BECAUSE THE FIFTH CIRCUIT'S INTERPRETATION OF HOSTILE WORK ENVIRONMENT CLAIMS UNDERMINES THE COURT'S HARASSMENT JURISPRUDENCE.

Respondent alleges that Petitioners incorrectly relied on Title VII precedent to argue that the lower court's opinion undermines the Court's harassment jurisprudence, claiming that it is a "flaw in Petitioner's argument." Br. Opp. at 13. Petitioner's reliance on the Court's sexual harassment jurisprudence was not a flaw – it is precisely the point.

The Court has a well-developed jurisprudence regarding harassment in the workplace. This originated in cases dealing with Title VII, but courts have applied it to other statutes, many of which, like USERRA, do not explicitly mention harassment in the statute.[17] The Court has consistently recognized that a ban on discrimination is a ban on harassment.[18] Congress legislates against the backdrop of

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[17] *See* BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1304 (1976) (discussing sexual harassment theory under Title VII and observing that "almost every [sexual harassment] principle . . . is applicable to harassment on any protected basis"). *See also, Brown v. Hot, Sexy and Safer Productions, Inc.,* 68 F.3d 525, 540 (1st Cir. 1995) (finding that "Title VII, and thus Title IX, 'strike at the entire spectrum of disparate treatment of men and women,' including conduct having the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment"); *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 633 (1999) (concluding that an individual may bring a discrimination claim under Title IX "for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); *Lanman v. Johnson County*, 393 F.3d 1151, 1156 (10th Cir. 2004) (holding that "a hostile work environment claim is actionable under the [Americans with Disabilities Act]"); *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005) (recognizing hostile work environment claims for federal employees pursuant to the Rehabilitation Act).

[18] *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986) (explaining that Title VII's language prohibiting discrimination on the basis of gender evinced a "congressional intent 'to strike at the entire spectrum of disparate treatment of men and women'" in the workplace – including harassment) (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)).

this jurisprudence. It is hard to envision that Congress intended to ignore the Court's precedent when it enacted the USERRA protections.

Congress used broad substantive language in its definition of USERRA's protections, similar to the expansive language found in Title VII. Respondent attempts to avoid acknowledging USERRA's expansive language by explaining that the explicit language used in Title VII differs from that used in USERRA. Br. Opp. at 13. While the language differs, its expansive nature should not be overlooked.

The Court has continuously held that Title VII's language prohibiting discrimination with respect to an employee's "compensation, terms, conditions, or privileges of employment" includes a prohibition against harassment.[19] USERRA does not have the precise terms found in Title VII, but it does have equally expansive language within its definition of benefit. This definition includes the concept "privileges" as considered under Title VII.[20]

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[19] For a general discussion on this point, *see* Pet. at 25-27.

[20] USERRA defines "benefit of employment" as "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations and the opportunity to select work hours or location of employment." 38 U.S.C. 4303(2).

Furthermore, Respondent fails to acknowledge that Congress explained that "the list of benefits is illustrative and not intended to be all inclusive." *Petersen v. Department of the Interior*, 71 M.S.P.R. 227, 235-36 (M.S.P.B. 1996) (citing H.R. Rep. No. 65, Part 1, 103d Cong., 1st Sess. 21 (1993)). This legislative history is another indication that USERRA's language is meant to be interpreted broadly. This Court should accept this case and decide what Congress intended through its use of expansive language.

V. CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit. Alternatively, this Court should invite the Solicitor General to file a brief in this matter expressing the views of the United States as to whether this Court should hear this case.

Respectfully submitted this 7th day of September, 2011.

BRIAN J. LAWLER*
PILOT LAW, P.C.
101 W. Broadway, Ste. 1050
San Diego, CA 92101
(619) 255-2398

CHARLES M. BILLY
THE LAW OFFICES OF CHARLES M. BILLY,
A PROFESSIONAL CORPORATION
22706 Aspan St., Ste. 305
Lake Forest, CA 92630
(949) 357-9636

GENE J. STONEBARGER
STONEBARGER LAW,
A PROFESSIONAL CORPORATION
75 Iron Point Cir., Ste. 145
Folsom, CA 95630
(916) 235-7140

MICHAEL L. FOREMAN
PENNSYLVANIA STATE UNIVERSITY
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Lewis Katz Building
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(814) 865-3832

**Counsel of Record*

Attorneys for Petitioners