LAW REVIEW[1] 22001
January 2022 • Updated July 2022

Supreme Court Agrees to Hear an Important Case about USERRA and the Sovereign Immunity of State Governments

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About Sam Wright

1.1.1.7—USERRA applies to state and local governments
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[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "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 am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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

[3]Lauren, a member of ROA, is in her third year at Baylor Law School and is a Second Lieutenant in the Marine Corps. After she graduates from law school and passes the Texas bar exam, she will go on active duty in the Marine Corps. Military title used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. Government.

***Texas Department of Public Safety v. Torres,* 583 S.W.3d 221 (Tex. App.—Corpus Christi-Edinburg 2018), *pet denied*, No. 19-0107, 2020 Tex. LEXIS 518 (Tex. June 5, 2020), *cert. granted,* No. 20-603, 2021 U.S. LEXIS 6281 (Dec. 15, 2021).**

***Clark v. Virginia Department of State Police,* 793 S.E.2d 1 (Va. 2016), *certiorari denied,* 138 S. Ct. 500 (2017).**

Q: I am a retired Army Reserve Colonel[4] and a life member of the Reserve Organization of America (ROA).[5] I am also a volunteer ombudsman for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). For years, I have read your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I regularly utilize your articles in my ESGR work.

Recently, ROA headquarters has distributed to me and other ROA members a press release and other communications about the case of *Torres v. Texas Department of Public Safety* and about the decision of the United States Supreme Court to add this case to its docket. I am confused about one issue, and perhaps you can explain it to me.

As I understand the facts, Leroy Torres was a Captain in the Army Reserve and a State police officer when he was called to active duty and deployed to Iraq. He left his civilian job to report to active duty as ordered, and he met the five USERRA conditions for reemployment.[6] While deployed in the combat theater, Torres was exposed to toxic "burn pit" smoke, and as a result he suffered from constrictive bronchiolitis, a disabling lung disease, and he eventually was medically retired from the Army with a service-connected disability. He returned to work for the Department of Public Safety (DPS), but only briefly. His serious disability made it impossible for him to serve as a police officer, and DPS forced him to resign.

If Torres was too disabled to work as a police officer, why did he have reemployment rights under USERRA?

A: Because Torres met the five USERRA conditions, and because he returned from his period of service with a disability he incurred during the period of service, his employer (the State of

[4]The factual set-up for this article is hypothetical but realistic.

[5]In 2018, members of the Reserve Officers Association amended the organization's constitution and made all military personnel, from E-1 through O-10, eligible for full membership, including voting and running for office in the organization. The organization adopted the "doing business as" (DBA) name of Reserve Organization of America to emphasize that the organization represents and seeks to recruit as members enlisted personnel as well as officers.

[6]Torres left his civilian job to perform service in the uniformed services, and he gave the civilian employer prior notice. His cumulative periods of uniformed service, relating to his employment relationship with the State of Texas, did not exceed USERRA's five-year limit, and he was released from the period of service without having received a disqualifying bad discharge from the Army. After his release from active duty, he made a timely application for reemployment with the Department of Public Safety. Please see Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

Texas) was required to make reasonable efforts to accommodate his disability in the position that he left (police officer) and would have continued to hold but for his call to the colors. If the disability could not reasonably be accommodated in that position, the employer was required to reemploy the returning disabled veteran in another position for which he or she is qualified *or can become qualified with reasonable employer efforts.* It is probably true that Torres could not return to his position as a police officer, but the State of Texas had a legal obligation to reemploy Torres in some other position and to give him training to help him qualify for that other position. The State of Texas violated USERRA by failing to comply with that obligation.

The pertinent subsection of USERRA is as follows:

> In the case of a person who has a disability incurred in, or aggravated during, such [uniformed] 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*
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> (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 the circumstances of such person's case.[7]

Q: Why did Captain Torres not receive his USERRA entitlements?

A: Through his counsel[8] and through ESGR, Captain Torres patiently explained to DPS and the State of Texas their obligations under USERRA, but the State insisted that it is exempt from being sued under the hoary doctrine of sovereign immunity, which has been explained as follows:

> *The legal protection that prevents a sovereign state or person from being sued without consent.*
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> Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong.

[7]38 U.S.C. § 4313(a)(3) (emphasis added).

[8]Lieutenant Colonel Brian Lawler, USMCR (Ret.), a life member of ROA and an attorney in San Diego with a nationwide USERRA practice, represents Captain Torres in this action.

Suits against the United States

In early American history, the courts supported the traditional view that the United States could not be sued without congressional authorization.[9] This immunity applied to suits filed by states as well as individuals.[10] Thus, for many years, those who had contract and tort claims against the government had no legal recourse except through the difficult, inconvenient, and often tardy means of convincing Congress to pass a special bill awarding compensation to the injured party on a case-by-case basis. The federal government first began to waive its sovereign immunity in areas other than torts. In 1855 Congress established the United States Court of Claims, a special court created to hear cases against the United States involving contracts based upon the Constitution, federal statutes, and federal regulations. In1887 Congress passed the Tucker Act, to authorize federal district courts to hear contractual claims not exceeding $10,000 against the United States.[11] Other special courts were later created for particular types of non-tort claims against the federal government. The U.S. Board of General Appraisers was created in 1890 and was replaced in 1926 by the U.S. Customs Court, and the U.S. Court of Customs Appeals was created in 1909 and then replaced in 1926 by the U.S. Court of Customs and Patent Appeals. These courts handled complaints about duties levied on imports. The Board of Tax Appeals, created in 1924 to handle internal revenue complaints, was replaced in 1942 by the Tax Court of the United States.

Not until 1946, however, did Congress address the issue of liability for torts committed by the government's agencies, officers, or employees. Until 1946, civil servants could be individually liable for torts, but they were protected by sovereign immunity from liability for tortious acts committed while carrying out their official duties. But the courts were not always consistent in making that distinction.

Finally, in 1946 Congress passed the Tort Claims Act, which authorized the U.S. district courts to hold the United States liable for torts committed by its agencies, officers, and employees just as the courts would hold individual defendants liable under similar circumstances.[12] This general waiver of immunity had a number of exceptions, however …

By 1953 the U.S. Supreme Court had drawn distinctions under the Tort Claims Act between tortious acts committed by the government at the planning or policy-making stage and those committed at the operational level.

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[9]*Chisholm v. Georgia,* 2 U.S. 419 (1793); *Cohens v. Virginia,* 19 U.S. 264, (1821).
[10]*Kansas v. United States,* 204 U.S. 331 (1907).
[11]28 U.S.C. § 1346(a)(2); 28 U.S.C.A. § 1346 (a)(2).
[12]28 U.S.C.A. §§ 1346(b), 2671-2678.

In *Dalehite v. United States,* the Supreme Court held that the Tort Claims Act did not waive sovereign immunity as to tortious acts committed at the planning stage; immunity applied only to torts committed at the operational stage.[13]

Congress also waived sovereign immunity in cases seeking injunctive or other nonmonetary relief against the United States in a 1976 amendment to the Administrative Procedure Act.[14]

Suits against the States

The doctrine of sovereign immunity applies to state governments within their own states, but it was not initially clear whether states had immunity as to suits involving other states or citizens other states. In the 1793 case of *Chisholm v. Georgia,* the U.S. Supreme Court permitted a North Carolina citizen to sue Georgia for property that Georgia had seized during the American Revolution.[15] The states' strong disapproval of the Court's decision in *Chisholm* led to the prompt adoption of the U.S. Constitution in 1795. The Eleventh Amendment specifically grants immunity to the states as to lawsuits by citizens of other states, foreign countries, or citizens of foreign countries in the federal courts. This imitation was judicially extended to include suits by a state's own citizens in *Hans v. Louisiana*.[16]

The 11th Amendment to the United States Constitution (ratified in 1795) reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[17]

Those of us who drafted USERRA[18] understood, based on the case law in effect at that time, that Congress could abrogate the 11th Amendment immunity of States, provided Congress were sufficiently clear in expressing the intent to abrogate 11th Amendment immunity. Accordingly, we included this statement in the text of USERRA: "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section."[19]

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[13]346 U.S. 15 (1953).
[14]5 U.S.C.A. §§ 702–703.
[15]2 U.S. 419 (1793).
[16]134 U.S. 1 (1890); U.S. CONST. amend. VI. *See Sovereign Immunity,* THE FREE DICTIONARY BY FARLEX https://legal-dictionary.thefreedictionary.com/Sovereign+Immunity (last visited Dec. 21, 2021).
[17]U.S. CONST. amend XI. Yes, it is capitalized just that way, in the style of the late 18th Century.
[18]As I have explained in footnote 2, I was one of two Department of Labor (DOL) attorneys who drafted the interagency task force work product that became USERRA in 1994, with only a few changes.
[19]38 U.S.C. § 4323(d)(3).

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA, and President Bill Clinton signed it into law on October 13, 1994.[20] As originally enacted in 1994, USERRA permitted an individual to sue a State (as an employer) in Federal court, alleging that the State had violated USERRA in Federal court.[21]

In 1996, two years after the enactment of USERRA, the Supreme Court decided that Congress, when acting under the authority of the Constitution's Interstate Commerce Clause[22] did not have the power to abrogate the 11th Amendment of States.[23] Applying *Seminole Tribe,* the United States Court of Appeals for the 7th Circuit[24] held that USERRA (as enacted in 1994) was unconstitutional insofar as it permitted an individual service member or veteran to sue a State in Federal court.[25] Later that same year (1998), Congress responded to *Velasquez* by amending USERRA, adding the following subsection: "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."*[26]

What does the phrase "in accordance with the laws of the State" mean? Appearing as amicus curiae ("friend of the court") in the New Mexico Supreme Court, the Virginia Supreme Court, and recently in the United States Supreme Court, ROA and the United States Department of Justice (DOJ) separately but similarly argued that section 4323(b)(2) of USERRA means that State courts *must* hear and adjudicate USERRA claims made against State government agencies as employers. We should look to State law only to determine in which State court to file the lawsuit and exactly how one initiates a civil action in the State courts of that specific State.

USERRA and the 11th Amendment in the Virginia Supreme Court

Jonathan R. Clark is an Army Reserve officer and a member of ROA. On the civilian side, he is a Virginia State Police (VSP) officer. He applied for a VSP promotion but was not selected. He claimed that the VSP discriminated against him based on his membership in the Army Reserve, his performance of military service, and his obligation to perform future service. He claimed that, but for his Army Reserve membership and service, he would have received the promotion.

Clark sued the VSP in the Circuit Court of Chesterfield County, Virginia. The VSP argued that the suit should be dismissed based on Virginia's sovereign immunity. Judge Lynn S. Brice agreed with Virginia's argument and dismissed Clark's lawsuit for want of jurisdiction.

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[20]*See supra* note 2.
[21]*See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).
[22]The United States Constitution gives Congress the power, through legislation, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
[23]*See Seminole Tribe of Fl. v. Florida,* 517 U.S. 44 (1996).
[24]The 7th Circuit is the Federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[25]*See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).
[26]38 U.S.C. § 4323(b)(2) (emphasis added).

Clark appealed to the Virginia Supreme Court, which affirmed Judge Brice's dismissal of the case. The State high court agreed with our argument that section 4323(b)(2) means that State courts *must* hear and adjudicate USERRA claims against State agencies as employers, but the Virginia Supreme Court held that USERRA was unconstitutional insofar as it commanded the State courts to hear and adjudicate these claims. The State high court quoted a single sentence from a 1999 United States Supreme Court decision: "We hold that the powers delegated to Congress under Article 1 of the United States Constitution do not include the power to subject non-consenting States to suits for damages in State courts."[27]

We believe and we argued that *Alden v. Maine* is distinguishable, but the Virginia Supreme Court held that only the United States Supreme Court, not a State high court, should try to distinguish or overrule a Supreme Court precedent. Clark applied to the United States Supreme Court for a writ of certiorari (discretionary review), and ROA and DOJ filed amicus curiae briefs urging the Supreme Court to grant certiorari, but the Supreme Court denied certiorari and the *Clark* case became final in 2017.

***Torres* is similar, but this time the Supreme Court granted certiorari.**

As I have explained above, the State of Texas violated USERRA when it refused to make accommodations for Leroy Torres' service-connected disability (constrictive bronchiolitis). Through his counsel, Brian Lawler, Torres filed suit against the DPS in state court in Corpus Christi, Texas. The Attorney General of Texas argued that the case should be dismissed based on the State's sovereign immunity, but the trial judge ruled against the State Attorney General's motion.

The Texas Attorney General appealed to Texas' intermediate appellate court, and, with leave of court, the Attorney General's appeal was interlocutory.[28] The intermediate appellate court agreed with the State Attorney General's claim that the case should be dismissed for want of jurisdiction, based on sovereign immunity.

Like the United States Supreme Court, the Texas Supreme Court only hears the cases that it wants to hear. In an unusual procedure, the Texas high court first agreed to hear the *Torres* case and then changed its mind and denied review. The *Torres* case became final in the Texas court system in 2018.

The final appellate step available to Captain Torres was to apply to the Supreme Court for a writ of certiorari. Applying for certiorari is a very long shot—the Court grants certiorari in only about 1% of the cases where it is sought. If four or more of the nine Justices vote for certiorari in a conference, certiorari is granted. Otherwise, certiorari is denied, and the case is over.

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[27] *Alden v. Maine,* 527 U.S. 706, 712 (1999).

[28] Ordinarily, a party who loses a non-dispositive ruling is not permitted to appeal until the case is over at the trial court level. The Texas Attorney General argued, and the judge agreed, that the State of Texas should not be required to defend Torres' claim on the merits until the jurisdictional issue was resolved by the appellate court. There has been no adjudication on the merits of Torres' claim that the State of Texas violated USERRA.

The Supreme Court granted certiorari in the *Torres* case, and that is a big deal. ROA drafted and filed an amicus curiae brief, urging the Court to grant certiorari. At the end of this article, you will find a copy of our brief.

Now that the Supreme Court has granted certiorari, there will be new briefs, on the merits, and an oral argument before the nine Justices. ROA will file a new brief on the merits, urging the Court to reverse the decision of the Texas intermediate court. We will keep the readers informed of development in this vitally important case.[29]

Here is a copy of ROA's amicus curiae brief in the Supreme Court, urging the Court to grant certiorari:

UPDATE—JULY 2022

On 6/29/2022, the Supreme Court released its decision in this case, and Captain Torres won. *Torres v. Texas Department of Public Safety,* 2022 U.S. LEXIS 3221 (June 29, 2022). By a 5-4 margin, the Supreme Court held that State courts are required to hear and adjudicate claims that State agencies, as employers, have violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See generally* Law Review 22046 (July 2022) for a detailed discussion of this great victory.

Q: Does this mean that the case is over?

A: No. The Texas trial court did not hear the *Torres* case on the merits and decide against Captain Torres. The State of Texas Department of Public Safety (DPS), represented by the Attorney General of Texas, filed a motion to dismiss for lack of jurisdiction, arguing that DPS, as a State agency, enjoyed sovereign immunity and could not be sued. The trial judge denied the motion to dismiss but then permitted DPS to file an interlocutory appeal[30] and the Texas intermediate appellate court ruled that Texas had sovereign immunity and ordered that the case be dismissed and not proceed to trial. Captain Torres asked the Texas Supreme Court to review the decision of the intermediate court, but the Texas Supreme Court declined to hear the case.

Captain Torres applied to the United States Supreme Court for a writ of certiorari (discretionary review), and the nation's high court granted certiorari on 12/15/2021. The oral argument at the

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[29]This case is exceedingly important because 10% of National Guard and Reserve part-timers have civilian jobs working for State government agencies as employers. *See* "Too Much to Ask? Supporting Employers in the Operational Reserve Era" by Dr. Susan M. Gate. The article was published in the November-December 2013 issue of *The Officer,* ROA's magazine.

[30] Ordinarily, a party cannot appeal until the trial court has ruled on the merits of the case, but when an interlocutory appeal is permitted, the party is permitted to appeal on a preliminary matter, without waiting for a trial court ruling on the merits.

United States Supreme Court was held on 3/29/2022, and the Supreme Court released its decision on 6/29/2022.

The United States Supreme Court remanded the case back to the Texas court system. Now, there will be a trial on the merits in State court in Corpus Christi, Texas. We will keep the readers informed of further developments in this most important case.

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

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

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

If you are now serving or have ever served in any one of our nation's eight31 uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www. roa.org or call ROA at 800-809-9448.

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

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Congress recently established the United States Space Force as the 8th uniformed service.