No. 20-603

IN THE

Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Thirteenth Judicial District

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM, IRAQ AND AFGHANISTAN VETERANS OF AMERICA, PARALYZED VETERANS OF AMERICA, VETERANS OF FOREIGN WARS, AND VIETNAM VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading nonprofit organizations dedicated to ensuring that our nation's 25 million veterans are provided with the benefits and support they have earned "serv[ing] their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). *Amici* have been instrumental in the passage of important veterans' rights legislation, regularly advocate for veterans before courts and agencies, and provide critical support to veterans returning to civilian life.

National Veterans Legal Services Program ("NVLSP") is one of the nation's leading organizations advocating for veterans' rights. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs ("VA") and dedicated to ensuring that the government honors its commitment to veterans. NVLSP prepares, presents, and prosecutes service members' and veterans' benefits claims before the VA and the Department of Defense, pursues veterans' rights legislation, and advocates before this and other courts.

Iraq and Afghanistan Veterans of America ("IAVA") is committed to connecting, uniting, and empowering post-9/11 veterans. IAVA has connected more than 1.2 million veterans with resources and community and provided thousands of veterans of all

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[1] Pursuant to Rule 37.2(a), counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici*, its members, or counsel made a monetary contribution to its preparation or submission.

generations with lifesaving and life-changing personalized support. IAVA focuses its efforts on six key priorities affecting post-9/11 veterans: (1) combatting suicide; (2) raising awareness on burn pits and other toxic exposures; (3) supporting women veterans; (4) increasing access to medical cannabis; (5) modernizing the VA; and (6) defending the benefits of the GI Bill.

Paralyzed Veterans of America ("PVA") is a national, congressionally chartered veterans service organization. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of veterans of the armed forces who have experienced spinal cord injury or a disorder (SCI/D). PVA seeks to improve the quality of life for veterans and all people with SCI/D through its medical services, benefits, legal, advocacy, sports and recreation, architecture, and other programs. PVA advocates for quality health care, research and education addressing SCI/D, benefits based on its members' military service, and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and citizens with disabilities. PVA has nearly 16,000 members, all of whom are military veterans living with catastrophic disabilities, and provides representation to its members, other veterans, and all people with disabilities throughout the VA claims process and in the federal courts, including the United States Supreme Court.

Veterans of Foreign Wars ("VFW") is a nonprofit veterans' service organization serving over 1.5 million members, comprised of eligible veterans and military service members of the active, guard, and reserve forces. VFW was founded in 1899 when veterans of the

Spanish-American War and the Philippine Insurrection founded local organizations to secure rights and benefits for their service. VFW was instrumental in establishing the Veterans Administration, national cemetery system, and compensation for Vietnam veterans exposed to Agent Orange and for veterans diagnosed with Gulf War Syndrome.

Vietnam Veterans of America ("VVA") is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. As the Vietnam war came to an end and years passed, it became clear that established veterans service organizations had failed to make a priority of the issues of concern for Vietnam veterans. In response, VVA works to put Vietnam veteran issues at the forefront and works to support the rights of veterans returning to their civilian occupations after service.

The issues in this case lie at the core of these organizations' experience and expertise. Each *Amicus* has a strong interest in protecting the rights of veterans, and in promoting the values at the heart of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq*. *Amici* are therefore well positioned to describe how USERRA fits within the full range of benefits Congress has provided to veterans, and the significant harm that will result to thousands of veterans if USERRA's private right of action against state employers is eliminated.

SUMMARY OF ARGUMENT

USERRA's private right of action is critical to veterans like Petitioner Torres, who was discriminated against by a state employer based on a service-related disability. Torres's case is not unique. More than a quarter of all veterans have a service-connected disability, and roughly 40 percent of post-9/11 veterans have a service-connected disability.[2] Veterans with service-related disabilities are more likely to suffer from unemployment and employment discrimination, and hundreds of thousands of veterans like Torres work for state employers.[3]

The undersigned *Amici* have long supported the rights of veterans returning to their civilian occupations after service. Petitioner and other veterans who develop disabling conditions because of their military service have earned the right to re-integrate into the workforce with the dignity and respect they deserve. This includes being able to seek redress in court when they face discrimination based on their military service or service-connected disabilities.

We submit this *amicus* brief because our experience makes us uniquely well-positioned to describe how USERRA fits within the full range of benefits Congress has provided to veterans, and the significant harm that will result to thousands of veterans if USERRA's private right of action against state

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[2] Bureau of Labor and Statistics, U.S. Dep't of Labor, *News Release: Employment Situation of Veterans - 2020*, at 1 (2021), https://www.bls.gov/news.release/pdf/vet.pdf.

[3] *Id.* at 4.

employers is eliminated. We offer four points to inform the Court's consideration in this case.

First, as a threshold matter, the Texas Intermediate Appellate Court erred when it concluded that Plaintiff's USERRA claim was barred by sovereign immunity. States waived sovereign immunity in the plan of the Convention when they ratified the Constitution, which granted Congress "plenary and exclusive" Article I War Powers. *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1871). Inherent in that surrender of sovereignty was a surrender of sovereign immunity against suits authorized by Congress pursuant to its own powers in that field. *See PennEast Pipeline Co., LLC v. New Jersey,* 141 S. Ct. 2244, 2259 (2021).

Second, while not dispositive of the constitutional issue presented, this Court has long recognized the vital importance of a unified national defense and the debt of gratitude we owe our veterans. *Boone v. Lightner*, 319 U.S. 561, 575 (1943). This case presents an opportunity for the Court to affirm the salience of the pro-veteran canon of statutory construction and ensure that future courts interpret laws like USERRA to fulfill their core purpose: to protect the men and women who have risked their lives to protect us.

Third, the USERRA is an important part of the full range of benefits Congress has provided to service members. Indeed, it is difficult to imagine a more important benefit than ensuring that "those who have been obliged to drop their own affairs to take up the burdens of the nation" *Boone v. Lightner*, 319 U.S. 561, 575 (1943), will not face discrimination because of their service when they return to civilian employment. This policy of protecting service members is reflected in the entire veterans benefit system, which provides

an important social safety net and "is imbued with special beneficence from a grateful sovereign." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004).

Finally, and perhaps most importantly, the invalidation of USERRA's private cause of action against state employers leaves hundreds of thousands of public-minded veterans and reservists vulnerable to discrimination based on their military service and service-related disabilities. These Americans not only served their country in the armed forces but also dedicate their careers to public service in state and municipal government jobs. This devotion to public service among veterans is not insignificant: thirty-one percent of employed veterans with a disability work in federal, state, or local government.[4]

As such, the private right of action granted by USERRA protects our most vulnerable veterans: those who became disabled because of their service in the armed forces yet are still committed to continuing their service through employment by state and local governments. Finding this provision of USERRA unconstitutional will leave veterans committed to public service with no recourse in the courts to redress discrimination by their employers. This would be an unconscionable result.

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[4] *Id.*

ARGUMENT

A. The Texas Intermediate Appellate Court Erred in Concluding That Congress Did Not Validly Authorize Private Damages Suits Against State Employers Under USERRA.

The decision below was wrong as a matter of law and should be reversed. Congress's authorization of private damage suits against state employers to redress USERRA violations was a valid exercise of its "tremendous," "drastic," "plenary and exclusive" powers to "raise and support Armies" and "provide and maintain a Navy," U.S. Const. Art. I, § 8, cls. 12–13 (collectively, the "War Powers"). *See United States v. Macintosh,* 283 U.S. 605, 622 (1931), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946) (War Powers "tremendous" and "drastic"); *In re Tarble*, 80 U.S. at 408 (War Powers both "plenary and exclusive"). The text and history of Article I shows that the States agreed "in the plan of the Convention" not to assert sovereign immunity to suits authorized under the War Powers. *PennEast* 141 S. Ct. at 2258 (quoting *Alden v. Maine*, 527 U.S. 706, 729 (1999)). The court below failed even to consider this dispositive issue.

1. The Sovereign Immunity Surrendered by the States in the "Plan of the Convention," Includes Immunity to Suits Authorized Pursuant to Congress's War Powers.

As explained in detail in the Petitioner's brief[5] and the government's amicus brief,[6] the basis for finding an implicit waiver of sovereign immunity for suits authorized pursuant to the War Powers is at least as strong, if not stronger than other instances where this Court has found waivers based on the "plan of the Convention.". *See, e.g., PennEast* 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 755–56 ("The 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding.")).

First, the lack of sovereign authority in the federal Congress to raise an army and its dependence upon the States to provide funding, equipment and manpower during the Revolutionary War was a central "failing[] of the Articles of Confederation." *PennEast*, 141 S. Ct. at 2263; *Arver v. United States,* 245 U.S. 366, 380–81 (1918). Article I of the Constitution addressed this problem by giving Congress sweeping authority to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] . . . the land and naval Forces." U.S. Const. Art. I, § 8, cls. 11–16. Congress's War Powers are "tremendous," "strictly

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[5] Pet. for Writ of Cert. 21; Reply of Pet. 5–9.

[6] Brief for United States as Amici Curiae on Pet. for Writ of Cert., at 9–15.

constitutional," and "brea[k] down every barrier so anxiously erected for the protection of liberty, property and of life." *Macintosh*, 283 U.S. at 622.

Second, unlike other Article I powers, Congress's War Powers are both "plenary and exclusive." *In re Tarble*, 80 U.S. at 408. Ratified by the States, Article I explicitly *withholds* war powers from the States. *See* U.S. Const. Art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War"); *see also Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) ("[T]he Constitution deprives [States] of the independent power to . . . wage war.").

Third, the Tenth Amendment explicitly deprives the States of powers granted to the federal government in the Constitution. U.S. Const. amend. X. (stating that only those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . ."). The Constitution grants Congress a broad array of war powers, including the powers to raise and support Armies and provide and maintain a Navy, effectively stripping the States of these powers. U.S. Const. Art. I, § 8, cls. 12–16. In addition, the Constitution specifically "reserv[ed] to the States" only one limited sphere of control over the militia: "Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* § 8, cl. 16.

Thus, as this Court has previously recognized, "Article I [of the Constitution] divests the States of the traditional diplomatic and military tools that foreign sovereigns possess." *Franchise Tax Bd. of Cal.*, 139 S. Ct. at 1497; *see also Arver*, 245 U.S. at 381 ("In supplying the [war] power it was manifestly intended

to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war.").

Pursuant to these authorities, this Court has consistently rejected state efforts to limit or intrude upon federal war powers. In *Tarble*, for example, the Court denied a State's attempt to retrieve, through a writ of habeas corpus, an individual in military custody for having deserted the Army. 80 U.S. at 408–09. The Court explained that the federal government "can determine, without question from any State authority, how the armies shall be raised," and that "[n]o interference with the execution of this power of the National government . . . could be permitted without greatly impairing the efficiency" of the military. *Id.* at 408. Similarly, in *Case v. Bowles*, the Court rejected a Tenth Amendment challenge to an exercise of Congress's War Powers, 327 U.S. 92, 102 (1946). The Court explained that allowing an assertion of state sovereignty to obstruct federal action in that field would render "the Constitutional grant of the power to make war . . . inadequate to accomplish its full purpose." *Ibid.*

Consequently, the States surrendered their sovereignty over war powers, and more specifically over the field of raising and supporting military forces in the plan of the Convention when they ratified the Constitution. Inherent in that surrender of sovereignty was a surrender of sovereign immunity against suits authorized by Congress pursuant to its own powers in that field. *See PennEast*, 141 S. Ct. at 2259.

2. Like Suits by Other States, Suits by the United States, and Suits Under the Federal Bankruptcy and Eminent-Domain Powers, Petitioner's Suit Authorized by the Federal War Powers "Falls Comfortably Within the Class of Suits to Which States Consented Under the Plan of the Convention."

USERRA allows a service member or veteran to sue a state employer for monetary relief in state court to redress a violation of the statute's military-employment protections. 38 U.S.C. § 4323(b)(2). That provision constitutes a valid exercise of Congress's powers to raise and support Armies and provide and maintain a Navy. U.S. Const. Art. I, § 8, cls. 12–13. Those "'broad and sweeping'" powers permit measures to promote military recruitment. *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.* (FAIR), 547 U.S. 47, 58 (2006) (citation omitted). Indeed, recruitment is central to raising and supporting military forces; "the mind cannot conceive an army without the [personnel] to compose it." *Arver*, 245 U.S. at 377.

Federal benefits to encourage military participation began as early as the Revolutionary War, when in 1780 Congress first offered service pensions to officers to prevent mass desertion. *See* William P. Quigley, The Earliest Years of Federal Social Welfare Legislation: Federal Poor Relief Prior to the Civil War, 79 U. Det. Mercy L. Rev. 157, 159 (2002) (citing 25 Journals of the Continental Congress, 1774–1789, at 581–82 (Gaillard Hunt, ed., 1922) and 18 Journals of the

Continental Congress, 1774–1789, at 957–58 (Gaillard Hunt, ed., 1910)). That tradition continues today. Benefits for servicemembers and veterans are an explicit and critical component of military recruiting. *See e.g.,* GoArmy.com/benefits.html ("You may be surprised by the range of benefits you'll receive in the Army. We offer . . . money for education, family services, and even career support after you serve."); http://myarmybenefits.us.army.mil/Benefit-Library/Federal-Benefits/Uniformed-Services-Employment-and-Reemployment-Rights-Act-(USERRA)?serv=125 (stating that USERRA "prohibits employers from discriminating against past and present members of the uniformed services").

USERRA's creation of employment protections for service members and veterans—enforceable through suits for monetary relief against state and other employers—fits squarely within Congress's authority to raise and support Armies and provide and maintain a Navy. U.S. Const. Art. I, § 8, cls. 12–13. Recruitment and retention are among the explicit goals of USERRA, which explains that it is intended "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. § 4301(a)(1). USERRA's reemployment rights in particular give assurance to reservists and veterans that, no matter who their employer is or what they choose as a civilian career, their service cannot be held against them or adversely affect their seniority, status and pay.

The particular provision at issue here was expressly justified by the need to "maintain[] a strong national defense." H.R. REP. NO. 105-448 at 5 (1998). Courts

interpreting USERRA and its predecessors have consistently recognized that such statutes embody an exercise of Congress's "war powers." *See* 144 Cong. Rec. 4458 (1998) (statement of Rep. Evans) (noting that "the authority for laws involving veterans[']benefits is derived from the War Powers clause"). *Compare* 20 C.F.R. § 1002.2 (2016) (describing USERRA as "the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940" with its "immediate predecessor" being the Veterans' Reemployment Rights Act ("VRRA"), former 38 U.S.C. §§ 2021–27 (1988)), *with United States v. Nugent*, 346 U.S. 1, 9 (1953) (describing the Selective Service Act as "a valid exercise of the war power"); *Reopell v. Massachusetts*, 936 F.2d 12, 15–16 (1st Cir. 1991) (noting that Congress enacted the VRRA pursuant to its war powers); *Peel v. Fla. Dep't of Transp.*, 600 F.2d 1070, 1072 (5th Cir. 1979) (same).

Thus, USERRA is a valid exercise of Congress's War Powers, specifically Congress's power to "raise and support Armies" and "provide and maintain a Navy." U.S. Const. Art. I, § 8, cls. 12–13. As such, private damages suits against state employers based on violations of the USERRA falls comfortably within the class of suits to which States consented under the plan of the Convention." *PennEast*, 141 S. Ct. at 2259.

B. Affirming the Constitutionality of the USERRA Provision at Issue Is Consistent with This Court's Longstanding Deference to Congress When it Legislates Under its War Powers, and with the Court's Pro-Veteran Canon of Statutory Construction.

This Court has long recognized that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *FAIR*, 547 U.S. at 58 (citation omitted). *See also King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991) ("[Statues] for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Boone*, 319 U.S. at 575 (The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (same regarding the Selective Service Act). Although not dispositive of the constitutional issue presented, this Court has also consistently construed statutes Congress passed pursuant to that authority in favor of veterans and the liberal provision of veteran benefits.

1. This Court Has Adopted the Pro-Veteran Canon in Favor of Veterans Seeking Benefits Since at Least the World War II Era.

The pro-veteran canon this Court formulated nearly 80 years ago reflects Congress's longstanding and deep

"solicitude" for veterans. *United States v. Oregon*, 366 U.S. 643, 647 (1961). As the United States deployed millions of people in the struggle against the Axis Powers, this Court first articulated a canon that statutory ambiguity in laws passed to provide veterans with benefits should always be resolved in favor of the veteran. In 1943, Justice Robert Jackson remarked that a federal law granting courts discretion to stay civil cases involving servicemembers must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575. Shortly after World War II's conclusion, Justice William Douglas opined that laws granting benefits to veterans must "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285.

The "pro-veteran canon" is thus described as an overarching principle that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Justice Souter described this canon as putting a "thumb on the scale" in favor of veterans. *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting). The late Justice Antonin Scalia went further, describing the pro-veteran canon as "more like a fist than a thumb, as it should be." Justice Scalia Headlines the Twelfth CAVC Judicial Conference, Veterans L.J. 1 (Summer 2013), http://www.cavcbar.net/Summer%202013%20VLJ%20Web.pdf.

2. Courts Have Consistently Used the Pro-Veteran Canon to Benefit Veterans.

Courts have "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King*, 502 U.S. at 220–21 n.9). A review of courts' application of the pro-veteran canon reveals a longstanding commitment to interpreting laws and regulations to benefit veterans.

To cite but a few examples, this Court has:

- Interpreted a provision of the USERRA's predecessor, the Veterans' Reemployment Rights Act, 38 U.S.C. § 2024(d), to impose no time constraints on when a servicemember retains a right to civilian employment after having to leave and serve in the military. This Court "ultimately read the provision in [the veteran's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220 n.9.

- Held the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 *et seq*. (1980), required employers bound by a collective-bargaining agreement to count military service in calculating seniority in awarding supplemental unemployment benefits. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 205–06

(1980). The law "is to be liberally construed for the benefit of the returning veteran." *Id*. at 196.

- Held that the 120-day deadline to file an appeal with the Court of Appeals for Veterans Claims, 38 U.S.C. § 7266(a), is procedural, rather than jurisdictional, reasoning especially "in light of" the pro veteran canon, the 120-day deadline did not "carry the harsh consequences that accompany the jurisdiction tag." *Henderson*, 562 U.S. at 441.

- Rejected the Secretary of Veterans Affairs' argument that statutory silence should be construed to find veterans at fault for injuries they claim under 38 U.S.C. § 1151. This Court questioned whether interpreting the federal statute in the manner advocated by the Secretary "would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 117–18.

- Acknowledged that the Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, 54 Stat. 1178, is "always to be liberally construed" to veterans' benefit but granted courts discretion to see that the Act's provisions "are not put to such unworthy use" by servicemembers deliberately shielding their obligations behind the law's protections. *Boone*, 319 U.S. at 575.

- Acknowledged that the Selective Training and Service Act of 1940, 54 Stat. 885, a predecessor to USERRA, "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285.

- Interpreted a provision of USERRA's predecessor, the Military Selective Service Act of 1948, 62 Stat. 604, to require provision of employment benefits to veterans that would have accrued with reasonable certainty had the veteran been employed by the employer during their period of service. *Ala. Power Co. v. Davis*, 431 U.S. 581, 589 (1977) (pension benefits); *see also Tilton v. Mo. Pac. R. Co.*, 376 U.S. 169 (1964) (seniority); *Accardi v. Pa. R. Co.*, 383 U.S. 225 (1966) (severance pay).

The text of the Article I War Powers and the history of their framing provide a more than adequate basis to find that the States surrendered their sovereign immunity to suits brought under the USERRA in the plan of the Convention. But if there is any doubt in this case of first impression, *Amici* submit that the Court should put "the thumb," or indeed "a fist" on the interpretive scale in favor of veterans and affirm Congress's authority to provide for their welfare.

C. USERRA Is an Important Part of the Full Range of Benefits Congress Has Provided to Service Members.

As discussed in Section A.2 *supra*, providing benefits to veterans is a critical recruitment and

retention tool. But perhaps more importantly, providing benefits to veterans is an overriding national moral obligation. "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Shinseki*, 556 U.S. at 412. Indeed, this policy of recognizing service is reflected in the entire veterans benefit system, which provides an important social safety net and "is imbued with special beneficence from a grateful sovereign." *Barrett*, 363 F.3d at 1320.

1. Providing Generous Benefits to Veterans Is This Country's Moral Obligation and Provides a Critical Social Safety Net.

What we owe to service members and veterans has at least two theoretical underpinnings: (1) a special obligation to provide for those who risk their lives for our common defense; and (2) a social safety net based on a kind of federal employment.

First, we provide benefits out of a shared belief "that we owe a debt of gratitude to those who served our country, . . . that those who served their country are entitled to special benefits from a grateful nation." *Procopio v. Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (citing 137 Cong. Rec. E1486-01, 137 Cong. Rec. E1486-01, E1486, 1991 WL 65877, *1 ("We owe it to our Vietnam veterans to enact badly needed legislation such as this so that they are given a full and proper 'thank you.'")). President Lincoln's second inaugural address summarized it so well that it became the motto for the Department of Veterans Affairs: the nation should "care for him who shall have borne the battle and for his widow, and his orphan."

See President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in Abraham Lincoln, Selected Speeches and Writings 449, 450 (First Vintage Books, The Library of America ed. 1992)*;* Dep't of Veterans Affairs, *The Origin of the VA Motto*, http://www.va.gov/opa/publications/celebrate/vamotto.pdf. *See also* the Honoring All Veterans Act, H.R. 2806, S. 1313 (117th Cong.) (to amend the VA's mission statement to be gender neutral).

Second, military and veterans' benefits reflect important economic and social policies and serve as a social safety net. The military provides health care and retirement pensions, and the VA provides a wide variety of health care and other benefits to poor wartime veterans who are either completely disabled or over 65 years old. Assistance with reintegration to civilian society, of which USERRA is a part, is a critical component of that economic and social policy. For example, the original GI Bill, passed just two weeks after the Allied invasion of Normandy in 1944, offered federal aid to help veterans buy homes, obtain jobs, and pursue an education, all with the goal of helping returning veterans to re-adjust to civilian life. Although the original GI bill expired in 1956, the Vietnam War necessitated a revival of the program, and the "Montgomery GI Bill" of 1984 established a permanent benefits program for veterans returning from active duty. As a hallmark of our nation's enduring obligation to veterans, the GI Bill was unanimously amended in 2017, making it easier for servicemembers and veterans to qualify for benefits, and eliminating the timeline for a veteran to use their benefits, ensuring they never expire.

The solicitude of Congress for veterans in their post-service careers includes a wide range of vocational rehabilitation and training benefits. These include, for example: federal hiring preferences, 5 U.S.C. § 1302(b); preferences for veteran-owned small businesses in government contracting, 15 U.S.C. § 636(d)(1); and veterans' employment and training services, 38 U.S.C. § 4102 (Veterans Employment and Training Service (VETS)); *see also* 38 U.S.C. § 3100 *et seq.* (Veterans Readiness and Employment Program ("VR&E" or "Chapter 31")); *and* 10 U.S.C. §§ 1143–44 (Employment Assistance), and employment protections, 38 U.S.C. § 4301 *et seq.* (USERRA), discussed in Section C.2 *infra.*

2. USERRA's Reemployment Protections Are an Important Element of Congress's Effort to Ease Veterans' Transition to Civilian Life.

Recognizing that veterans and reserve service members often face disadvantages in their return to civilian employment, Congress passed USERRA "to minimize the disruption to the lives of persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of such service; and . . . to prohibit discrimination against persons because of their service in the uniformed services." *See* 38 U.S.C. § 4301(a)(2)–(3). The statute establishes a broad array of protections for veterans and reserve service members, including the right to take military leave, the right to be reemployed upon return from service, and the right to be free from discrimination based on military service. 39 U.S.C. §§ 4311–13; 4316.

The statute also provides specific protections to veterans who suffer disabilities in their military service. Among these are a requirement that employers make reasonable efforts to accommodate veterans' disabilities and rehire them in the position they would have held absent their military service, or in a position of equivalent "seniority, status, and pay." 38 U.S.C. § 4313(a)(3); *see* 20 C.F.R. § 1002.225. Veterans and reservists who believe they have been discriminated against by a state employer may commence a civil action for damages and equitable relief in a state court of competent jurisdiction. 38 U.S.C. § 4323(b)(2).

USERRA arose out of the Selective Training and Service Act of 1940 ("STSA"), which provided servicemembers with reemployment rights upon their return to civilian life. Originally, STSA applied only to those who left their employment involuntarily as a consequence of being drafted into military service.[7] In 1941, Congress passed the Service Extension Act which expanded the reemployment rights to those who voluntarily enlisted.[8] During the Vietnam War, Congress amended and renamed the STSA the Veterans' Reemployment Rights Act (VRRA), allowing servicemembers to request an unpaid leave of absence from an employer and be guaranteed the same position when they returned.[9] As the draft came to an

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[7] *See* Daniel J. Bugbee, *Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries*, 12 CHAP. L. REV. 279, 281 (2008).

[8] *See* Service Extension Act of 1941, ch. 362, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627 (repealed 1956).

[9] *See* Bugbee, *supra* at 281–82; 38 U.S.C. § 2404(d) (1988), *repealed by* USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (1994).

end in the post-Vietnam era, and the military relied entirely on voluntary enlistment, Congress found it necessary to expand employment protections through USERRA.[10]

D. USERRA's Private Right of Action Against State Employers Protects Hundreds of Thousands of Veterans from Discrimination.

The invalidation of USERRA's private cause of action against state employers leaves hundreds of thousands of Americans, like petitioner Le Roy Torres, vulnerable to discrimination based on their military service and disabilities they incurred defending our nation.

1. An Increasing Number of Veterans Return Home with Service-Connected Disabilities, Exposing Them to Employment Discrimination.

USERRA's right to disability accommodations is a critical part of its employment protections because a large and increasing number of veterans experience disabling conditions. More than a quarter of all veterans have a service-connected disability,[11] and the number of disabled veterans has more than doubled in

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[10] Lisa Limb, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*, 117 MICH. L. REV. 761, 765 (2019).

[11] *Employment Situation of Veterans*, *supra* at 1.

the Gulf War era.[12] Roughly 40 percent of post-9/11 veterans have a service-connected disability, compared to 26 percent of all veterans.[13] Post-9/11 veterans are also more likely to have more severe forms of disability, with 40 percent of disabled post-9/11 veterans receiving a disability rating of 70 or higher from the VA.[14] Veterans with high disability ratings are also more likely to suffer from unemployment.[15] For post-9/11 veterans, those with a disability rating of less than 30 percent faced a 5.8 percent unemployment rate in August 2020, while those with a disability rating of 60 percent or higher, faced a more than double unemployment rate of 11.8 percent.[16] By enacting USERRA, Congress expressly saw a need to protect returning servicemembers from discrimination based on the injuries we can and cannot see.

According to the VA, between a quarter and a third of veterans may experience Post-Traumatic Stress Disorder ("PTSD"). A study examining Vietnam-era veterans estimated that nearly one-third of men and one-quarter of women who served in Vietnam would

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[12] Nat'l Ctr. for Veterans Analysis & Stat., U.S. Dep't of Veterans Affs., *Statistical Trends: Veterans with a Service-Connected Disability, 1990 to 2018*, at 4–7 (2019), https://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL_2018.PDF.

[13] *Employment Situation of Veterans*, *supra* at 1.

[14] U.S. Census Bureau, *Those Who Served: America's Veterans From World War II to the War on Terror*, at 8–10 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/acs-43.pdf.

[15] *Employment Situation of Veterans*, *supra* at 4.

[16] *Id.*

experience PTSD in their lifetimes, even though only about 15 percent had been diagnosed with PTSD at the time of the study.[17] Early studies of veterans of Operation Enduring Freedom and Operation Iraqi Freedom reveal similar rates of PTSD diagnosis.[18]

PTSD is a signature wound of modern warfare, but it is far from the only risk factor for service members and veterans of the post-9/11 era. Traumatic brain injury ("TBI") from improvised explosive devices ("IED") may affect hundreds of thousands of veterans deployed to Afghanistan and Iraq.[19] Exacerbating risk factors for current service members are that they are more likely to be deployed multiple times and receive longer deployments than service members in past eras, which increases acute stress responses, depression, and other behavioral health conditions.[20]

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[17] Jaimie L. Gradus, *Epidemiology of PTSD*, https://www.ptsd.va.gov/professional/treat/essentials/epidemiology.asp (citing The National Vietnam Veterans Readjustment Study, conducted between November 1986 and February 1988). Although the prevalence of currently diagnosed PTSD was lower in women (26 percent), fewer than 8,000 female troops served in Vietnam.

[18] Gradus, *supra*, citing a RAND study conducted in 2008–2009 of post-9/11 veterans.

[19] RAND Corporation, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* (Terri Tanielian & Lisa H Jaycox, ed. 2008), at 4 ("potentially hundreds of thousands more (at least 30 percent of troops engaged in active combat in Afghanistan and Iraq for four months or more) may have suffered a mild TBI as a result of IED blast waves (Glasser, 2007; Hoge et al., 2007; Hoge et al., 2008).").

[20] RAND Corporation, *supra* at 58, 79–80 at tables 3.21 and 3.22.

Nearly 30 percent of reservists have a mental health condition that requires treatment.[21] Depression is also common; according to a 2020 survey by Iraq and Afghanistan Veterans of America ("IAVA") of its members, 44 percent of their members report experiencing suicidal ideation since joining the military.[22] Every day, 17 veterans die by suicide, representing nearly 14 percent of all suicides among U.S. adults.[23]

In addition to the high incidence of mental health conditions among veterans, many also incur physical disabilities from common military practices. For example, during the Vietnam War, the U.S. military regularly used Agent Orange and other commercial and tactical exfoliants, including Agent White and Agent Blue, to clear vegetation for military operations, exposing millions of veterans to carcinogens.[24] In the

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[21] Ronald Kessler, Steven Heeringa, Murray Stein, et al., *Thirty-Day Prevalence of DSM-IV Mental Disorders Among Nondeployed Soldiers in the US Army*, 71 JAMA PSYCHIATRY 504 (2014), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1835338.

[22] IAVA, *IAVA 10th Annual Member Survey*, https://iava.org/survey2020/ (last accessed Feb. 4, 2022).

[23] Dep't of Veterans Affairs, *2021 National Veteran Suicide Prevention Annual Report* (Sept. 2021), https://www.mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf.

[24] Dep't of Veterans Affairs, *Agent Orange exposure and VA disability compensation*, https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/ (last accessed Feb. 4, 2022). *See also* Institute of Medicine (US) Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure, *Blue Water Navy*

more recent Gulf Wars, burn pits were common military installations in Iraq and Afghanistan. Burn pits are open-air combustions of trash, which on military bases can include everything from medical waste to ammunition, that are used when there is "no feasible alternative" for waste disposal.[25] The smoke and fumes from the burn pits contain toxic chemicals and harmful particulate matter. An estimated 3.5 million servicemembers have been exposed to burn pits, causing disabling lung damage in Petitioner Torres and thousands of others.[26] According to IAVA, 86 percent of their members report exposure to burn pits or other toxins. In 2020, 88 percent of respondents to IAVA's survey reported experiencing health conditions that may be related to burn pits or other toxic exposure.[27]

To protect service members, USERRA contemplates accommodations for veterans like Petitioner Torres, who need accommodations due to disabilities incurred during service that may not necessarily meet the definition of "disability" in other contexts (e.g., under the Americans with Disability Act ("ADA")). USERRA's disability protections are broader than the ADA and are triggered by any disability incurred

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Vietnam Veterans and Agent Orange Exposure, Washington, D.C.: National Academies Press, "3, Selected Chemicals Used During The Vietnam War" (2011), https://www.ncbi.nlm.nih.gov/books/NBK209597/.

[25] DoD Instruction 4715.19, *Use of Open Air Burn Pits in Contingency Operations* (Nov. 13, 2018).

[26] IAVA, *IAVA's Big 6*, https://iava.org/burn-pits-2/#burn-pits (last visited Feb. 4, 2022).

[27] IAVA, *IAVA 10th Annual Member Survey*, https://iava.org/survey2020/ (last accessed Jan. 28, 2022).

during or aggravated by military service.[28] When veterans leave service and return to civilian employment, many face difficulties in performing their previous job responsibilities due to injuries, whether physical or mental. The ADA prohibits discrimination against individuals based on disability, but USERRA's provisions further protect veterans seeking reemployment. USERRA is critical to veterans like Petitioner Torres who are unable to perform their previous duties of employment, but are discriminated against and fired, rather than accommodated. These provisions are essential as increasing numbers of veterans return home with service-related injuries, the scope and severity of which are only now becoming better understood through emerging medical studies.

2. The Issue Presented Is of Particular Importance, as Hundreds of Thousands of Veterans and Service Members Are Employed by, and Face Discrimination from, State and Local Agencies.

As servicemembers return to civilian life, many of them choose to continue serving the country through employment by federal, local, or state governments. This devotion to service is particularly notable amongst employed post-9/11 veterans, who are more than twice as likely to work in the public sector as employed nonveterans, at a rate of 28 percent versus 14 percent.[29] This commitment to service is even more significant for veterans with a service-connected

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[28] 20 C.F.R. §§ 1002.225, 1002.226.

[29] *Employment Situation of Veterans*, *supra* at 3.

disability, as 31 percent of employed veterans with a disability work in federal, state, or local government.

Without the protection offered by USERRA, many of these veterans would be subject to discrimination at work with no recourse. In total, more than 800,000 veterans work for their state or local government.[30] Of these 800,000 veterans, more than 250,000 suffer from service-connected disabilities.[31] The federal government claims that a private suit under USERRA is not the only option available to a prospective plaintiff, as the United States can sue a state employer on behalf of a plaintiff through USERRA's administrative mechanism.[32] As Petitioner notes, however, this alternative enforcement mechanism is effectively "useless."[33] In fiscal year 2020, for example, the U.S. Department of Labor reviewed 1,117 USERRA cases, and referred only 41 cases to the Attorney General and 25 to the Office of Special Counsel.[34] Of these referrals from the Department of Labor, the U.S. Department of Justice filed only two USERRA complaints, and the U.S. Office of Special

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[30] *Employment Situation of Veterans*, *supra* at Table 8.

[31] *Id*.

[32] Brief for United States as Amici Curiae on Pet. for Writ of Cert., at 21. *See also* 38 U.S.C. § 4323(a)(1) and (b)(1).

[33] Pet. for Writ of Cert. 17–18; Reply of Pet. 4.

[34] Office of the Assistant Secretary for Veterans' Employment and Training, *Uniformed Services Employment and Reemployment Rights Act of 1994 Annual Report to Congress FY 2020*, at 10 (2021), https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Annual_FY2020.pdf.

Counsel did not file any USERRA appeals with the Merit Systems Protection Board.[35]

Moreover, if the Texas decision is upheld, veterans will be left vulnerable to discrimination based on the state they work in and that state's decision whether to waive sovereign immunity. While some states have passed legislation waiving sovereign immunity for USERRA claims, the vast majority of states have not, and all state appellate courts to consider the issue have found that sovereign immunity barred USERRA claims.[36] Veterans should be able to count on receiving the benefits earned by their service regardless of where they reside and work. It would be a disgrace if states could arbitrarily limit veterans' benefits or discriminate against veterans on the basis of their service or disability.

The private right of action granted by USERRA protects our most vulnerable veterans: those who became disabled because of their service in the armed forces yet are still committed to continuing their service to this country through employment by state

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[35] *USERRA Annual Report to Congress FY 2020*, *supra* at 10–12.

[36] *Compare Smith v. Tenn. Nat'l Guard*, 551 S.W.3d 702, 706 (Tenn. 2018) (Tennessee legislature "enacted a statute waiving Tennessee's sovereign immunity for USERRA claims") and *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 518 (Minn. Ct. App. 2017) (Minnesota legislature "passed a law waiving state sovereign immunity from USERRA claims") with *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 (Va. 2016) (USERRA claims barred by sovereign immunity) and *Fla. Dep't of Highway Safety & Motor Vehicles v. Hightower*, No. 1D19-227, 2020 WL 5988204 (Fla. Dist. Ct. App. Oct. 9, 2020) (Congress did not validly abrogate state sovereign immunity through USERRA and the Florida legislature did not clearly and explicitly waive sovereign immunity in its adoption of USERRA).

and local governments. Finding this provision of USERRA unconstitutional will leave hundreds of thousands of veterans who choose to continue to serve without recourse in the courts if they are discriminated against based on their military service or service-related disabilities. This would be an unconscionable result.

CONCLUSION

The intermediate Texas appellate court failed to consider whether the States surrendered their sovereign immunity to suits authorized by Congress pursuant to its War Powers. The text, history and structure of Article I indicates that the answer to that question is a resounding yes. Failing to affirm Congress's authority to provide these vital protections under USERRA would harm hundreds of thousands of veterans who work for state and local employers, many of whom face discrimination in the workplace based on service-related disabilities. The Constitution and the debt this nation owes to its veterans requires reversal.

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