No. 20-603

In the Supreme Court of the United States

LE ROY TORRES, PETITIONER,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH JUDICIAL DISTRICT, CORPUS CHRISTI, TEXAS

SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Supplemental Brief 1

I. The United States Agrees With Petitioner on Every Material Issue In This Case 2

II. This Court's Review Would Not Be "Premature" 3

Conclusion 11

TABLE OF AUTHORITIES

Cases Page(s)

Allen v. Cooper,
140 S. Ct. 994 (2020) 1, 8

Hahr v. Fla. Fish & Wildlife Conservation Comm'n,
No. SC21-1489 (Fla.) 6

Hightower v. Fla. Department of Highway Safety & Motor Vehicles,
No. SC20-1888 (Fla.) 6

King v. Fla. Fish & Wildlife Conservation Comm'n,
No. SC20-1884 (Fla.) 6

Matsushita Elec. Indus. Co. v. Epstein,
516 U.S. 367 (1996) 1

Obermark v. Mo. Dep't of Corrections,
No. 18CY-CV07905 (7th Judicial Cir., Clay Cty., Mo.) 6

Park v. California Military Dep't,
No. H049417 (Cal. Ct. App.) 6

Park v. California Military Dep't,
No. 18CV001888 (Monterey Cty. Sup. Ct.) 6

Sandoval v. Texas Dep't of Public Safety,
No. 07-20-00290-CV (Tex. App.-Amarillo) 6

Sandoval v. Texas Dep't of Public Safety,
No. D-1-GN-18-005881 (419th D. Ct.) 6

PennEast Pipeline Co. v. New Jersey,
141 S. Ct. 2244 (2021) 1, 4, 5, 7, 8, 10

Rules

Sup. Ct. Rule 10(c) 1

Legislative Materials

Justice for Servicemembers and Veterans Act of 2017, S. 646, 115th Cong., 1st Sess. § 102 9

Other Authorities

Letter from Representative Joaquin Castro to Acting Solicitor General Elizabeth Prelogar, July 2, 2021, https://bit.ly/3c1PiEA..... 2

Samuel F. Wright, *Can I Sue My State Government Employer for Violating My USERRA Rights?* (Oct. 2018), https://bit.ly/3D3YrIQ..... 3

U.S. Br., *Clark v. Virginia Dep't of State Police*, 138 S. Ct. 500 (2017) (No. 16-1043)..... 9

U.S. Br., *Cummings v. Premier Rehab Keller, PLLC*, No. 20-219..... 10

U.S. Br., *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 1289 (2021) (No. 19-1039)..... 7

U.S. Br., *Waterfront Comm'n of New York Harbor v. Murphy*, No. 20-772..... 2

SUPPLEMENTAL BRIEF

It is inexplicable that the United States would recommend that the Court deny review in this case, where an important federal statute has been repeatedly held unconstitutional, where the United States agrees that the uniform consensus in the lower courts is wrong, where the United States does not dispute that the case is an attractive vehicle to decide the question, and where what is at stake is nothing less than the promise the United States made to its own soldiers to protect them from discrimination on the basis of their service in its military. The United States gives too little weight to the exceptional importance of the question presented to veterans and servicemembers who joined the military believing they could rely on USERRA's cause of action for protection.

This case warrants this Court's review, and it warrants it now, not at some indefinite future time, a time that will come too late for countless veterans and servicemembers to vindicate their rights under USERRA. This Court grants review when state courts decide "an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). It grants review when lower courts "invalidat[e] a federal statute on constitutional grounds." U.S. Br. 17 (citing Pet. 11-12); *Allen v. Cooper*, 140 S. Ct. 994, 999-1000 (2020). And it grants review when necessary to "clarify" "important area[s] of federal law." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2253-54 (2021) (similar).

The United States does not dispute—in fact agrees—that this case meets all of those criteria.[1] The Court should therefore grant this case and uphold USERRA's constitutionality so that tens of thousands of veterans and servicemembers who have chosen to serve the public even in civilian life will be protected against discrimination on the basis of their military service.

I. The United States Agrees With Petitioner on Every Material Issue In This Case

As an initial matter, the United States agrees with petitioner on every material issue in this case. The United States agrees that the decision below is wrong, along with all the other decisions in state supreme courts and appellate courts around the country that have invalidated USERRA's cause of action against nonconsenting states. U.S. Br. 8, 15. As the United States explains, USERRA's cause of action against states is constitutional; the courts that have held otherwise "erred." U.S. Br. 8. They "did not engage in the textual, structural, or historical analysis that this Court's precedents require." U.S. Br. 15. The United States does not dispute that the question presented warrants certiorari, nor that this Court will necessarily have to answer it at some point in the future, calling review "premature" (U.S. Br. 17), not "unwarranted." *See, e.g.*, U.S. Br. at 9, *Waterfront Comm'n of New York Harbor v. Murphy*, No. 20-772 (further review of the question presented "not warrant[ed]"). And the United States does not dispute that this case is a good vehicle for deciding the question

[1] The United States could hardly contest this case's importance. Members of Congress even wrote a letter to the Solicitor General asking the United States to support this Court's review in this case. *See* Letter from Representative Joaquin Castro to Acting Solicitor General Elizabeth Prelogar, July 2, 2021, https://bit.ly/3c1PiEA.

presented. The United States does not even discuss Texas's meritless vehicle arguments.

II. This Court's Review Would Not Be "Premature"

The United States' only stated reason for recommending denial of certiorari is that review, in the opinion of the United States, would be "premature." U.S. Br. 17. The opposite is true. In eight states, home to over 80 million people and to three of the five largest military bases in the United States,[2] USERRA's cause of action against states as employers has already been erroneously held to be unconstitutional. *See* Pet. 7 n.1 (collecting decisions). And in at least fourteen more states,[3] home to more than 50 million people, no veteran will ever be able to sue without first persuading a court to reject the erroneous but nonetheless "uniform[]" consensus of courts that have held USERRA's cause of action unconstitutional. U.S. Br. 5-6. The harm from failing to rectify this state of affairs is measured in lives: lives of servicemembers destroyed by discrimination on the basis of service to their country.

The reasons the United States deems review premature only confirm that review should be granted now. There is no need for additional percolation; this question arises frequently; there is no chance that every state will waive sovereign immunity and moot this issue; and the existence of a Department of Labor process does not diminish the importance of the civil lawsuits that Congress expressly authorized.

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[2] Fort Campbell (Tennessee), Fort Hood (Texas), and Fort Benning (Georgia).

[3] Samuel F. Wright, *Can I Sue My State Government Employer for Violating My USERRA Rights?* 4-12 (Oct. 2018), https://bit.ly/3D3YrIQ (listing states that have not waived sovereign immunity).

A. The Court's Review Will Not Be Aided By Awaiting More Decisions By Lower Courts

The United States is wrong that additional percolation would be "appropriate." U.S. Br. 17. There would be no benefit to waiting for further percolation by state courts. For twenty years state courts—like the court below—have failed to "engage in the textual, structural, [and] historical analysis that this Court's precedents require." U.S. Br. 15. Yet, the United States argues that "this Court's recent decision in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), could lead courts in Texas and other States to reach a different conclusion as to the sovereign-immunity question here," U.S. Br. 9, and later in its brief claims that "it would be appropriate for the Court to allow lower courts to address the effect of *PennEast* on the question presented before addressing that issue itself." U.S. Br. 17.

The United States does not explain why it would be "appropriate" to wait for lower courts to address the effect of *PennEast* on the question presented. While *PennEast* confirms that the decision below is incorrect, *see* U.S. Br. 9-17, it will not plausibly cause every one of the courts to rule on this issue to reverse itself. And *PennEast* did not change the law. The United States appears to suggest that *PennEast* made two major innovations: (1) it established that "bankruptcy is not the only area" where the states waived their sovereign immunity in the plan of the convention, U.S. Br. 15-16, and (2) it held that "a 'historical analogue' is not necessary for Congress to authorize suits pursuant to a power over which States have surrendered sovereign immunity," U.S. Br. 16. But this Court's cases established both propositions many years before *PennEast*, as *PennEast* itself explains. *See* 141 S. Ct. 2244, 2258, 2261 (2021). The United States filed numerous briefs arguing USERRA's cause of action was constitutional *before* this Court's

decision in *PennEast*. *See* Pet. 18-19 (collecting briefs). Petitioner brought this case, and this Court issued a CVSG, all without the benefit of *PennEast*.

Even if *PennEast* had changed the law, it *still* would not make it "appropriate" to wait years for lower courts to decide whether to overrule their own precedents based on a decision that does not concern the War Powers. And this Court is better positioned than any other court in the United States to address the effect of *PennEast* on the question presented. The "appropriate" course would be to answer the question presented so lower courts do not have to guess.

The United States does not contend that this Court's decision on this purely constitutional question of sovereign immunity would be better reasoned or more informed by waiting for lower courts' analyses. And even as this Court gains no benefit from postponing its decision on the question presented, waiting to finally decide the question presented will come at a significant cost to the many reservists who will be "unable to vindicate their rights." ROA Amicus 21-22.

B. The Problem of Service-Connected Discrimination is Widespread and Serious

The United States argues that this question "arises infrequently" and admonishes that there is "no conflict among the lower courts." The first assertion is wrong, and the second favors granting certiorari now. The question presented here arises frequently; and, the absence of a conflict in a case where the consensus of lower courts is egregiously incorrect makes this Court's review more necessary, not less. *Contra* U.S. Br. 17-18.

As the petition explains (at 14-18), the veterans who are essentially unprotected from discrimination on the basis of their service by their state employers number in the many thousands. The *amicus* brief of the Reserve

Organization of America (ROA) confirms that "[m]any" reservists "have been unable to vindicate their rights because … state courts have refused to grant relief under USERRA." ROA Amicus 21. Indeed, the lawyers on this very case are currently litigating three USERRA cases against states-as-employers in state courts around the United States. *See Park v. California Military Dep't*, No. H049417 (Cal. Ct. App.), *appealing* No. 18CV001888 (Monterey Cty. Sup. Ct.); *Sandoval v. Texas Dep't of Public Safety*, No. 07-20-00290-CV (Tex. App.-Amarillo), *appealing* No. D-1-GN-18-005881 (419th D. Ct.); *Obermark v. Mo. Dep't of Corrections*, No. 18CY-CV07905 (7th Judicial Cir., Clay Cty., Mo.). One of those cases is pending in a different appellate court in Texas. *Contra* U.S. Br. 18. The question presented is also currently being litigated in at least three cases in Florida, all of which are now pending before the Florida Supreme Court, including *Hightower v. Fla. Department of Highway Safety & Motor Vehicles*, No. SC20-1888 (Fla.); it appears these cases are being held pending this Court's decision on the petition in this case. *Contra* U.S. Br. 18; *see also King v. Fla. Fish & Wildlife Conservation Comm'n*, No. SC20-1884 (Fla.); *Hahr v. Fla. Fish & Wildlife Conservation Comm'n*, No. SC21-1489 (Fla.).

The United States is thus incorrect to claim that "the question presented here arises infrequently." U.S. Br. 17. There is no evidence that that assertion is based on a careful analysis of state court dockets or state employer termination decisions. And to the degree the assertion is based on published state court of appeals decisions, the question only "arises infrequently" because every court in the past twenty years has ruled that USERRA is unconstitutional—as the United States admits. U.S. Br. 18. Servicemembers and their counsel simply do not have the resources to litigate futile cases in the hopes that eventually state courts might overturn settled

precedent or this Court might intervene—especially where, as it has twice done, the United States continues to tell this Court that the proper course is to deny relief. *See* U.S. Br. 6. Nonetheless, even though litigation is expensive and difficult, the question has arisen numerous times in the past two decades as evidenced by the array of state appellate and supreme court decisions that have held USERRA's cause of action unconstitutional.

In any event, the frequency with which a question arises is not the sole or even primary determinant of its importance. In *PennEast* the question whether a state could claim sovereign immunity against a private entity to which the United States delegated eminent domain power was only litigated *once*: in *PennEast* itself. In fact, the Third Circuit did not even decide the constitutional question in *PennEast*, it decided a constitutional *avoidance* question. The respondent raised this very argument against certiorari, explaining that "certiorari is unwarranted because the decision below does not conflict with a decision of another court of appeals." U.S. Br. at 21, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 1289 (2021) (No. 19-1039). Yet, the United States recommended that this Court grant review in that case. *See id.* The United States explained that "the importance of the natural-gas industry to the Nation's economy and well-being" meant that this was "not the sort of legal question in which the Court should wait years for further percolation while the States of Pennsylvania, New Jersey, and Delaware enjoy a veto over FERC's authority to efficiently and effectively manage the natural-gas supply in those and surrounding States." *Id.* at 22. Why do servicemembers not deserve the same consideration?

The United States' other claim—that there is no conflict and therefore no reason to review the question presented—is backward given the United States' recognition that every state appellate and supreme court

that has addressed this issue for the past twenty years has wrongly denied relief to the servicemember on the basis of an erroneous understanding of the Constitution. The absence of a conflict does not counsel against review in a situation like this where states are erroneously declaring a federal statute unconstitutional. Rather, it confirms that there is no reason to wait and the Court should grant review as soon as possible.

C. The Speculative Possibility That One Or More States Could Waive Sovereign Immunity Is Irrelevant

The United States argues that "[l]egislative developments" "may" "affect the urgency for review by this Court." U.S.18-19. That is incorrect. The speculative possibility that a state or set of states could waive sovereign immunity is irrelevant to when or whether this Court should review a question of Congress's authority to subject nonconsenting states to suit. *Contra* U.S. Br. 18-20. The whole point of Congress authorizing suits against nonconsenting states is to withhold that precise veto power.

The ability of states to waive their sovereign immunity is not a reason to deny or delay review in sovereign immunity cases. Otherwise, the possibility would be a reason to deny review in every sovereign immunity case. In *Allen*, North Carolina could have waived its sovereign immunity. In *PennEast*, New Jersey could have waived its sovereign immunity. And *in this very case* Texas could have waived its sovereign immunity at *any point*—instead, it has asserted it vigorously. Because states can invoke their sovereign immunity as readily as they can waive it, servicemembers in Texas and nationwide will only ever be assured of their USERRA rights by a decision of this Court holding that a state's waiver is not required.

The United States' claim of imminent Congressional action also rings hollow. The proposed bill the United States cites to suggest that Congress might soon fix USERRA, U.S. Br. 20, is the exact same bill the United States cited in *Clark v. Virginia Department of State Police* for the same proposition, U.S. Br. at 14, *Clark*, 138 S. Ct. 500 (2017) (No. 16-1043). Yet here we are. And that bill—the Justice for Servicemembers and Veterans Act of 2017, S. 646, 115th Cong., 1st Sess. § 102—is not grounds to deny review; instead it highlights this case's undeniable importance. The very reason Congress introduced it was to remedy the exact problem that the United States now tells this Court is not important enough to warrant swift correction.

D. The Existence of the Ineffectual Department of Labor Process Is Not a Reason to Leave Servicemembers Unprotected

The United States argues that the existence of the Department of Labor (DOL) process, by which a servicemember may seek DOL's help obtaining relief from a state employer, makes review less urgent. It does not. Congress chose to provide servicemembers a cause of action for a reason: to guarantee servicemembers' right to be free from unlawful discrimination. If *Congress* thought the DOL process sufficed, it would never have created USERRA's private cause of action.

The DOL process is no substitute for private suits. As ROA explained in its *amicus* brief "private lawsuits are less burdensome, more efficient, and provide servicemembers with a greater opportunity to obtain relief." ROA Amicus Br. 26. Forcing servicemembers to rely on the DOL process "subverts USERRA's intent" and "provides little hope for all but a lucky few servicemembers seeking redress from a state employer." ROA Amicus Br. 26. The United States' brief offers statistics purporting to show that the DOL process works,

but they show the opposite: 71% of the claims brought to DOL resulted in no relief for the service member—often because a DOL bureaucrat decided, without the benefit of an adversarial judicial process and without even consulting with the Department of Justice, that the servicemember's claim was "meritless or ineligible for relief." U.S. Br. 21. That figure confirms that Congress was right to provide servicemembers an alternative judicial avenue for relief.

In any event, the availability of a federal enforcement mechanism is not typically a reason to permit an erroneous limitation on private antidiscrimination enforcement. As the United States explained when recommending certiorari in *Cummings v. Premier Rehab Keller, PLLC*, No. 20-219, "[w]hile the federal government has the authority to enforce these antidiscrimination provisions" "the private enforcement mechanisms play an important role in ensuring that recipients of federal financial assistance do not intentionally engage in discriminatory conduct—and that they fully compensate their victims when they breach this duty." U.S. Br. at 22, *Cummings*, No. 20-219. The same is true of the private cause of action in USERRA.

* * *

The United States suggests that "the Court could consider granting the petition, vacating the decision below, and remanding for further consideration in light of *PennEast*." U.S. Br. 17. The better course of action would be to grant this case and set it for argument. But if the Court disagrees, petitioner respectfully requests that rather than deny the petition, the Court grant, vacate, and remand the case for further consideration in light of *PennEast*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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