No. 20-603

IN THE
Supreme Court of the United States

LEROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Court of Appeals for the Thirteenth Judicial District, Corpus Christi, Texas

BRIEF OF RESERVE ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Reserve Organization of America ("ROA") is America's only exclusive advocate for the Reserve and National Guard—all ranks, all services. With a sole focus on support of the Reserve and National Guard, ROA promotes the interests of Reserve Component members, their families, and veterans of Reserve service. ROA regularly files briefs as part of this advocacy—including in cases before this Court and cases that concern the proper interpretation and application of the Uniformed Services Employment and Reemployment Rights Act of 1994.

[1] The parties have filed blanket consents to the filing of amicus briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

United States military reserves date back to before the founding of the Republic when national citizen-soldier forces fought in the French and Indian War. State militias—which became the National Guard—played a major role in the Revolutionary War. During the Civil War, state militias supplied 96 percent of the Union army and 80 percent of Confederate troops. About 400,000 Guardsmen served in World War I, representing the largest state contribution to overseas military operations during the 20th century. Nearly 300,000 Guardsmen served in World War II. More than 200,000 Reservists contributed to the liberation of Kuwait in the Gulf War. And since September 11, 2001, more than half a million Reservists and National Guardsmen have answered the call to serve their nation – some, many times over.

Today, the United States' Reserve Components have more than 1 million members and constitute nearly half of the total U.S. military force. They hail from all walks of life. They are public high school teachers, doctors, lawyers, police officers, and, like Petitioner, state troopers. They are united not only by their undying devotion to this nation, but by their commitment to public service—many devoting their entire careers to working in state and local governments.

Recognizing that the only way to ensure a ready and strong national defense was to boost the recruitment,

retention, and morale of noncareer servicemembers, Congress sought to eliminate disadvantages to their civilian careers. Thus, during, and immediately after World War II, Congress enacted a suite of reemployment protections designed to ensure that servicemembers sent to fight overseas could return to their former civilian jobs. Congress progressively expanded these reemployment rights over the ensuing decades, culminating in the 1998 amendment to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which reaffirmed Reservists' protections against adverse employment actions by state employers and expressly authorized suits in state courts to vindicate those protections.

While the 1998 amendment reaffirmed that USERRA applies to state employers, it is also true that Congress' War Powers under Article I of the United States Constitution authorize it to grant servicemembers the right to bring suit against their state employers in state court. That right is supported by the Constitution's text. It is supported by the historical importance of a unified national defense. And it is supported—many times over—by this Court's precedent.

A growing number of states, however, have undermined USERRA's protections by asserting sovereign immunity against Reservists seeking vindication of their reemployment rights in state courts. These states flout Congress' clear intent to

allow servicemembers to bring suit against states. And they erode the United States' warfighting capabilities: more than a quarter of all USERRA claims are filed against public-sector employers, and failing to provide these servicemembers with the ability to remedy adverse employment actions by their state employers directly impacts the military's ability to recruit and retain Reservists—the backbone of the modern military.

Indeed, Reservists' only other option—a request that the United States Department of Justice seek enforcement against the state—affords little, if any, prospect of meaningful relief. The procedure is riddled with deficiencies, delays, and, as the statistics indicate, is unlikely to protect the vast majority of servicemembers.

Because Congress has granted and progressively expanded servicemembers' reemployment rights for 59 years as a valid exercise of its Article I War Powers, the Court should reverse the lower court's erroneous decision denying servicemembers these protections.

ARGUMENT

I. States' Invalidation of a Federal Statute Hinders the United States' Warfighting Ability.

Since this Court decided *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44 (1996) and *Alden* v. *Maine*, 527 U.S. 706 (1999), lower courts have routinely dismissed otherwise valid USERRA claims on sovereign immunity grounds. But Congress enacted USERRA pursuant to its Article I War Powers. See 144 Cong. Rec. 4458 (1998). USERRA's enforcement provision permitting private suits against state government employers in state courts is a valid exercise of Congress' plenary and exclusive War Powers.

The exclusive power to raise, support, and control armies and to regulate militias belongs to Congress, and that power is absolute. Prior to the Constitution's ratification, state militias—which evolved into the National Guard—were under exclusive state control. See Charles Lofgren, *War Powers, Treaties, and the Constitution*, THE FRAMING AND RATIFICATION OF THE CONSTITUTION 242, 249 (1987). However, the Constitution entrusted the federal government with complete and ultimate control over the militia. U.S. Const. art. I, § 8, cl.15 (Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."). Indeed, since the beginning of the

Republic, the War Powers have been considered absolute *vis-à-vis* the states. See*, e.g.*, THE FEDERALIST NO. 23 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]here can be no limitation [of Congress'] authority . . . to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the national Forces.").

This Court has long recognized that fact, stating time and time again that Congress' actions in the exercise of its War Powers are "beyond question." *Lichter* v. *United States*, 334 U.S. 742, 756 (1948). "[P]erhaps in no other area has th[is] Court accorded Congress greater deference" than "in the context of Congress' authority over national defense and military affairs[.]" *Rostker* v. *Goldberg*, 453 U.S. 57, 59-64 (1981) (holding that in determining whether a statute is constitutional, Congress' determination is afforded "great weight", and discussing at length the Court's history of War Powers deference). The Court afforded Congress this substantial deference 150 years ago in *In re Tarble*, when it rejected Wisconsin's attempt to retrieve—through a writ of habeas corpus—an individual who was in military custody for having deserted the Army. In doing so, this Court described Congress' War Powers as "plenary and exclusive," and held that "[n]o interference with the execution of th[e] power of the national government in the formation, organization, and government of its armies by any

State officials could be permitted without greatly impairing the efficiency" of the military. 80 U.S. 397, 408 (1871). Fifty years later, this Court again deferred to Congress' authority to impose requirements on states' militias, holding that states cannot intrude on Congress' War Powers because these powers were "complete to the extent of its exertion and dominant." *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918).

The War Powers are noteworthy for their expansive grant of authority to Congress, and the extent of the limitations they impose upon state power. The enactment of USERRA fits firmly within the ambit of this expansive authority and empowers the initiation of suits against nonconsenting states when necessary to vindicate the statute's intended protections. See Pet'r's Br. 18. As detailed below, Congress enacted USERRA's employment protections pursuant to its War Powers, and those protections are a vital element of the United States' ability to engage in effective warfighting.

Accordingly, this Court's history of deference to legislation invoking Congress' authority under the War Powers, and the Constitution's text, structure, and history, confirm that authorizing private suits against state government employers in state courts is a valid exercise of Congress' plenary and exclusive War Powers.

A. Congress' Progressive Expansion of Servicemembers' Employment Protections Was Intended to Facilitate Effective Warfighting.

Servicemembers' reemployment protections have always been linked with raising and supporting the Armed Forces. These protections originated in the Selective Training and Service Act of 1940 (the "1940 Act"). See Pub. L. No. 76-783, 54 Stat. 885 (1940). Enacted to prepare for rapid military mobilization shortly before World War II, the 1940 Act gave the President broad authority to induct civilians into the armed forces. See *id.* § 3(a).

To help facilitate the Act's aims, Congress included a novel post-service reemployment right. The 1940 Act required federal and private employers to "restore[]"—to their prior position or a "position of like seniority, status, and pay"—persons returning to the civilian workforce after being "inducted into [military service][.]" *Id.* § 8(b). This approach directly advanced the military's ability to effectively wage war. Senator Elbert Thomas—a member of the Senate Military Affairs Committee—explained:

It would seem to be obvious that if the Congress has power to raise an army[,] that power can be effectively exercised only if the Congress can take such measures as are necessary to make it an efficient army and to prevent undue hardships upon the persons who

constitute the army. . . [N]o one can deny that if we guarantee their jobs when their military service is completed we have taken a long step in providing the Army and Navy with patriotic men who are willing and anxious to serve their country.

86 Cong. Rec. 10573 (1940); see also *Selective Compulsory Military Training and Service; H.R. 10132 Before the H. Comm. On Military Affairs* (1940) (similar assessment from War Department).

Post-war recodification of the 1940 Act—through the 1948 Military Selective Service Act (the "1948 Act")—likewise characterized the right to reemployment as part of Congress' efforts to "achieve[]" and "maintain[]" "an adequate armed strength" "to insure the security of th[e] Nation." Pub. L. No. 80-759, § 1(b), 62 Stat. 604, 605 (1948). In furtherance of these warfighting aims, Congress expanded the right further. Where the 1940 Act required reemployment so long as the servicemember was still able to perform the duties of such position, see 1940 Act, § 8(b), the 1948 Act mandated—in certain cases—that the employer provide servicemembers with service-related disabilities a position of "like seniority, status, and pay, or the nearest approximation thereof[.]" 1948 Act, § 9(b)(A), (B).

In 1968, Congress extended reemployment protections to the Reserve components. See Pub. L. No. 90-491, 82 Stat. 790 (1968). President Johnson's signing statement makes explicit the connection to

American warfighting capabilities, explaining that "members of the reserve components are . . . indispensable sinews in the military strength of our Nation." Presidential Statement on Signing Pub. L. No. 90-491, 4 WEEKLY COMP. PRES. DOC. (Aug. 17, 1968). It was thus critical to "spell out, so there can be no doubt," that these servicemembers "ha[d] the same reemployment rights and attendant conditions of employment as their fellow workers who do not have such military obligations." *Id.*

Near the end of the Vietnam War, Congress enacted what became USERRA's immediate predecessor, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (the "1974 Act"). While the Military Selective Service Act had declared it the "sense of the Congress" that state and local employers should reemploy veterans, 1948 Act, § 9(b)(C), Congress found this non-binding declaration to be lacking. S. Rep. No. 93-907, at 110 (1974). Accordingly, after a decade of war in Vietnam, Congress *required* reemployment by states and their political subdivisions. See Vietnam Era Veterans' Readjustment Act of 1974, Pub. L. No. 93-508, § 404, 88 Stat. 1578, 1595 (1974). It also allowed servicemembers to vindicate these rights in federal court.[2] See *id.* § 404. With roughly 500,000 Vietnam

[2] Federal court decisions applying the 1974 Act to state employers did not find state employers' sovereign immunity defense compelling. In addressing whether the reemployment provisions of the 1974 Act violated the Eleventh Amendment, the Seventh Circuit held that Congress' "war powers serve as the vehicle for

veterans returning to the country—more than half of whom "were employed prior to their entering service"—Congress found it "logical and consistent with congressional intent to extend" reemployment rights "to veterans who had been *employed by State and local governments*." S. Rep. No. 93-907, at 110 (1974).

After the Vietnam War, the transition to an all-volunteer military resulted in the drawdown of the armed forces and ushered in an era in which the role of the Reserve Components took on even greater importance. Specifically, Reservists played a crucial role in the Gulf War, particularly in support of Operation Desert Shield/Storm ("ODS/S"). During ODS/S, 228,000 Reservists were mobilized in August 1990. See David Mangelsdorff, *Reserve Components' Perceptions and Changing Roles*, MILITARY MEDICINE, Vol. 164, 10:715 at 717 (Oct. 1999).

This expansion in the role of Reservists further underscored the difficult challenges many Reservists face. During the Gulf War, Reservists were deployed for longer periods of time. *Id.* As a result, many lost

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overriding the bar of the Eleventh Amendment." *Jennings* v. *Ill. Off. of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979). Similarly, in *Peel* v. *Florida Department of Transportation*, the Fifth Circuit, in considering whether the Eleventh Amendment prevents a federal court from ordering a state agency to reinstate a former employee under the [1974 Act], held that the "express language in the Act authorizing suits against the states is sufficient to overcome the potential bar of the [E]leventh [A]mendment." 600 F.2d 1070, 1081 (5th Cir. 1979).

their civilian income and reported problems arranging "for continued civilian benefits." *Id.* In light of these issues—and recognizing the prominent role Reservists continue to play in the American military system—Congress took steps to promote Reservists' recruitment and retention.

Congress again expanded reemployment rights through the enactment of USERRA in 1994. Like its predecessor, USERRA sought to fortify American warfighting capabilities by "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service[.]" Pub. L. No. 103-353, § 2(a)(1), 108 Stat. 3149, 3150 (1994) (codified at 38 U.S.C. § 4301(a)(1)).

Congress made explicit that its remedies had to trump sovereign immunity to effectively carry out the War Powers. After this Court held in *Seminole Tribe* that Congress' attempt to abrogate state sovereign immunity in the Indian Gaming Regulatory Act—enacted pursuant to the Indian Commerce Clause—violated the Eleventh Amendment, Congress amended USERRA to expressly authorize suits against state employers in state court. See Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3329 (1998) (codified at 38 U.S.C. § 4323(b)(2)) ("In the case of an action against a State (as an employer) by a person, the action may be brought in State court of competent jurisdiction in accordance with the laws of the State."). Congress

explained that states that "successfully raised . . . [sovereign immunity] as a bar to . . . private actions [under USERRA]" "threaten not only a long-standing policy protecting individuals' employment right, but also raise serious questions about the United States ability to provide for a strong national defense." H.R. Rep. No. 105-448, at 5 (1998).

Representative Bob Filner of California underscored this point with an example fresh on the legislators' minds:

> We all remember the crucial role members of the Guard and Reserves played in the successful conduct of the Persian Gulf War and the sacrifices these individuals made to serve their country. Literally hundreds of thousands of our citizen soldiers, many with little more than 48 hours' notice, left their families and their jobs to answer their country's call to arms. Because the law protects veterans' reemployment rights, these brave men and women were able to contribute enormously to the Gulf War effort with the assurance that their civilian employment would be available to them following their military service.

Id. at 4459.

In light of the critical importance of Reservists to the United States military, the increasing need to protect their reemployment rights, and Congress' expansive War Powers, this Court should not permit

states to use sovereign immunity as a shield to frustrate Congress' intent.

B. Full Application of USERRA is Necessary to Protect the United States' Military Recruitment and Retention Efforts.

Every service branch except the newly created Space Force maintains a Reserve Component fully capable of supporting the nation's military missions. From the standpoint of readiness, the Reserve Components provide a significant portion of the nation's military forces. More than one million citizen-warriors—nearly half of the United States Armed Forces—serve in the Ready Reserve while maintaining their civilian employment. See *Defense Primer: Reserve Forces*, CONGRESSIONAL RESEARCH SERVICE 1 (updated Dec. 21, 2021), https://fas.org/sgp/crs/natsec/IF10540.pdf.[3]

The Reserve Components bear a significant burden in carrying out the nation's overseas operations and "provid[ing] critical combat power and support." See Col. (Ret.) Richard J. Dunn, *America's Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, THE HERITAGE FOUND. (Oct. 5, 2015). In 2011, the Vice Chairman of the Joint Chiefs of Staff reported that "[d]uring a decade of sustained

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[3] "The Ready Reserve is the primary manpower pool of the reserve components." *Id.* at 1. It includes the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard. *Id.*

engagement in combat operations, the Reserve Components of our Armed Forces have been transformed . . . from a strategic force of last resort to an operational reserve that provides full-spectrum capability to the Nation." DEP'T OF DEF., *Comprehensive Review of the Future Role of the Reserve Component*, Vol. I at 1 (Apr. 5, 2011). As a result of this transformation of the force, a total of "40,375 [reservists] were serving on active duty on June 9, 2020," vastly exceeding the number of reservists mobilized at almost any point prior to September 11, 2001. C.R.S., Reserve Component Personnel Issues: Questions and Answers at 8, n.32 (June 15, 2020).

Since the Gulf War, Reservists have continued to play a significant role in the United States military. "Reserve Component . . . service members have repeatedly deployed and operated in Bosnia, Iraq, Afghanistan, and participated in numerous other contingency, humanitarian, and homeland support missions." RESERVE FORCES POL'Y BD., *Improving the Total Force: Using the National Guard and Reserves,* RFPB Report FY17-01 11 (Nov. 1, 2016). In fact, over 931,000 Reservists have been activated since September 11, 2001, many multiple times. *Id.* at 18. Since 2001, more than half of Reservists have been mobilized more than once, and 89% of the Reservists' mobilizations were to combat zones. *Id.* at 25. Moreover, unlike earlier conflicts, soldiers being mobilized now are more likely to face increased time on active duty, thus putting their ability to return to their

previous employment at greater risk. See Jeffery M. Hirsch, *Can Congress Use Its War Powers To Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004).

The nation benefits greatly from Reservists' service because of their unique talents. Reservists "bring unique capabilities and professional expertise to the Total Force gained through years of experience in the civilian sector[,]" especially in professions that are typically too "cost-prohibitive to develop in the Active Component (i.e. doctors, nurses, lawyers, computer analysts, cyber experts, engineers, etc.)." RESERVE FORCES POL'Y BD., *supra*, at 29. Moreover, the Reserve Components "require[] significantly less overhead and infrastructure costs"— "typically less than one-third the cost of the Active Component[.]" *Id.* at 18. Yet, Reservists "have performed at a level on par with their Active Component[] counterparts and their performance has been consistently exceptional[.]" *Id.* at 11.

Accordingly, the Reserve Components are an indispensable part of securing and protecting the national interest. As the Department of Defense ("DoD") recently concluded, "[u]nless we had chosen to drastically increase the size of the Active Components, our domestic security and global operations since September 11, 2001 *could not have been executed* without the activation of hundreds of thousands of

trained Reserve Component personnel." DEP'T OF DEF., *supra, at* 1–2 (emphasis added).

Congress' ability to establish and maintain these Reserve Components would be seriously impaired if employers did not allow their employees to serve or failed to accommodate employees who wish to serve and are serving as Reservists. See Jessica Vasil, *The Beginning of the End: Implications of Violating USERRA*, 11 DEPAUL J. SOC. JUST. 1, 22 (2018) ("Due to an increased reliance on the Reserve/National Guard in a post[-]9/11 world, any violation of USERRA ultimately hurts national security."); see also COMMISSION ON THE NATIONAL GUARD AND THE RESERVES, *Transforming the National Guard and Reserves into a 21st-Century Operational Force* 257–58 (Jan. 31, 2008) (explaining that the reemployment protections "allay fears that may be a distraction in combat. A service member's thoughts of his or her family should always be a comfort, never a worry.") ("*Transforming the Reserve Components*").

According to the 2019 Status of Force Survey of Reserve Component Members, a significant portion of the surveyed Reservists (approximately 22%) responded that conflicts between their civilian jobs and their monthly weekend drills would constitute a reason to leave the service to a great or very great extent. See Off. of People Analytics, *2019 Status of Forces Survey of Reserve Component Members*, DEP'T OF DEF. 174 (Aug. 2019). This is of particular concern given that

the same survey shows that only 65% of the surveyed Reservists answered that their civilian employers have a favorable or very favorable view of their service as Reservists, *id.* at 92, and other research shows that Reservists are less likely to get hired in the civilian sector, see Theodore F. Figniski, *Research: Companies Are Less Likely to Hire Current Military Reservists*, HARV. BUS. SCH. (Oct. 13, 2017), https://hbr.org/2017/10/research-companies-are-less-likely-to-hire-current-military-reservists.

By ensuring that Reservists can retain their jobs and participate in the military without fear of reprisal by their civilian employers, USERRA's reemployment protections are an indispensable element to DoD's recruiting and retention efforts.

C. Veterans Constitute a Great Number of State and Local Government Employees and, Upon Return from Service, Increasingly Face Workplace Discrimination.

State and local governments employ high rates of Reservists and veterans. Approximately 21% of Reservists are employed either by a state or local government. See Susan M. Gates, et al., *Supporting Employers in the Reserve Operational Forces Era*, RAND CORP. 44 (2013).

Moreover, "[S]tate and local government workers . . . are more likely to be veterans[.]" David Cooper and Julia Wolfe, *Cuts to the State and local public sector*

will disproportionately harm women and Black workers, ECONOMIC POLICY INSTITUTE (July 9, 2020), https://www.epi.org/blog/cuts-to-the-state-and-local-public-sector-will-disproportionately-harm-women-and-black-workers/. A 2018 study by the Economic Policy Institute shows that 1,133,600 (or 6.6%) of state and local government workers are veterans.[4] *Id.* Many of these veterans also have a service-connected disability. For example, "[i]n August 2020, 31 percent of employed veterans with a [service-connected] disability worked in federal, state, or local government, compared with 19 percent of veterans with no disability and 14 percent of nonveterans." U.S. DEP'T OF LAB., Bureau of Labor Statistics, *Employment Situation of Veterans—2019* 4 (Mar. 18, 2021), https://www.bls.gov/news.release/pdf/vet.pdf. In total, more than 200,000 veterans both work for their state or local government and suffer from a service-connected disability, *See id* at tbl. 8.

As servicemembers return to civilian employment, many employers do not welcome them back. As the congressionally-chartered Commission on the National Guard and Reserves explained, "[a]s use of the reserve components has risen, reservists have become increasingly concerned that their service will harm

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[4] In 2014, approximately 24 percent of Texas veterans were federal, state, or local government employees. See OFF. OF THE TEX. GOVERNOR, *Veterans in Texas: A Demographic Study* (2016), https://gov.texas.gov/uploads/files/organization/twic/veteransupdate_summary.pdf.

their civilian employment." *Transforming the Reserve Components*, at 258 (collecting data). In recent years, Reservists have alleged discrimination by state and local governments in greater numbers. For example, in fiscal year 2011, public-sector jobs—including federal, state and local—accounted for 27 percent of the 2,884 USERRA cases filed. See Steve Vogel, *Returning military members allege job discrimination — by federal government*, WASH. POST (Feb. 19, 2012), https://www.washingtonpost.com/world/national-security/returning-military-members-allege-job-discrimination--by-federal-government/2012/01/31/gIQAXvYvNR_story.html. Moreover, alleged and proven discrimination by state and local governments is wide ranging, and impacts Reservists in *all* employment sectors.

For example, public high school teachers have been terminated by Department of Education supervisors for attending pre-deployment planning sessions. See, *e.g.*, *Dilfanian* v. *New York City Dep't of Educ.*, No. 12-cv-6012, 2018 WL 4259976, at *2 (E.D.N.Y. Sep. 5, 2018). State parole officers have been denied promotion because "if . . . called to active duty, [they would] be required to be away from the job for long periods of time." *Risner* v. *Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 957 (N.D. Ohio 2008). Police officers have also been denied promotion for "focusing on [their] military career." *Eichaker* v. *Vill. of Vicksburg*, 627 F. App'x. 527, 530 (6th Cir. 2015); see also *Clark* v. *Va. Dep't of State Police*, 292 Va. 725

(2016). And faculty members at state universities have had their positions terminated for no reason other than answering the call to serve their country. See *Breaker* v. *Bemidji State Univ.*, 899 N.W.2d 55, 518 (Ct. App. Minn. 2017); *Townsend* v. *Univ. of Alaska*, No. 3:06-cv-000171, 2007 WL 9734540, at 1 (D. Alaska Oct. 11, 2007).

Many of these Reservists have been unable to vindicate their rights because—*contrary to Congress' clearly expressed intention*—state courts have refused to grant relief under USERRA.[5] Denying USERRA protections to Reservists not only precludes them from vindicating their rights, it sanctions the discrimination that servicemembers and veterans frequently encounter in the civilian workforce as a price for serving their country.

Unchecked, this trend will reduce the number of Americans willing to join and remain in the Reserve Components, and thus threatens the nation's combat readiness—the very outcome Congress sought to avoid when it amended USERRA in light of this Court's decision in *Seminole Tribe*.

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[5] See, *e.g.*, *Larkins* v. *Dep't of Mental Health & Mental Retardation*, 806 So.2d 358 (Ala. 2001); *Janowski* v. *Div. of State Police, Dep't of Safety & Homeland Sec.*, 981 A.2d 1166 (Del. 2009); *Anstadt* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 303 Ga. App. 483 (2010); *Clark* v. *Va. Dep't of State Police*, 292 Va. 725 (2016); *Smith* v. *Tenn. Nat'l Guard*, 387 S.W.3d 570, 572 (Tenn. Ct. App. 2012).

II. USERRA's Alternative Enforcement Provision is Ineffective.

Denying state-employed servicemembers the right to bring USERRA claims allows states to undermine Congress' War Powers. While USERRA provides an administrative enforcement option as an alternative to private litigation, that option provides only false hope to injured servicemembers.

Administrative enforcement of reemployment rights under USERRA disincentivizes veterans from filing claims because it requires veterans to clear multiple unnecessary hurdles. A veteran must first file a complaint with the DOL, which then investigates the claim. See 20 C.F.R. § 1002.288–89. If DOL finds the claim meritorious, the agency will then attempt to resolve the matter through negotiation or mediation. See U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2020 Annual Report to Congress* 6-7 (Aug. 2021). Alternatively, DOL may find that the claim lacks merit, in which case it does nothing. See 20 C.F.R. § 1002.290. Only after DOL has weighed in can the veteran request that his or her claim be referred to DOJ, which can take up to two months or more if the claimant consents to an extension. See 20 C.F.R. § 1002.291.

After DOJ receives the claim, it then conducts its own independent review. See 38 U.S.C. § 4323(a)(1). While the statute requires DOJ to decide whether it

will represent the servicemember within 60 days, see 38 U.S.C. § 4323(a)(2), DOJ has openly flouted this statutory deadline in cases that involve state employers. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-55, *Servicemember Reemployment: Agencies Are Generally Timely in Processing Redress Complaints, but Improvements Needed in Maintaining Data and Reporting* 13 (2010) (finding that half of claims analyzed involving state employers missed 60-day statutory deadline). Accordingly, "servicemembers who are employed by state governments may not . . . receiv[e] the same treatment as other servicemembers in terms of the timeliness of USERRA complaint processing." *Id.* And, even if DOJ is "reasonably satisfied" the servicemember is entitled to relief under USERRA, DOJ is by no means required to bring a case in federal court; often, it does not. 38 U.S.C. § 4323(a)(1).

Not surprisingly, this burdensome process rarely produces satisfactory results. For example, of the 1,016 claims DOL closed in fiscal year (FY) 2020, the employer granted all of the veteran's USERRA entitlements in just 96 of them. See U.S. DEP'T OF LAB., *supra*, at 18. An additional 98 claims were settled. *Id.* DOL closed the remaining 822 claims without ensuring the veteran received relief. *Id.* All in all, the GAO has found that DOL provided favorable results to just 20 percent of USERRA claimants. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-77, *Veterans' Reemployment Rights: Department of Labor Has*

Higher Performance Than the Office of Special Counsel on More Demonstration Project Measures 11, table 1 (Nov. 2014).

The claims that actually make it to DOJ fare no better. DOL reviewed 1,117 claims in FY2020, yet it referred just 39 of them to DOJ. U.S. DEP'T OF LAB., *supra*, at 10, 12. Of those 39 claims, DOJ found only 8 had merit. *Id.* at 10. Even when DOJ finds a claim has merit, it is still unlikely to offer representation: of these 8 meritorious claims, DOJ offered to represent the servicemember in just 1. *Id.* DOJ's refusal to provide representation for even meritorious claims is a consistent pattern.

From 2004 to 2020, DOL received approximately 20,140 complaints. See also U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2020 Annual Report to Congress* (2021)*;* U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2014 Annual Report to Congress* (2015); U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2008 Annual Report to Congress* (2009) (estimating the number of complaints filed between fiscal years 2004 and 2020). Since the DOJ's Civil Rights Division was granted authority to bring USERRA employer suits in 2004, it has filed lawsuits in only 0.54% of cases (i.e., DOJ has filed 109 lawsuits in a span of 16 years). *Id.* at 8. Moreover, this figure is inflated because many of the

DOL reports do not account for informal complaints filed with other agencies. For example, for fiscal years 2004 and 2005, the DOL's "annual report to Congress on [R]eservists' complaints . . . did not include almost 10,000 informal complaints filed with DOD." U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-259, *Nuclear Detection: Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues* 2 (Feb. 2007)

It is even more rare for DOJ to represent a servicemember with a meritorious USERRA claim against a state employer. In FY2019, DOJ found merit in six referrals involving state agencies, yet offered representation in none of them. U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2019 Annual Report to Congress* 17. In fact, DOJ has only brought two USERRA cases against state employers since 2015. See U.S. DEP'T OF LAB., FY2020 *supra*, at 12; U.S. DEP'T OF LAB., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2015 Annual Report to Congress* 14. For context, between FY2015 and FY2020, DOL received 5,808 USERRA complaints. See U.S. DEP'T OF LAB. FY 2020, *supra*, at 10, fig. 1. Plainly, USERRA's federal enforcement remedy is illusory at best.

USERRA's statutory scheme reflects Congress' decision to encourage private enforcement of the Act against states. And for good reason: private lawsuits are less burdensome, more efficient, and provide

servicemembers with a greater opportunity to obtain relief. Accordingly, requiring state employees to rely only on potential federal enforcement not only subverts USERRA's intent, it provides little hope for all but a lucky few servicemembers seeking redress from a state employer. *Cf. Alden*, 527 U.S. at 810 (Souter J., dissenting) ("[U]nless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and *Seminole Tribe*, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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