

LAW REVIEW¹ 22046

July 2022

**Good News from the Supreme Court about Enforcing
USERRA against State Government Employers**

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Torres v. Texas Department of Public Safety, United States Supreme Court, Number 20-603 (June 29, 2022).

Texas Department of Public Safety v. Torres, 583 S.W.3d 221 (Tex. App.-Corpus Christi-Edinburg 2018), pet. denied, No. 19-0107, 2020 Tex. LEXIS 5181 (Tex. June 5, 2020), cert. granted, 142 S. Ct. 735 (December 15, 2021). The United States Supreme Court reversed this

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>.

decision of Texas' intermediate appellate court and remanded the case to the Texas court system.

This is the case that Second Lieutenant Lauren Walker, USMCR, and I discussed in detail in Law Review 22001 (January 2022). The United States Supreme Court granted certiorari (discretionary review) on 12/15/2021. Oral argument in the Supreme Court was conducted on 3/29/2022. The Supreme Court released its decision on 6/29/2022, at the end of the Court's 2021-22 term.

Justice Stephen Breyer wrote the majority opinion, and he was joined by Chief Justice Roberts, Justice Sotomayor, Justice Kagan, and Justice Kavanaugh. Justice Clarence Thomas wrote a dissent, joined by Justice Alito, Justice Gorsuch, and Justice Barrett.

The first two paragraphs of the majority opinion are as follows:

The Constitution vests in Congress the power “to raise and support Armies” and “to provide and maintain a Navy” Art. I, Section 8, Clauses 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 [as well as federal agencies, local governments, and private 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.

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 the immunity from congressionally authorized suits pursuant to the “plan of the [Constitutional] Convention” as part of “the structure of the original Constitution itself.”

The final two paragraphs of the majority opinion are as follows:

Texas' contrary view would permit States to thwart national military readiness. We need not stray from the statute at hand [USERRA] to see the dangers of this approach. If a State—or even 25 States—decided to protest a war by refusing to employ returning servicemembers, Congress, on Texas' telling, would be powerless to authorize private reinstatement suits against those States. The potentially debilitating effect on national security would not matter.

We think that it does matter. Text, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense.

As a result of this excellent Supreme Court precedent, veterans and service members in all 50 states can now sue state agencies as employers for violating USERRA, and state court judges are required to hear and adjudicate those USERRA claims, *without regard to state laws and state constitutions*. Under Article VI, Clause 2 of the United States Constitution, commonly called the “Supremacy Clause,” a federal statute like USERRA trumps a conflicting state statute or even a state constitution. *State agency employers can no longer hide behind the hoary doctrine of “sovereign immunity” to avoid their USERRA obligations.*

Congratulations to all who helped in achieving this great accomplishment

Attorney Brian J. Lawler of Pilot Law P.C. has represented Captain Le Roy Torres throughout this long case, and he was assisted by attorney Stephen J. Chapman of Webb, Cason & Manning. Brian Lawler is a recently retired Marine Corps Reserve officer and a life member of ROA. He has a nationwide USERRA practice, representing service members and veterans. He is one of two lawyers to whom I frequently refer service members seeking legal advice and representation in issues of this nature.

In the United States Supreme Court, attorneys Andrew Tutt, Elisabeth Theodore, Sam Callahan, and Steven Wirth of the law firm Arnold & Porter Kaye Scholer LLP represented Captain Torres on a pro bono basis, meaning that these lawyers and their law firm received no financial compensation for their excellent work.

We, the Reserve Organization of America (ROA), drafted and filed an *amicus curiae* (“friend of the court”) brief in the Supreme Court, urging the Court to grant *certiorari* (discretionary review) in this case. After the Supreme Court agreed to hear the case, we filed a new *amicus* brief on the merits, urging the Court to reverse the decision of the Texas intermediate appellate court. We frequently draft and file *amicus* briefs in the Supreme Court and other courts, representing the rights and interests of those who serve our country in uniform, especially in the Reserve and National Guard.

The two excellent ROA *amicus* briefs were drafted and filed by attorneys Theodore A. Howard, Scott Felder, Lukman Azeez, George Petel, Frank Chang, Boyd Garrott, and Alexander Lichtenstein of the law firm Wiley Rein LLP. Like the involvement of Arnold & Porter Kaye Scholer LLP, the involvement of Wiley Rein LLP was pro bono. Wiley Rein LLP has also assisted ROA on a pro bono basis in drafting and filing several other *amicus curiae* briefs in other cases. ROA expresses its gratitude to Wiley Rein LLP, to these attorneys, and to Wiley Rein founding partner Richard Wiley.

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This article is one of 2,000-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight³ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
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³ Congress recently established the United States Space Force as the 8th uniformed service.

⁴ You can also donate on-line on the ROA website, www.roa.org.