No. 20-603

In the
Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Thirteenth District

BRIEF OF BIPARTISAN MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

RAFFI MELKONIAN
Counsel of Record
ERIC B. BOETTCHER
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
Telephone: (713) 572-4321
Facsimile: (713) 572-4320
melkonian@wrightclosebarger.com

Counsel for Amici Curiae

February 7, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are members of the U.S. House of Representatives, some of whom have served in the Armed Forces of the United States. They have a deep concern about the impact of the consequential and incorrect constitutional holding of the court below stripping veterans and servicemembers in their constituencies who are state employees from the protections of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Together, the House members comprising the *amici* come from states where millions of veterans make their homes.

More specifically, two *amici* are members of the Congressional Burn Pits Caucus. During the conflicts in Iraq and Afghanistan, burn pits were used as the primary method to dispose of waste and garbage generated on American military bases. Because items were indiscriminately burned, the pits released an array of pollutants, including particulate matter and known carcinogens. Within months or years after returning from deployment, soldiers exposed to the burn pits suffered from respiratory issues, cardiovascular conditions, insomnia, and cancer. Caucus members seek to address long-term, life-threatening health effect of burn pits on veterans.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus curiae briefs in these matters.

Amici believe strongly in the goals of USERRA and in supporting American veterans and servicemembers. Not only do they keep this nation safe by sacrificing their lives and bodies overseas, they teach all of us the value of service, the gravity of war, and the price of freedom. They should not be abandoned by their states when they return from war.

SUMMARY OF ARGUMENT

Although career military members are central to our national defense, the success of the modern American military also depends on reservists and National Guard members. American Presidents have long paid tribute to their noble sacrifice. "From working on the frontlines of the COVID-19 pandemic, to responding to storm damage and raging wildfires, to deploying overseas … National Guard and Reserve members put their lives on hold—away from their families and civilian workplaces—to stand as a shield … whenever our country is in need." A Proclamation on National Employer Support of the Guard and Reserve Week, 2021, *available at* http://tinyurl.com/yj6286xb.

Making sure that these brave men and women can "return to their civilian careers" is directly in the national interest of the United States. *Id.* For that reason, Congress enacted USERRA and its predecessor statutes to protect the employment rights of American civilian-soldiers returning from war. As this Court has stated, "he who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). The decision below threatens that crucial right by taking away the

protections that allow at least some National Guard and Reserve members to act as America's shield and support.

The parties here dispute whether USERRA really is important to American military readiness—whether, for example, National Guard and Reserve members might have other remedies available to them if they face employment discrimination when they return to work at state employers. In fact, they often do not. Many states do not offer returning veterans their jobs back; others do not have adequate protections for veterans with disabilities; and almost none offer USERRA's keystone protection—the escalator principle—that means returning members are reemployed in the job *they would have attained* had they not been absent for service.

Service members should not be left to this patchwork system of protections. Without USERRA, soldiers who served alongside each other overseas might find themselves with vastly different rights and remedies depending upon where they happen to call home in the United States. To effectively recruit and retain the soldiers necessary to the success of its military operations, the United States must be able to guarantee servicemembers a fair and uniform deal. The patchwork vagaries of state law simply do not accomplish that goal.

ARGUMENT

I. USERRA's powerful remedies are critical to the Armed Forces' ability to recruit, retain, and boost morale among servicemembers.

A. Veterans returning from war deserve ensured reemployment and protection from discrimination.

The American war efforts of the early 21st century have depended in significant part on the efforts of reservists and members of the National Guard. As the *amicus* brief of the Reserve Organization of America in support of certiorari explains at greater length, nearly half of the troops deployed to Iraq and Afghanistan over the past twenty years were from those organizations. And these citizen-soldier formations suffered significant casualties while serving their country. For example, more than 10% of the deaths in Operation Iraqi Freedom came from the National Guard and Reserve. *See* Congressional Research Service, *American War and Military Operations Casualties: Lists and Statistics,* at 15-16, July 29, 2020, available at https://sgp.fas.org/crs/natsec/RL32492.pdf (1/17/2022, 11:30 AM). The same was true of Operation Enduring Freedom. *Id* at 11-12. In a very real way, the success of American arms overseas depends on reservists and the National Guard.

These service members did not just make physical sacrifices. Members who left their civilian roles to take up arms at their country's call have suffered financial and professional consequences as well. Veterans have had to leave jobs for months and even years at a time;

sell their homes; move their families; and have their spouses pick up extraordinary burdens. They have also faced discrimination because of their service when they returned from war. In times of poor economic performance, veterans can suffer *greater* rates of unemployment compared with nonveterans. *See, e.g.,* U.S. Bureau of Labor Statistics, *Unemployment rates for veterans and nonveterans by period of service, 2009-19 annual averages*, available at https://www.bls.gov/spotlight/2020/gulf-war-era-veterans-in-the-labor-force/home.htm.

These sacrifices are why Congress has repeatedly acted to protect American soldiers returning from war, regardless of whether they previously worked for a state government or a private entity. As this Court observed in construing USERRA's predecessor, the Selective Training and Service Act of 1940, "he who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold*, 328 U.S. at 284. Indeed, far from being penalized, a veteran was to "gain by his service for his country an *advantage* which the law withheld from those who stayed behind." *Id.* (emphasis added).

By the same token, USERRA is critical to the United States' warfighting capabilities. USERRA's reemployment provisions and antidiscrimination protections are necessary to ensure that the Armed Forces can effectively recruit soldiers, retain them, and maintain morale among them. *See Carter v. United States*, 407 F.2d 1238, 1243 (D.C. Cir. 1968) ("That worry over losing a job might have substantial adverse impact on the morale of the armed services is plain.");

H.R. Rep. No. 105-448, at 5 (1998) (stating that states' immunity from USERRA "raise[s] serious questions about the United States['] ability to provide for a strong national defense"); Reservists' Amicus Br. at 3-4, 17-18.

Recognizing the importance of these principles, Congress set expressly forth USERRA's purposes: to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"; "to minimize disruption to the lives of persons performing service . . . as well as to their employers . . . by providing for [] prompt reemployment" upon completion of service; and to prohibit discrimination against servicemembers because of their service. 38 U.S.C. § 4301(a).

B. USERRA provides important reemployment rights and protections from discrimination.

USERRA achieves its purposes by providing servicemembers reemployment rights upon their return from service and by protecting them against discrimination based on their service. Its provisions are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285 (construing USERRA's predecessor statute); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195 (1980) (same)

1. USERRA's reemployment rights.

Title 38 U.S.C. § 4312 provides that a servicemember returning from duty is entitled to reemployment rights and benefits if the servicemember

gave his or her employer advance notice of the service, the cumulative length of the servicemember's absence is not longer than five years, and the servicemember timely applies for reemployment with the employer.

Title 38 U.S.C. § 4313, in turn, provides the details of the returning servicemember's reemployment rights and benefits. Subsections 4313(a)(1) and (2) provide that the returning servicemember "shall be promptly reemployed" 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." This is referred to as the "escalator principle," established by this Court in interpreting USERRA's predecessor statute in *Fishgold*:

> [A veteran] shall be restored without loss of seniority and be considered as having been on furlough or leave of absence during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

328 U.S. at 284-85 (citations and quotations omitted).

Likewise, 38 U.S.C. § 4316(a) provides that a returning servicemember's seniority and rights and benefits are "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." *See also Ford Motor Co. v. Huffman*, 345 U.S. 330, 339 (1953) (observing that the beneficial "public policy and fairness inherent in" requiring employers to give servicemember employees seniority credit for time spent in military service). Thus, the returning servicemember's seniority credit extends to the accrual of pension benefits and similar perquisites. *See Ala. Power Co. v. Davis*, 431 U.S. 581, 594 (1976).

Section 4313(a)(3) extends protections to returning servicemembers who incurred or aggravated a disability during their service. If the disabled servicemember is unable to perform the position which he or she would have held had employment not been interrupted by service, the servicemember is entitled to "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 the "nearest approximation" to such a position. 38 U.S.C. §§ 4313(a)(3)(A), (B).

Finally, § 4316(c) prohibits employers from terminating any returning servicemember without cause within one year of his or her reemployment.

2. USERRA's antidiscrimination protection.

Title 38 U.S.C. § 4311(a) contains USERRA's broad antidiscrimination provision. It provides:

> 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.

Id.

3. USERRA's right of action and remedies.

Title 38 U.S.C. § 4323(a)(3) provides that "[a] person seeking to enforce his or her rights under USERRA may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer." The servicemember may obtain injunctive relief, §§ 4323(d)(1)(A), (e), and money damages, including backpay, § 4323(d)(1)(B). The servicemember may also obtain attorney's fees, expert witness fees, and other litigation expenses. § 4323(h)(2).

II. USERRA provides servicemembers remedies where other sources of law do not.

In its opposition to certiorari, the State of Texas asserted that non-career service members returning from war to work for state employers do not need special protections from discrimination because there are other remedies available to them, whether under State law or other administrative procedure. BIO at 4-6. This superficially attractive argument is wrong. A service member wounded overseas and then discriminated against because of their injuries has few options for redress other than USERRA. The most obvious alternative candidate—the Americans with

Disabilities Act of 1990 ("ADA")—is unavailable against state employers. Tort suits will almost certainly fail. Indeed, service members injured by burn pits, like Mr. Torres here, have already tried and failed to get redress in court through other alternatives. As for the state law remedies Texas touts, the evidence shows that state law remedies vary unacceptably across states. Congress enacted USERRA to provide a uniform remedy facing employment difficulties for *all* returning veterans, not those that happen to live in states that have domesticated USERRA's protections.

A. The ADA does not protect state employees against disability discrimination.

Title I of the ADA is perhaps the most obvious alternative option for a person in Mr. Torres's situation. *See* 42 U.S.C. §§ 12111-12117. Title I prohibits certain employers from discriminating against a person because of the person's disability and requires employers to make reasonable accommodations to an employee's disability. §§ 12112(a), 12112(b)(5)(A). But there is no question that these protections are not available here—this Court held in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that a state's sovereign immunity bars state employees from suing a state for employment discrimination under Title I of the ADA because § 5 of the Fourteenth Amendment does not grant Congress the power to subject states to such suits. *Id.* at 374.

Nor is it any answer to say that the ADA *does* provide remedies for employees of local public employees, such as employees of municipalities. A large

number of returning veterans, like Mr. Torres, work for state governments and do not have access to the ADA's employment protections. Texas provides a dramatic example. As of 2019, Texas was home to about 1,500,000 veterans, of whom 22% worked for state, local, and federal governments. *See, e.g.,* Texas Workforce Investment Council, *Veterans in Texas: A Demographic Study*, available at https://gov.texas.gov/uploads/files/organization/twic/Veterans-Summary-2021.pdf. And even where the ADA applies, USERRA is more generous. USERRA does not just require an employer to provide a reasonable accommodation for a disability (ADA's standard), it requires employers to "go further than the ADA by making *reasonable efforts* to assist a veteran who is returning to employment." *See, e.g.,* EEOC, *Veterans and the Americans with Disabilities Act: A Guide for Employers*, Question No. 11, available at: https://www.eeoc.gov/laws/guidance/veterans-and-americans-disabilities-act-guide-employers (emphasis added).

B. Tort law does not provide remedies for injured servicemembers.

Servicemembers like Mr. Torres cannot turn to tort law any more than they can turn to the ADA. Experience has shown that tort cases for battlefield or service-related injuries fail.[2] Under the *Feres* doctrine,

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[2] Servicemembers who are injured during their service may be entitled to disability compensation. *See* 38 U.S.C. §§ 1110, 1131. However, the amounts disabled servicemembers receive as disability compensation are generally substantially less than the servicemembers would receive in successfully prosecuting tort

the federal government is not liable under the Federal Tort Claims Act for injuries to servicemen that arise out of or are in the course of activity incident to service. *Feres v. United States*, 340 U.S. 135, 146 (1950). As this Court has explained, these claims are barred because "they [are] the type of claims if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States v. Shearer*, 473 U.S. 52, 59 (1985) (emphasis omitted).

Nor are there viable claims against other parties who might be responsible for servicemembers' injuries. Take burn pits as an example. Although veterans tried to find a path to compensation for these injuries through tort suits, they failed. Courts uniformly rejected those suits, holding that the soldiers' claims were nonjusticiable political questions. *See In re KBR, Inc. Burn Pit Litig.*, 893 F.3d 241, 252 (4th Cir. 2018). Most other suits brought by veterans for compensation have also failed under the political question doctrine or under related doctrines. *See, e.g., Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1322 (11th Cir. 1989) (claims against aircraft manufacturer arising from death of Air Force Captain were barred by the government contractor defense); *Carmichael v. KBR, Inc.*, 572 F.3d 1271, 1275 (11th Cir. 2009) (claims against contractor arising out of tragic fuel truck accident in Iraq were barred by political question doctrine).

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claims. *See* 38 U.S.C. §§ 1114, 1134.

There are thus substantial—and in most cases, insurmountable—barriers to servicemembers obtaining a remedy under tort law for injuries sustained during service.

C. The *Ex parte Young* doctrine does not provide servicemembers with an adequate alternative to an USERRA cause of action.

A servicemember whose rights under USERRA are violated by a state employer could perhaps obtain prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). As set forth by the *Ex parte Young* doctrine, a person may bring a suit "for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (summarizing doctrine). While a servicemember could potentially sue a state official for violations of USERRA and thereby seek to enjoin a state employer from discrimination or to obtain reinstatement with a state employer, the servicemember would not be able to seek money damages from the state. *Id.*

A critical feature of USERRA, in contrast, is that it allows a servicemember to obtain money damages against a state, as well as attorney's fees. 38 U.S.C. §§ 4323(d), (h)(2). The monetary amounts servicemembers can receive for state employers' violation of their USERRA rights are far from trivial. For example, in this case, Mr. Torres is seeking at least $700,892.88 in future lost wages and $4,566,240 in future lost retirement benefits. App.78a. Because an *Ex parte Young* suit does not offer money damages or

attorney's fees, it is not a suitable alternative to a servicemember's cause of action under USERRA.

D. State laws both diverge widely and often provide little relief.

In resisting certiorari, Texas insisted that "Texas law also provides servicemembers who are subject to discrimination options for relief." BIO at 5. But Texas's argument actually cuts against it, for at least two reasons.

States provide widely varying protections for servicemembers returning to the workforce. Some states, like Ohio, import USERRA's standards as their own state-law statutory protections. *See* OHIO REV. CODE § 5903.02. Most states, however, provide less—and in many cases, far less—protection for servicemembers than USERRA. For example, in Delaware, 29 Delaware Code Annotated § 5105(a) purports to give state employees reemployment rights upon return from military service, and 20 Delaware Code Annotated § 905 might appear to grant these employees a legal action to enforce these rights against the state, but the Delaware Supreme Court ruled that such actions are still barred by sovereign immunity. *Janowski v. Div. of State Police*, 981 A.2d 1166, 1170-71 (Del. 2009).

The upshot is that soldiers who served alongside each other overseas might find themselves with vastly different rights and remedies depending upon where they happen to call home in the United States. A key function of USERRA is provide a uniform floor of rights and remedies for servicemembers nationwide so that no

servicemembers forgo protections simply by residing in a particular state. Indeed, "[t]he relationship between the Government and members of its armed forces is distinctively federal in character," *Feres*, 340 U.S. at 143 (quotation omitted), and federal remedies are necessary and appropriate for servicemembers returning to civilian life. *Cf. Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("[A] primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law."). Given how important antidiscrimination protection and reemployment rights are to the military's ability to recruit and retain soldiers, these matters simply cannot be left to the patchwork vagaries of state law.

Putting aside the crucial need for uniformity, the schemes of many states—including many states with large veteran populations or important military bases—provide insufficient relief for veterans, especially compared to USERRA. Texas provides an excellent example. Among other points, the relevant Texas statute for public employees, Texas Government Code § 613.001 et seq., has completely different and inadequate remedies. First, Texas law requires only reemployment to either the "same," or "similar" position in which the employee was employed at the time of the employee's induction into active military service. *See* TEX. GOV'T CODE §§ 613.002, 613.003. There are no money damages, and there is no escalator provision. USERRA offers both of those remedies. Likewise, Texas Government Code § 437.204 provides members of state military forces the right to a leave of

absence for service and reemployment rights upon their return, but to vindicate these rights the members must first file a complaint with the Texas Workforce Commission, who will then investigate the complaint. TEX. GOV'T CODE §§ 437.204(b), 437.402.

But Texas is not alone. Other states too deliver less than USERRA does.

- Georgia state employees are entitled to leaves of absence for military service, GA. CODE ANN. § 38-2-279, and servicemembers working for private employers have reemployment rights, GA. CODE ANN. § 38-2-280. These provisions, however, do not give servicemembers the benefit of the escalator principle, and no Georgia statute specifically protects servicemembers from discrimination.

- Nevada protects Nevada National Guard members from discrimination, NEV. REV. STAT. § 412.606, and protects Nevada National Guard members and members of other state's National Guard against employment termination on account of military training or active service, NEV. REV. STAT. §§ 412.139, 412.1395. Nevada also provides state and local employees the right to a leave of absence for military service. NEV. REV. STAT. § 281.145.

- South Dakota gives National Guard members "all protections afforded to persons serving on active federal duty" by USERRA, S.D. CODIFIED LAWS § 33A-2-9, but also specifies that a state employee may only "use up to 40 hours of

accumulated sick leave annually for any military-related service as a member of the military reserve or national guard," S.D. ADMIN. CODE § 55:09:04:05.

- Arizona protects National Guard members from employment discrimination, ARIZ. REV. STAT. ANN. § 26-167, and provides them with leaves of absence for service, ARIZ. REV. STAT. ANN. § 26-168. Arizona provides state employees with leaves of absence for military service. ARIZ. REV. STAT. ANN. §§ 38-610, 38-610.01.

Thus, although state law protections for veterans vary widely across states, they are uniform in failing to provide the level of protection and rights offered by USERRA, with the exception of the handful of states adopting USERRA as their own state-law statutory protections.

CONCLUSION

This Court should reverse and remand this case.

Respectfully submitted,

/s/ Raffi Melkonian
RAFFI MELKONIAN
Counsel of Record
ERIC B. BOETTCHER
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, Texas 77056
Telephone: (713) 572-4321
Facsimile: (713) 572-4320
melkonian@wrightclosebarger.com

Counsel for Amici Curiae

Dated: February 7, 2022

APPENDIX – LIST OF *AMICI CURIAE*

André Carson (IN)

Joaquin Castro (TX)

Peter Meijer (MI)

Raul Ruiz (CA)

Tim Ryan (OH)

David Trone (MD)