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Enforcing USERRA against a State Government Employer.
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1.1.1.7—USERRA applies to State and local governments.
1.3.2.9—Accommodations for disabled veterans.
1.4—USERRA enforcement.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA), and President Bill Clinton signed it

[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 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.

into law on 10/13/1994.[3] As enacted in 1994, section 4323 of USERRA read as follows:

> '**^§4323**. **Enforcement of rights with respect to a State or private employer**
>
> "(a)(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of an unsuccessful effort to resolve a complaint *relating to a State (as an employer)* or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for appropriate relief for such person in an appropriate United States district court.
>
> *"(2) A person may commence an action for relief with respect to a complaint if that person—*
>
> *"(A) has chosen not to apply to the Secretary for assistance regarding the complaint under section 4322(c);*
>
> *"(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or*
>
> *"(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.*
>
> "(b) *In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function.* In the

[3] Public Law 103-353, 108 Stat. 3149 (Oct. 13, 1994).

case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

"(c)(1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition, or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter— "(i) to require the employer to comply with the provisions of this chapter; "(ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and "(iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

"(B) Any compensation under clauses (ii) and (iii) of subparagraph (A) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for in this chapter.

"(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter.

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

"(3) The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and

contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

"(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

"(5) In any such action, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

"(6) No State statute of limitations shall apply to any proceeding under this chapter.

"(7) *A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.*[4]

Under this language, an individual who was serving or had served our country in the uniformed services and who alleged that his or her employer (a State agency) had violated USERRA could sue that State agency employer in the appropriate federal district court, just like suing a private employer. In 1998, the United States Court of Appeals for the 7th Circuit[5] held that USERRA, as originally enacted, was unconstitutional as far as it permitted an individual to sue a State in federal court.[6]

In *Velasquez,* the 7th Circuit held that permitting individuals to sue States in federal court violated the 11th Amendment, which provides as follows: "The Judicial power of the United States shall not be construed

[4] 108 Stat. 3149, 3165 (emphasis supplied).
[5] The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[6] *Velasauez v. Frapwell,* 160 F.3rd 389 (7th Cir. 1998).

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."[7]

Later in 1998, Congress amended section 4323 of USERRA into its present form,[8] as follows:

> **§ 4323. Enforcement of rights with respect to a State or private employer**
> **(a) Action for relief.**
> **(1)** A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title [38 USCS § 4322(e)] of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [38 USCS §§ 4301 et seq.] for such person. *In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.*

[7] United States Constitution, Amendment 11, ratified 2/7/1795. Yes, it is capitalized in just that way, in the style of the late 18th Century.
[8] There have been some other amendments. The critical amendments for the present purpose were enacted in 1998 and relate to enforcing USERRA against State government employers.

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

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

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

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

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title [38 USCS § 4322(a)];

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

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

(b) Jurisdiction.

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

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

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

(c) Venue.

(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.
(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies.

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

(A) The court may require the employer to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.] was willful.

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter [38 USCS §§ 4301 et seq.].

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

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

(e) Equity powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter [38 USCS §§ 4301 et seq.].

(f) Standing. An action under this chapter [38 USCS §§ 4301 et seq.] may be initiated only by a person claiming rights or benefits

under this chapter [38 USCS §§ 4301 et seq.] under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent. In any action under this chapter [38 USCS §§ 4301 et seq.], only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, court costs.

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter [38 USCS §§ 4301 et seq.].

(2) In any action or proceeding to enforce a provision of this chapter [38 USCS §§ 4301 et seq.] by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Definition. *In this section, the term "private employer" includes a political subdivision of a State.*[9]

Two ways to enforce an individual's USERRA rights against a State government employer.

Option 1: Suit by the Attorney General of the United States in the name of the United States, as plaintiff.

[9] 38 U.S.C. § 4323 (emphasis supplied).

Mary Jones (MJ) is a Captain in the Marine Corps Reserve. On the civilian side, she is an untenured[10] assistant professor at New Caledonia State University (NCSU).[11] When her two-year contract expired in May 2024, NCSU decided not to renew her contract. MJ believes that the university decided not to renew her contract because it was annoyed with her about her absences from work for USMCR duty, although her absences were protected by USERRA.

In accordance with section 4322(a) of USERRA,[12] MJ made a formal, written USERRA complaint against NCSU to the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS). In accordance with section 4322(d),[13] DOL-VETS investigated MJ's complaint, found it to have merit, and made "reasonable efforts" to persuade NCSU to comply with USERRA, but the university refused to comply with USERRA and to make MJ whole for the loss of wages and benefits that she suffered because of the university's violation.

In accordance with section 4322(e),[14] DOL-VETS advised MJ of the results of its investigation and of her entitlement to proceed under the enforcement provisions of USERRA. In accordance with section 4323(a)(1),[15] MJ requested that DOL-VETS refer the case file to the United States Department of Justice (DOJ), and DOL-VETS promptly referred the file as requested. DOJ reviewed the case file and agreed that MJ was entitled to the USERRA benefits that she sought.[16]

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[10] MJ's "at will" status as an untenured professor in no way detracts from her USERRA rights or the enforcement of those rights. *See* Law Review 24036 (July 2024).

[11] A State university is "an arm of the State" for 11th Amendment purposes. *See Velasquez v. Frapwell,* 160 F.3rd 389, 390 (7th Cir. 1998); *Woods v. Indiana University-Purdue University,* 996 F.2d 880, 883 (7th Cir. 1989); *Kashani v. Purdue University,* 813 F.2d 843 (7th Cir. 1987).

[12] 38 U.S.C. § 4322(a).

[13] 38 U.S.C. § 4322(d).

[14] 38 U.S.C. § 4322(e).

[15] 38 U.S.C. § 4322(a)(1).

[16] Id.

DOJ filed suit against NCSU in the United States District Court.[17] Because the defendant (NCSU) was a State government agency, DOJ filed the suit in the name of the United States, as the plaintiff in the lawsuit.[18]

A prominent example of how this procedure worked.

The complainant (Roy Hamilton), DOL-VETS, and DOJ successfully followed this pattern in *United States v. Alabama Department of Mental Health.*[19] Roy Hamilton, a member of the Alabama Army National Guard (ARNG), worked for the Alabama Department of Mental Health (ADMR) for more than 16 years, from 1987 until December 2003, when he was called to active duty and deployed to Iraq.

In the fall of 2003, Hamilton learned that he would be called to active duty and deployed with his ARNG unit, and he informed his ADMR supervisors of his deployment. At the same time, in the fall of 2003, ADMR decided to close some facilities because of financial problems. The Tarwater facility, where Hamilton worked, was one of the facilities to be closed. ADMR made efforts to assist employees at the facilities being closed to find ADMR employment at other facilities.

In December 2003, ADMR offered Hamilton a transfer to another facility that was not closing. Hamilton informed ADMR that he accepted the offer but could not report to the new facility immediately because of his impending military deployment. On 12/23/2003, Hamilton

[17] Id.
[18] Id. (final sentence).
[19] 673 F.3rd 1320 (11th Cir. 2012). The 11th Circuit is the federal intermediate appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. I discuss this important lawsuit in Law Review 10051 (June 2010) and Law Review 12032 (March 2012).

received his written military orders and shared a copy with ADMR. Hamilton worked his assigned shift at Tarwater on 12/29/2003 and then left to report to active duty. ADMR closed the Tarwater facility on 1/15/2004, while Hamilton was on active duty and on his way to Iraq.

In 4/2005, Hamilton was released from active duty. He met the five USERRA conditions for reemployment. On 12/29/2003, he left his civilian job to perform service in the uniformed services, after having given his civilian employer prior notice.[20] He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service that he performed with respect to the employer relationship for which he sought reemployment, and since he was involuntarily called to active duty his 2004-05 active-duty period did not count toward his five-year limit with ADMR.[21] He served honorably and did not receive a disqualifying bad discharge from the Army.[22] After he was released from active duty, he made a timely application for reemployment with ADMR, well within the 90-day deadline for doing so.[23]

Hamilton was entitled to prompt reemployment when he applied in 4/2005, but because of bureaucratic delays and bungling, including the ADMR personnel office losing Hamilton's personnel file, Hamilton was not reemployed until 8/2007. Apparently unaware that he had enforceable USERRA rights, Hamilton did not file a formal, written USERRA complaint with DOL-VETS until 2/2008.[24] DOL-VETS

[20] 38 U.S.C. § 4312(a).
[21] 38 U.S.C. § 4312(c).
[22] 38 U.S.C. § 4304.
[23] 38 U.S.C. § 4312(e)(1)(D).
[24] Hamilton was entirely too patient with ADMR in asserting his USERRA rights. The services and their Reserve Components, including the ARNG, need to do a better job of informing National Guard and Reserve service members of their legal rights. *See* Law Review 22055 (September 2022). Please see www.roa.org/lawcenter. You

investigated Hamilton's complaint, found it to have merit, and attempted to persuade ADMR to compensate Hamilton for the pay and benefits that he lost between 4/2005, when he was entitled to reemployment, until 8/2007, when he was finally reemployed.

Hamilton requested that DOL-VETS refer his case to DOJ, and DOL-VETS did so. DOJ sued ADMR in 12/2008, in the United States District Court for the Middle District of Alabama. DOJ prevailed in the District Court.[25] ADMR appealed to the 11th Circuit, which affirmed the District Court's judgment.[26]

Q: How does this procedure get around the 11th Amendment problem identified by the 7th Circuit in *Velasquez?*

A: The 11th Amendment precludes a lawsuit against a State by a citizen. This amendment does not address lawsuits filed against States by the United States, so this procedure does not violate the 11th Amendment. ADMH argued that the 11th Amendment barred this lawsuit because Roy Hamilton, not the United States, was the "real party in interest." The 11th Circuit decision forcefully rejected this argument, as follows:

> ADMH's first contention is that the district court erred in ruling that sovereign immunity does not bar this suit. We disagree with ADMH and hold that Alabama is not entitled to sovereign

will find more than 2,200 "Law Review" articles about military-legal topics, including more than 1,500 USERRA articles.

[25] *See United States v. Alabama Department of Mental Health,* 2010 U.S. Dist. LEXIS 75664 (M.D. Ala. July 27, 2010).

[26] I am aware of two other cases where the complainant, DOL-VETS, and DOJ followed this playbook successfully in enforcing USERRA against a State government employer. *See United States v. Nevada,* 2012 U.S. Dist. LEXIS 60483 (D. Nev. May 1, 2012) (discussed in Law Review 13031—February 2013) and *United States v. State of Missouri,* 2014 WL 2574487 (W.D. Missouri 2014) (discussed in Law Review 1407600July 2914). I am not aware of any cases where DOJ followed this playbook and lost.

immunity. "Our federal system is premised on the principle that the States possess a 'residuary and inviolable sovereignty.'" *Chao v. Va. Dep't of Transp*., 291 F.3d 276, 280 (4th Cir. 2002) (quoting The Federalist No. 39, at 258 (James Madison) (I. Kramnick ed. 1987)). One of the principal attributes of this sovereignty is immunity: "It is inherent in the nature of sovereignty not to be amenable to suit of *an individual* without its consent." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324, 78 L. Ed. 1282, 1286-87, 54 S. Ct. 745, 748 (1934) (quoting The Federalist No. 81 (Hamilton) (emphasis added)).

If Roy Hamilton had been the plaintiff, it is undisputed that sovereign immunity would have barred his suit because a State cannot be sued by an individual without its consent. *See Pennh); Aldene Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67, 78-79 (1984) (noting that, unless a State has consented, the State is immune from suits brought in federal court by the State's own citizens or by citizens of other States); *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781, 111 S. Ct. 2578, 115 L. Ed. 2d 686; 501 U.S. 775, 111 S. Ct. 2578, 2582, 115 L. Ed. 2d 686, 695; *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252, 265 (1996); *Alden v. Maine*, 527 U.S. 706, 729, 119 S. Ct. 2240, 2254, 144 L. Ed. 2d 636, 662 (1999).

ADMH acknowledges that States do not have immunity from federal-court suits, brought and controlled by the United States, seeking to vindicate the general interests of the federal government. Appellant's Br. 26; *see United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S. Ct. 808, 814-15, 13 L. Ed. 2d 717, 725

(1965) ("[N]othing in the [Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States. The United States in the past has in many cases been allowed to file suits in this and other courts against States."). It is well-settled that States "surrendered their immunity from suit by the Federal Government" when they ratified the Constitution. *Chao*, 291 F.3d at 280; *see also United States v. Texas*, 143 U.S. 621, 644, 36 L. Ed. 285, 12 S. Ct. 488 (1892); *Principality of Monaco*, 292 U.S. at 329, 54 S. Ct. at 751, 78 L. Ed. at 1289; *Alden*, 527 U.S. at 755-56, 119 S. Ct at 2267, 144 L. Ed. 2d at 679.

However, ADMH contends that Hamilton, and not the United States, is the real plaintiff in this lawsuit. Thus, ADMH claims that the suit is functionally indistinguishable from a suit brought by an individual. ADMH argues that Alabama has not consented to suit by an individual and therefore Congress must be trying to abrogate the State's immunity through USERRA, in violation of *Seminole Tribe*. 517 U.S. at 72-73, 116 S. Ct. at 1131-32, 134 L. Ed. 2d at 277-78. In *Seminole Tribe*, the Supreme Court held that the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *Id*. However, USERRA gives the federal government—and not individuals—the right to sue States in federal court to enforce federal law. USERRA does not purport to abrogate sovereign immunity and therefore does not violate *Seminole Tribe. Id*.

ADMH maintains that the DOJ should not be allowed to seek victim-specific relief from ADMH for Hamilton's benefit. According

to ADMH, USERRA is a "transparent attempt by Congress . . . to evade the Supreme Court's decision . . . in *Seminole Tribe* by making the United States the nominal plaintiff in USERRA actions that are, in substance, no different from ones in which the individual serves as the nominal plaintiff." Appellant's Br. at 34.

ADMH attempts to evade established precedent that sovereign immunity does not apply by arguing that this lawsuit is essentially a private suit, which is subject to sovereign immunity. ADMH argues that Hamilton is the plaintiff "in substance rather than form" and thus his claims against ADMH must be barred. Appellant's Br. at 29. ADMH focuses on the role of the AG in acting as the individual's "attorney." It stresses that this means that the individual, and not the DOJ, has control over the litigation. Appellant's Br. at 33.

ADMH relies on *New Hampshire v. Louisiana* for the proposition that, in evaluating whether a state is entitled to sovereign immunity, courts must look to substance rather than form to determine who the plaintiff is. 108 U.S. 76, 2 S. Ct. 176, 27 L. Ed. 656, 4 Ky. L. Rptr. 915 (1883). In *New Hampshire*, the Court held that a State retained its sovereign immunity when sued by another State that is only nominally a plaintiff and the suing State does not have an independent interest in the case. 108 U.S. at 88-89, 2 S. Ct. at 182, 27 L. Ed. at 661. In that case, Louisiana had defaulted on bonds owned by New Hampshire and New York citizens. *Id*. The Eleventh Amendment barred the individual citizens from suing Louisiana directly.

New York and New Hampshire passed legislation to circumvent the Eleventh Amendment's barrier. *Id*. The two States passed statutes allowing citizens to assign their claims to the State, provided that the citizens paid all of the litigation expenses. *Id*. When citizens assigned their claims to the State, New York and New Hampshire attempted to sue Louisiana as the named plaintiff in the case. *Id*. The Supreme Court held that, because New York and New Hampshire did not have an independent interest in the case and were merely attempting to subvert the Eleventh Amendment to benefit their citizens, Louisiana retained its sovereign immunity. *Id*. at 90, 2 S. Ct. at 183, 27 L.Ed. at 662.

In a later case, the Supreme Court explained that the controlling consideration in *New Hampshire* "derived its force from the fact that the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393, 58 S. Ct. 954, 957, 82 L. Ed. 1416, 1419 (1938) (following *New Hampshire* and explaining the "underlying point of the decision"). Likewise, ADMH asserts that the government is "not seeking a recovery in its own interest," but is merely suing for the private benefit and interest of Hamilton. *Id*.

ADMH's reliance on *New Hampshire* is misplaced. Two important factors distinguish this case from *New Hampshire*. First, the United States—and not Hamilton—has control over the prosecution of the case. Second, the United States has an independent interest in enforcing USERRA.

In *New Hampshire*, the Supreme Court focused on the relative levels of control that the State and the individual exercised. The Court held that sovereign immunity barred suit because "while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." 108 U.S. at 89, 2 S. Ct. at 182, 27 L. Ed. at 661. The Supreme Court listed many factors to determine the individual's level of control and role as the "promoter and . . . manager of the suit." For example, courts must assess whether the individual "pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, [whether it goes to the individual] without even passing through the treasury of the State." *Id*.

Here, the suit is firmly under the control of the executive branch. Although ADMH focuses on the meaning of the word "attorney" in the statute, USERRA does not give the individual the level of control that concerned the Supreme Court in *New Hampshire*. Hamilton had little control, if any, after the Attorney General accepted his suit. For example, the DOJ did not seek permission to file the lawsuit and Hamilton signed an agreement stating that the DOJ did not represent him. Moreover, the DOJ, and not Hamilton, had the right to decide whether to settle the case. Finally, whereas the individual paid all expenses in *New Hampshire*, here, "[n]o fees or court cost may be charged or taxed against" a veteran whose case is litigated by the DOJ. 38 U.S.C. § 4323(h). Clearly, the U.S. government, and not Hamilton, was in control of this case.

ADMH also argues that the United States does not have the requisite independent interest in this suit because it sought relief specific to Hamilton. In *New Hampshire*, the Supreme Court emphasized that the State did not have an interest in prosecuting the case. It noted that the State was "nothing more nor less than a mere collecting agent" for the citizens who were the owners of the bonds at issue. 108 U.S. at 89, 2 S. Ct. at 182, 27 L. Ed. at 661.

However, here, the United States has a significant interest in prosecuting the case in order to enforce federal law. As the Supreme Court noted in *Seminole Tribe*, one of the important "methods of ensuring the States' compliance with federal law" is allowing the DOJ to "bring suit in federal court against a State." 517 U.S. at 71 n.14, 116 S. Ct at 1131 n.14, 134 L. Ed. 2d at 276 n.14.

Further, it is well-settled that the United States may obtain victim-specific relief on behalf of a particular individual without offending the Eleventh Amendment. The Supreme Court stated in *Alden v. Maine* that: [t]he difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that . . . States have consented to the suits of the first kind but not of the second. 527 U.S. at 759-60, 119 S. Ct. at 2269, 144 L. Ed. 2d at 682. A number of our sister circuits have rejected States' contentions that lawsuits brought by the United States on behalf of specific victims are simply private lawsuits masquerading in costume.

Specifically, the Fourth Circuit held that "where the immediate beneficiaries of the Secretary's suit are specific private individuals, the Federal Government has an interest in enforcing federal law, even as against the States," and therefore the Eleventh Amendment did not bar the lawsuit. *Chao v. Va. Dep't of Transp.*, 291 F.3d 276, 278-82 & n.4 (4th Cir. 2002); *see also United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 499 (5th Cir. 2003) (holding that "the federal government has the responsibility to determine when it is in the public interest to sue to vindicate federal law via victim-specific relief" and may sue a State to obtain relief authorized by the ADA without violating the Eleventh Amendment); *EEOC v. Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d 270, 274 (5th Cir. 2009) ("The Supreme Court . . . has recognized that the EEOC plays an independent public interest role that allows it to seek victim-specific relief—even when such relief could not be pursued by the employee . . ."); *Bd. of Regents of the Univ. of Wis. Sys.*, 288 F.3d 296, 300-01 (7th Cir. 2002) (holding that sovereign immunity did not bar a lawsuit regardless of the relief sought by the EEOC); *Ky. Ret. Sys.*, 16 F. App'x 443, 448 (6th Cir. 2001) (rejecting the State's argument that the EEOC's action, seeking relief for a specific State employee, merely disguised a private lawsuit and was thus prohibited by the Eleventh Amendment).

Here, the United States has "deemed the case one of sufficient importance to take action against" ADMH to enforce the federal law on Hamilton's behalf. *Alden*, 527 U.S. at 760, 119 S. Ct. at 2269, 144 L. Ed. 2d at 682. The United States has a clear and substantial interest in enforcing USERRA to achieve the law's goal

of encouraging service in the armed forces. Therefore, we affirm the district court's decision that Eleventh Amendment sovereign immunity does not bar the lawsuit.[27]

Option 2: Retaining private counsel and suing the State agency employer in State court.

***Torres v. Texas Department of Public Safety,* 597 U.S. 580 (2022).**

On 6/29/2022, the United States Supreme Court decided this extraordinarily important case and determined that Texas and the other 49 states cannot invoke sovereign immunity to prevent lawsuits in State courts against State agencies, as employers, for violating USERRA. The *Torres* Syllabus sets forth the facts and the issue as follows:

> Petitioner Le Roy Torres enlisted in the Army Reserve in 1989. In 2007, he was called to active duty and deployed to Iraq. While serving, Torres was exposed to toxic burn pits, a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment. Torres received an honorable discharge. But he returned home with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult.
>
> These ailments, Torres says, left him unable to work his old job as a state trooper. Torres asked his former employer, respondent Texas Department of Public Safety (Texas), to accommodate his condition by reemploying him in a different role. Texas refused.

[27] *United States v. Alabama Department of Mental Health,* 673 F.3rd 1320, 1325-28 (11th Cir. 2012).

So, Torres sued Texas in state court to enforce his rights under USERRA. §4313(a)(3).

Texas tried to dismiss the suit by invoking sovereign immunity. The trial court denied the State's motion. An intermediate appellate court reversed, reasoning that, under this Court's case law, Congress could not authorize private suits against nonconsenting States pursuant to its Article I powers except under the Bankruptcy Clause, citing *Central Va. Community College* v. *Katz*, 546 U. S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945. The Supreme Court of Texas denied discretionary review.

After the decision below, this Court issued *PennEast Pipeline Co.* v. *New Jersey*, 594 U. S. ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624. *PennEast* held that the States waived their sovereign immunity as to the federal eminent domain power pursuant to the "plan of the Convention." The Court then granted Torres' petition for certiorari to determine whether, in light of that intervening ruling, USERRA's damages remedy against state employers is constitutional.

USERRA provides as follows concerning the duty of the employer to reemploy a veteran or service member who meets the five USERRA conditions for reemployment and who returns to work with a temporary or permanent disability incurred during the period of service:

> **(3)** In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not

qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

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

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.[28]

Leroy Torres met the five USERRA conditions and returned to work at the Texas Department of Public Safety (DPS) without initial complication. About six months later, the symptoms of his lung disease became manifest, and it was then clear that he was not qualified, because of the disability, to be a police officer. DPS put him on administrative duties for a brief time, but when it became clear that the disability was long-term DPS forced him to resign.

Torres was not qualified to perform the duties of a police officer, but there were many other State of Texas jobs[29] for which he was qualified or could become qualified with reasonable employer efforts (like training). The State of Texas violated USERRA when it refused to

[28] 38 U.S.C. § 4313(a)(3) (emphasis supplied).

[29] For purposes of the employer's duty to find another position for the returning disabled veteran, Torres' employer was the State of Texas (the State government as a whole), not just DPS. *See* Law Review 0640 (December 2006).

transfer Torres to another position, perhaps in a different department, after it became clear that he had suffered a disability during his 2007-08 military service and that the disability precluded him from serving as a police officer.

Torres chose not to file a formal, written USERRA complaint against DPS with DOL-VETS. Instead, he retained attorney Brian Lawler[30] and sued DPS in State court[31] in Corpus Christi, Texas. Representing DPS, the Attorney General of Texas (TXAG) moved to dismiss the lawsuit for lack of jurisdiction, contending that DPS, as a State agency, has sovereign immunity and cannot be sued in State court. The trial judge rejected that motion but then, in accordance with the Texas Rules of Civil Procedure, permitted the TXAG to make an interlocutory appeal[32] to the intermediate appellate court, the Court of Appeals of Texas, 13th District. The intermediate appellate court agreed with TXAG and reversed the trial judge's decision not to dismiss the lawsuit based on sovereign immunity. The court held:

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

[30] Brian Lawler, who retired from the Marine Corps Reserve as a Lieutenant Colonel, is a life member of ROA. He as a nationwide USERRA practice. He is one of two lawyers to whom I frequently refer potential USERRA clients.

[31] Because the defendant=employer was a State government agency, the lawsuit had to be brought in State court, not federal court. "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." 38 U.S.C. § 4323(b)(2). It is possible for an individual to bring a USERRA action in his or her own name, and with his or her own attorney, if the individual has chosen not to request DOL-VETS assistance. *See* 38 U.S.C. § 4323(a)(3)(A).

[32] Ordinarily, a party is not permitted to appeal to the appellate court until there has been a decision on the merits in the trial court. In unusual circumstances, a party can be permitted to make an interlocutory appeal on a preliminary question and not wait until the trial court has made a dispositive decision.

> appellant, the Texas Department of Public Safety (DPS), in a suit brought by appellee Leroy Torres.
>
> By one issue on appeal, DPS contends that the trial court erred in denying its plea because sovereign immunity applies and has not been validly abrogated by Congress or waived by the legislature. A review of the relevant case law compels us to agree. Therefore, we will reverse and render judgment granting DPS's plea.[33]

In civil cases in the Texas court system, the losing party at the trial court has the right to appeal to the intermediate appellate court. The losing party in the intermediate appellate does not have the right to appeal to the Texas Supreme Court. The State's high court has discretion to hear or to decline appeals. After first indicating that it would hear Torres' appeal, the Texas Supreme Court decided not to hear the case. Thus, the decision of the intermediate appellate court became the final decision of the Texas court system.

In the final appellate step available to him, LeRoy Torres, through his attorney Brian Lawler, applied to the United States Supreme Court for a writ of certiorari. Certiorari is granted only if four or more of the nine Justices vote for certiorari at a conference where the Justices consider hundreds of cases and grant certiorari in a handful of them. Certiorari is denied in 97-99% of the cases where it is sought.

ROA filed an amicus curiae ("friend of the court") brief in the Supreme Court, urging the Court to grant certiorari. Brian Lawler, Torres' attorney, has said that the ROA amicus brief was a critical part of the

[33] *Texas Department of Public Safety v. Torres,* 583 S.W.3d 221, 223 (Tex. App. Corpus Christi; Nov. 20, 2018).

successful effort to persuade the Supreme Court to agree to hear and decide the *Torres* case.

The Supreme Court granted certiorari in *Torres* in December 2021. ROA filed a new amicus brief on the merits. The oral argument was held in March 2022. The decision came down on 6/29/2022, at the end of the Supreme Court's 2021-22 term. 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.
>
> 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)).
>
> 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).

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.[34]

[34] *Torres v. Texas Department of Public Safety,* 597 U.S. 580, 584-85 (2022).

As a result of *Torres,* State courts in Texas and the other 49 States are now required to hear and adjudicate USERRA claims against State agencies as employers, without regard to State law or State claims of sovereign immunity. This is exceedingly important because many National Guard and Reserve part-timers have civilian jobs working for State agencies.[35]

After the Supreme Court decided *Torres* on 6/29/2022, the Supreme Court remanded the case to the Court of Appeals of Texas, 13th District. That intermediate appellate court remanded the case back to the State trial court in Corpus Christi. A jury trial was held in September 2023, and Torres won, getting a judgment for $2.49 million in back pay plus prejudgment interest, attorney fees, and other relief. The TXAG has appealed again to the intermediate appellate court. This time, the appeal will have to be on the merits, because the United States Supreme Court has definitively resolved the sovereign immunity issue.

We will keep the readers informed of further developments in this interesting and important case.

Q: What about local governments?

A: The final subsection of section 4323 provides: "In this section [for USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[36] The term "political subdivision" has been defined as follows:

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[35] *See* *https://www.bing.com/search?q=What+percentage+of+Reserve+and+National+Guard+service+members+have+civilian+jobs+working+for+state+governments%3F&form=ANNTH1&refig=1c6482a2e80049eaa7141d7869324718&pc=HCTS*.

[36] 38 U.S.C. § 4323(i).

> POLITICAL SUBDIVISIONS are local governments created by the states to help fulfill their obligations. Political subdivisions include counties, cities, towns, villages, and special districts such as school districts, water districts, park districts, and airport districts. In the late 1990s, there were almost 90,000 political subdivisions in the United States.[37]

An individual who is claiming that his or her USERRA rights have been violated by a political subdivision can sue that political subdivision in federal court, in his or her own name, and with his or her own attorney. This is just like suing a private employer.[38]

Q: Why are political subdivisions treated differently from States?

A: Because political subdivisions do not have 11th Amendment immunity, like States do.

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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

[37] *See https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/political-subdivisions.*

[38] *See* Law Review 23011 (March 2023) for a detailed description of USERRA's enforcement mechanism with respect to private employers.

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).[39]

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 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, federal 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.

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

If you are now serving or have ever served in any one of our nation's eight[40] uniformed services, you are eligible for membership in ROA,[41] 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 https://www.roa.org/page/memberoptions.

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
1 Constitution Ave. NE
Washington, DC 20002[42]

[40] Congress recently established the United States Space Force as the eighth uniformed service.
[41] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.
[42] You can also contribute on-line at www.roa.org.