APPENDIX A

NUMBER 13-17-00659-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TEXAS DEPARTMENT OF PUBLIC SAFETY,
Appellant,

v.

LEROY TORRES,
Appellee.

On appeal from the County Court at Law No. 1
of Nueces County, Texas.

OPINION

Before Justices Contreras, Benavides, and Longoria
Opinion by Justice Contreras

In this case of first impression, we are asked whether sovereign immunity bars claims by private individuals against units of state government under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *See* 38 U.S.C.A. §§ 4301–4335 (West, Westlaw through P.L. 115-223). The trial court denied a plea to the jurisdiction on those grounds filed by appellant, the Texas Department of Public Safety (DPS), in a suit brought by appellee Leroy Torres.

By one issue on appeal, DPS contends that the trial court erred in denying its plea because sovereign immunity applies and has not been validly abrogated by Congress or waived by the legislature. A review of the relevant case law compels us to agree. Therefore, we will reverse and render judgment granting DPS's plea.

I. BACKGROUND

Torres enlisted in the United States Army Reserve in 1989 and was deployed to Iraq in 2007. Prior to deployment, Torres had been employed as a DPS trooper since 1998. In 2008, Torres was honorably discharged and sought to be reemployed by DPS. However, because of a lung condition he acquired while serving in Iraq, Torres requested reemployment with DPS in a different position than the one he held earlier. DPS declined to offer him a different job but did provide a "temporary duty offer" of continued employment in his prior position. Instead of returning to his original position, Torres resigned.

Torres sued DPS in 2017, alleging that DPS's failure to offer him a job that would accommodate his disability violated USERRA, a federal statute that prohibits adverse employment actions against an employee based on the employee's military service. *See id.* § 4311. Torres alleged that DPS officials "forced" him to resign because of the injuries he suffered incident to his military service. His petition sought: (1) a declaration that DPS's actions

violated USERRA; (2) an order "[r]equir[ing] that [DPS] fully compl[y] with the provisions of USERRA by providing [Torres] with . . . compensatory and/or liquidated damages in an amount equal to the amount of lost compensation and other benefits suffered by reason of [DPS]'s willful violations of USERRA"; and (3) attorney's fees and costs. DPS filed a plea to the jurisdiction contending that sovereign immunity applies and deprives the trial court of subject-matter jurisdiction. After a hearing, the trial court denied the plea, and DPS perfected this appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West, Westlaw through 2017 1st C.S.).

II. DISCUSSION

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id.* Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). We construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Miranda*, 133 S.W.3d at 226, 228.

Here, the issue of immunity turns on the trial court's construction of constitutional and statutory provisions,

which are decisions that we review de novo. *See Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009).

B. Applicable Law

The doctrine of sovereign immunity holds that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)); *see Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity."). Thus, unless waived by the Texas Legislature or abrogated by the United States Congress, sovereign immunity deprives a Texas trial court of subject-matter jurisdiction over any lawsuit against a Texas governmental agency such as DPS. *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011).

USERRA provides that "[a] person who is a member of . . . a uniformed service shall not be denied . . . reemployment . . . or any benefit of employment by an employer on the basis of that membership . . . ." 38 U.S.C.A. § 4311(a). Subchapter III of USERRA sets forth a procedure under which employees may seek assistance in investigating and enforcing their claims of USERRA violations. *See id.* § 4321–4327. Under that subchapter, a person who claims entitlement to employment or reemployment rights under USERRA may file a complaint with the Secretary of Labor, who must then investigate the claim. *Id.* § 4322(a), (d). If the Secretary of Labor cannot resolve the complaint, the claimant may request that the Secretary refer the claim to the Attorney General, who must then decide whether to appear on

behalf of, or act as attorney for, the claimant. *Id.* §§ 4323(a)(1), (2). The statute then provides:

> A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person
>
> (A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;
>
> (B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or
>
> (C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

Id. § 4323(a)(3). The following subsection, entitled "Jurisdiction," states:

> (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
>
> (2) *In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.*
>
> (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

Id. § 4323(b) (emphasis added).

C. Analysis

Torres alleged in his suit that the trial court had jurisdiction pursuant to USERRA section 4323(b)(2). *See id.* § 4323(b)(2). In its plea to the jurisdiction, DPS argued that its immunity to a private suit in state court for

damages under USERRA has neither been validly abrogated by Congress nor validly waived by the legislature. *See Sawyer Tr.*, 354 S.W.3d at 388.

1. Abrogation of Immunity by Congress

We first address whether Congress has validly abrogated immunity with its enactment of USERRA. For Congress to validly abrogate a State's sovereign immunity, it must (1) unequivocally express its intent to do so, and (2) act "pursuant to a constitutional provision granting Congress the power to abrogate." *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010).[1]

DPS argues that Congress has the constitutional power to abrogate a State's sovereign immunity to suits in its own courts only when exercising its powers under section 5 of the Fourteenth Amendment, and never when exercising the powers granted to it by Article I of the Constitution. It relies on *Alden v. Maine*, in which the United States Supreme Court broadly held that "[t]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. 706, 712 (1999). USERRA was arguably enacted pursuant to Congress's Article I War Powers, *see* U.S. CONST. art. I, § 8, cl. 11–16; therefore, according to DPS, USERRA cannot constitutionally

[1] The dissent acknowledges that both of these prongs must be satisfied in order for Congress to effectively abrogate State immunity, but it addresses only the first prong. It suggests, based on a cursory examination of legislative history, that Congress intended to abrogate State immunity by enacting USERRA. The dissent does not dispute our conclusion, which we will explain herein, that Congress lacked the power to abrogate pursuant to the Constitution. Such power is a necessary prerequisite to finding that Congress abrogated State immunity. *See Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010). Therefore, the dissent's discussion regarding Congressional intent is irrelevant. *See* TEX. R. APP. P. 47.1.

abrogate its sovereign immunity to private suits for damages in Texas courts.

The United States Supreme Court held in *Seminole Tribe of Florida v. Florida* that Congress lacks power under Article I to abrogate States' sovereign immunity to suits commenced or prosecuted in federal courts. 517 U.S. 44, 66, 76 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989)); *see also* U.S. CONST. amend XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). In *Alden*, the Court was asked whether the *Seminole Tribe* holding applies equally to suits brought in State courts; specifically, it considered whether the federal Fair Labor Standards Act of 1938 (FLSA) validly abrogated Maine's sovereign immunity to private suits for damages in its own courts. 527 U.S. at 711–12.

Justice Kennedy, writing for a 5–4 majority, held that even though the Eleventh Amendment does not address jurisdiction of State courts, *see* U.S. CONST. amend. XI, immunity from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S at 713.[2] Thus, the States retain "a residuary and inviolable sovereignty" which includes immunity to non-consensual

[2] The Court noted that, though a State's immunity from suit is sometimes referred to as "Eleventh Amendment immunity," that phrase is "something of a misnomer" because "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 712–13 (1999); *see Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004).

suits in its own courts "save where there has been 'a surrender of this immunity in the plan of the convention.'" *Id.* at 715, 730 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)). The Court held: "In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design"; that is, there must be "compelling evidence" that "this derogation of the States' sovereignty is 'inherent in the constitutional compact.'" *Id.* at 731, 741 (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 781 (1991)). After reviewing the "history, practice, precedent, and structure of the Constitution," the Court concluded that the States' "immunity from private suit in their own courts" is "beyond the congressional power to abrogate by Article I legislation." *Id.* at 754. Therefore, Maine's sovereign immunity could not be validly abrogated by the FLSA, which was enacted pursuant to Congress's Article I power to regulate interstate commerce. *Id.*; *see* 29 U.S.C.A. § 202(b) (West, Westlaw through P.L. 115-223).

The *Alden* majority observed, however, that the States' immunity to suit in their own courts is not unlimited; for example, States may waive immunity by consenting to suit, or their immunity may be "surrendered" by the adoption of a constitutional amendment. *Alden*, 527 U.S. at 712. For example, in adopting the Fourteenth Amendment, the States "surrender[ed] a portion of the sovereignty that had been preserved to them by the original Constitution"; therefore, Congress may validly abrogate a State's immunity in its own courts under section 5 of that amendment, which grants Congress the "power to enforce" the provisions of the amendment by "appropriate legislation." *Id.* at 756 (citing *Fitzpatrick v.*

Bitzer, 427 U.S. 445 (1976)); *see* U.S. CONST. amend. XIV, § 5.

Here, there is no suggestion that USERRA was enacted pursuant to Congress's powers under section 5 of the Fourteenth Amendment; instead, the parties agree that it was enacted pursuant to Congress's Article I powers. Nevertheless, Torres argues that *Alden* did not categorically preclude abrogation of sovereign immunity in all Article I laws. Torres contends instead that *Alden*'s holding applies narrowly to the specific legislation considered in that case (the FLSA) and the specific Article I enumerated power under which that legislation was enacted (the interstate commerce clause). *See* U.S. CONST. art. I, § 8, cl. 3. To the extent *Alden* purported to reject abrogation of sovereign immunity in any other Article I legislation, Torres alleges that such holding is merely dicta. More specifically, Torres contends that USERRA was enacted pursuant to Congress's War Powers, *see* U.S. CONST. art. I, § 8, cl. 11–16, and that Congress could validly abrogate state immunity in its exercise of those powers because there is "compelling evidence" that the States "were required to surrender" War Powers to Congress "pursuant to the constitutional design." *See Alden*, 527 U.S. at 731, 741 (quoting *Blatchford*, 501 U.S. at 781).

In support of this narrow reading of *Alden,* Torres cites *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609 (1st Cir. 1996) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). In *Diaz-Gandia*, the federal First Circuit Court of Appeals held that claims brought by a private plaintiff against State entities under the Veterans' Reemployment Rights Act (VRRA), the predecessor of USERRA, were not barred by sovereign immunity. 90 F.3d at 616 (relying on *Reopell v. Massachusetts*, 936 F.2d 12, 16 (1st Cir. 1991) ("[P]assage of the VRRA—assuming Congress expressed its

intention to abrogate with adequate clarity—removed the Eleventh Amendment bar to damages actions brought under the Act against a state.")). *Diaz-Gandia* was decided after *Seminole Tribe*, but before *Alden*. Accordingly, it reflects the First Circuit's determination that, notwithstanding *Seminole Tribe*, States are amenable to private suits in federal court if suit is authorized pursuant to Congress's War Powers. *See id.*

In *Katz*, the United States Supreme Court considered whether, despite *Seminole Tribe* and *Alden*, a private plaintiff was authorized to sue State entities under federal bankruptcy legislation. *See* 546 U.S. 356, 359. The statutes at issue in that case, enacted under Congress's Article I bankruptcy powers, purport to abrogate sovereign immunity for, *inter alia*, suits by bankruptcy trustees to set aside "preferential transfers" by the debtor to state agencies. *See* 11 U.S.C.A. §§ 106, 547(b), 550(a) (West, Westlaw through P.L. 115-223). In another 5–4 opinion, the *Katz* Court rejected the defendants' sovereign immunity defense to a suit brought pursuant to those statutes, concluding that that the States "agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Katz*, 546 U.S. at 377 (quoting U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States")).[3] The Court noted, however, that "[b]ankruptcy jurisdiction, at its core, is *in rem*" and therefore "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.*

[3] The *Katz* Court acknowledged that both the majority and dissenting opinions in *Seminole Tribe* "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). The Court found that assumption to be "erroneous." *Id.*

at 362 (citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004) (noting that a bankruptcy debtor "does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts")).

We decline to interpret *Alden* narrowly as suggested by Torres. Our decision is based on the broad language used in the opinion itself and is in accord with the decisions of the other State courts that have considered the issue.

First, we observe that in analyzing whether Congress validly abrogated state immunity, the *Alden* majority opinion did not mention the subject matter of the legislation at issue, nor did it mention the specific Article I enumerated power pursuant to which that legislation was enacted. *See* 527 U.S. at 731–55. This strongly implies that the *Alden* holding was intended to apply to laws enacted pursuant to *any* of the powers of Congress enumerated in Article I—not just laws, such as FLSA, enacted under the interstate commerce clause.

Second, the plain language of USERRA indicates that it was not, strictly speaking, enacted pursuant to Congress's War Powers as enumerated in Article I, section 8; rather, it was enacted pursuant to the Necessary and Proper Clause of that section. *See* U.S. CONST. art. I, § 8, cl. 11–16 (War Powers),[4] cl. 18

---

[4] The enumerated War Powers granted to Congress in Article I, section 8 are as follows:

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;

(Necessary and Proper Clause). The *Alden* Court specifically rejected the notion that the Necessary and Proper Clause of Article I granted Congress "the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers." 527 U.S. at 732. Therefore, regardless of whether the ruling in *Alden* is applicable to War Powers legislation, it is indisputably applicable to USERRA as legislation enacted under the Necessary and Proper Clause.

Subsequent case law generally supports the broad principle that, under *Seminole Tribe* and *Alden*, state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation. Though *Katz* recognized a limited exception to this rule for actions to enforce certain bankruptcy statutes, the Court made clear that this exception is derived from the particular attributes of *in rem* bankruptcy jurisdiction which are not present in this case. *See* 546 U.S. at 377; *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 (Va. 2016) (stating that the *Katz* "qualification" is "applicable only to claims arising within a federal bankruptcy court's *in rem* jurisdiction over a bankruptcy estate" and "does not apply to [appellant]'s state-court claim for *in*

> To make Rules for the Government and Regulation of the land and naval Forces; [and]
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

U.S. CONST. art. I, § 8, cl. 11–16. As DPS notes, the regulation of non-military employment discrimination against members of the armed forces is not among these enumerated powers.

personam damages" under USERRA); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (stating that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Diaz-Gandia is more difficult to distinguish. The federal appeals court in that case specifically held that the holding of *Seminole Tribe* does not extend to laws enacted pursuant to Congress's War Powers. *See* 90 F.3d at 616 n.9. But, as at least two federal district courts have recognized, the decision in *Diaz-Gandia* appears to have been based on an incorrect observation that "no subsequent development has undermined *Reopell*," the case upon which that decision relied. *See Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 964 (N.D. Ohio 2008) (noting that "the decision in *Diaz–Gandia* is undermined by the fact that *Reopell* was based upon *Pennsylvania v. Union Gas Co.*, . . . which was overruled by *Seminole Tribe*"); *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (declining to follow *Diaz-Gandia* and *Reopell* because they are based on *Pennsylvania v. Union Gas Co.* and therefore "their continuing vitality is suspect" in light of *Seminole Tribe*).

In any event, the federal Fifth Circuit Court of Appeals has directly stated, contrary to *Diaz-Gandia*, that *Seminole Tribe* applies to War Powers legislation. *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 288 (5th Cir. 2000) (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers[.]")). And several state appellate courts, applying both *Seminole Tribe* and *Alden*, have specifically

concluded that the sovereign immunity of state agencies is not abrogated for suits in state courts brought under section 4323(b) of USERRA. *See Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 524 (Minn. Ct. App. 2017) (concluding that "Congress lacked authority under the Article 1 War Powers Clause to abrogate state sovereign immunity from USERRA claims in state court"); *Clark*, 793 S.E.2d at 7 ("*Alden*'s holding was unqualified: Nonconsenting States cannot be forced to defend 'private suits' seeking *in personam* remedies 'in their own courts' based upon 'the powers delegated to Congress under Article I of the United States Constitution.'"); *Anstadt v. Bd. of Regents of Univ. Sys. of Ga.*, 487, 693 S.E.2d 868, 871 (Ga. Ct. App. 2010) (rejecting the argument that "the enactment of USERRA abrogated the state's sovereign immunity because it was enacted pursuant to Congress's war powers"); *Janowski v. Div. of State Police*, 981 A.2d 1166, 1170 (Del. 2009) (holding that "[USERRA] could not abrogate state sovereign immunity, because Congress passed that law pursuant to its Article I, Section 8 war powers"); *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So.2d 358, 362–63 (Ala. 2001) ("*Alden* forecloses, on constitutional grounds, resort to Article I as the basis for subjecting the State of Alabama to suit in a state court on a remedy based upon Congress's assertion of its powers with respect to military preparedness.").[5] These cases either implicitly or explicitly reject the contention, made by Torres here, that *Alden* is non-

[5] Though the Texas Supreme Court has not explicitly weighed in on the matter at issue here, it has used language suggestive of a broad interpretation of *Alden*. *See Hoff*, 153 S.W.3d at 48 (stating that, under *Alden*, sovereign immunity "protects nonconsenting states from being sued in their own courts for federal law claims"). The Fifth Circuit has held that there is no private right of suit in federal court under USERRA section 4323(b), but it declined to address whether that section effectively abrogates Texas's sovereign immunity. *See McIntosh v. Partridge*, 540 F.3d 315, 321 n.5 (5th Cir. 2008).

binding dicta to the extent it purports to pass judgment over legislation other than the FLSA.

Though these cases are not binding,[6] they are directly on point and persuasive. We therefore follow them and reject the flawed reasoning in *Diaz-Gandia*. Accordingly, we conclude that, pursuant to the binding precedent of the United States Supreme Court in *Seminole Tribe* and *Alden*, DPS's sovereign immunity to private claims in state court has not been validly abrogated by USERRA.[7]

---

[6] *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Courtee.").

[7] DPS further argues that, even if Congress had the authority to abrogate sovereign immunity to private suits in state court through USERRA, it has not unequivocally expressed its intent to do so in USERRA section 4323(b)(2). *See Herrera*, 322 S.W.3d at 195. It notes that, according to the statute, such suits are subject to "the laws of the State," but the legislature has not waived DPS's immunity under state law. *See* 38 U.S.C.A. § 4323(b)(2) (West, Westlaw through P.L. 115-223); *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012) (interpreting section 4323(b)(2) to mean that "for an individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law"). DPS further notes that section 4323(b)(2) states that suit "may" be brought, whereas sections 4323(b)(1) and (b)(3), which purport to authorize suit in federal court, state that suit "shall" be brought. *See* 38 U.S.C.A. § 4323(b)(1)–(3). In response, Torres notes that section 4323(b)(2) was enacted soon after *Seminole Tribe* and the intent of Congress was to ensure that plaintiffs have a forum—state court—in which they can bring USERRA claims against state agencies.

We need not and do not address whether Congress has unequivocally expressed its intent to abrogate state sovereign immunity in section 4323(b)(2), because we have already concluded that it lacked the Constitutional authority to do so. *See Alden*, 527 U.S. at 712; *Herrera*, 322 S.W.3d at 195; *see also* TEX. R. APP. P. 47.1.

2. Waiver of Immunity by the Legislature

We next address whether DPS's sovereign immunity has been validly waived by the Texas Legislature. For the legislature to validly waive sovereign immunity, it must consent to suit by "clear and unambiguous" statutory language. TEX. GOV'T CODE ANN. § 311.034 (West, Westlaw through 2017 1st C.S.) ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *Tooke*, 197 S.W.3d at 332–33. Any ambiguity in a statute must be resolved in favor of retaining immunity. *Tooke*, 197 S.W.3d at 330, 342 (holding that statutory provisions providing that state entities may "sue and be sued" or "plead and be impleaded" are unclear and ambiguous and therefore do not, by themselves, waive immunity); *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

At the trial court and on appeal, Torres argues that the legislature demonstrated its intent to waive sovereign immunity in this case by enacting chapter 437 of the government code. *See* TEX. GOV'T CODE ANN. § 437.001–.419 (West, Westlaw through 2017 1st C.S.) (entitled "Texas Military"). Under section 437.202 of that chapter, a state employee who is a member of "a reserve component of the armed forces" and is ordered to duty "is entitled, when relieved from duty, to be restored to the position that the employee held when ordered to duty." *Id.* § 437.202(d). Section 437.204, entitled "Reemployment of Service Member Called to Training or Duty," provides that "[a]n employer may not terminate the employment of an employee who is a member of the state military forces of this state or any other state because the employee is ordered to authorized training or duty by a proper authority" and that "[t]he employee is entitled to return

to the same employment held when ordered to training or duty . . . ." *Id.* § 437.204(a).[8] Section 437.402 states that "[a] person claiming to be aggrieved by an unlawful employment practice under Section 437.204 or the person's agent may file a complaint" with the Texas Workforce Commission (TWC). *Id.* § 437.402(a). If the TWC dismisses the complaint or fails to resolve it, the complainant is entitled to request a notice of the complainant's right to file a civil action. *Id.* § 437.411(a). The complainant may then bring a civil action against the employer within sixty days after receiving that notice. *Id.* § 437.412. On finding that an employer engaged in an "intentional unlawful employment practice" under section 437.204, a court may award compensatory and punitive damages, but it may not award back pay. *Id.* § 437.416(a), (c).

Torres contends that government code chapter 437 is similar to statutes in New Mexico and Wisconsin which have been held, by courts in those states, to evince a legislative intent to waive sovereign immunity for USERRA claims. *See Ramirez v. State of N.M. Children, Youth & Families Dep't*, 372 P.3d 497 (N.M. 2016); *Scocos v. State of Wis. Dep't of Veteran Affairs*, 819 N.W.2d 360 (Wis. App. 2012). But, as DPS notes, the statutes involved in those cases are distinguishable because they explicitly refer to USERRA or to federal law generally. *See*

---

[8] Torres was not a member of "the state military forces of this state or any other state." *See* TEX. GOV'T CODE ANN. § 437.204(a) (West, Westlaw through 2017 1st C.S.). However, "service member" is defined as "a member or former member of the state military forces or a component of the United States armed forces, including a reserve component." *Id.* § 437.001(8) (West, Westlaw through 2017 1st C.S.). In any event, we need not determine whether Torres, as a United States Army reservist, was eligible to sue under chapter 437 because of our conclusion herein that he did not exhaust administrative remedies with regard to any such claim.

Ramirez, 372 P.3d at 505 (construing N.M. STAT. ANN. § 20-4-7.1 (West, Westlaw through 2018 2nd R.S.) ("The rights, benefits and protections of [USERRA] shall apply to a member of the national guard ordered to federal or state active duty for a period of thirty or more consecutive days.")); *Scocos*, 819 N.W.2d at 366 (construing WIS. STAT. ANN. § 321.64(2) (West, Westlaw through 2017 Act 367) (providing that the discharge of persons restored to state employment after military service is "subject to all federal . . . laws")).

We need not determine whether the New Mexico and Wisconsin statutes are analogous to government code chapter 437 because, to the extent chapter 437 waives sovereign immunity, it does so only in cases in which the administrative process has been exhausted as set forth in the chapter. *See* TEX. GOV'T CODE ANN. § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."). There is no dispute that Torres has not exhausted his administrative remedies with respect to his claims against DPS. Accordingly, assuming but not deciding that section 437.412 clearly and unambiguously waives sovereign immunity for certain claims, Torres has not alleged facts showing that the trial court had jurisdiction over his claims in particular. *See id.* § 311.034; *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.[9]

---

[9] As the dissent notes, Texas Government Code chapter 613, entitled "Reemployment Following Military Service," explicitly provides that a State employee who leaves to enter active military service and is later discharged from service "is entitled to be reemployed" in the same position or "a position of similar seniority, status, and pay" at the same State agency. TEX. GOV'T CODE ANN. § 613.002(a) (West, Westlaw through 2017 1st C.S.). If the employee sustained a disability during military service that prevents the employee from performing the duties of such a position, the employee is entitled to be reemployed "in a position that the employee can perform and has:

III. CONCLUSION

For the reasons set forth herein, DPS's immunity to Torres's suit has not been validly abrogated by Congress or waived by the Texas Legislature.[10] Accordingly, we

---

(1) like seniority, status, and pay as the former position; or (2) the nearest possible seniority, status, and pay to the former position." *Id.* § 613.003 (West, Westlaw through 2017 1st C.S.).

Torres does not contend that section 613.021 waives DPS's immunity to USERRA claims in state court; in fact, the record contains no references to chapter 613 by any party, and it is not mentioned on appeal. In any event, this statute does not clearly and unambiguously waive DPS's immunity to his specific claims. That is because, to the extent chapter 613 waives immunity, it does so only for suits seeking to compel "a public official to comply with" the provisions of the chapter—it does not authorize the recovery of monetary damages. *See id.* § 613.021(a) (West, Westlaw through 2017 1st C.S.). Torres's petition did not seek an order compelling DPS to restore his employment; rather, it sought only a declaration that DPS's actions were unlawful, a judgment for "compensatory and/or liquidated damages," and attorney's fees and costs. Those remedies are not recoverable under chapter 613. *See id.* It follows that sovereign immunity is not waived for a suit seeking those remedies. *See Zachry Const. Corp. v. Port of Hous. Auth. of Harris Cty.*, 449 S.W.3d 98, 110 (Tex. 2014) (holding that chapter 271 of the Texas Local Government Code "does not waive immunity from suit on a claim for damages not recoverable" under that statute); *Tooke v. City of Mexia*, 197 S.W.3d 325, 346 (Tex. 2006) (same).

[10] The dissent argues that our ruling leaves our armed forces with "no remedy in state courts when they have faced employment discrimination from a state agency due to their service to our country." Respectfully, that is incorrect. State military forces may sue under chapter 437, provided that administrative remedies are exhausted. *See* TEX. GOV'T CODE ANN. § 613.021(a). And as the dissent seems to acknowledge, a state employee claiming employment discrimination due to federal military service may sue, notwithstanding sovereign immunity, under Texas Government Code chapter 613. *See* TEX. GOV'T CODE ANN. § 613.021(a). Had Torres sued under this statute and proved his case, he would have been entitled to an order compelling DPS to reemploy him, despite his disability, "in a position that [he] can perform and has: (1) like

reverse the trial court's judgment and render judgment granting DPS's plea to the jurisdiction.

DORI CONTRERAS
Justice

Dissenting Opinion by
Justice Benavides.

Delivered and filed the 20th
day of November, 2018.

---

seniority, status, and pay as the former position; or (2) the nearest possible seniority, status, and pay to the former position." *Id.* § 613.003.

To the extent the precise remedy sought by Torres—i.e., monetary damages—is unavailable to him, it is not this Court that is depriving him of that option. Rather, the Texas Legislature has chosen not to waive immunity for that remedy.

NUMBER 13-17-00659-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TEXAS DEPARTMENT OF PUBLIC SAFETY,
Appellant,

v.

LEROY TORRES,
Appellee.

On appeal from the County Court at Law No. 1
of Nueces County, Texas.

DISSENTING OPINION

Before Justices Contreras, Benavides, and Longoria
Dissenting Opinion by Justice Benavides

I write separately to respectfully dissent to the majority's conclusion that the trial court erred in denying the Department of Public Safety's (DPS) plea to the

jurisdiction regarding Leroy Torres's Uniformed Services Employment and Reemployment Rights Act (USERRA) claim. *See* 38 U.S.C.A. §§ 4301–4335 (West, Westlaw through P.L. 115-223). The majority's opinion leads our armed forces to have no remedy in state courts when they have faced employment discrimination from a state agency due to their service to our country.

A. Congressional Actions

The majority lays out a detailed history of abrogation of immunity by Congress through Supreme Court case law. To find abrogation by Congress, there must be an unequivocal intent to do so by Congress and action pursuant to a constitutional provision allowing such abrogation. *See Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010). Although DPS and the majority relies on *Alden v. Maine*, 527 U.S. 706 (1999), we cannot overlook the legislative committee report that came out of the USERRA legislation. House Report Number 105-448, which coincided with the introduction of the current version of USERRA, states that USERRA is a "continuation of policy enacted in 1940" and "applies to all employers, regardless of their size." H.R. Rep. No. 105-448, at 2 (1998). The House Report addresses the position taken by some states that the Eleventh Amendment makes USERRA inapplicable to state agencies, addressing the holding in *Seminole Tribe of Florida v. Florida*. *Id.* at 3 (citing 517 U.S. 44 (1996)). The House Report states the

> decisions [also referring to an Indiana and a Michigan court decision under former versions of USERRA] threaten not only a long-standing policy protecting individuals' employment right [sic], but also raise serious questions about the United States [sic] ability to provide for a strong national defense. Far more than in the days when the Constitution was being

> drafted, the peace enjoyed throughout much of the world is dependent on the responsive and powerful armed forces of the United States. Accordingly, to assure that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA, the committee is favorably reporting this legislation.

Id. at 5.

It is hard to imagine, based on the language found in the House Report requesting the Committee on Veterans' Affairs to recommend the current version of the legislation to a full House vote, that Congress did not intend to allow private citizens who served in the armed forces the ability to sue state agencies under USERRA in state courts. The report shows that Congress intended to protect citizens who served our country in suits against a state when they were discriminated against by an employer upon returning from combat. The House Report supports the intention to abrogate state sovereign immunity under USERRA.

B. State Actions

The Texas Legislature also added certain provisions to the Texas Government Code which provide special protections to members of the armed forces returning to their former employment. Those protections give former servicemembers a remedy to seek if they are discriminated against. I argue that those provisions prove an intent of the Texas Legislature to waive sovereign immunity in these narrow exceptions.

The parties and the majority refer to chapter 437 of the government code, entitled "Texas Military." *See* TEX. GOV'T CODE ANN. § 437.401–419 (titled "Administrative Review and Judicial Enforcement") (West, Westlaw

through 2017 1st C.S.). A member of the state military forces would be entitled to restoration to his former position of employment if he was called into duty. *See id.* § 437.202(d) (West, Westlaw through 2017 1st C.S.). Any issues with reemployment are referred to the Texas Workforce Commission. *See id.* § 437.402(a). Although chapter 437 shows an intent of the legislature to protect Texas service members, the majority mainly refers to its administrative remedies and finds that Torres has not exhausted all administrative remedies available to him. However, under USERRA, Torres could file a claim with the Secretary of Labor and petition the United States Attorney General to represent him in federal court *or* could file a claim on his own in state district court. *See* 38 U.S.C.A. § 4323(a)(1), (3) (emphasis added). Torres is not required under USERRA to first file a claim with an administrative agency. *See id.* Therefore, the majority's statement that Torres has not exhausted all his administrative remedies and not raised facts showing the trial court had jurisdiction over his claims is puzzling. Additionally, the majority's statement that "assuming but not deciding that section 437.412 clearly and unambiguously waives sovereign immunity for certain claims" but not Torres's is confusing. It appears the majority concludes that the State's sovereign immunity would be waived if Torres had exhausted all his administrative remedies. However, since no specific administrative procedures are required under USERRA and Torres followed the requirements of USERRA, then it would rationally follow that the majority agrees that chapter 437 would waive the state's sovereign immunity.

Besides chapter 437, I would argue that chapter 613 of the government code is applicable to Torres's claim. While I agree that chapter 437 applies to Texas state military, chapter 613, titled "Reemployment Following Military Service," includes wording to specifically include

federal and state military servicemembers. The majority addresses government code chapter 613 in a footnote.[1]

Chapter 613, defines "military service" as service as a member of the Armed Forces of the United States, Texas National Guard, Texas State Guard, or reserve component of the Armed Forces of the United States. TEX. GOV'T CODE ANN. § 613.001 (West, Westlaw through 2017 1st C.S.). Chapter 613.002 states:

> (a) A public employee who leaves a state position or a position with a local governmental entity to enter active military service is entitled to be reemployed:
>
> (1) by the state or the local governmental entity;
>
> (2) in the same department, office, commission, or board of this state, a state institution, or local governmental entity in which the employee was employed at the time of the employee's induction or enlistment in, or order to, active military service; and
>
> (3) in:
>
> (A) the same position held at the time of the induction, enlistment, or order;
>
> or
>
> (B) a position of similar seniority, status, or pay.
>
> (b) To be entitled to reemployment under Subsection (a), the employee must be:
>
> . . .

[1] Although as the majority points out, neither party raised this section in their briefs before this Court.

> (2) physically and mentally qualified to perform the duties of that position.

Id. § 613.002 (West, Westlaw through 2017 1st C.S.). Chapter 613.003 includes:

> A public employee who cannot perform the duties of a position to which the employee is otherwise entitled under Section 613.002 because of a disability the employee sustained during military service is entitled to be reemployed in the department, office, commission, or board of the state, a state institution, or a local government entity in a position that the employee can perform and that has:
>
> (1) like seniority, status, and pay as the former position; or
>
> (2) the nearest possible seniority, status, and pay to the former position.

Id. § 613.003 (West, Westlaw through 2017 1st C.S.).

Additional provisions in chapter 613 lay out the procedure for compliance with the law:

> (a) If a public official fails to comply with a provision of Subchapter A, a district court in a district in which the individual is a public official may require the public official to comply with the provision on the filing of a motion, petition, or other appropriate pleading by an individual entitled to a benefit under the provision.

Id. § 613.021 (West, Westlaw through 2017 1st C.S.). Chapter 613.022 allows for the district attorney in the appropriate district to act in place of the individual filing under this provision. *See id.* § 613.022.

Chapter 613 allows a servicemember who was aggrieved by a public official (which a state agency would fall under) to file suit in a state district court and force the

official to comply with the reemployment requirements of chapter 613, similar to USERRA. *Id.* Although the majority states that chapter 613 would not apply in this case because Torres only requested monetary damages in his petition, doing so would ignore that chapter 613 falls in line with one of the remedies offered under USERRA, which can also include a request for reemployment. *See id.*; 38 U.S.C.A. § 4323. By following the majority's reasoning, it would seem that if Torres had filed suit and requested reemployment (as he originally tried to do upon his return from active duty) instead of requesting damages under USERRA, then the majority would agree there was abrogation by the state legislature. But due to the fact Torres requested damages, as allowed by USERRA, the majority finds there is no abrogation by the Texas Legislature under this provision. We cannot split a code provision in half. Either we find that under section 613, the Texas legislature clearly intended to abrogate its sovereign immunity in cases involving reemployment of military servicemembers or we remand this case back to the trial court and allow Torres to replead his grounds.

As a final note, USERRA also includes the term "private employer," which includes a political subdivision of the State. 38 U.S.C.A. § 4323(i). A "political subdivision" is defined as a "division of a state that exists primarily to discharge some function of local government." *Political Subdivision*, BLACK'S LAW DICTIONARY (10th ed. 2014). An individual bringing suit under USERRA can sue a "private employer" in federal district court. *See* 38 U.S.C.A. § 4323(b)(3). Chapter 613 also finds that servicemembers that previously had positions with local governmental entities have the right to sue for reemployment. *See* TEX. GOV'T CODE ANN. § 613(a)(1). Congress specifically included language to make sure a local government agency could be sued in

federal court and seemingly not be able to assert sovereign immunity to avoid suit. *See* 38 U.S.C.A. § 4323. The Texas Legislature also included local government agencies in its code to give employees a remedy against reemployment discrimination. *See* TEX. GOV'T CODE ANN. § 613(a)(1). For this Court to hold that although the federal or local governments are open to suit for discrimination, but not the state, is illogical. The federal and state provisions were written in such a way to allow for abrogation of sovereign immunity in federal and state courts to protect our servicemembers upon return from duty.

C. Conclusion

When taken together, the legislative report created with the USERRA legislation, as well as the government code chapters 437 and 613, show an intent of both the federal and state legislatures to waive sovereign immunity in Texas. Torres's claim should be allowed to go forward, or in the alternative, this Court should remand to allow Torres an opportunity to replead the allegations in his petition. I respectfully dissent.

GINA M. BENAVIDES,
Justice

Delivered and filed the 20th
day of November, 2018.

APPENDIX B

THE SUPREME COURT OF TEXAS

Orders Pronounced June 5, 2020

ORDERS ON CAUSES

18-1134 W&T OFFSHORE, INC. v. WESLEY FREDIEU; from Harris County; 14th Court of Appeals District (14-16-00511-CV, 584 SW3d 200, 10-30-18)

The Court affirms the court of appeals' judgment and remands the case to the trial court.

Justice Blacklock delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Guzman, Justice Devine, Justice Busby, and Justice Bland joined.

Justice Boyd delivered a dissenting opinion.

(Justice Lehrmann did not participate)

ORDERS ON CASES GRANTED

THE FOLLOWING PETITIONS FOR REVIEW ARE GRANTED:

18-0781 ELECTRIC RELIABILITY COUNCIL OF TEXAS,INC. v. PANDA POWER GENERATION INFRASTRUCTURE FUND, LLC D/B/A PANDA POWER FUNDS, ET AL.; from Grayson County; 5th Court of Appeals District (05-17-00872-CV, 552 SW3d 297, 04-16-18)

~ consolidated for oral argument with ~

18-0792 IN RE PANDA POWER INFRASTRUCTURE FUND, LLC, D/B/A PANDA POWER FUNDS, ET AL.; from Grayson County; 5th Court of Appeals District (05-17-00872-CV, 552 SW3d 297, 04-16-18)

[**Note:** The date and time for oral argument are yet to be determined.]

18-0944 LEMUEL DAVID HOGAN v. STEPHANIE MONTAGNE ZOANNI; from Harris County; 1st Court of Appeals District (01-16-00584-CV, 555 SW3d 321, 07-19-18)

[**Note:** The date and time for oral argument are yet to be determined.]

(Justice Bland not participating)

18-1181 EMERSON ELECTRIC CO. D/B/A FUSITE AND EMERSON CLIMATE TECHNOLOGIES, INC. v. CLARENCE JOHNSON; from Tarrant County; 2nd Court of Appeals District (02-16-00173-CV, ___ SW3d ___, 10-18-18)

[**Note:** The date and time for oral argument are yet to be determined.]

18-1187 ENDEAVOR ENERGY RESOURCES, L.P. v. ENERGEN RESOURCES CORPORATION, ET AL.; from Howard County; 11th Court of Appeals District (11-17-00028-CV, 563 SW3d 449, 10-25-18)

[**Note:** The date and time for oral argument are yet to be determined.]

19-0280 LOUIS HINOJOS v. STATE FARM LLOYDS AND RAUL PULIDO; from El Paso County; 8th Court of Appeals District (08-16-00121-CV, 569 SW3d 304, 01-18-19)

[**Note:** The date and time for oral argument are yet to be determined.]

19-0400 SAN JACINTO RIVER AUTHORITY v. VICENTE MEDINA, ET AL., MICHAEL A. BURNEY, ET AL., AND CHARLES J. ARGENTO, ET AL.; from Harris County;

1st Court of Appeals District (01-18-00407-CV, 570 SW3d 820, 12-04-18)

[**Note:** The date and time for oral argument are yet to be determined.]

19-0561 IN RE THE COMMITMENT OF JEFFERY LEE STODDARD; from Tarrant County; 2nd Court of Appeals District (02-17-00364-CV, ___ SW3d ___, 05-30-19)

[**Note:** The date and time for oral argument are yet to be determined.]

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

19-0025 CITY OF AUSTIN, TEXAS AND SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN v. TEXAS ASSOCIATION OF BUSINESS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AMERICAN STAFFING ASSOCIATION; LEADINGEDGE PERSONNEL, LTD.; STAFF FORCE, INC., HT STAFFING LTD. D/B/A THE HT GROUP; THE BURNETT COMPANIES CONSOLIDATED, INC. D/B/A BURNETT SPECIALISTS; SOCIETY FOR HUMAN RESOURCE MANAGEMENT; TEXAS STATE

COUNCIL OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT; AUSTIN HUMAN RESOURCE MANAGEMENT ASSOCIATION; STRICKLAND SCHOOL, LLC; AND THE STATE OF TEXAS; from Travis County; 3rd Court of Appeals District (03-18-00445-CV, 565 SW3d 425, 11-16-18)

19-0107 LEROY TORRES v. TEXAS DEPARTMENT OF PUBLIC SAFETY; from Nueces County; 13th Court of Appeals District (13-17-00659-CV, 583 SW3d 221, 11-20-18)

19-0186 BTX SCHOOLS, INC. AND BASIS SCHOOLS, INC. v. KONARK LIMITED PARTNERSHIP; from Bexar County; 4th Court of Appeals District (04-17-00558-CV, 580 SW3d 194, 11-07-18)

19-0225 COLUMBIA VALLEY HEALTH CARE SYSTEM, L.P. D/B/A VALLEY REGIONAL MEDICAL CENTER v. MARIA ZAMARRIPA, AS GUARDIAN OF THE ESTATES OF R.F.R. AND R.J.R., MINORS; from Cameron County; 13th Court of Appeals District (13-18-00231-CV, ___ SW3d ___, 02-28-19)

19-0538 CHESAPEAKE EXPLORATION, LLC, ET AL. v. STANTON P. BELL, ET AL.; from Bexar County; 4th Court of Appeals District (04-18-00129-CV, ___ SW3d ___, 03-13-19)

(Justice Bland not participating)

19-0649 BBB INDUSTRIES, LLC v. CARDONE INDUSTRIES, INC.; from Tarrant County; 2nd Court of Appeals District (02-18-00025-CV, ___ SW3d ___, 05-09-19)

19-0713 JEFFREY ERDNER, D.O. AND THE EMERGENCY CENTER AT WEST 7TH, LLC v. HIGHLAND PARK EMERGENCY CENTER, LLC; from Dallas County; 5th Court of Appeals District (05-18-00654-CV, 580 SW3d 269, 05-22-19)

19-0759 GRACIE NGUYEN; PATRICK SANCHEZ; TAMARA AND DERRICK O'NEAL, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF DE'ANDRE TATUM, DECEASED; ERICA D. HALL; CURTISHA DAVIS; ARTHUR ZAMARRIPA, AS NEXT FRIEND OF A.Z.; AND WILLIAM JOSMA v. SXSW HOLDINGS, INC.; SXSW LLC; PATRICK LOWE; TRANSPORTATION DESIGN CONSULTANTS; AND CITY OF AUSTIN; from Travis County; 14th Court of Appeals District (14-17-00575-CV, 580 SW3d 774, 07-18-19)

(Justice Busby not participating)

19-0766 DALLAS WORLD AQUARIUM CORP. v. GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS; from Travis County; 3rd Court of Appeals District (03-18- 00209-CV, ___ SW3d ___, 06-19-19)

19-0955 ANCOR HOLDINGS, LP, TIMOTHY MCKIBBEN, JOSEPH RANDALL KEENE, AND ANCOR PARTNERS, INC. v. PETERSON, GOLDMAN & VILLANI, INC.; from Tarrant County; 2nd Court of Appeals District (02-18-00102-CV, 584 SW3d 556, 07-18-19)

19-0974 CALENA MORRIS, R.N., MICHEAUX THOMAS, R.N. AND WENDY CALVERT, R.N. v. BRENDA PONCE AND RICCO GONZALEZ, AS NATURAL PARENTS, NEXT FRIENDS AND LEGAL GUARDIANS OF E.G., A MINOR; from Harris County; 14th Court of Appeals District (14-17-00997-CV, 584 SW3d 922, 09-24-19)

(Justice Guzman not participating)

19-0998 READYONE INDUSTRIES, INC. v. MARIA G. GUILLEN-CHAVEZ; from El Paso County; 8th Court of Appeals District (08-17-00046-CV, 588 SW3d 281, 06-21-19)

19-1006 MADISON PLAZA, LP v. WALLACE CONSTRUCTION & DEVELOPMENT COMPANY; from Jefferson County; 9th Court of Appeals District (09-18-00364-CV, ___ SW3d ___, 05-30-19)

19-1038 THE FAN EXPO, LLC v. NATIONAL FOOTBALL LEAGUE; from Dallas County; 5th Court of Appeals District (05-17-01304-CV, ___ SW3d ___, 05-22-19)

19-1044 GIA THORNTON, INDIVIDUALLY, AS THE REPRESENTATIVE FOR ALL WRONGFUL DEATH BENEFICIARIES, AND AS AN HEIR AT LAW AND REPRESENTATIVE OF

THE ESTATE OF MCQUESTER J. SOLOMON, DECEASED v. COLUMBIA MEDICAL CENTER OF PLANO SUBSIDIARY, L.P. D/B/A MEDICAL CITY PLANO, FORMERLY KNOWN AS MEDICAL CENTER OF PLANO, AND JANE LEE, R.N.; from Collin County; 5th Court of Appeals District (05-18-01010-CV, ___ SW3d ___, 09-12-19)

19-1094 IN THE MATTER OF D.K., A CHILD; from Denton County; 2nd Court of Appeals District (02-19-00119-CV, 589 SW3d 861, 10-31-19)

19-1127 MATT MALOUF, ET AL. v. STERQUELL PSF SETTLEMENT, L.C.; from Dallas County; 5th Court of Appeals District (05-17-01343-CV, ___SW3d ___, 11-07-19)

20-0064 T. MARK ANDERSON AND CHRISTINE ANDERSON, AS CO-EXECUTORS OF THE ESTATE OF TED ANDERSON v. RICHARD T. ARCHER, ET AL.; from Travis County; 3rd Court of Appeals District (03-19-00003-CV, ___ SW3d ___, 11-21-19)
2 petitions

20-0069 CHRISTOPHER MITCHELL AND TIFFANY MITCHELL v. CALVIN PRESTON; from Harris County; 1st Court of Appeals District (05-18-01383-CV, ___ SW3d ___, 01-28-20)

20-0192 PMC CHASE, LLP AND STEVE TURNBOW v. BRANCH STRUCTURAL SOLUTIONS, LLC; from Dallas County; 5th Court of Appeals District (05-18-01383-CV, ___ SW3d ___, 01-28-20)

20-0350 EWING CONSTRUCTION CO., INC. v. BENAVIDES INDEPENDENT SCHOOL DISTRICT; from Duval County; 4th Court of Appeals District (04-19-00797-CV, ___ SW3d ___, 03-18-20)

20-0352 IN THE INTEREST OF H.L.M., A CHILD; from Travis County; 3rd Court of Appeals District (03-19-00490-CV, ___ SW3d ___, 12-11-19)

20-0395 IN THE INTEREST OF D.C., J.C. III, J.C., AND J.C., CHILDREN; from Dallas County; 5th Court of Appeals District (05-19-01217-CV, ___ SW3d ___, 03-04-20)

20-0409 IN THE INTEREST OF I.N.D., D.M.R., A.M.R., L.F.R., AND A.R.R., CHILDREN; from Bexar County; 4th Court of Appeals District (04-20-00121-CV, ___ SW3d ___, 05-13-20)

20-0418 IN THE INTEREST OF Y.M.L., A CHILD; from Bexar County; 4th Court Appeals District (04-19-00168-CV, ___ SW3d ___, 04-08-20)

THE FOLLOWING PETITIONS FOR REVIEW ARE DISMISSED:

18-0028 MACINA, BOSE, COPELAND AND ASSOCIATES D/B/A MBC ENGINEERS, MCCORD ENGINEERING, INC. AND JORDAN & SKALA ENGINEERS, INC. v. ERIKA YANEZ, INDIVIDUALLY AND AS NEXT FRIEND OF JOSE MANUEL LOPEZ, E.L.Y., A MINOR, AND X.L.Y., A MINOR; from Dallas County; 5th Court of Appeals District (05-17-00180-CV, ___ SW3d ___, 10-26-17)
4 petitions
joint motion to lift abatement granted
abatement order issued February 19, 2020, lifted
joint motion to dismiss appeal granted

19-0917 IN THE INTEREST OF A.L.P., A CHILD; Fort Bend County; 1st Court of Appeals District (01-19-00144-CV, ___ SW3d ___, 08-22-19)

See TEX. R. APP. P. 53.7(a)

ORDERS ON MOTIONS FOR REHEARING

THE MOTION FOR REHEARING OF THE FOLLOWING PETITION FOR REVIEW IS GRANTED:

19-0238 CATHAY BANK v. LYDA SWINERTON BUILDERS, INC.; from Harris County; 14th Court of Appeals District (14-17-00030-CV, 566 SW3d 836, 12-18-18)
denial of petition for review on February 14, 2020, withdrawn
petition reinstated

(Justice Busby not participating)

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

18-0658 BELL HELICOPTER TEXTRON INC. v. BRIAN BURNETT; from Tarrant County; 2nd Court of Appeals District (02-16-00489-CV, 552 SW3d 901, 06-14-18)

(Justice Green not participating)

19-0828 PE SERVICES, LLC, LANDRY ARCHITECTS, AND FABRISTRUCTURE, INC. v. KERRVILLE FITNESS PROPERTY, LLC, J. HOUSER CONSTRUCTION, INC., AND JOSH HOUSER D/B/A HOUSER CONSTRUCTION; from Dallas County; 5th Court of Appeals District (05-17-01317-CV, ___ SW3d ___, 08-21-19)

19-1063 CHARLIE WILSON, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DEBRA WILSON v. DALLAS COUNTY HOSPITAL DISTRICT D/B/A PARKLAND HEALTH & HOSPITAL SYSTEM; from Dallas County; 1st Court of Appeals District (05-18-01049-CV, ___ SW3d ___, 12-03-19)

19-1114 BOW GROVE v. MARION GINE FRANKE AND BRENDA KAY LYNCH; from Montgomery County; 9th Court of Appeals District (09-18-00119-CV, ___ SW3d ___, 10-17-19)

MISCELLANEOUS

THE FOLLOWING PETITIONS FOR WRIT OF MANDAMUS ARE DENIED:

19-0636 IN RE RIG QA INTERNATIONAL, INC.; from Harris County; 14th Court of Appeals District (14-19-00174-CV, ___ SW3d ___, 05-16-19)

19-1091 IN RE GEORGE WEIMER, BOB ROBERTS, JR., JAMES HUGHES, DUSTIN NAVARRO, JOSE PEREZ, MORRIS SALZMAN, GORDAN HITZFELDER, BRIAN SULLIVAN, AND BONNIE TAPP; from Bandera County; 4th Court of Appeals District (04-19-00750-CV, ___ SW3d ___, 11-13-19)

20-0042 IN RE BRIAN E. VODICKA AND STEVEN B. AUBREY; from Dallas County; 5th Court of Appeals District (05-19-01067-CV, ___ SW3d ___, 01-10-20)
motion for orders denied
stay order issued January 30, 2020, lifted
stay order issued February 4, 2020, lifted

20-0429 IN RE LANCE GOODEN; from Travis County; 14th Court of Appeals District (14-20-00358-CV, ___ SW3d ___, 05-12-20)

[**Note:** The petition is denied. The Court's stay order issued in *In re State of Texas*, 20-0401, remains in effect while that petition is pending.]

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

August 30, 2019

Mr. Stephen Jeffrey Chapman
Chapman Law Firm
710 N. Mesquite St.
Corpus Christi, TX 78401-2312
* DELIVERED VIA E-MAIL *

Trevor Ezell
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711
* DELIVERED VIA E-MAIL *

RE: Case Number: 19-0107
Court of Appeals Number: 13-17-00659-CV
Trial Court Number: 2017-CCV-61016-1

Style: LEROY TORRES
v.
TEXAS DEPARTMENT OF PUBLIC SAFETY

Dear Counsel:

Pursuant to TEX. R. APP. P. 55.1, you are requested to file briefs on the merits in the above-styled case. Please refer to TEX. R. APP. P. 55 for the requirements of petitioners' and respondents' briefs. The petition for review remains under consideration by this Court. The

briefing schedule is outlined below. *See* TEX. R. APP. P. 55.7.

Petitioner/s shall file their brief by **September 30, 2019**.

Respondent/s shall file their response brief by **October 21, 2019**.

Petitioner/s shall file any reply brief by **November 05, 2019**.

Pursuant to TEX. R. APP. P. 9.2(c)(2) all documents (except documents submitted under seal) must be e-filed through eFileTexas.gov. You may file up to midnight on the due date.

PLEASE NOTE: For cases filed after February 20, 2018, attorneys should verify that the entire record for the case was automatically uploaded to the Court through the attorney portal. The attorney portal can be accessed by attorneys only through the Court's website at https://attorneyportal.txcourts.gov/. Contact the Clerk's Office at 512-463-1312 if any items are missing from the record.

Sincerely,

Blake A. Hawthorne

Blake A. Hawthorne, Clerk

by Claudia Jenks, Chief
Deputy Clerk

cc: Mr. Donald B. Verrilli Jr. (DELIVERED VIA E-MAIL)
Ms. Zoe Bedell (DELIVERED VIA E-MAIL)

Mr. Jeffrey M. Hirsch (DELIVERED VIA E-MAIL)
Ms. Adele El-Khouri (DELIVERED VIA E-MAIL)
Mr. Brian J. Lawler (DELIVERED VIA E-MAIL)

APPENDIX D

COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS

December 19, 2018

Hon. Brian Lawler
PILOT LAW, P.C.
850 Beech Street, Ste. 713
San Diego, CA 92101
* DELIVERED VIA E-MAIL *

Hon. Kyle D. Hawkins
Office of the Texas Attorney General
PO Box 12548
Austin, TX 78711-2548
* DELIVERED VIA E-MAIL *

Hon. John C. Sullivan
Office of the Attorney General
PO Box 12548
Austin, TX 78711-2548
* DELIVERED VIA E-MAIL *

Re: Cause No. 13-17-00659-CV
Tr.Ct.No. 2017-CCV-61016-1
Style: Texas Department of Public Safety v. Leroy Torres

Appellee's motion for rehearing en banc in the above cause was this day DENIED by this Court. Justices Benavides and Hinojosa would grant.

Very Truly Yours,

Dorian E. Ramirez

Dorian E. Ramirez, Clerk

APPENDIX E

CAUSE NO. 2017CCV-61016-1

LEROY TORRES	§	**IN THE COUNTY**
	§	**COURT**
V.	§	
	§	**AT LAW**
TEXAS DEPARTMENT	§	**NUMBER ONE**
OF PUBLIC SAFETY	§	
	§	**NUECES**
	§	**COUNTY, TEXAS**

ORDER DENYING PLEA TO THE JURISDICTION

On this date November 16, 2017 came on for hearing Defendant's Plea to the Jurisdiction. After considering said Plea to the Jurisdiction, the Court is of the opinion that the it should be DENIED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Plea to the Jurisdiction is hereby DENIED.

SIGNED THIS 21 day of November, 2017.

/s/

JUDGE PRESIDING

APPENDIX F

PROVISIONS OF U.S. CONSTITUTION AND U.S. CODE

U.S. Const. Art. I, § 8, Cl. 11

The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

U.S. Const. Art. I § 8, Cl. 12

The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

U.S. Const. Art. I § 8, Cl. 13

The Congress shall have Power . . . To provide and maintain a Navy;

U.S. Const. Art. I § 8, Cl. 14

The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces;

U.S. Const. Art. I § 8, Cl. 15

The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

U.S. Const. Art. I § 8, Cl. 16

The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. Const. Art. I § 10, Cl. 3

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

38 U.S.C. § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(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.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. § 4312. Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 141;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

(d)(1) An employer is not required to reemploy a person under this chapter if—

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether—

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e)(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f)(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

38 U.S.C. § 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

38 U.S.C. § 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

(b)(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall—

(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

(B) ensure that the person is offered such position.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that—

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person.

(c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

38 U.S.C. § 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)(A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.

(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

(e)(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(2) For purposes of section 4312(e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

38 U.S.C. § 4323. Enforcement of rights with respect to a State or private employer

(a) Action for relief.—(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall—

(A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision.

(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction.—(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue.—(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies.—

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers.—The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

(f) Standing.—An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent.—In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, court costs.—

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Definition.—In this section, the term "private employer" includes a political subdivision of a State.

APPENDIX G

CAUSE NO. 2017CCV-61016-1

LEROY TORRES	§	**IN THE COUNTY**
	§	**COURT**
V.	§	
	§	**AT LAW**
TEXAS DEPARTMENT	§	**NUMBER ONE**
OF PUBLIC SAFETY	§	
	§	**NUECES**
	§	**COUNTY, TEXAS**

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

COMES NOW Plaintiff complaining of Defendant and for causes of action pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. 4301, et seq., would respectfully show the Court and jury as follows:

Discovery Control Plan

1. This lawsuit seeks damages over $1,000,000. Therefore, discovery is intended to be conducted under Level Three pursuant to Rule 190 of the Texas Rules of Civil Procedure.

Parties

2. Plaintiff is an individual residing in Nueces County, Texas. Defendant employed Plaintiff in Corpus Christi, Nueces County, Texas, and at all relevant times Plaintiff was an "employee" and member of the uniformed services for purposes of 38 U.S.C. §4303(3), (9), and (16).

3. Defendant, Texas Department of Public Safety ("DPS") is political subdivision of the State of Texas and

existing and having a place of business in Corpus Christi, Nueces County, Texas. At all relevant times, DPS was and is an employer for purposes of 38 U.S.C. § 4303(4)(A) and § 4323(b)(2). DPS can be served with process via Steve McCraw, Director of the Texas Department of Public Safety at his office located at 5805 North Lamar Blvd., Austin, Texas 78752 or wherever they may be found in Texas.

Jurisdiction and Venue

4. This Court has jurisdiction of the parties and of the subject matter of this suit as conferred by 38 U.S.C. §4323(b)(2) (further codified by 20 C.F.R. §1002.39). "In the case of action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. §4323(b)(2).

5. Pursuant to 38 U.S.C. § 4323(h), "No fees or court costs may be charged or taxed against any person claiming rights under [USERRA]."

6. Venue is proper in Nueces County, Texas pursuant to 38 U.S.C. §4323(b)(2) and Section 15.002(a)(1), Texas Civil Practice and Remedies Code, since all events forming the basis of this suit occurred in this county.

Facts

7. Plaintiff enlisted in the United States Army Reserve ("USAR") on December 9, 1989.

8. Plaintiff was hired by DPS in October 1998 as a Trooper/Trainee. Plaintiff notified Defendant of his military service obligations with the USAR when he was hired.

9. On October 12, 2004, Plaintiff was commissioned as a Second Lieutenant in the USAR.

10. On or about November 5, 2007, Plaintiff was mobilized to active duty with his USAR unit and deployed to Iraq.

11. Prior to departing for military leave, Plaintiff timely notified Defendant of his upcoming military service obligations.

12. Plaintiff was released from his military service obligations on October 30, 2008 with an Honorable Discharge and returned to Texas.

13. In December 2008, prior to returning to work with DPS, Plaintiff timely notified DPS of his intent to be re-employed.

14. When Plaintiff was deployed to Iraq, he was exposed to "burn pits" on his base. The "burn pits" were where waste and trash were burned, causing toxic fumes and smoke to envelope the base. Because of the exposure to the "burn pits," thousands of servicemembers, including Plaintiff, returned home afflicted with various illnesses and diseases, including respiratory and pulmonological illnesses, and cancer.

15. On or about _November 16, 2010, Plaintiff was diagnosed with constrictive bronchiolitis.

16. Plaintiff's lung disease prevented him from resuming full duties with DPS so he requested reasonable alternative accommodations from DPS.

17. Defendant refused Plaintiff's reasonable accommodation request to return to work in a different capacity.

18. On or about January 10th, 2011, Plaintiff received a memo from CPT Rhonda Lawson, an employee of Defendant, stating that Plaintiff would be "unable to return to your current position." LT. Pete Amador, another employee of Defendant, sent Plaintiff a memo

with a temporary duty offer but threatened Plaintiff with termination from his job if he did not report to duty.

19. On or about July 26, 2012, Chris Livingston, DPSOA Counsel, told Plaintiff he would need to resign. This decision was supported by CPT Rhonda Lawson and SGT Exiquiel Benavides. Plaintiff was instructed to change his memorandum to say "resignation" instead of "medical retirement" to qualify for ERS (Employee Retirement System) retirement. Plaintiff has never received his ERS retirement.

20. Defendant's illegal decision to force Plaintiff to resign because of the injuries he suffered incident to his military service obligations has destroyed his career and he will continue to sustain lost compensation and benefits for the remainder of his work life. In all reasonable probability, Plaintiff will sustain future lost wages, not including any LWOP Plaintiff was forced to take due to his ongoing medical issues, future lost longevity pay, and future pension or retirement benefits.

Count I —Discrimination in Violation of 38 U.S.C. 4301, et seq.

21. Plaintiff repeats and incorporates the allegations contained in the foregoing paragraphs as if fully set forth herein.

22. USERRA prohibits "discrimination against persons because of their service in the uniformed services." 38 U.S.C. §4301(a)(3).

23. Plaintiffs protected status as a member of the U.S. Army Reserve was a substantial and motivating factor in Defendant's denial of Plaintiff's benefits of employment without good cause, including but not limited to, failing to properly reemploy Plaintiff after his military service obligations, materially changing Plaintiff's employment status, failing to timely and properly

contribute to Plaintiff's retirement or pension plan(s), and ultimately terminating him based on his military service obligations.

24. Section 4311 of USERRA provides, in relevant part, that a person "who is a member of…performs, has performed…or has an obligation to perform service in a uniformed service shall not be denied… any benefit of employment by an employer on the basis of that membership…performance of service, or obligation.").

25. Section 4311(c) further provides, in relevant part, that "[a]n employer shall be considered to have engaged in actions prohibited… if the person's membership… or obligation for service in the uniformed services is a motivating factor in the employer's action."

26. Section 4303 defines a "benefit of employment" to include the "terms, conditions and privileges of employment including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed)… and the opportunity to select work hours or location of employment."

27. Section 4313 of USERRA (further codified by 20 C.F.R. § 1002.191) provides that an employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service.

28. "A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service." 20 C.F.R. §1002.225.

29. Section 4313 of USERRA provides that the employer is obligated to make reasonable efforts to accommodate the employee's disability and employ him at his previous position or one he reasonably would have attained but for his military service. Only if, after the employer makes these reasonable efforts, the employee may still not perform the duties of that position, the employer must reemploy the employee "in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer, or in a position which is the nearest approximation to a position referred to [above] in terms of seniority, status, and pay consistent with circumstances of such person's case." 38 U.S.C. § 4313(a)(3)(A),(B); 20 C.F.R. §1002.225.

30. Section 4316 of USERRA provides that any period of absence from employment due to or necessitated by uniformed service is not considered a break in employment, so an employee absent due to military duty must be treated as though they were continuously employed.

31. DPS's failure to re-employ Plaintiff at a position equivalent in seniority, status and pay violates USERRA, including, but not limited to, Sections 4311, 4312 and 4313.

32. DPS's failure to timely and properly contribute to Plaintiff's retirement or pension plan(s) violates USERRA, including, but not limited to, Section 4316.

33. Defendant knowingly and willfully violated USERRA by, among other ways, discriminating against Plaintiff, and by denying him employment benefits "on the basis of" his "obligation to perform service in a uniformed service.

34. As a direct and proximate result of the conduct of Defendant as set forth in this count, Plaintiff has suffered injuries and damages including but not limited to, loss of past earnings and benefits, and loss of future earnings and benefits, all to his damage in an amount to be proven at trial.

35. Plaintiff alleges such violations of USERRA were willful and requests liquidated damages in an amount equal to the amount of his lost wages and other benefits pursuant to 38 U.S.C. §4323(d)(1)(C).

36. Pursuant to 38 U.S.C. §4323(h), Plaintiff further requests an award of reasonable attorney's fees, expert witness fees, and other litigation expenses.

Damages

37. Plaintiff is entitled to an award for future lost earnings and employment benefits if reinstatement is not feasible. Plaintiff should recover damages for future lost earnings and for any future lost retirement contributions. Said amounts are future lost wages in the amount of $700,892.88 and future lost retirement benefits in the amount of $4,566,240 or in the amount proven at trial.

38. Further and exclusive of any such amounts, Defendants intentional actions will sustain an award of liquidated damages in the amount equal to his economic damages.

39. Under Texas law, plaintiff is entitled to recover prejudgment interest computed as simple interest at the rate of 10 percent per annum.

40. Pursuant to USERRA, Plaintiff will show himself entitled to an award of reasonable attorneys' fees and costs of litigation.

Jury Demand

41. Plaintiff has presented a timely demand for jury trial for all issues triable by a jury, and he hereby reaffirms such demand.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that, on trial of this action, Plaintiff have final judgment against Defendant for the following relief:

1. Declare that the acts and practices complained of herein are unlawful and are in violation of USERRA, 38 U.S.C. § 4301, et seq.;

2. Require that Defendant fully complies with the provisions of USERRA by providing Plaintiff with lost wages and all employment benefits denied to him as a result of the unlawful acts and practices under USERRA described herein;

3. Fees and expenses, including attorneys' fees and costs, including expert witness fees, pursuant to 38 U.S.C. §4323(h);

4. Award Plaintiff prejudgment interest on the amount of lost wages or employment benefits found due;

5. Order that Defendant pays compensatory and/or liquidated damages in an amount equal to the amount of lost compensation and other benefits suffered by reason of Defendant's willful violations of USERRA;

6. Grant an award for costs of suit incurred; and;

7. Grant such other and further relief as may be just and proper and which Plaintiff may be entitled to under all applicable laws.

Respectfully submitted,

CHAPMAN LAW FIRM
710 N. Mesquite, 2nd Floor
Corpus Christi, Texas 78401
Telephone: (361) 883-9160
Facsimile: (361) 883-9164
schapman@chaplaw.net

/s/
Stephen J. Chapman
State Bar No. 24001870

Brian J. Lawler
PILOT LAW, P.C.
750 Beech Street, Suite 108
San Diego, California 92101
Telephone: (619) 255-2398
Facsimile: (619) 231-4984
blawler@pilotlawcorp.com

Pro Hac Vice pending

ATTORNEYS FOR PLAINTIFF

PLAINTIFF HEREBY DEMANDS TRIAL BY JURY