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DC Is Not a State, But USERRA Treats it as a State

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About Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

The following excerpts from the text of the Uniformed Services Employment and Reemployment Rights Act (USERRA) will help us understand the status of the District of Columbia (DC) government under this law:

> The term "State" means each of the several States of the United States, *the District of Columbia,* the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof.[3]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 very 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 1700 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 43 years, I have worked 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 36 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] 38 U.S.C. 4303(14) (emphasis supplied).

> A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title 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 complain is submitted and commence an action for relief under this chapter 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.*[4]
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> 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 in accordance with the laws of the State.[5]
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> In this section [for purposes of USERRA enforcement], the term "private employer" includes a political subdivision of a State.[6]

Q: I am an attorney in Washington, DC, and I have a client who was a police officer for the Metropolitan Police Department (MPD), the police department for the District of Columbia (DC). My client is a Captain in the Army Reserve (USAR), and his MPD supervisors gave him a hard time about his absences from work for USAR training and service, although those absences were clearly protected by USERRA. I have read with great interest several of your "Law Review" articles about that law.

I believe that MPD's decision to fire my client was motivated, at least in part, by his USAR service and his absences from work necessitated by his service. I believe that the firing violated section 4311 of USERRA.[7] I am planning to sue the MPD on behalf of this client. Do I need to file this case in the United States District Court for the District of Columbia (USDC-DC) or in the Superior Court of the District of Columbia (SUPCT-DC)?

A: You need to file the lawsuit in SUPCT-DC because section 4303(14) of USERRA[8] expressly provides that DC is to be treated as a state, for USERRA purposes, although DC is not a state, and because section 4323(b)(2)[9] expressly provides that a USERRA lawsuit against a state, as an

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[4] 38 U.S.C. 4323(a)(1) (emphasis supplied).
[5] 38 U.S.C. 4323(b)(2).
[6] 38 U.S.C. 4323(i).
[7] 38 U.S.C. 4311.
[8] 38 U.S.C. 4303(14). This subsection is quoted above.
[9] 38 U.S.C. 4323(b)(2). This subsection is quoted above.

employer, is to be "brought in a State court of competent jurisdiction in accordance with the laws of the State." That "State court of competent jurisdiction" is SUPCT-DC.

Q: If DC is not a State, what is it?

A: Among the United States Constitution's grants of authority to Congress is the following: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, become the Seat of the Government of the United States."[10]

Under this provision, Congress and the President comprehensively governed the local affairs of DC until Congress enacted the District of Columbia Home Rule Act of 1973, just 47 years ago.[11] Under that federal statute, the DC Government has a measure of autonomy, but there remain serious limitations:

> Under the Home Rule government, however, Congress reviews all legislation passed by the [DC City] Council before it can become law and retains authority over the District's budget. Also, the President appoints the District's judges, and the District still has no voting representation in Congress. Because of these and other limitations on local government, citizens continue to lobby for the authority held by all 50 States.[12]

Q: What is the 11th Amendment of the United States Constitution? How is it an impediment to enforcing USERRA against State government employers?

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[13] and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[14]

The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),[15] Congress expanded the application of the VRRA to include State and local governments. Applying the reemployment statute to State and local governments is even more important today than it was

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[10] United States Constitution, Article I, Section 8, Clause 17. Yes, it is capitalized just that way, in the style of the late 18th Century.

[11] *See* https://dccouncil.us/dc-home-rule/.

[12] Id.

[13] Public Law 103-353, 108 Stat. 3149. The citation means that USERRA was the 353rd new Public Law enacted during the 103rd Congress (1993-94), and you can find this Public Law, in the form that it was enacted, in Volume 108 of *Statutes at Large,* starting on page 3149. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

[14] Public Law 76-783, 54 Stat. 885.

[15] Public Law 93-508, 88 Stat. 1593.

in 1974, because according to a Rand Corporation computation ten percent of Reserve Component (RC) part-timers have civilian jobs for State government agencies and another 11 percent for political subdivisions of States (counties, cities, school districts, and other units of local government).[16]

Under the "Total Force Policy" adopted by the Department of Defense (DOD) in 1974, our country is more dependent than ever before on RC part-timers.[17] State and local governments, as well as the Federal Government and private employers, must comply with USERRA.

As I have explained in detail in Law Review 16070 (July 2016) and other articles, sovereign immunity or "the king can do no wrong" has been an important part of the common law of Great Britain and the United States for almost a millennium. Sovereign immunity means that you cannot sue the sovereign (State or federal) without the sovereign's consent. It is only in the last century, since about 1920, that there have been significant inroads into sovereign immunity, as Congress and the State legislatures have enacted statutes waiving sovereign immunity for certain kinds of claims. There remain many exceptions to and conditions upon waivers of sovereign immunity of State and federal government agencies.

In one of its first published decisions, the United States Supreme Court held that Mr. Chisholm (a citizen of South Carolina) could sue the sovereign State of Georgia in the nascent federal court system.[18] The reaction was immediate and negative. Congress quickly proposed, and the States quickly ratified a constitutional amendment, as follows:

> The Judicial power of the United States shall not be construed 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.[19]

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[16] *See* Appendix C of "Supporting Employers in the Operational Forces Era," available at www.rand.org/pubs/research_reports/RR152.html.

[17] Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of actively participating RC part-timers is almost equal to the number of persons serving full-time in the Active Component (AC) of the armed forces, so RC members account for almost half of the nation's pool of trained military personnel available in an emergency. Almost one million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001. More than 300,000 of them have been called up more than once, and more than 5,000 of them have made the ultimate sacrifice in overseas military operations since 9/11/2001. The RC has been transformed from a "strategic reserve" that is available only for World War III (which thankfully never happened) to an "operational reserve" that is routinely called upon to participate in intermediate military operations like Iraq and Afghanistan. The days when RC service can be characterized as "one weekend per month and two weeks in the summer" are gone, and probably gone forever. Without a law like USERRA, the services would not be able to recruit and retain enough RC and AC personnel to defend our country. Please see Law Review 14080 (July 2014).

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

[19] United States Constitution, Amendment 11, ratified February 7, 1795. Yes, it is capitalized just that way, in the style of the late 18th Century.

Although the 11th Amendment by its terms only forbids a suit against a State by a citizen of *another* State, the Supreme Court long ago held that the 11th Amendment also bars a suit against a state by a citizen of *the same State.*[20]

Those of us who drafted USERRA, especially Susan M. Webman and I,[21] were under the impression, based on the Supreme Court case law in effect at the time, that Congress could abrogate the 11th Amendment immunity of States, so long as it did so deliberately and explicitly. Accordingly, we included specific language showing the intent of Congress to abrogate the 11th Amendment immunity of State government employers.[22]

Ms. Webman and I did not anticipate an important Supreme Court decision that was decided two years after USERRA was enacted.[23] In that case, the Supreme Court held that a statute enacted by Congress under the authority of Article I, Section 8, Clause 3[24] did not and could not abrogate the 11th Amendment immunity of the State of Florida.

After the Supreme Court decided *Seminole Tribe,* it was thought that the principle enunciated by the Supreme Court meant that legislation enacted by Congress under any of the 18 clauses of Article I, Section 8 could not abrogate 11th Amendment immunity, because the Constitution was ratified in 1789 and the 11th Amendment in 1795. Accordingly, in 1998 the 7th Circuit[25] held that USERRA was unconstitutional insofar as it permitted an individual claiming USERRA rights to sue a State government employer in federal court.[26]

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. The 1998 amendments provide for two separate ways to enforce USERRA against a State government employer. The first way is through section 4323(a)(1), which provides as follows:

> A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title 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

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[20] *See Hans v. Louisiana,* 134 U.S. 1 (1890).
[21] Please see footnote 2.
[22] USERRA's section 4323(d)(3) provides: "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this chapter." 38 U.S.C. 4323(d)(3).
[23] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).
[24] Article I, Section 8, Clause 3 gives the Congress the power to enact legislation "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is one of 18 separate clauses that give Congress the authority to enact certain kinds of legislation.
[25] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[26] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

> 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 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*.[27]

The final sentence of section 4323(a)(1), italicized above, was added in 1998.

When the Department of Justice (DOJ) initiates a USERRA lawsuit against a State government employer, the named plaintiff is the United States, not the individual USERRA claimant.[28] This solves the 11th Amendment problem, because the 11th Amendment bars a suit against a state *by an individual.* The 11th Amendment does not bar a suit against a State by the United States. In at least two cases, DOJ has used this provision successfully to sue a State government employer for violating USERRA and to prevail.[29]

When the employer-defendant is a State government agency, getting DOJ to bring the lawsuit in the name of the United States is the preferred solution. The problem with this approach is that it means that you must get to DOJ through the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and all too often investigators for that agency do slipshod investigations and simply accept as gospel the legal and factual assertions of attorneys representing employers, and close cases as "no merit" even when those cases have merit.[30]

The other way to enforce USERRA against a State government employer is through section 4323(b)(2) of USERRA, which provides: "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.*"[31]

What is the meaning of the phrase "in accordance with the laws of the State?" There are two possible interpretations:

a. You can sue the State in State court if state law permits such a suit.

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[27] 38 U.S.C. 4323(a)(1) (emphasis supplied).

[28] When DOJ initiates a USERRA lawsuit against a private employer or a political subdivision of a state, the named plaintiff is the individual veteran or service member. I have proposed that Congress should amend the law to make the United States the named plaintiff in any case brought by DOJ, but Congress has not made that change.

[29] *See United States v. Alabama Department of Mental Health & Mental Retardation,* 673 F.3d 1320 (11th Cir. 2012); *United States v. State of Nevada,* 817 F. Supp. 2d 1230 (D. Nev. 2011).

[30] Please see Law Reviews 0611, 0701, 0758, 1152, 1181, and 13126. As I explained in Law Review 16099, there has been some recent improvement at DOL-VETS, but much remains to be done.

[31] 38 U.S.C. 4323(b)(2) (emphasis supplied).

b. You can sue the State in state court regardless of whether the State law permits lawsuits against the State, because Congress has decided that such lawsuits are permitted. We must look to the State law only to determine *in which State court* to bring the lawsuit.[32]

If State law permits you to sue the State in State court, section 4323(b)(2) of USERRA is meaningless. If State law permits such a suit, you do not need permission from Congress to bring it. The rules of statutory construction do not favor an interpretation that renders a whole subsection meaningless. Accordingly, I believe that the second interpretation is the correct one.

The Fair Labor Standards Act (FLSA) is the federal statute that requires employers to pay at least the federal minimum wage and that requires employers to pay non-exempt employees 150% of their usual hourly wage for hours worked beyond 40 in a week. The FLSA applies to State and local governments as well as private employers.

The 11th Amendment has made it difficult or impossible to enforce the FLSA against many State governments. Accordingly, Congress amended the FLSA to require State courts to hear and adjudicate FLSA claims against State government agencies and to enforce the FLSA. The Supreme Court declared that FLSA amendment to be unconstitutional.[33] Does that mean that section 4323(b)(2) of USERRA is unconstitutional if it means that the State courts *must* enforce USERRA against State government agencies? In my opinion, no. I believe that *Alden v. Maine* is distinguishable.

A possible interpretation of *Seminole Tribe of Florida* is that a statute of Congress based on constitutional authority that pre-dates 1795 (when the 11th Amendment was ratified) cannot abrogate the 11th Amendment immunity of States. Under this interpretation, any statute that is based on one of the 18 clauses of Article I, Section 8 of the Constitution (ratified in 1789) cannot overcome the 11th Amendment (ratified in 1795). On the other hand, a federal statute that is based on Section 5 of the 14th Amendment (ratified in 1868) can overcome the 11th Amendment, because 1868 was after 1795.

I believe that the above interpretation of *Seminole Tribe* is overly simplistic and incorrect. If a federal statute is based on a clause of Article I, Section 8 that is *central to the role of the Federal Government, rather than the States, the statute can abrogate the 11th Amendment immunity of states.*

The federal Bankruptcy Code is based on Clause 4 of Article I, Section 8, and that clause gives Congress the authority "To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." In a case decided ten years after *Seminole*

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[32] As *amicus curiae* (friend of the court) in the Virginia Supreme Court and the New Mexico Supreme Court, DOJ has argued for this interpretation. Please see Law Review 16124 (December 2016).
[33] *Alden v. Maine,* 527 U.S. 706 (1999).

Tribe, the Supreme Court upheld, over an 11th Amendment challenge, the power of Congress, under the Bankruptcy Code, to force State government entities to respect the power of federal courts to discharge debts owed to State agencies.[34]

Nothing is more central to the role of the Federal Government, rather than the States, than national defense. Accordingly, I believe that *Velasquez v. Frapwell* was wrongly decided by the 7th Circuit. I think that Congress should reconsider the 1998 amendment. Congress should reaffirm that an individual claiming USERRA rights against a State government employer can sue the State in federal court, in his or her own name and with his or her own lawyer. This will set up a constitutional question that the Supreme Court will be forced to answer. The States must not be allowed to hide behind hoary doctrines of sovereign immunity and to escape from the obligation to comply with USERRA.

Q: How is DC different?

Because DC is not a State, it clearly does not have sovereign immunity under the 11th Amendment. But USERRA defines the term "State" as follows: "The term 'State' means each of the several States of the United States, *the District of Columbia,* the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof)."[35]

Congress first enacted the right to reemployment on September 16, 1940. The very first version of the federal reemployment statute provided the right to reemployment for persons who were drafted under that same statute (the Selective Training and Service Act of 1940) "if such [pre-service] position was in the employ of the United States Government, its territories or possessions, *or the District of Columbia."*[36] Until 1994, when Congress enacted USERRA as a long-overdue update and rewrite of the 1940 statute, the DC Government was treated as part of the Federal Government for purposes of enforcement of the reemployment statute. The 1993 report of the Senate Veterans' Affairs Committee (part of USERRA's legislative history) makes clear that treating DC as a State, rather than part of the Federal Government, was intentional:

> Under present section 4303 of title 38 [the VRR law], any individual who was employed by an agency in the Federal executive branch *or by the District of Columbia* may appeal a denial of reemployment to the Director of OPM [Office of Personnel Management]. In practice, such complaints usually are heard by the MSPB [Merit Systems Protection Board]. In the Committee bill, as noted in the discussion of definitions in new section 4303 above, employees of the District of Columbia would be treated as employees of a State for

[34] *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006).
[35] 38 U.S.C. 4303(14) (emphasis supplied).
[36] Public Law 783, chapter 720, section 8, 54 Stat. 890. This provision can be found in Appendix S-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. This specific language can be found on page 1680 of the 2019 edition of the *Manual.*

purposes of chapter 43 [USERRA], with enforcement rights being provided under new section 4322 [now 4323], discussed above.[37]

Q: How does USERRA treat political subdivisions[38] of States for purposes of USERRA enforcement?

A: Under section 4323(i) of USERRA,[39] political subdivisions are treated as private employers. This means that an individual claiming that a political subdivision has violated his or her USERRA rights can sue that political subdivision in federal court, in his or her own name and with his or her own lawyer.

Q: Why are political subdivisions of States treated differently from States?

A: Political subdivisions of States do not have immunity from being sued in federal court under the 11th Amendment of the United States Constitution.[40] When Congress amended USERRA in 1998, to account for the *Velasquez* holding that it was unconstitutional insofar as it permitted an individual to sue a State in federal court, Congress wanted to preserve, insofar as possible, the right to sue employers in federal court. Because political subdivisions do not have 11th Amendment immunity, Congress enacted section 4323(i) to permit federal court lawsuits by persons claiming USERRA violations by political subdivisions.

Q: Why was the DC Government not included in the carve-out for political subdivisions?

A: Congress did not consider the DC Government when it amended USERRA in 1998.

Q: Can this oversight be corrected legislatively?

A: Yes. I propose that Congress amend section 4323(i) to read as follows: "In this section, the term 'private employer' includes a political subdivision of a State *and the Government of the District of Columbia.*"[41] I think that USERRA lawsuits against DC Government agencies belong in the United States District Court for the District of Columbia, not in the DC Superior Court. I favor legislation to bring about that result.

Please join or support ROA

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[37] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158) (emphasis supplied), reprinted in Appendix D-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The specific language quoted can be found on pages 882-83 of the 2019 edition of the *Manual.*

[38] Political subdivisions include counties, cities, villages, school districts, and other units of local government.

[39] 38 U.S.C. 4323(i).

[40] *See Northern Insurance Company of New York v. Chatham County,* 547 U.S. 189, 193 (2006).

[41] The italicized language is my proposed amendment.

This article is one of 1900-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.

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Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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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