LAW REVIEW[1] 23013

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Enforcing USERRA against a State University or other State Agency

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1.1.1.7—USERRA applies to state and local governments.
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees.
1.4—USERRA enforcement
1.7—USERRA regulations
10.1—Supreme Court cases on reemployment

Q: I am a Captain in the Army Reserve and a member of the Reserve Organization of America (ROA).[3] I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), especially Law

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at mailto:swright@roa.org.

[3] In 2018, ROA members amended the organization's constitution to make enlisted service members, as well as officers, eligible for full membership, including voting and running for office. The organization adopted the doing-business-as name of Reserve Organization of America to emphasize that the organization represents all service members, without regard to rank.

Review 23012, about enforcing USERRA against a political subdivision of a State, like a school district.

Until recently, I worked for a State university (let us call it "New Caledonia State University" or NCSU) as an untenured assistant professor. During the two years that I worked for the university, the Department Chair and the Dean gave me a hard time about my occasional absences from work for my Army Reserve drills and annual training, and they disparaged my Army Reserve service, referring to it as "playing soldier." When I suggested that USERRA gave me the right to absent myself from my civilian job to perform Army Reserve duty, they said that "silly Army laws" like USERRA did not apply to them or to the university.

When my second one-year contract expired at the end of the 2021-22 academic year, the university declined to renew it. I believe that the decision to fire me, by declining to renew my contract, was motivated by my Army Reserve service and the occasional absences from work that my service necessitated.

In your Law Review 23012, you wrote that an individual claiming USERRA rights can sue a political subdivision of a state (like a school district) in Federal court, in his or her own name and with his or her own lawyer, just like suing a private employer. Is a State university like NCSU considered a "political subdivision" of the State? Can I sue the university in Federal court to enforce my USERRA rights?

Answer, bottom line up front

A State university is considered an "arm of the State" rather than a "political subdivision of the State" like a county, city, or school district.[4] If you choose to get your own lawyer and sue the university in your own name, you will need to do so in State court, not federal court. If you file a formal, written USERRA claim against the university with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and if DOL-VETS refers the case file to the Department of Justice (DOJ) at your request, and if DOJ agrees to represent you, DOJ will file the case in the name of the United States, as plaintiff, rather than in your name.

Explanation - *Paige v. Mississippi Department of Mental Health,* 2022 U.S. Dist. LEXIS 140306 (S.D. Miss. Aug. 8, 2022)[5] and *Torres v. Texas Department of Public Safety,* 142 S. Ct. 2455 (2022).

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[4] *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

[5] This is a decision of the United States District Court for the Southern District of Mississippi, dismissing for want of jurisdiction, based on the 11th Amendment of the United States Constitution, a plaintiff's claim that the Mississippi Department of Mental Health violated her rights under USERRA. Surprisingly, the District Judge did not mention

In the *Paige* case (cited above), the Federal District Court did not have jurisdiction to hear and adjudicate Ms. Paige's claim that the Mississippi Department of Mental Health violated USERRA.[6] Instead, she should have filed her lawsuit in State court, not federal court.[7] In *Torres,* the Supreme Court held that the State courts are required to hear and adjudicate claims that State agencies, as employers, have violated USERRA.

Section 4323(b) of USERRA sets forth the courts that have jurisdiction to hear and adjudicate USERRA cases, as follows:

> **(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.
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> **(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.[8]

The *Paige* case was initiated by Ms. Paige individually, not by the United States Department of Justice (DOJ) on behalf of the United States. Accordingly, Ms. Paige should have filed the case in the appropriate State court in Mississippi.[9]

Q: Why does USERRA provide that a suit by an individual against a State government agency must be filed in State court, while a suit by an individual against a private-sector employer may be filed in Federal court?

A: It was necessary to draft the law in that way because of an interpretation of the 11th Amendment to the United States Constitution, which provides as follows:

Torres v. Texas Department of Public Safety, which was decided by the Supreme Court 40 days before the District Judge decided *Paige.*

[6] *See* 38 U.S.C. § 4323(b)(2). That subsection provides that USERRA lawsuits initiated by individuals are to be brought "in a State court of competent jurisdiction." By negative implication, that language means that such suits cannot be brought in Federal district court.

[7] This is a *pro se* case brought by Ms. Paige—that means that she is representing herself. Abraham Lincoln said: "A man who represents himself has a fool for a client." This case is a good example of the wisdom of Lincoln's observation.

[8] 38 U.S.C. § 4323(b)(2).

[9] *See* 38 U.S.C. § 4323(b)(2).

> 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.[10]

During the American Revolution and the years following it, our fledgling country operated under the Articles of Confederation, which provided a very weak Federal Government. During the summer of 1787, delegates from 12 States (Rhode Island not included) met in Philadelphia for the Constitutional Convention and drafted our Constitution. The draft was proposed to the 13 original States, with the understanding that it would go into effect when at least nine of those States ratified it. Nine States ratified, and the First Congress under the Constitution convened on 3/4/1789. The other four original States ratified the Constitution soon thereafter.

As originally ratified, the Constitution provided:

> The judicial Power [of the Federal Government] shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; *between a State and Citizens of another State;* between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States; *and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.*[11]

In its first significant case, *Chisolm v. Georgia*, the United States Supreme Court held, based on the language of Article III, Section 2, Paragraph 1 that was then in effect, that Mr. Chisholm, a citizen of South Carolina, could sue the State of Georgia in the nascent Federal court system. [12] The reaction was swift and negative. Congress quickly proposed and the States quickly ratified a constitutional amendment to prevent Federal court lawsuits against States by citizens of other States. The 11th Amendment was ratified on 2/7/1795.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in

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[10] U.S. CONST. amend. XI. Yes, it is capitalized just that way, in the style of the late 18th Century. Although the text of the 11th Amendment only precludes a suit against a State by "Citizens of another State," the Supreme Court long ago held that the amendment also precludes suits against States by citizens of the same State. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

[11] U.S. CONST. art. III, § 2, cl. 1. The italicized words were changed by the ratification of the 11th Amendment on 2/7/1795.

[12] *Chisholm v. Georgia,* 2 U.S. 419 (1793).

1940. Those who drafted USERRA, including Susan M. Webman and I, were aware of the 11th Amendment. We believed, based on caselaw in effect at the time,[13] that Congress could abrogate the 11th Amendment immunity of States, but that Congress had to be explicit in its language abrogating 11th Amendment immunity. Accordingly, we included the following language in USERRA: "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section."[14]

We (those who drafted USERRA) did not anticipate an important 1996 Supreme Court decision in *Seminole Tribe of Florida v. Florida*.[15] In that case, the Supreme Court held that Congress cannot abrogate the 11th Amendment immunity of States when Congress is acting under the authority of Article I, Section 8, Clause 3 of the Constitution.[16]

One broad interpretation of *Seminole Tribe* is that Congress can abrogate the 11th Amendment immunity of States only when Congress is acting under a constitutional amendment that was ratified after the 11th Amendment was ratified on 2/7/1795. For example, the 14th Amendment was ratified on 7/9/1868, and the final section of that amendment provides: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[17] The Civil Rights Act of 1964 is based on this constitutional authority. In that Act, Congress validly abrogated the 11th Amendment immunity of States against lawsuits brought to enforce that Act against States. Thus, the judge ruled correctly when he declined to dismiss Ms. Paige's claims under the Civil Rights Act of 1964. Like the VRRA before it, USERRA is based on the "war powers clauses" of Article I, Section 8 of the Constitution.[18]

As enacted in 1994, USERRA permitted an individual to sue a State in Federal court. In 1998, the United States Court of Appeals for the 7th Circuit[19] followed a broad interpretation of *Seminole Tribe* and held USERRA to be unconstitutional, under the 11th Amendment, as far as it authorized an individual to sue a State in Federal court.[20] The 7th Circuit decision includes the following paragraph:

> The Supreme Court held recently that Congress cannot abrogate a state's sovereign immunity by a federal statute based on Congress' power over various forms of

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[13] *See, e.g., Reopell v. Commonwealth of Massachusetts,* 936 F.2d 12 (1st Cir. 1991). *See generally* Law Review 08048 (October 2008).
[14] 38 U.S.C. § 4323(d)(3).
[15] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).
[16] That clause gives Congress the authority to enact legislation to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
[17] U.S. CONST. amend. XIV, § 5.
[18] U.S. CONST. art. 1, § 6, cl. 11-16.
[19] The 7th Circuit is the Federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[20] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

commerce, because that power was conferred on Congress by the original Constitution, which predates the 11th Amendment and so cannot limit it. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).[21]

Later that same year (1998), Congress amended USERRA, providing two ways to enforce USERRA against a State agency as employer. Neither way implicates the 11th Amendment because neither way authorizes an individual to sue a State agency in Federal court.

Alternative 1—Rely on DOL-VETS and DOJ

A person who claims that his or her employer (Federal, State, local, or private sector) has violated USERRA can make a formal, written USERRA complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency is then required to investigate the complaint.[22] DOL-VETS is required to investigate the complaint and then to advise the complainant of the results of the investigation.[23] If DOL-VETS is unable to resolve the complaint to the complainant's satisfaction, DOL-VETS must notify the complainant of his or her right to request referral of the case file to the United States Department of Justice (DOJ).[24] If the complainant makes such a request, DOL-VETS must refer the case file to DOJ within 60 days.[25]

If DOJ is reasonably satisfied that the complainant's case has merit, DOJ may appear and act as attorney in filing and prosecuting the lawsuit.[26] If the lawsuit is against a State agency, as employer, DOJ shall file the lawsuit in the name of the United States, as plaintiff.[27]

This approach avoids the 11th Amendment problem because the named plaintiff in the action is the United States, not the individual service member or veteran, and the 11th Amendment does not address lawsuits brought by the United States against individual States. I am aware of two cases wherein this approach was used successfully.[28]

The problem with this approach is that the service member or veteran must rely on DOL-VETS to get to the DOJ, and DOL-VETS investigations are often cursory and DOL-VETS investigators

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[21] *Velasquez,* 160 F.3d at 391.
[22] *See* 38 U.S.C. § 4322(a).
[23] *See* 38 U.S.C. § 4322(d).
[24] *See* 38 U.S.C. § 4322(e)(2).
[25] *See* 38 U.S.C. § 4323(a)(1).
[26] *See* 38 U.S.C. § 4323(a)(1).
[27] *See* 38 U.S.C. § 4323(a)(1) (final sentence)—added by 1998 amendment. When DOJ sues a private employer, including a political subdivision of a State, the named plaintiff is the individual service member or veteran.
[28] *See United States v. Alabama,* 673 F.3d 1320 (11th Cir. 2012); *United States v. Nevada,* 817 F. Supp. 2d 1230 (D. Nev. 2011). *See generally* Law Review 13031 (February 2013) and Law Review 12032 (March 2012).

are often too anxious to accept at face value legal and factual assertions made by attorneys for employers.[29]

Alternative 2—Sue the State agency employer in State court, in your own name and with your own lawyer

You can initiate the lawsuit in State court, and that court is required to hear and adjudicate your claim that the State agency violated your USERRA rights.[30]

Q: Is it not true that the Supreme Court, in 1999, held that it was unconstitutional for Congress to conscript the State courts to hear and adjudicate claims that State agencies, as employers, have violated the Federal Fair Labor Standards Act (FLSA)?[31]

A: Yes, that is true. You are referring to *Alden v. Maine.*[32] In *Alden,* the Court found that in exercising its powers under Article I of the Constitution Congress may subject the States to private suits in their own courts only if there is compelling evidence that the States are required to surrender this power to Congress pursuant to the constitutional design.

In *Torres,* the Court found that the 13 original States gave up the power to object to lawsuits enforcing laws like USERRA when they effectively ratified the "Plan of the Constitutional Convention" by ratifying the Constitution, and the other 37 States gave up that power when they voluntarily joined the Union. The Court held:

> The Constitution vests in Congress the power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." Art. I, §8, cls. 1, 12-13. Pursuant to that authority, Congress enacted a federal law that gives returning veterans the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate them. See Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U. S. C. § 4301 *et seq.* This case asks whether States may invoke sovereign immunity as a legal defense to block such suits.
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> In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to the "'plan of the Convention,'" as part of "'the structure of the original Constitution itself.'" *PennEast Pipeline Co.* v. *New Jersey*, 594 U. S. ___, ___, 141 S. Ct. 2244, 210 L.

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[29] *See* Law Review 22032 (May 2022).
[30] *See* 38 U.S.C. § 4323(b)(2). *See also Torres v. Texas Department of Public Safety,* 142 S. Ct. 2455 (2022).
[31] The FLSA is the Federal statute that requires employers to pay at least the minimum wage and to pay overtime to non-exempt employees who work more than 40 hours per week.
[32] 527 U.S..706 (1999).

> Ed. 2d 624, 641 (2021) (quoting *Alden* v. *Maine*, 527 U. S. 706, 728, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).
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> Congress has "broad and sweeping" power "to raise and support armies." *United States* v. *O'Brien*, 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). It has long exercised that power to encourage service in the Armed Forces in a variety of ways. *See, e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 58, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (campus recruiting); *Johnson* v. *Robison*, 415 U. S. 361, 376, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974) (educational benefits). Since before the United States' entry into World War II, Congress has sought, in particular, to smooth volunteers' reentry into civilian life by recognizing veterans' "right to return to civilian employment without adverse effect on . . . career progress" in the federal work force and private employment. H. R. Rep. No. 105-448, p. 2 (1998); see Selective Training and Service Act of 1940, §§8(b)(A)-(B), (e), 54 Stat. 890, 891 (damages remedy against private employers).
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> The Vietnam War prompted Congress to extend these protections to employment by States. Amidst political opposition to the war, "some State and local jurisdictions ha[d] demonstrated a reluctance, and even an unwillingness, to reemploy" returning servicemembers. S. Rep. No. 93-907, p. 110 (1974). So Congress authorized private damages suits against States to ensure that "veterans who [had] previously held jobs as schoolteachers, policemen, firemen, and other State, county, and city employees" would not be denied their old jobs as reprisal for their service. *Ibid.* The statute at issue, USERRA, embodies these protections today.[33]

As a result of the *Torres* precedent, all 50 States are now subject to being sued in their own courts for violating USERRA, and the State courts must hear and adjudicate those claims, without regard to State laws or State claims of sovereign immunity. This is very important because 10% of National Guard and Reserve service members (100,000 of 1,000,000) have civilian jobs working for State agencies.

Q: Was *Velasquez v. Frapwell* correctly decided? As originally enacted in 1994, USERRA permitted an individual to sue a State in Federal court. Could Congress reinstate that original provision? Would that approach be constitutional?

A: In my opinion, yes, based on the implications of *Torres v. Texas Department of Public Safety.* I think that the 7th Circuit's analysis in *Velasquez* is overly simplistic. In determining the constitutionality of a Federal statute that authorizes individuals to sue States in Federal court, it is not enough to determine whether the constitutional authority for that statute came before or after 2/7/1795, when the States ratified the 11th Amendment. It is necessary to determine if the constitutional provision relied upon relates to a subject matter that is central to the role of

[33] *Torres v. Texas Department of Public Safety,* 142 S. Ct. 2455, 2460-61 (2022).

the Federal Government, not the States. USERRA is based on the War Powers Clauses of Article I, Section 8 of the Constitution. Defending our nation is central to the role of the Federal Government, more so than regulating interstate commerce and commerce with Indian tribes and foreign nations.

The *Torres* decision includes the following detailed explanation of the power of Congress to authorize private lawsuits against States in matters related to the national defense:

> Last Term, in *PennEast Pipeline Co.* v. *New Jersey*, 594 U. S. ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, we considered whether Congress could, pursuant to its eminent domain power, authorize private parties to sue States to enforce federally approved condemnations necessary to build interstate pipelines. We held that "when the States entered the federal system, they renounced their right to the 'highest dominion in the[ir] lands,'" meaning they agreed their "eminent domain power would yield to that of the Federal Government." *Id*., at ___-___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 642 (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 656, 10 S. Ct. 965, 34 L. Ed. 295 (1890)). Congress could therefore authorize private actions against States.
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> *PennEast* defined the test for structural waiver as whether the federal power at issue is "complete in itself, and the States consented to the exercise of that power—in its entirety—in the plan of the Convention." 594 U. S., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 642, 646 (internal quotation marks and citation omitted). Where that is so, the States implicitly agreed that their sovereignty "would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'" *Id*., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624,at 642 (quoting *Kohl* v. *United States*, 91 U. S. 367, 372, 23 L. Ed. 449 (1876)). By committing not to "thwart" or frustrate federal policy, the States accepted upon ratification that their "consent," including to suit, could "never be a condition precedent to" Congress' chosen exercise of its authority. 594 U. S., at ___, ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 638 (internal quotation marks omitted). The States simply "have no immunity left to waive or abrogate." *Id*., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 646.
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> Congress' power to build and maintain the Armed Forces fits *PennEast*'s test. The Constitution's text, its history, and this Court's precedents show that "when the States entered the federal system, they renounced their right" to interfere with national policy in this area. *Id*., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 642.
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> For one thing, the Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. Unlike most of the powers given to the National Government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions. The Preamble makes the "common defence" one of the document's central projects. Article I gives Congress authority to "provide for th[at] common Defence" in six

numbered paragraphs: to "declare War"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules" for the Armed Forces; "provide for calling forth the Militia"; and "provide for [their] organizing, arming, and disciplining." §8, cls. 1, 11-16. Article II makes the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States." §2, cl. 1. And the Federal Government is charged with "protect[ing] each" State "against Invasion." Art. IV, §4.

The Constitution also divests the States of like power. States may not "engage in War, unless actually invaded," "enter into any Treaty," or "keep Troops, or Ships of War in time of Peace." Art. I, §10, cls. 1, 3. States retain a role in "the Appointment of the Officers" to and the "training [of] the Militia," but that delegation is strictly cabined. Art. I, §8, cl. 16. States must do so "according to the discipline prescribed by Congress." *Ibid.* These substantial limitations on state authority, together with the assignment of sweeping power to the Federal Government, provide strong evidence that the structure of the Constitution prevents States from frustrating national objectives in this field.

History teaches the same lesson. "When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation." *PennEast*, 594 U. S., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 646. The Founders recognized, first and foremost, "that the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by the[ir] own authority," because Congress lacked the power to marshal and maintain a fighting force "fit for defence." 1 Records of the Federal Convention of 1787, p. 19 (M. Farrand ed. 1966) (Edmund Randolph opening remarks) (alterations in original).

"[T]he want of power in Congress to raise an army" had left the National Government "dependen[t] upon the States" to supply military forces via a system of quotas and requisition that had nearly cost the Nation victory in the Revolutionary War. *Selective Draft Law Cases*, 245 U. S. 366, 381, 38 S. Ct. 159, 62 L. Ed. 349 (1918). George Washington warned from the battlefield that, unless Congress is "vested with powers by the several States" to raise an army, "our cause is lost." Letter to J. Jones (May 31, 1780), in 8 Writings of George Washington 304 (W. Ford ed. 1890). In short, "[t]he experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition." 3 J. Story, Commentaries on the Constitution of the United States §1174, p. 65 (1833) (Story). The need to fix that failing by establishing a strong national power to raise and maintain a military was one of the "recognized necessities" for calling the Constitutional Convention. *Selective Draft Law Cases*, 245 U. S., at 381, 38 S. Ct. 159, 62 L. Ed. 349.

The Constitution, by design, worked "an entire change in the first principles of the system." The Federalist No. 23, at 148 (A. Hamilton). The Framers gave Congress direct power over the "*formation*, *direction* or *support* of the NATIONAL FORCES." *Ibid.*

(emphasis in original). So "general and indefinite" were these powers vis-à-vis the States that "[o]bjections were made against" them as "subversive of the state governments," which retained "no control on congress" under the new arrangement. 3 Story §§1176, 1177, at 67. Some state conventions pitched proposals to limit the reach of Congress' war powers, but those amendments "die[d] away." *Id*., §1186, at 74. The States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.

Consistent with that structural understanding, Congress has, since the founding era, directed raising and maintaining the national military, including at the expense of state sovereignty. For instance, early Congresses established military bonuses to reward service, even requiring Virginia to give land to some Revolutionary War officers. See Act of Aug. 10, 1790, 1 Stat. 182. Could Virginia have refused to go along? We do not think so.

As President Lincoln reflected while the Civil War raged: The federal power to raise and maintain a military "'is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; . . . it is a power to raise and support armies given to Congress by the Constitution, without an "if." '" *Lichter* v. *United States*, 334 U. S. 742, 757, n. 4, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948) (quoting 9 J. Nicolay & J. Hay, Complete Works of Abraham Lincoln 75-77 (1894)).

An unbroken line of precedents supports the same conclusion: Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces. During the Civil War, this Court rejected a State's attempt to retrieve, through habeas corpus, a deserted soldier "held in the custody of a recruiting officer of the United States." *Tarble's Case*, 80 U.S. 397, 13 Wall. 397, 398, 20 L. Ed. 597 (1872). The "National government['s] . . . power 'to raise and support armies'" cannot be "question[ed by] any State authority," we said. *Id*., at 408, 80 U.S. 397, 20 L. Ed. 597. In *Stewart* v. *Kahn*, 78 U.S. 493, 11 Wall. 493, 20 L. Ed. 176 (1871), the Court approved a federal statute that, among other provisions, tolled state statutes of limitations in state courts for suits against soldiers while they were in service of the Union. The Court described Congress' authority as "carr[ying] with it inherently the power" to "remedy" state efforts to frustrate national aims; objections sounding in ordinary federalism principles were "untenable." *Id*., at 507, 78 U.S. 493, 20 L. Ed. 176.

In the early 20th century, the Court again rejected state-sovereignty objections in this area, this time to the draft. See *Selective Draft Law Cases*, 245 U. S., at 381, 38 S. Ct. 159, 62 L. Ed. 349. We wrote that Congress' authority to raise armies could not be qualified or restricted by the States because the Constitution "manifestly intended to give . . . all" such power to the Federal Government and "leave none to the States." *Ibid.*

Modern examples illustrate the same structural point. In *United States* v. *Oregon*, 366 U. S. 643, 644-649, 81 S. Ct. 1278, 6 L. Ed. 2d 575 (1961), this Court rejected a State's Tenth

Amendment challenge to a federal law providing that, when certain veterans die without heirs, their property distributes to veterans' facilities rather than escheating to the State. Even though estate and property law are areas "normally left to the States," the Court explained that those background assumptions are displaced when it comes to Congress' "constitutional powers to raise armies and navies." *Id*., at 648-649, 81 S. Ct. 1278, 6 L. Ed. 2d 575. When, years later, the Court adopted a broader view of state sovereignty under the Tenth Amendment, the Court was careful to clarify that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." *National League of Cities* v. *Usery*, 426 U. S. 833, 854-855, n. 18, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976), overruled on other grounds, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

Nor is the Federal Government's power limited to the "context of an actual war," as we held more recently in *Perpich* v. *Department of Defense*, 496 U. S. 334, 349, 110 S. Ct. 2418, 110 L. Ed. 2d 312 (1990). After the Governors of California and Maine refused to allow their States' National Guard members to be sent on training missions in Honduras, Congress eliminated the longstanding requirement that the military obtain consent from the relevant Governor before transferring National Guard members to active military service. *Id*., at 346, 110 S. Ct. 2418, 110 L. Ed. 2d 312. The Court rejected the notion that so holding "nullif[ied] an important state power," instead "recogniz[ing] the supremacy of federal power in the area of military affairs." *Id*., at 351, 110 S. Ct. 2418, 110 L. Ed. 2d 312.

The lesson we draw from these cases is that "'[t]he power to wage war is the power to wage war successfully.'" *Lichter*, 334 U. S., at 780, 68 S. Ct. 1294, 92 L. Ed. 1694 (quoting address by C. Hughes, War Powers Under the Constitution (Sept. 5, 1917)). The Framers "'had emerged from a long struggle which had taught them the weakness of a mere confederation,'" so "'they established a Union which could fight with the strength of one people under one government entrusted with the common defence.'" *Ibid.* Under our constitutional order, States may not place any "'limitations inconsistent'" with Congress' power because "'every resource of the people must be at command.'" *Ibid.* In short, the States agreed to "dives[t]" themselves of "the traditional diplomatic and military tools that . . . sovereigns possess"—to sacrifice their sovereignty for the common defense. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ___, ___, 139 S. Ct. 1485, 203 L. Ed. 2d 768, 780 (2019).

It follows that Congress' power to build and maintain a national military is "complete in itself." *PennEast*, 594 U. S., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 643 (internal quotation marks omitted). Text, history, and precedent show the States agreed that their sovereignty would "yield . . . so far as is necessary" to national policy to raise and maintain the military. *Id*., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 642 (internal quotation marks omitted). And because States committed themselves not to "thwart" the exercise of this federal power, "[t]he consent of a State," including to suit, "can never be a condition precedent to [Congress'] enjoyment" of it. *Id*., at ___, ___, 141 S.

> Ct. 2244, 210 L. Ed. 2d 624, at 638 (internal quotation marks omitted). We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power "[t]o raise and support Armies" and "provide and maintain a Navy." §8, cls. 12-13.
>
> Neither Texas nor the dissent persuades us otherwise. Texas asserts that "Congress cannot abrogate state sovereign immunity through the exercise of Article I powers." Brief for Respondent 33. But, as explained, "congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of the Convention." *PennEast*, 594 U. S., at ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, at 642. We recognize that waiver today, as we have before in *PennEast* and *Katz*.[34]

The power of Congress and the Federal Government generally to provide for the common defense, under several interrelated clauses of the Constitution, is "complete in itself" and supplants any opportunity for the States to stand in the way of enforcement of Federal laws (like USERRA) that are essential for national defense readiness. After *Torres,* it is possible to say that *Velasquez v. Frapwell* was wrongly decided and cannot be upheld.

Torres also includes the following instructive paragraph:

> Like other state sovereign immunity cases, *Alden* "understood the 11th Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms." … It follows that a waiver [of the sovereign immunity of States pursuant to the plan of the Convention, as we found in *PennEast* and *Katz,* displaces the background principles of state sovereign immunity wherever those suits proceed. Neither *Alden* nor any other case holds to the contrary.[35]

We cannot say that *Torres* expressly overruled *Velasquez* because the Supreme Court decision does not mention this 7th Circuit decision. But it is fair to say that if the 7th Circuit were presented with the same question today, after *Torres,* it probably would not hold that a USERRA provision authorizing an individual to sue a State government employer in Federal court was unconstitutional.

In *Torres,* the Supreme Court addressed the constitutionality and the interpretation of USERRA as currently written, in the 1998 amendments. The Court was not called upon to address the constitutionality of USERRA in its original 1994 form. It is not surprising that the Supreme Court decision does not mention *Velasquez.*

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[34] *Torres,* 142 S. Ct. at 2463-66.
[35] *Torres,* 142 S. Ct. at 2468.

Q: Do you favor amending USERRA to authorize individuals to sue State government agencies in Federal court?

A: Yes. Federal courts are much more likely than State courts to be fair and to follow Federal precedents in applying USERRA to State government agencies as employers. Based on *Torres,* I think that such a USERRA provision would pass constitutional muster, *Velasquez v. Frapwell* to the contrary notwithstanding.

Q: What about suits against political subdivisions of States (counties, cities, school districts, etc.)? Is it possible for a service member or veteran to sue a local government employer in Federal court in his or her own name and with his or her own lawyer?

A: Yes. The final subsection of section 4323 provides: "In this section [with regard to USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[36] This provision means that you can sue a political subdivision of a State in Federal court, in your own name and with your own lawyer, just like suing a private employer.

Q: Why are political subdivisions of a State treated differently from State agencies?

A: Political subdivisions do not have sovereign immunity under the 11th Amendment of the United States Constitution.[37]

While 10% of Reserve and National Guard personnel have civilian jobs working for State government agencies, another 11% work for political subdivisions (local governments).

Q: The General Counsel of NCSU has pointed out that I am a probationary, untenured assistant professor. The General Counsel claims that means that the decision not to renew my one-year contact is "absolutely unreviewable" and that my lawsuit challenging the non-renewal will be summarily dismissed without consideration of the merits of my claim. What do you say about that?

A: The General Counsel is wrong. Section 4331 of USERRA Gives DOL the authority to promulgate regulations about the application of USERRA to State and local governments and private employers.[38] The pertinent section of the DOL USERRA Regulations is as follows:

> **Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**

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[36] 38 U.S.C. § 4323(j).

[37] *See Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014); *Sandoval v. City of Chicago,* 560 F.3d 703 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009). *See generally* Law Review 19091 (October 2019).

[38] 38 U.S.C. § 4331.

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position.[39]

Q: If I sue NCSU in State court, or if DOJ sues the university in Federal court, what will we need to prove to prevail?

A: You will need to prove (or DOJ will need to prove on your behalf) that your membership in a uniformed service, your application to join a uniformed service, your performance of uniformed service, or your application or obligation to perform future service was *a motivating factor* in the employer's decision.[40] If you prove motivating factor, you win, unless the employer can *prove* (not just say) that your contract would not have been renewed anyway, for lawful reasons, even if you had not been a member of the Army Reserve.[41]

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[39] 20 C.F.R. § 1002.41 (bold question in original).
[40] 38 U.S.C. § 4311(a).
[41] 38 U.S.C. § 4311(c). *See generally* Law Review 17016 (March 2017) for a detailed discussion of how to prove a violation of section 4311 of USERRA.

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