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 ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a hostile work environment cause of action cognizable under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Continental Airlines, Inc. is a wholly owned subsidiary of United Continental Holdings, Inc. United Continental Holdings, Inc. is publicly traded on the New York Stock Exchange under the symbol UAL.

TABLE OF CONTENTS

TABLE OF CONTENTS—CONTINUED

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—CONTINUED

PAGE

TABLE OF AUTHORITIES—CONTINUED

STATUTES

TABLE OF AUTHORITIES—CONTINUED

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ORDERS AND OPINIONS BELOW

Petitioners Derek Carder, Mark Bolleter, Drew Daugherty, and Andrew Kissinger ("Petitioners") included the Opinion from the United States Court of Appeals for the Fifth Circuit, dated May 22, 2011, and reported at 636 F.3d 172, in the Appendix to their Petition. *See* Pet. at Appendix ("App.") at 1-24. Petitioners also included the Memorandum and Order from the United States District Court for the Southern District of Texas, dated November 30, 2009, in the Appendix to their Petition. *See* App. at 28-55.

STATEMENT OF THE CASE

On July 2, 2009, Petitioners filed a complaint in the United States District Court for the Southern District of California, asserting four causes of action under the Uniformed Services Employment and Re-employment Rights Act of 1994, 38 U.S.C. §§ 4301 et. seq. ("USERRA"). On September 28, 2009, the Southern District of California granted Continental's motion to transfer the case to the United States District Court for the Southern District of Texas. On October 12, 2009, Continental filed a Motion to Dismiss Petitioners' first three causes of action, including their claim of an alleged hostile work environment.

On November 30, 2009, the district court entered an order granting in part Continental's Motion to Dismiss and dismissing Petitioners' first three claims with leave to re-plead the second claim. (App. at 28.) On January 6, 2010, the district court entered an order granting Plaintiffs' Motion for Certificate of Appealability of its November 30, 2009 order with respect to Plaintiffs' allegations concerning freedom from a hostile work environment under USERRA. (App. at 26.) On March 22, 2011, the Fifth Circuit affirmed the Court's order. (App. at 1.)

I. SUPREME COURT RULE 15.2 OBLIGATES CONTINENTAL TO CORRECT ANY PERCEIVED MISSTATEMENT IN THE PETITION.

Although a respondent is not generally required to file a brief in opposition to a petition for writ of certiorari, Rule 15.2 requires a respondent to report any perceived misstatement in a petition of writ of certiorari:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

SUP. CT. R. 15.2.

Continental denies the allegations in Petitioners' original complaint, which Petitioners restate in their Petition under the misleading subtitle "Facts." *See* Pet. at 5-8 (reiterating allegations from Original Complaint as "Facts"). To be clear, the district court made no such findings, and Continental denies these allegations. However, Petitioners' appeal raises a straightforward, purely legal question. In ruling on Continental's motion to dismiss, the district court correctly noted that Rule 12(b)(6) of the Federal Rules of Civil Procedure requires that "the plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." App. at 33 (quoting *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996)). Petitioners' underlying factual allegations are therefore irrelevant to the purely legal issue raised in the Petition and in the opinions of the district court and the Fifth Circuit Court of

Appeals. Accordingly, Continental reserves its substantive factual arguments for later briefing, if ordered.

Petitioners have also exaggerated the extent to which lower courts have analyzed whether USERRA creates a cause of action for a hostile work environment. Continental addresses the federal appellate courts' scant attention to this issue in more detail below. Continental also objects to Petitioners' use of statistics on pages 10-11 of their Petition, which are not in the record.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

The Petition should be denied because it presents no "compelling reasons" for granting certiorari. This case involves a straightforward question of law: whether the district court properly granted Continental's motion to dismiss Petitioners' hostile work environment claims on the grounds that the plain language of USERRA does not give rise to such claims. This case does ***not*** involve (1) a conflict among United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; (3) a departure from the accepted and usual course of judicial proceedings; (4) a conflict on an important federal question among state courts of last resort; or (5) a conflict between this Court's decisions and the decisions of lower courts.

Petitioners do not, and can not, argue that the lower courts failed to apply controlling precedent or that their opinions conflict with decisions of other appeals courts. The Fifth Circuit is the first federal appellate court to rule on this issue, which means its opinion is not in conflict with a ruling of another court of appeals or of this Court. Petitioners have presented no reason why the straightforward question of statutory interpretation raised in this case

warrants review by this Court. The Court should deny the Petition.

A. The Fifth Circuit's Opinion Does Not Conflict with Opinions of This Court, Opinions of Other Federal Courts of Appeals, or Opinions of Any State Court of Last Resort.

Petitioners argue in their Petition that "Lower Courts Have Sufficiently Defined the Issue," Pet. at 19, but they noticeably do ***not*** assert that federal appellate courts have reached conflicting opinions on this issue. The Fifth Circuit's opinion is clearly ***not*** "in conflict with the decision of another United States court of appeals on the same important matter," because the Fifth Circuit was "the first circuit court to consider whether the statute creates a cause of action for hostile work environment." *Compare* SUP. CT. R. 10(a) *with Carder*, 636 F.3d at 175. Petitioners even admit in their Petition that "the Fifth Circuit became the first federal appellate court to expressly rule on the issue. . . ." Pet. at 20. As the Fifth Circuit noted:

> **We have little direct authority to guide us. "Neither the Supreme Court nor any court of appeals has decided whether a hostile work environment claim is cognizable under USERRA."** *Vega-Colon v. Wyeth Pharms.*, 625 F.3d 22, 32 (1st Cir. 2010). Several circuit courts have assumed without deciding that USERRA does provide for such a claim while disposing of the claim on other grounds. *Id.* at n.9 (citing *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 F. App'x 49, 53 (11th Cir. 2010); *Church v. City of Reno*, 168 F.3d 498

> (9th Cir. Feb. 9, 1999)); *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002). A number of district courts have reached differing conclusions on the merits. Thus, **we are the first circuit court to consider whether the statute creates a cause of action for hostile work environment.**

Carder v. Continental Airlines, Inc., 636 F.3d 172, 175 (5th Cir. 2011) (App. at 5) (emphasis added).

Neither this Court nor any federal court of appeals has ever interpreted USERRA to create liability for a hostile work environment. As the lower court noted, several circuit courts have refused to address whether USERRA provides for such a claim while disposing of the claim on other grounds. *Id.* at 175. Three circuit courts have affirmed summary judgment of USERRA hostile work environment claims after assuming, without deciding, that such a claim is a cognizable cause of action under USERRA. *Dees v. Hyundai Motor Mf'g Alabama, LLC*, No. 09-12107, 368 Fed. Appx. 49, 53 (11th Cir. Feb. 26, 2010); *Vega-Colon v. Wyeth Pharmaceuticals*, 625 F.3d 22 (1st Cir. 2010); *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002). The Ninth Circuit also refused to address this issue but noted that "the USERRA does not specifically include a nonhostile work environment in its definition of 'benefit of employment.'" *Church v. City of Reno*, No. 97-17097, 168 F.3d 498, 1999 WL 65205, at *1 (9th Cir. Feb. 9, 1999). The opinions of the First, Seventh, Ninth, and Eleventh Circuits are *not* in conflict with the Fifth Circuit's opinion in *Carder*.

In *Church*, the Ninth Circuit reviewed a district court's order denying the appellant's motion to show cause why the City of Reno should not be held in

contempt of a consent decree prohibiting the City from violating USERRA. *Church*, 1999 WL 65205, at *1. The appellant alleged that he had been subjected to a hostile work environment because of the "caustic comments of his coworkers." *Id.* He argued "that the term 'benefit of employment' [in USERRA] should be interpreted to include freedom from a hostile work environment." *Id.* The court held that it "need not reach the issue of whether a hostile work environment claim is cognizable under the statute," although it noted the absence of any valid authority supporting such a claim:

> While the consent decree prohibits violations of reservists' statutory rights, **the USERRA does not specifically include a non-hostile work environment in its definition of "benefit of employment."** In addition, neither the Ninth Circuit nor the U.S. Supreme Court has interpreted either the USERRA or the VRRA to create liability for a hostile work environment. The City cannot, therefore, be held in contempt of the consent decree for failing to protect Church from the caustic comments of his coworkers.

Id. (emphasis added). The court also rejected the argument, similar to one raised by Petitioners,[1] that "the language 'otherwise discriminate' includes a prohibition on hostile work environments." *Id.* at 2.

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[1] Specifically, Petitioners assert that "USERRA promises: no discrimination based upon military status, including freedom from harassment based upon their military service," Pet. at 12, and argue that the Fifth Circuit erred by not applying case law under other anti-discrimination statutes to USERRA. Pet. at 25-32.

The Seventh Circuit affirmed summary judgment of a harassment claim under USERRA in *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002), without addressing whether such a claim was cognizable under USERRA. In granting summary judgment against the hostile work environment claim, the district court noted that "neither party has directed the Court to authority that a claim for hostile work environment exists under USERRA." *Miller v. City of Indianapolis*, No. IP-99-1735-CMS, 2001 WL 406346, *8 (S.D. Ind. April 13, 2001). Assuming that such a cause of action existed under USERRA, the district court ruled that the plaintiffs' allegations of isolated comments and pressure to leave the military were not sufficiently severe or pervasive to alter the conditions of plaintiffs' employment and thereby create an abusive working environment. *Id.* The court accordingly granted the defendant's motion for summary judgment, and the Seventh Circuit affirmed without addressing the threshold question of whether the claim was cognizable under USERRA. *Miller*, 281 F.3d 648 (7th Cir. 2002).

The Eleventh Circuit affirmed summary judgment of a USERRA harassment claim in *Dees v. Hyundai Motor Mf'g Alabama, LLC*, No. 09-12107, 368 Fed. Appx. 49, 53 (11th Cir. Feb. 26, 2010). The court reached this conclusion after "[a]ssuming without deciding that harassment or hostile work environment is a cognizable claim under USERRA." *Id.* It nevertheless affirmed the district court's ruling that the appellant lacked standing to bring such a claim because he did not allege that he was entitled to any of the relief provided by USERRA. *Id.*

The First Circuit specifically acknowledged in *Vega-Colon v. Wyeth Pharmaceuticals*, 625 F.3d 22, 32 (1st Cir. 2010): "Neither the Supreme Court nor any court of appeals has decided whether a hostile work environment claim is cognizable under USERRA." For the purposes of that decision, the First Circuit "assume[d], without deciding, that it is." *Id.* The court nevertheless affirmed the lower court's summary judgment ruling because it found no basis for a jury to conclude that the plaintiff was subject to a hostile work environment. *Id.*

None of the opinions listed above addressed whether a hostile work environment cause of action exists under USERRA, instead disposing of the purported claims on other grounds.[2] These opinions therefore do not conflict with the lower courts' conclusion that USERRA does not create a cause of action for a hostile work environment. Petitioners have not cited to any conflicting decision of another United States court of appeals on this matter.

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[2] Similarly, Respondent argued to both the district court and the Fifth Circuit that even if USERRA created a hostile work environment cause of action, Petitioners' allegations are neither severe nor pervasive and, accordingly, could not establish such a cause of action. However, as both the district court and the Fifth Circuit held that USERRA does not provide a hostile work environment cause of action as a matter of law, those courts did not analyze whether Petitioners' allegations are sufficiently severe or pervasive to rise to the level of an actionable hostile work environment.

B. The Few Conflicting District Court Opinions on This Issue Do Not Present a "Compelling Reason" to Grant Certiorari.

Acknowledging the scarcity of appellate case law on this issue, Petitioners state that "district courts, however, have not avoided the issue and most have found that USERRA prohibits harassment based on military status." Pet. at 20. In fact, only five district courts have found that a hostile work environment cause of action exists under USERRA. Four of those opinions, noting the scarcity of federal case law on the issue, relied blindly on a flawed ruling of the Merit Systems Protection Board (M.S.P.B.) in *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227 (1996). *See Dees v. Hyundai Motor Mfg. Alabama, LLC*, 605 F. Supp. 2d 1220, 1226-28 (M.D. Ala. 2009) (following *Petersen* in holding that harassment claims are cognizable under USERRA, but dismissing claim due to lack of standing on grounds that plaintiff could not recover damages or injunctive relief); *Maher v. City of Chicago*, 406 F. Supp. 2d 1006, 1023 (N.D. Ill. 2006) (relying blindly on *Petersen* in holding that harassment is actionable under USERRA); *Vickers v. City of Memphis*, 368 F.Supp.2d 842, 844 (W.D. Tenn. 2005) (adopting the M.S.P.B.'s ruling in *Petersen* that USERRA provides a cause of action for harassment due to prior military service); *see also Conners v. Billerica Police Dept.*, 679 F.Supp.2d 218 (D. Mass. 2010). It does not appear from the opinion in *Maher* that the defendant pointed out to the court that such claims are not cognizable under USERRA. *See Maher*, 406 F. Supp. 2d at 1023.

The existence of five conflicting district court opinions on this matter is not a sufficiently compelling

reason to grant certiorari of the Fifth Circuit's better-reasoned opinion, especially when those district courts typically disposed of the plaintiffs' claims on other grounds. *See, e.g.*, *Conners*, 679 F.Supp.2d 218 (granting summary judgment on hostile work environment claim, stating "Conners is a veteran police officer and a long-time member of the military reserves. No reasonable person in Conners' situation, with his experience, could find Chief Rosa's conduct so sufficiently 'severe or pervasive' as to make his working conditions intolerable or even difficult."); *Dees*, 605 F. Supp. 2d at 1226-28 (dismissing claim due to lack of standing on grounds that plaintiff could not recover damages or injunctive relief), *aff'd*, No. 09-12107, 368 Fed. Appx. 49, 53 (11th Cir. Feb. 26, 2010); *Maher*, 406 F. Supp. 2d at 1023 (granting motion for summary judgment on hostile work environment claim where "[Plaintiff's] allegations do not even rise to the level found insufficient in *Miller*, where the plaintiffs were subjected to pressure to either resign their positions or give up their military status"). Similarly, federal district courts in at least three cases have chosen not to rule on the question of whether USERRA permits a hostile work environment claim, instead dismissing the USERRA harassment allegations because they were not sufficiently severe or pervasive to establish a hostile work environment. *See Ortiz Molina v. Rimco, Inc.*, No. 05-1181, 2006 WL 2639297, at *3 (D.P.R. Sept. 13, 2006); *Figueroa Reyes v. Hospital San Pablo del Este*, 389 F.Supp.2d 205, 212 (D.P.R. 2005); *Miller v. City of Indianapolis*, No. IP-99-1735-CMS, 2001 WL 406346 (S.D. Ind. April 13, 2001), *aff'd*, 281 F.3d 648 (7th Cir. 2002). The better reasoned federal district court opinions have declined to find a hostile work environment cause of action under USERRA. *See,*

e.g., *Carder v. Continental Airlines, Inc.*, No. 4:09-cv-3173, 2009 WL 4342477 (S.D. Tex. Nov. 30, 2009); *Baerga-Castro v. Wyeth Pharmaceuticals*, No. 08-1014, 2009 WL 2871148, at *12 (D.P.R. Sept. 3, 2009) (holding that "plaintiff's claim of harassment in the form of a hostile work environment is not cognizable under USERRA" because USERRA "does not specifically prohibit an employer from subjecting an employee to harassment or a hostile work environment due to the employee's military status").

The existence of a handful of conflicting district court opinions does not rise to the same level of importance as the examples listed in Supreme Court Rule 10 for granting certiorari. The Court should accordingly deny the Petition.

C. The Fifth Circuit's Opinion Is Not Inconsistent with this Court's Hostile Work Environment Jurisprudence.

Despite the fact that this Court has never addressed whether a hostile work environment cause of action is cognizable under USERRA, Petitioners allege that the Fifth Circuit's decision is "Inconsistent with the Court's Hostile Work Environment Jurisprudence." Pet. at 25. The flaw in Petitioners' argument is that they cite Title VII case law to argue that the Fifth Circuit wrongly interpreted USERRA. Contrary to Petitioners' argument, the Fifth Circuit analyzed this Court's Title VII hostile work environment jurisprudence but appropriately reached a different conclusion based on the different language used in USERRA. *See Carder*, 636 F.3d at 177-78 (App. at 10-14). In distinguishing USERRA from Title VII, the Fifth Circuit acted consistently with this Court's guidance in *Gross v. FBL Financial Services, Inc.*, in which this Court analyzed the

textual differences between Title VII and the ADEA and concluded that Title VII decisions like *Price Waterhouse* and *Desert Palace* did not govern its interpretation of the ADEA. *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2349 (2009) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."); *see also Smith v. City of Jackson*, 544 U.S. 228 (2005) (holding that this Court's interpretation of Title VII in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), remained applicable to identical language in the ADEA, where Congress's 1991 amendments to Title VII did not amend the ADEA). Similarly, cases interpreting other anti-discrimination statutes are inapplicable to USERRA to the extent the text of USERRA differs from those other statutes.

This Court first held in *Meritor Savings Bank v. Vinson* that an individual may establish a violation of Title VII of the Civil Rights Act of 1964 by establishing that discrimination based on sex has created a hostile or abusive work environment. 477 U.S. 57, 64-66 (1986). The Court gave two reasons for this holding. One reason was that EEOC Guidelines supported this view. *Id.* at 65. The interpretative regulations under USERRA provide extensive guidance on protection from employer discrimination and retaliation, reemployment, health plan coverage, seniority rights and benefits, and pension plans and benefits, but – unlike regulations interpreting Title VII – those regulations also lack *any* mention of the words *harass*, *harassment*, or *hostile*. *See generally* 20 C.F.R. Part 1002.

The other reason given by this Court in *Meritor* was based on the language of Title VII itself, which prohibits employers from discriminating against an employee **"with respect to his compensation, terms, conditions, or privileges of employment."** *Id.* at 64. The Court held: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* More specifically, the Court held that a cause of action for a hostile work environment is actionable under Title VII if and only if it alters the "***conditions*** of employment": **"For sexual harassment to be actionable,** it must be sufficiently severe or pervasive 'to alter **the conditions of [the victim's] employment . . . ."** 477 U.S. at 67 (emphasis added).

As the Fifth Circuit noted in its opinion, this Court "has consistently applied this standard." *Carder*, 636 F.3d at 177 (App. at 11). For example, this court stated in *Harris v. Forklift Systems, Inc.*: "'When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the **conditions** of the victim's employment and create an abusive working environment, Title VII is violated.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 368, 126 L.Ed.2d 295 (1993) (quoting *Meritor*, 477 U.S. at 67, 106 S.Ct. at 2405) (emphasis added). This Court similarly noted in *Oncale v. Sundowner Offshore Services, Inc.*:

> The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter **the**

> **"conditions" of the victim's employment.** . . . We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace . . . **for discriminatory "conditions of employment."**

523 U.S. 75, 81, 118 S.Ct. 998, 1003 (1998) (emphasis added). Also, in *Pennsylvania State Police v. Suders*, the Court stated: "To establish hostile work environment, plaintiffs like Suder must show harassing behavior 'sufficiently severe or pervasive to alter the **conditions** of their employment.'" *Penn. State Police v. Suders*, 542 U.S. 129, 133, 124 S.Ct. 2342, 2347, 159 L.Ed.2d 204 (2004) (internal citations omitted) (emphasis added). In fact, Petitioners phrase the "Question Presented" section of their Petition with respect to the "conditions of [their] employment." *See* Pet. at i (asking whether a hostile work environment claim exists under USERRA when the workplace harassment is allegedly "'sufficiently severe or pervasive to alter **conditions of [their] employment**") (emphasis added) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

USERRA ***does not use*** the phrase "terms, conditions, or privileges of employment," nor any language to that effect. *See generally* 38 U.S.C. §§ 4301 et seq. Instead, USERRA provides that individuals protected by the statute "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. § 4311(a). Whereas Congress did not define the phrase "terms, condi-

tions, or privileges of employment" in Title VII, the ADEA, or the ADA, it *did* specifically define the phrase "benefit of employment" in USERRA 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, or practice and includes rights and benefits under a pension 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).

Congress enacted USERRA years after this Court ruled that a hostile work environment cause of action exists under Title VII. If Congress intended to provide protection from harassment to members of the uniformed services, it would have explicitly included such a provision in the statute[3] or, at the very least, would have phrased the statute with respect to

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[3] The 1986 amendments to the False Claims Act ("FCA") are evidence that Congress knows how to draft a statute to specifically create a cause of action for harassment. On October 27, 1986 (approximately four months after the Supreme Court issued its opinion in *Meritor Savings Bank*), Congress amended the FCA to create a "private cause of action for an individual retaliated against by his employer for assisting an FCA investigation or proceeding." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 412, 125 S.Ct. 2444, 2447 (2005). In so doing, Congress explicitly provided relief to "[a]ny employee who is discharged, demoted, suspended, threatened, **harassed,** or in any other manner discriminated against in **the terms and conditions of employment** by his or her employer." *Id.* (quoting 31 U.S.C. § 3730(h)) (emphasis added).

"terms, conditions, or privileges of employment" rather than "benefits of employment." Notably, the Age Discrimination in Employment Act ("ADEA") and Americans with Disabilities Act ("ADA"), which also permit hostile work environment claims, also use the phrase "terms, conditions, or privileges of employment." *See* 29 U.S.C. § 623; 42 U.S.C. § 12112. The False Claims Act and the Sarbanes-Oxley whistleblower statute – both of which were passed after this Court's ruling in *Meritor* – both prohibit discrimination "in the terms and conditions of employment" ***and*** specifically prohibit "harass[ing]" employees. *See* 18 U.S.C. § 1514A (a); 31 U.S.C. § 3730(h).

The relevant provisions of the above-referenced statutes are listed in the following table, in chronological order by enactment date. The table also includes relevant excerpts of the Military Selective Service Act (MSSA), Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and USERRA.[4] Notably, the language of the MSSA, VEVRAA, and USERRA all relate to economic and contractual benefits, whereas the other statutes specifically reference "terms" and "conditions" of employment or a specific prohibition against "harass[ment]":

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[4] Petitioners note that cases interpreting USERRA's predecessor statutes are applicable when interpreting USERRA. *See* Pet. at 16 & n.16; *see also* 20 C.F.R. § 1002.2 ("Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA."). However, neither this Court nor any federal appellate court has interpreted any of USERRA's predecessor statutes to create a cause of action for an alleged hostile work environment.

Statute	**General Rule Prohibiting Discrimination**
Military Selective Service Act (MSSA) [of 1948], 50 U.S.C. App. § 459(b)	"In the case of any such person who, in order to perform such [military] training and service, has left or leaves a position (other than a temporary position) in the employ of any employer . . . if such position was in the employ of a private employer, such person shall—(i) if such position was in the employ of a private if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or (ii) if not qualified to perform the duties of such position, . . . be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case."
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a)(1).	"It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, **or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment**, because of such individual's race, color, religion, sex, or national origin . . . ."

Age Discrimination in Employment Act [of 1967], 29 U.S.C. § 623 (a)	"It shall be unlawful for an employer – to fail or refuse to hire or to discharge any individual **or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,** because of such individual's age . . . ."
1974 - Vietnam Era Veterans' Readjustment Assistance Act	"Any person who [is covered by the Act] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of [the Armed Forces of the United States.]" 38 U.S.C. § 2021(b)(3) (1988) (renumbered § 4301(b)(3) pursuant to Pub. L. No. 102-568, § 506 (1992); renumbered § 4311 in Pub. L. No. 103-353, § 2 (1994))
June 19, 1986 - Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)	
False Claims Act, 31 U.S.C. § 3730(h) [employment protections added Oct. 27, 1986]	"Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, **harassed, or in any other manner discriminated against in the terms and conditions of employment** because of lawful acts done by the employee, contractor, or agent . . . ."

Americans with Disabilities Act [of 1990] ("ADA"), 42 U.S.C. § 12112 (a).	"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, **and other terms, conditions, and privileges of employment**."
Uniformed Services Employment and Reemployment Rights Act [of 1994], 38 U.S.C. § 4311(a).	"A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."
The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (a).	"[No covered entity or individual] may discharge, demote, suspend, threaten, **harass,** or in any other manner **discriminate against an employee in the terms and conditions of employment** because of any lawful act done by the employee . . . ."

The Fifth Circuit and the district court in this case correctly concluded that Congress acted intentionally when it worded the provisions of USERRA so differently from other anti-discrimination statutes. They reached this conclusion after analyzing this Court's hostile work environment jurisprudence under Title VII, which is distinguishable when interpreting

the statutory language of USERRA. The Court should accordingly deny the Petition.

D. Petitioners Have Failed to Present Any Other Compelling Reason Why This Court Should Grant the Petition for Writ of Certiorari.

Petitioners identify other purported reasons why their appeal is important, none of which are sufficiently compelling to justify granting certiorari. First, Petitioners urge the Court to grant certiorari because "millions of Americans" serve or have served in the uniformed services, and are therefore covered under USERRA. Pet. at 10-11. The number of individuals protected by a statute should be of no relevance to whether this Court grants certiorari. If the number of individuals protected by a statute is important to granting certiorari, then questions of USERRA interpretation would necessarily be deemed less important than questions under the ADA or the ADEA, which would necessarily be deemed less important than questions under statutes that impact all Americans. Petitioners' appeal to the large number of servicemembers in America's workforce is not a "compelling reason" to grant certiorari.

Petitioners also have no basis for their assertion that "delay [by this Court] in deciding this issue may result in needlessly subjecting our servicemembers to improper harassment and hostility." Pet. at 13. To the contrary, during oral argument before the Fifth Circuit, Petitioners' counsel stated "his belief that Continental is the only airline engaging in the complained-of, alleged harassment of military reservist pilots." *Carder*, 636 F.3d at 179, n.7 (App. at 16, n.7). The paucity of case law on this issue is further evidence of the fact that "workplace harassment

of military members is not a widespread problem." *Carder*, 636 F.3d at 179, n.7 (App. at 16, n.7). Furthermore, unlike Title VII and certain other statutes, USERRA was not enacted to counter a negative stereotype about the persons protected by the statute. Congress did not enact USERRA "to combat an ignorant or vicious stereotyping of reservists as undependable employees" but "to encourage people to join [the armed services]". *Velasquez v. Frapwell*, 160 F.3d 389, 392 (7th Cir. 1998) (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981)), *vacated in part on other grounds*, 165 F.3d 593 (1999)). As the Seventh Circuit opined: "There is little evidence that employers harbor a negative stereotype about military service or that Congress believes they do." *Velasquez*, 160 F.3d at 392.

The fact that the district court and the Fifth Circuit permitted Petitioners' interlocutory appeal to proceed is also not a "compelling reason" to grant the petition for writ of certiorari, as Petitioners suggest on pages 13-15 of the Petition. The standards for reviewing an interlocutory order under 28 U.S.C. § 1292(b) does not equate to the standard for granting certiorari. Under § 1292(b), the question is whether the interlocutory order "[1] involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292 (b). The existence of substantial ground for difference of opinion with respect to a controlling question of law, standing alone, is not a "compelling reason" for this Court to

devote its time to reviewing the district court's order.[5]

CONCLUSION

The district court properly dismissed Petitioners' hostile work environment claim in an order that was properly affirmed by the Fifth Circuit. Petitioners have not identified any legal issues that warrant further attention or consideration by this Court. For the foregoing reasons, Continental Airlines, Inc. respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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[5] Continental contended before the district court, and still contends, that it was not necessary to certify the court's order for interlocutory appeal. There is no "substantial ground for difference of opinion" as to the correctness of the district court's order, whose ruling on this straightforward question of statutory interpretation is consistent with the plain language of the statute. Petitioners themselves admit that the district court reached its conclusion "[r]elying solely on the plain language of the statute." Pet. at 9. Therefore, even if the § 1292(b) standard were relevant to the standard for granting certiorari (which it is not), the district court's order should not have been certified for interlocutory appeal, and this Court should decline to grant certiorari.