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Courts Should Liberally Construe Statutes for Service Members and Veterans.
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10.1—Supreme Court Cases on the Reemployment Statute.
10.2—Other Supreme Court Cases

The everyday work of courts, including the United States Supreme Court, is to construe the words that Congress or a State legislature has enacted—to determine the meaning and effect of the statute at issue in the case. The process of *statutory construction* begins with the words that Congress or the Legislature has enacted. If the words are clear and unambiguous (capable of only one reasonable interpretation), there is

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[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2200 "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 Spouse 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 (Wright) am the author of more than two thousand of the articles.

[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 44 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 SWright@roa.org.

no room for "liberal construction" or for trying to decipher the "legislative intent" underlying the enactment.

Because of hasty or unprofessional drafting, or because of compromises in the legislative process, there are frequently ambiguities in the words of the statute, and the court must utilize various tools to ascertain what the legislators who drafted and voted for the bill had in mind, or what they would have had in mind if the question before the court had occurred to them during the legislative process.

In at least a dozen cases decided by the Supreme Court in the last century, the Court has held that federal statutes should be liberally construed for the benefit of those who are serving or have served our country in the armed forces. The purpose of this article is to mention these cases and their citations. These Supreme Court precedents can provide powerful ammunition to lawyers representing service members and veterans.

***Boone v. Lightner,* 319 U.S. 561 (1943).**[3]

In a case applying the Soldiers' and Sailors' Civil Relief Act (SSCRA),[4] the Supreme Court wrote: "The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[5]

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[3] This is a 1943 decision of the United States Supreme Court. Supreme Court decisions are published (reported) in a series of volumes called *United States Reports.* The citation means that you can find this case in Volume 319 of *United States Reports,* starting one page 561.

[4] In 2003, Congress substantially updated the SSCRA and renamed it the Servicemembers Civil Relief Act (SCRA). *See* Law Review 116 (March 2004).

[5] *Boone,* 319 U.S. at 575.

***Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946).**

In its first case construing the federal reemployment statute, which was enacted in 1940, the Supreme Court stated:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner,* 319 U.S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate parts of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[6]

***Dameron v. Brodhead,* 345 U.S. 322 (1953).**

The City of Denver claimed that the SSCRA was unconstitutional as far as it prevented the City from imposing its personal property tax on an active-duty Air Force service member who physically resided in the City of Denver, pursuant to his military assignment, but who was domiciled in Louisiana, and the Colorado Supreme Court agreed with this assertion. The United States Supreme Court granted certiorari (discretionary review) and firmly overruled the Colorado Supreme Court, holding:

> The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in

[6] *Fishgold,* 328 U.S. at 285. *See generally* Law Review 23058 (October 2023) for a detailed discussion of this case.

> which they may be required to be present by virtue of their service, cannot be doubted. Generally similar relief has been accorded to other types of federal operations or functions. And we [the Supreme Court] have upheld the validity of such enactments. … Nor do we see any distinction between those cases and this. … We have, in fact, generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. Petitioner's duties are directly related to an activity which the Constitution delegated to the National Government [national defense] … Since this is so, Congressional exercise of a "necessary and proper" power such as this statute [the SSCRA] must be upheld.[7]

***McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265 (1958).**

The Supreme Court emphasized that the reemployment statute gives special rights to the veteran, over and above the rights available to employees generally, and that the veteran claiming rights under this law is not required to exhaust remedies that may be available under the collective bargaining agreement or the Railway Labor Act. The Court's decision includes these two eloquent paragraphs:

> The Court of Appeals correctly held that petitioner was not obliged, before bringing suit in the District Court under § 9(d) of the Act, 62 Stat. 616, as amended, 50 U. S. C. App. (Supp. V) § 459 (d), to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. See 48 Stat. 1189-1193, 45 U.S.C. § 153. The rights petitioner asserts are rights created by federal statute even though their determination may

[7] *Dameron,* 345 U.S. at 324-25. *See generally* Law Review 09017 (April 2009) for a detailed discussion of this case.

necessarily involve interpretation of a collective bargaining agreement. Although the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement, it requires the application of the principles of that system in a manner that will not deprive the veteran of the benefits, in terms of restoration to position and advancement in status, for which Congress has provided. *Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.*

For the effective protection of these distinctively federal rights, Congress provided in § 9(d) of the Act that if any employer fails to comply with the provisions of the statute, the District Court, upon the filing of a petition by a person entitled to the benefits of the Act, has jurisdiction to compel compliance and to compensate for loss of wages. The court is enjoined to order speedy hearing in any such case and to advance it on the calendar, and the United States Attorney must appear and act for the veteran in the prosecution of his claim if reasonably satisfied that he is entitled to the benefits of the Act. Nowhere is it suggested that before a veteran can obtain the benefit of this expeditious procedure and the remedies available to him in the District Court he must exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the National Railway Adjustment Board. On the contrary, the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court, advanced on the calendar before other litigation, and prosecuted with the assistance of the United States Attorney. Only thus, it evidently was thought, would adequate protection be assured the veteran, since delay in the vindication of re-employment rights might often result in hardship to the veteran and the defeat, for all practical purposes, of the rights Congress sought to give him. To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights.[8]

Accardi v. Pennsylvania Railroad Co., **383 U.S. 225 (1966).**

The language of the 1940 Act clearly manifests a purpose and desire on the part of Congress to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country.

Section 8 (b)(B) of the statute requires that private employers reinstate their former employees who are honorably discharged veterans "to [their former] position or to a position of like seniority, status, and pay," and § 8 (c) provides that such a person "shall be so restored without loss of seniority." This means that for the purpose of determining seniority the returning veteran is to be treated as though he has been continuously employed during the period spent in the armed forces. *Fishgold* v. *Sullivan Corp*., 328 U.S. 275, 284-285.The continuing purpose of Congress in this matter was again shown in the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. § 451 *et seq*. (1964 ed.). Section 9 (c)(2) of that Act provides:

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[8] *McKinney,* 357 U.S. at 268-70 (emphasis supplied). *See generally* Law Review 08042 (September 2008) for a detailed discussion of this case.

> "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."[9]

***Alabama Power Co. v. Davis,* 431 U.S. 581 (1977).**

> The second guiding principle we identified [in Fishgold] was: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need…. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." 328 U.S., at 285.[10]

***Regan v. Taxation With Representation,* 461 U.S. 540 (1983).**

The Internal Revenue Code (IRC) provided then and still provides today that charities recognized by the Internal Revenue Service (IRS) under section 501(c)(3) of the IRC are both tax-exempt and tax-deductible, but charities are not permitted to lobby (except “incidental” lobbying), while “veterans’ organizations” recognized under section 501(c)(19) are both tax-exempt and tax-deductible and are permitted to lobby without limitation. An organization called “Taxation With Representation” (TWR) challenged the constitutionality of this special treatment for

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[9] *Accardi,* 383 U.S. at 228-29. *See generally* Law Review 08061 (November 2008) for a detailed discussion of this case.

[10] *Alabama Power Co.,* 431 U.S. at 584-85. *See generally* Law Review 09015 (April 2009) for a detailed discussion of this case.

veterans organizations, under both the First Amendment and the Fifth Amendment of the Constitution.

In a unanimous opinion written by Justice William Rehnquist[11] and joined by all eight of his colleagues, the Supreme Court rejected both the First Amendment challenge and the Fifth Amendment challenge. The Court's opinion summarized TWR's Fifth Amendment argument as follows:

> TWR also contends that the equal protection component of the Fifth Amendment renders the prohibition against substantial lobbying invalid. TWR points out that section 170(c)(3) [of the IRC] permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under section 501(c)(19). Qualifying veterans' organizations are permitted to lobby as much as they want in furtherance of their exempt purposes. TWR argues that because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of section 501(c)(3) organizations.[12]

Justice Rehnquist's decision firmly rejected the TWR Fifth Amendment argument, as follows:

> It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans "have been obliged to drop their own affairs to take up the burdens of the nation. *Boone v. Lightner,* 319 U.S. 561, 575 (1943), "subjecting themselves to the mental and physical hazards as well

[11] In 1983, when this decision was made, William Rehnquist was an Associate Justice. He was nominated to be Chief Justice and confirmed by the Senate in 1986.
[12] *Regan,* 461 U.S. at 546-47.

> as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Johnson v. Robinson,* 415 U.S. 361, 380 (1974) (emphasis deleted). Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has "always been deemed to be legitimate." *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 n. 25 (1979).[13]

***King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).**

In a scholarly and eloquent decision written by Justice David Souter, the Supreme Court firmly and unanimously reversed the 11th Circuit decision before it and overruled 3rd Circuit and 5th Circuit precedents holding that a Reserve Component service member had the right to an unpaid but job-protected leave of absence from his or her civilian job only if the court agreed that the burden placed on the civilian employer was "reasonable." The Supreme Court held:

> Although the court [the 11th Circuit decision under review] held that service in the AGR program carried protection under § 2024(d), it nonetheless rendered declaratory judgment for St. Vincent's on the ground that the request for a 3-year leave of absence was *per se* unreasonable. In imposing a test of reasonableness on King's request, the District Court was following the opinion of the Eleventh Circuit in *Gulf States Paper Corp.* v. *Ingram*, 811 F.2d 1464, 1468 (1987), which had in turn interpreted a Fifth Circuit case as requiring that leave requests for protection under § 2024(d) must be reasonable. See *Lee* v. *Pensacola*, 634 F.2d 886, 889 (1981). A panel of the Eleventh Circuit affirmed,

[13] *Regan,* 461 U.S. at 550-51.

with two judges agreeing with the District Court that guaranteeing reemployment after a 3-year tour of duty would be *per se* unreasonable, thereby putting King outside the protection of § 2024(d). 901 F.2d 1068 (1990). Judge Roney concurred separately that King's request was unreasonable, but dissented from the creation of a *per se* rule. *Id.*, at 1072-1073.

Like the Fifth and Eleventh Circuits, the Third has engrafted a reasonableness requirement onto § 2024(d). *Eidukonis* v. *Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688, 694 (1989) The Fourth Circuit, on the other hand, has declined to do so. *Kolkhorst* v. *Tilghman*, 897 F.2d 1282, 1286 (1990), cert. pending, No. 89-1949. We granted certiorari to resolve this conflict, 498 U.S. 1081 (1991), and now reverse the judgment of the Eleventh Circuit.

We start with the text of § 2024(d), see *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 5, (1985), which is free of any express conditions upon the provisions in contention here:

"[Any covered person] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such . . . [duty] . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U. S. C. § 2024(d).

Thus, the Fourth Circuit could call the subsection's guarantee of leave and reemployment "unequivocal and unqualified”, *Kolkhorst, supra*, at 1286, and the Eleventh Circuit itself observed that the subsection "does not address the reasonableness' of a reservist's leave request. *Gulf States, supra*, at 1468.

Although St. Vincent's recognizes the importance of the statute's freedom from provisos, see Brief for Respondent 9, it still argues that the text of subsection (d) favors its position. The hospital stresses that "leave" as used in subsection (d) is to be enjoyed by an "employee," whose status as such implies that the employment relationship continues during the absence. Accordingly, employees protected under subsection (d) are "returned" to their positions after military service is over, while reservists protected by other subsections of § 2024 are "restored" to theirs, the difference in language attesting that the former remain employees, while the latter cease to be such during their time away. The hospital argues that the very notion of such a continuing relationship is incompatible with absences as lengthy as King's, and finds that conclusion supported by the provisions speaking to the actual mechanics for resuming employment. While the reservists subject to other subsections must reapply for employment, those protected by subsection (d) are allowed, and indeed required, to "report for work at the beginning of the next regularly scheduled working period" after the tour of military duty expires. The hospital posits the impracticality of expecting an employee to report for work immediately after a 3-year absence, "to take his apron off the peg," as the hospital's counsel put it, and go back to work as if nothing had happened. It also makes much of the difficulties of filling responsible positions that would follow if their incumbents could be turned out so abruptly after serving for so long, upon the prior incumbent's equally abrupt return.

To these arguments, and others like them that we do not set out at length, two replies are in order. We may grant that the congressionally mandated leave of absence can be an ungainly perquisite of military service, when the tour of duty lasts as long as King's promises to do, and if we were free to tinker with the statutory scheme we could reasonably accord some significance to the burdens imposed on both employers and workers when long leaves of absence are the chosen means of guaranteeing eventual reemployment to military personnel.

But to grant all this is not to find equivocation in the statute's silence, so as to render it susceptible to interpretive choice. On the contrary, the verbal distinctions underlying the hospital's arguments become pallid in the light of a textual difference far more glaring than any of them: while, as noted, subsection (d) is utterly silent about any durational limit on the protection it provides, other subsections of § 2024, protecting other classes of full-time service personnel, expressly limit the periods of their protection. Thus, § 2024(a) currently gives enlistees at least four years of reemployment protection, with the possibility of an extension to five years and even longer. Again, for example, § 2024(b)(1) extends protection to those entering active duty (except for "the purpose of determining physical fitness [or] for training") for at least four years, with the possibility of a further extension beyond that. Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service.

In so concluding we do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, see *Massachusetts* v. *Morash*, 490 U.S. 107, 115, 104 L. Ed. 2d 98, 109 S. Ct. 1668 (1989), since the meaning of statutory language, plain or not, depends on context. See, *e. g., Shell Oil Co.* v. *Iowa Dept.*

of Revenue, 488 U.S. 19, 26 (1988)."Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ." *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.) (quoted in *Shell Oil, supra*, at 25, n. 6).

St. Vincent's itself embraces the same principle (though, we think, by way of misapplication) by countering the preceding textual analysis with a structural analysis of its own, in which it purports to discern a significant hierarchy of re-employment rights in the statutory scheme. As the hospital reads § 2024 together with its companion provisions, the most generous protection goes to inductees, whose reemployment rights are unqualified by any reference to duration of service. Enlistees and those entering active duty in response to an order or call come next with protection so long as their tours of duty do not exceed five years; and at what the hospital claims to be "the bottom of the employment rights scheme," Brief for Respondent 16, fall the reemployment rights protected by § 2024(d). *Ibid.* It is not unnatural, on this view, that the least protected veterans should be subject to an imprecise limit of reasonableness on the length of voluntary duty giving rise to their job protection.

But the hospital's argument does not convince. While it invokes the significance of context, its conclusion rests on quite circular reasoning. There are, as we have just pointed out, differences of treatment among the various classes of service people protected by various provisions of the statute. But differences do not necessarily make hierarchies, and the differences revealed by the hospital's examples do not point inexorably downward without assuming the point at issue, that the reservists subject to training duty within the meaning of subsection (d) really do get less

> protection than inductees, enlistees, and so on, covered by other provisions. Without such an assumption there are simply differences of treatment, to be respected by limiting protection where the text contains a limit and leaving textually unlimited protection just where the Congress apparently chose to leave it. Because the text of § 2024(d) places no limit on the length of a tour after which King may enforce his reemployment rights against St. Vincent's, we hold it plain that no limit was implied.[14]

Torres v. Texas Department of Public Safety, **142 S.Ct. 2455 (2022).[15]**

LeRoy Torres, a life member of the Reserve Organization of America,[16] is a Captain in the Army Reserve, now medically retired with a service-connected disability. In 1999, he was hired by the Texas Department of Public Safety (DPS) as a state trooper, and he worked in that capacity for eight years. In 2007, the Army called him to active duty and deployed him to Camp Anaconda in Balad, Iraq. While so deployed, he was exposed repeatedly to toxic burn-pits smoke, and as a result he developed constrictive bronchiolitis, a disabling lung disease.[17] Torres did not manifest bronchiolitis symptoms until about 18 months after he returned to work at DPS.

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[14] *King,* 502 U.S. at 217-22. *See generally* Law Review 09029 (July 2009) for a detailed discussion of this case. *See also* Law Review 06042 (2006), Law Review 10019 (2010), Law Review 10097 (2010), Law Review 13099 (July 2013), Law Review 15093 (October 2015), and Law Review 17103 (November 2017).

[15] As I explained in footnote 3, decisions of the United States Supreme Court are officially reported in *United States Reports,* but the official reports take about five years to be published. *Torres* will be officially reported in bout 2027. In the meantime, the proper form is to cite the case in *Supreme Court Reports,* an unofficial publication. The *Torres* case is discussed in detail in Law Review 23061 (November 2023).

[16] In 2018, the members of our organization amended our organization's constitution and made all service members, from the most junior enlisted personnel to the most senior officers, eligible for full membership. We adopted the "doing business as" name of Reserve Organization of America to emphasize the fact that we represent and seek to recruit service members of all ranks.

[17] *See* Law Review 21061 (October 2021) for a detailed discussion of constrictive bronchiolitis and other diseases and conditions that are attributable to toxic burn pits smoke. Law Review 21061 was written by Second Lieutenant (now First Lieutenant) Lauren Walker, USMCR, one of ROA's youngest life members. At the time she authored the article, she was a third-year law student at Baylor University in Waco, Texas. She is now serving on active duty as a Marine Corps judge advocate.

Captain Torres was released from active duty and returned home to Texas, and he met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[18] USERRA provides as follows for the situation where a person meets the five USERRA conditions for reemployment but returns to work with a temporary or permanent disability incurred during the period of service:

> 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—
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> **(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

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[18] USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). A person who seeks reemployment in a civilian job after a period of absence from that job necessitated by uniformed service must meet five simple conditions. The person must have left the civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services. 38 U.S.C. § 4312(a). The person must have given the employer prior oral or written notice. 38 U.S.C. § 4312(a)(1). The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment. 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit. The person must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. § 4304. After release from the period of service, the person must have made a timely application for reemployment. After a period of service of 181 days of service or more, the person has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. *See generally* Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

> **(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.[19]

Because of the disability he incurred on active duty, Captain Torres was unable to continue working as a police officer after the symptoms of constrictive bronchiolitis manifested themselves, about 18 months after he returned to work at DPS. Under those circumstances, Torres' employer (the State of Texas) was required to make reasonable accommodations for his disability and to reemploy him in some other position for which he was qualified (despite the disability) or for which he could become qualified with reasonable employer efforts.[20]

DPS assigned Torres to administrative duties for a short period of time. When it became apparent that his disability was permanent, DPS refused to make permanent accommodations for his disability and forced him to resign, thus violating USERRA.

In accordance with section 4323(b)(2) of USERRA,[21] Torres sued DPS and the State of Texas in the appropriate state court in Corpus Christi, Texas. In this case, Torres has been represented from the outset by ROA life member Lieutenant Colonel Brian Lawler, USMC (Ret.).[22]

[1919] 38 U.S.C. § 4313(a)(3). *See generally The USERRA Manual: Uniformed Services Employment and Reemployment Rights Act,* by Kathryn Piscitelli and Edward Still, § 5:2. That section can be found on pages 180-84 of the 2023 edition of the *Manual.*

[20] Id.
[21] 38 U.S.C. § 4323(b)(2).
[22] Brian Lawler's office is in San Diego, California. He has a nationwide practice representing service members and veterans under USERRA. He is one of two lawyers to whom I frequently refer potential USERRA plaintiffs.

Relying on the hoary doctrine of sovereign immunity or "the King can do no wrong," the Attorney General of Texas urged the trial court to dismiss Torres' lawsuit. The trial judge refused to dismiss the case but then, in accordance with Texas civil procedure, permitted the State to appeal to Texas' intermediate appellate court without waiting for a trial on the merits. The Texas intermediate appellate court held that Texas had sovereign immunity and could not be sued and therefore dismissed Torres' lawsuit without considering the merits of his claim. Torres asked the Texas Supreme Court to hear the case, but the State high court declined to do so.

The final step available to Torres was to petition the United States Supreme Court for a writ of certiorari (discretionary review). The Supreme Court denies certiorari in 99% of the cases where it is sought. Certiorari is granted only if four or more of the nine Justices vote for certiorari at a conference where hundreds of cases are considered.

ROA drafted and filed an amicus curiae ("friend of the court") brief urging the Supreme Court to grant certiorari in the *Torres* case, and the Court did so in December 2021. ROA filed a new amicus brief on the merits.[23] The oral argument was held in March 2022. At the end of the 2021-22 term, on 6/29/2022, the Supreme Court released a very favorable decision.[24] As a result of this precedent, Texas and the other 49 states will no longer be able to rely on the hoary doctrine of sovereign immunity to avoid complying with USERRA. The Supreme Court remanded the *Torres* case back to the Texas court system for a trial on the merits.[25]

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[23] You can find links to these two amicus briefs at the end of this article.

[24] *Torres v. Texas Department of Public Safety,* 142 S. Ct. 2455 (2022).

[25] On remand, a jury in Corpus Christi awarded Torres a verdict for $2.49 million. As of this writing, this case is not over.

Several times per year, ROA drafts and files amicus briefs in the Supreme Court and other courts, advocating for the rights and interests of those who serve our country in uniform. This work is done for us by Wiley Rein LLP, a top law firm in our nation's capital. The work is done *pro bono publico,* or for the good of the public. That means that ROA does not pay any money for this excellent service, which is worth millions of dollars cumulatively. Bravo Zulu to Theodore A. Howard, Scott Felder, and the other lawyers at Wiley Rein LLP.

Torres was decided 5-4, and the majority opinion was written by Justice Stephen Breyer, who retired from the Court at the end of the 2021-22 term. *Torres* was his final case as a Supreme Court Justice. The Opinion of the Court begins as follows:

> 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.
>
> 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. Ed. 2d 624, 641 (2021) (quoting *Alden* v. *Maine*, 527 U. S. 706, 728, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).[26]

Q: You explained in footnote 2 that Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, to replace the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940. I note that five of the cases that you have cited (*Fishgold, McKinney, Accardi, Alabama Power*, and *King)* were VRRA cases decided before 10/13/1994. Does that fact detract from the precedential value of these cases?

A: No. USERRA's legislative history includes the following instructive paragraph:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over 50 years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[27]

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[26] *Torres,* 142 S.Ct. at 2460.

[27] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1). The entire text of this committee report is reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 690 of the 2023 edition of the *Manual.*

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ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[28]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than 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

[28] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, congressional and state legislators and 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.

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Washington, DC 20002[30]

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[29] Congress recently established the United States Space Force as the eighth uniformed service.
[30] You can also contribute on-line at www.roa.org.

On 12/23/2020, the Reserve Organization of America (ROA) filed this amicus curiae brief in the United States Supreme Court, urging the Court to grant certiorari in *Torres v. Texas Department of Public Safety*:

https://www.supremecourt.gov/DocketPDF/20/20-603/164584/20201223114222796_Amicus%20Brief.pdf

On 2/7/2022, after the Supreme Court granted certiorari (agreed to hear and decide the case), ROA filed this amicus brief on the merits:

https://www.supremecourt.gov/DocketPDF/20/20-603/213536/20220207162553666_20-603%20Amicus%20Brief.pdf