



STATEMENT FOR THE RECORD

MILITARY OFFICERS ASSOCIATION OF AMERICA

on

“Access to Justice for Those Who Serve”

USERRA and SCRA Improvements

2d Session, 113th Congress

Subcommittee on Oversight, Federal Rights, and Agency Action

Senate Judiciary Committee

March 27, 2014

CHAIRMAN BLUMENTHAL, RANKING MEMBER HATCH, Members of the Subcommittee, the Military Officers Association of America (MOAA), is pleased to present its views on protecting reemployment and other rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).

National Guard and Reserve service men and women who have served a qualifying period of active duty are unique in our Armed Forces community in that after being called to a period of active Federal service under Title 10 orders they become veterans while continuing to serve in active status in the Reserves.

These dual-status veterans face unique challenges associated with their service including multiple re-entries into civilian life, employment challenges and reduced civilian career potential due to workplace absences.

893,500 Guard and Reserve members (as of 11 March 2014), have served on operational active duty since September 10, 2001; more than 300,000 have served on multiple tours. Sustained reliance on citizen-warriors over the past 12+ years has no precedent in American history. Reliance on the “operational reserve” is likely to continue after the Afghanistan conflict.

Operational Reserve Policy

Reliance on National Guard and Reserve (G-R) forces for operational missions evolved gradually after the Vietnam war. Major policy changes led the way: first, a “total force policy” was established (1972) to upgrade the organization, training, equipment and integration of the G-R in the nation’s Armed Forces; second, the All-Volunteer Force replaced conscription. Then, in the mid-1970s, Congress adopted a provision that gave the Commander in Chief authority to activate the G-R on his own authority.

The activation of approximately 250,000 members of the G-R for Gulf War I in 1991 was the first large-scale “live fire” event that tested the total force policy. Until then, there was considerable political and public uncertainty that the President would actually invoke his authority to call up the reserve forces.

After Gulf War I, G-R call-ups steadily increased in the mid-late 1990s primarily as a result of peacekeeping operations in Kosovo and Bosnia.

Terrorist attacks on the homeland on Sept. 11, 2001 resulted in the largest sustained activation of the G-R since World War II. Senior civilian and military defense leaders began using the term “operational reserve” to signal a de-facto change in national security policy for the employment of reserve forces in the operating forces to conduct missions alongside active duty formations in Iraq, Afghanistan and elsewhere.

Secretary of Defense Robert Gates formally announced the operational reserve policy on January 19, 2007 in a memorandum, Utilization of the Total Force. “. . . the planning objective for involuntary mobilization of Guard/Reserve units will remain one year mobilized to five years demobilized ratio.”

The operational policy means that G-R members must be available for activation for extended active duty service multiple times over a 20-year or longer career.

Use of the Operational Reserve for Non-Emergency Missions

The National Defense Authorization Act (NDAA) for FY 2012 (P.L. 112-81) established even greater flexibility for accessing the G-R for operational missions. The statute authorizes the call-up of up to 60,000 G-R members for not more than 365 “consecutive days” active duty to perform “pre-planned” and budgeted active duty missions other than emergency and humanitarian operations. The missions must be funded and approved for a fiscal year or multiple fiscal years in the services’ budget planning materials.

The authority means that pre-planned and budgeted call-ups of the G-R can be made by the Service Secretaries, a policy that was unimaginable just a few years ago.

The recent report of the Commission on the Air Force recommends the new authority be considered by the Air Force in planning future mission allocation for the Air National Guard and Air Force Reserve.

With the accelerated drawdown of the armed forces due to Sequestration and withdrawal from Afghanistan, the G-R soon will constitute more than 50% of the nation’s military capability.

All of these factors place enormous demands on the National Guard and Reserve, employers, family members and communities in ways not envisioned at the dawn of the all-volunteer force / total force era forty years ago.

Ever greater reliance on the Reserves means that it will be critical for the Congress to ensure that reservists’ re-employment rights after call-ups are robust, transparent to all stakeholders and vigorously enforced. Similarly, personal financial protections need to be updated to reflect the sea-change in the use of the G-R in our armed forces.

USERRA

MOAA has long endorsed continuous review of the USERRA to ensure it meets the needs of our nation’s returning citizen-warriors after completing active duty service.

S. 944 and S. 1982, pending Veterans Omnibus Benefits bills, include provisions to improve reemployment rights. It’s our understanding that the provisions are largely based on recommendations from the Justice Department on the Act.

MOAA strongly supports the USERRA provisions in S. 944 and S. 1982:

- ***Allow the United States to serve as a named plaintiff in all suits filed by the Attorney General, while preserving the right of the aggrieved person to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit. It***

would also allow the Attorney General to investigate and file suit to challenge a pattern or practice in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA)

- *Allow for the suspension and debarment of federal contractors that repeatedly violate the rights of members of the uniformed services provided for under USERRA*
- *provide the Special Counsel with authority to subpoena attendance, testimony, and documents from federal employees and federal executive agencies in order to carry out investigations related to USERRA*
- *Authorize the Attorney General to issue civil investigative demands in investigations under USERRA. It would not include the authority to compel oral testimony or sworn answers to interrogatories*

MOAA also supports making workplace arbitration agreements unenforceable in disputes arising under the statute.

Servicemembers Civil Relief Act (SCRA)

Operational reserve policies also point to the need to ensure that financial and legal protections are rock solid for G-R members called to active duty service.

MOAA recommends the Subcommittee endorse legislation that would impose civil fines for violations of the law; criminal penalties in egregious cases of violation of the statute; and recovery of reasonable attorneys' fees by servicemembers from SCRA violators.

MOAA and our Military Coalition (TMC) partners recently endorsed S. 1999, the Servicemembers Civil Relief Act Protections Act of 2014, a bi-partisan bill introduced by Senator Lindsey Graham (R-SC) and Senator Jack Reed (D-RI).

In a letter to the Senators on February 24, 2014 on S. 1999, TMC wrote:

“This important legislation would simply guarantee that our military servicemembers can enforce the rights already granted to them. Their mission can easily be jeopardized when their duties are interrupted with financial burdens back home in cases where companies take action against servicemember contracts due to forced arbitration clauses.

“Many of our servicemembers have been unable to enforce their SCRA rights due to the increased use of forced arbitration clauses buried in the fine print of all types of contracts, including mortgage origination documents, automobile leases, and student loans. These clauses eliminate access to the courts that would protect the servicemember and instead funnel all claims against those who are deployed into private, costly arbitration systems set up by the same businesses that hope to bypass the law in the first place.

“Congress has already passed laws to ban forced arbitration for disputes brought by auto dealers; certainly our nation's servicemembers should be afforded the same protections on other types of contracts. It's time Congress enhanced SCRA protections for our brave men and women who

commit their lives to defending our country.” (Military Coalition letter re: S. 1999, Servicemembers Civil Relief Act Protections Act of 2014, 24 February 2014).

A 2006 Department of Defense report concluded:

“Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver isn’t a matter of ‘choice’ in take-it-or-leave-it contracts of adhesion.” (Department of Defense, 2006).

Conclusion

MOAA is grateful to the Members of the Subcommittee for your leadership in supporting our veterans and their families who have “borne the battle” in defense of the nation.



FOR IMMEDIATE RELEASE: MARCH 27, 2014
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**The National Employment Lawyers Association
Urges Congress To Reform USERRA And The Tax Code
To Protect Servicemembers' Employment Rights**

(Washington, DC) - Today, the U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Federal Rights And Agency Action held a hearing to examine whether current laws are protecting "[Access To Justice For Those Who Serve](#)." Subcommittee Chair Richard Blumenthal (D-CT) presided at the hearing.

NELA Legislative & Public Policy Director Julie M. Strandlie stated, "NELA commends the Subcommittee for convening this hearing. The Department of Defense increasingly relies on National Guard and Reserve forces for operational missions around the world. Since September 11, 2001, for example, nearly 900,000 reservists have been called up to Federal active duty for such missions and more than 300,000 have served on multiple call-ups. It's critical that the laws that protect National Guard and Reservists' civilian jobs are strengthened."

NELA submitted testimony for the record, prepared by NELA member Kathryn S. Piscitelli, urging Congress to reform the [Uniformed Services Employment and Reemployment Rights Act \(USERRA\)](#) and the Internal Revenue Code to ensure that servicemembers are treated fairly by both their employers and the Internal Revenue Service. USERRA ensures veterans and servicemembers that their jobs will not be jeopardized by their military service.

Among these reforms, NELA and its coalition partners strongly endorse two bipartisan bills, the **Servicemember Employment Protection Act of 2014**, soon to be reintroduced by Senators Mark Pryor (D-AR) and Lisa Murkowski (R-AK) and the [Civil Justice Tax Fairness Act \(CJTFA\)](#), S. 1224/H.R. 2509, sponsored by Senators Ben Cardin (D-MD) and Susan Collins (R-ME). The Pryor/Murkowski legislation would ban forced arbitration of USERRA claims and provide servicemembers with additional Family and Medical Leave Act benefits. The CJTFA would end unfair taxation of settlements or awards received by individuals in employment cases brought under civil rights and worker protection laws, including USERRA.

NELA Executive Director Terisa E. Chaw added, "We, as lawyers and as Americans, must do all we can to help servicemembers who have suffered violations of their employment rights by improving USERRA's enforcement and remedial provisions. NELA, our members, and our Affiliates are honored to serve as advocates for servicemembers, and we are pleased to have the opportunity to do so in partnership with the Reserve Officers Association and other organizations that support our nation's military and their families."

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The National Employment Lawyers Association advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 69 circuit, state, and local affiliates have more than 3,000 members around the country.



STATEMENT OF KATHRYN S. PISCITELLI

Submitted On Behalf Of The

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

To The

Committee On The Judiciary,

Subcommittee On Oversight, Federal Rights And Agency Action

United States Senate

On The Subject Of

ACCESS TO JUSTICE FOR THOSE WHO SERVE

March 27, 2014

Updated April 3, 2014

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Chairman Blumenthal, Ranking Member Hatch, and Members of the Subcommittee:

My name is Kathryn Piscitelli. I am an attorney in private practice in Orlando, Florida. I submit this testimony on behalf of the National Employment Lawyers Association (NELA) regarding its comments and recommendations for statutory changes to improve and ensure access to justice for our nation's servicemembers.

NELA is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 69 circuit, state, and local affiliates have more than 3,000 members around the country.

My law practice focuses on labor and employment law, and I am Board Certified by the Florida Bar in Labor and Employment Law and Vice Chair of the Florida Bar's Labor and Employment Law Certification Committee. I am a NELA member and serve as NELA's advisor on the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have taken a special interest in USERRA since the law's inception and wrote one of the first law review articles on the statute, *Veterans' Employment Rights: Keeping in Step with USERRA's Legion of Changes*, 46 Lab. L.J. 387 (1995). For many years now, Edward Still (who is also a NELA member) and I have co-authored *The USERRA Manual: Uniformed Services Employment and Reemployment Rights* (Thomson Reuters 2014) (and all prior editions).

NELA commends the Subcommittee for calling this hearing today. We, as lawyers and as Americans, must do all we can to help veterans and servicemembers who have suffered violations of their employment rights by improving USERRA's enforcement and remedial provisions. NELA and its members are honored to serve as advocates for military reservists and we are pleased to have the opportunity to do so in partnership with the Reserve Officers Association and other organizations that support our nation's military and their families.

Our testimony will address some of the enforcement obstacles—forced arbitration, sovereign immunity, weak remedies—and offer specific recommendations for strengthening the Act. We will also address another overlooked issue: the significant tax consequences for servicemembers who receive lump sum payments of back pay awards in compensation for violations of their employment rights.

USERRA Defined

The [Uniformed Services Employment and Reemployment Rights Act of 1994](#) (USERRA), 38 U.S.C. § 4301 *et seq.*, ensures veterans and servicemembers (including members of the Reserves and National Guard) that their jobs will not be jeopardized by their military service.

The Act protects against employment discrimination due to military membership or service; provides reemployment rights and benefits to employees who leave civilian jobs to perform military service; and entitles employees to certain rights and benefits while they are away for military service. USERRA permits persons who believe their USERRA rights have been violated to file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS) and—if VETS does not resolve their complaint—to request that the Department of Justice (DOJ) pursue litigation on their behalf.

The Act also provides individuals with a private right of action should they choose not to file a

complaint with VETS or pursue the DOJ representation procedure, or should DOJ decline to pursue the alleged violation. To facilitate the goal of full compensation for individuals wronged under the Act, the original legislation specifically authorized “the award of attorney fees, expert witness fees, and other litigation expenses as a further effort to make servicemembers whole and not have them suffer any loss in realizing their reemployment rights.” Senate Report No.103-158 at 69 (1993).

These remedies, however, are in fact very weak because they are allowable *at the court’s discretion* for employees who obtain private counsel and prevail in USERRA lawsuits against private, state, or local government employers. As Lt. Savage testified today, these weak remedies make it very difficult for servicemembers to find counsel willing to take their cases. Furthermore, state and local government employers are arguing USERRA does not apply to them.

Barriers To Access To Justice: Forced Arbitration

Forced arbitration is a major problem for returning servicemembers attempting to get their jobs back under USERRA. In 2006, the United States Court of Appeals for the Fifth Circuit held USERRA claims are subject to forced, binding arbitration under the Federal Arbitration Act (FAA), despite express language in Section 4302(b) of USERRA prohibiting “any” contract that limits “any right or benefit” provided to servicemembers by USERRA, “including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.”¹ The court misconstrued “right” as used in Section 4302(b) as inapplicable to the enforcement rights USERRA grants servicemembers.

In the wake of the Fifth Circuit’s decision, numerous courts, including the Court of Appeals for the Sixth Circuit, have enforced forced arbitration clauses against servicemembers who sought to exercise their right under USERRA to have their claims heard in court.² The arbitration clauses enforced in these cases, like that in the Fifth Circuit case, were imposed by employers without the servicemembers’ knowledge and consent and before the USERRA claims alleged in the cases had arisen. In fact, it is not unusual in such cases for the servicemember to have any

¹ *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (employer’s pre-dispute arbitration policy provided to servicemember in 1995 treated as agreement to arbitrate his USERRA claims arising in 2002 and 2003 by virtue of his failure to opt out of policy within 30 days of receipt).

² See, e.g., *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008) (pre-dispute arbitration clause in employment agreement); *McLean v. Byrider Sales of Indiana S, LLC*, 2013 WL 4777199 (S.D. Ohio 2013) (pre-dispute arbitration clause in job application); *Palmer v. Midland Food Servs. Inc.*, 2011 WL 4458781 (N.D. Ohio 2011) (pre-dispute arbitration clause in employment agreement; clause required veteran to pay cost to initiate arbitration) *Will v. Parsons Evergreene, LLC*, 2008 WL 5330681 (D. Colo. 2008) (pre-dispute arbitration clause in employment agreement); *Ohlfs v. Charles Schwab & Co., Inc.*, 2008 WL 4426012 (D. Colo. 2008) (pre-dispute arbitration clause in securities broker/advisor registration); *Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964 (D. Colo. 2008) (pre-dispute arbitration agreement required as condition of employment); *Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837 (N.D. Ind. 2007) (pre-dispute arbitration agreement in job application).

awareness or recollection of ever entering into any so-called “agreement” to arbitrate future USERRA claims.³

Properly construed, Section 4302(b) prohibits contracts requiring servicemembers to give up their enforcement rights under USERRA in order to gain employment or keep their jobs. USERRA’s legislative history confirms this construction. In explaining Section 4302(b), the House Committee on Veterans’ Affairs stated that “resort to . . . arbitration . . . is not required”; and that “[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in [USERRA] and would be void.”⁴ Moreover, the Department of Labor interprets Section 4302(b) as prohibiting arbitration agreements waiving a servicemember’s right to pursue a court action under USERRA.⁵

Nonetheless, the established and growing trend in the courts is to enforce pre-dispute arbitration contracts against unwilling servicemembers claiming violations of their rights under USERRA. **We urge Congress to stem the tide by amending USERRA to prohibit explicitly enforcement of pre-dispute arbitration provisions against servicemembers who want their USERRA claims to be heard in court.**

Senators Mark Pryor (D-AR) and Lisa Murkowski (R-AK) will soon reintroduce the **Servicemember Employment Protection Act**, which would ban forced arbitration of USERRA claims and provide servicemembers with additional Family and Medical Leave Act benefits. NELA strongly supports this bipartisan legislation, which was endorsed in the 112th Congress by organizations including the Reserve Officers Association, the Paralyzed Veterans Association, the Iraq and Afghanistan Veterans of America, the Military Officers Association of America, and the Veterans of Foreign Wars.

To combat forced arbitration against servicemembers and their families, NELA urges Congress to enact the [Arbitration Fairness Act \(AFA, S. 878\)](#). The AFA would ban forced arbitration of consumer claims (including those under the Servicemembers Civil Relief Act), as well as employment and civil rights disputes.

Barriers To Access To Justice: State Sovereign Immunity

Servicemembers seeking to bring lawsuits to enforce their USERRA rights against state employers have increasingly been denied access to courts.

³ See, e.g., *Ernest*, 2008 WL 2958964 (veteran required to arbitrate USERRA claim under pre-dispute mandatory arbitration agreement that he had no recollection of signing).

⁴ H.R. REP. No. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

⁵ 70 Fed. Reg. 75,246, 75,257 (Dec. 19, 2005) (“Section 4302(b) of USERRA states that the statute supersedes ‘any * * * contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [the Act].’ This provision against waivers . . . includes a prohibition against the waiver in an arbitration agreement of an employee’s right to bring a USERRA suit in Federal court.”) (internal citation omitted).

When enacted in 1994, USERRA authorized servicemembers to sue state employers in federal court. Based on well-established case law under USERRA's predecessor legislation, Congress's War Powers under Article I of the Constitution fully authorized Congress to subject states to private lawsuits to enforce servicemembers' civilian employment and reemployment rights.⁶

The tide turned, however, with the Supreme Court's 1996 decision in *Seminole Tribe of Florida v. Florida*, which held Congress cannot use its commerce powers under Article I of the Constitution to override states' immunity under the Eleventh Amendment from private suits for damages.⁷ Although *Seminole Tribe* did not concern Congress's War Powers, broad language in the decision suggested no Article I power authorized Congress to override the Eleventh Amendment. In the immediate aftermath of *Seminole Tribe*, some federal courts held states enjoyed Eleventh Amendment immunity from USERRA claims.⁸ Nonetheless, the Court of Appeals for First Circuit bucked the trend, ruling that *Seminole Tribe's* "hold[ing] that Congress lacks the power to abrogate the Eleventh Amendment under the Commerce Clause ... does not control the War Powers analysis."⁹

In response to the post-*Seminole Tribe* decisions holding states have Eleventh Amendment immunity from private USERRA suits filed in federal court, and in an effort to ensure state employees a forum to bring lawsuits to enforce USERRA, Congress, in 1998, amended USERRA's enforcement provisions to (among other things) replace federal court jurisdiction over private suits against states with state court jurisdiction over such suits.¹⁰ The understanding at the time was that states would have no immunity from federal claims brought in state courts. In 1999, however, the Supreme Court ruled in *Alden v. Maine* that Congress's

⁶ See *Reopell v. Commonwealth of Mass.*, 936 F.2d 12 (1st Cir. 1991); *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070, 1084 (5th Cir. 1979); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979); *Moore v. State of Kansas*, 1979 WL 1866 (D. Kan. 1979); *Sheely v. Idaho Falls School Dist. No. 91*, 1978 WL 1667 (D. Idaho 1978); *Camacho v. Public Svc. Com. of Commonwealth of Puerto Rico*, 450 F.Supp. 231 (D.P.R. 1978).

⁷ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁸ See *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997).

⁹ *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996).

¹⁰ See 38 U.S.C. § 4323(b)(2). **Note:** Federal appellate courts addressing the issue have ruled the 1998 amendment divested the federal courts of jurisdiction to hear private suits against states. See *Velasquez v. Frapwell*, 165 F.3d 593, 593–94 (7th Cir. 1999); *McIntosh v. Partridge*, 540 F.3d 315, 320–21 (5th Cir. 2008); *Townsend v. University of Alaska*, 543 F.3d 478, 484–85 (9th Cir. 2008); *Wood v. Florida Atlantic University Bd. of Trustees*, 432 Fed. Appx. 812, 815 (11th Cir. 2011) (citing *Velasquez*, *McIntosh*, and *Townsend*). See also *Rimando v. Alum Rock Union Elementary School Dist.*, 356 Fed. Appx. 989 (9th Cir. 2009) (California public school district is treated same as state for jurisdictional purposes under USERRA.).

authority under Article I did not include the power to subject nonconsenting states to private suits for damages in state courts.¹¹

Alden was not brought under USERRA and did not concern Congress's War Powers. Rather it was brought under the Fair Labor Standards Act, which is a commerce powers enactment. Nonetheless, in the wake of *Alden*, a number of state courts have held state employers enjoy immunity from USERRA claims brought in state court. Thus far, state courts in Alabama, Delaware, Georgia, New Mexico, and Tennessee have so held.¹² As a result, no forum is available for state employees in these states to bring private suits to enforce their rights under USERRA. State courts in only three states—Ohio, South Carolina, and Wisconsin—have found no state immunity from USERRA claims.¹³ Minnesota may be the lone state with a statute explicitly waiving sovereign immunity; the statute, Minn. Stat. Sec. 1.05, allows direct lawsuits under specific federal laws including USERRA. State employees in most other states have no assurance they can sue to enforce their USERRA rights.

As a solution, NELA recommends that Congress amend USERRA to provide explicitly once again for federal court jurisdiction over private USERRA suits against states. NELA believes Congress's War Powers authorize Congress to subject unwilling states to lawsuits in federal court under USERRA.¹⁴ NELA notes that a decade after deciding *Seminole Tribe*, the Supreme Court held in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that the language in *Seminole Tribe* suggesting that Article I power cannot be used to override states' Eleventh Amendment immunity was dicta based on an "assumption" that "was erroneous."¹⁵ Significantly, *Katz* went on to hold that Congress's power under Article I to enact

¹¹ *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999).

¹² *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, No. 31,820, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014); *Smith v. Tennessee Nat. Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), *appeal denied*, (Nov. 21, 2012), *cert. denied*, 133 S.Ct. 1471 (2013); *Anstadt v. Board of Regents of University System of Ga.*, 303 Ga. App. 483, 693 S.E.2d 868 (2010); *Janowski v. Division of State Police, Dept. of Safety and Homeland Sec., State of Delaware*, 981 A.2d 1166 (Del. 2009); *Larkins v. Department of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001).

¹³ *Copeland v. South Carolina Dept. of Corrections*, No. 2013-CP-42-2498 (S.C. Ct. Com. Pl. Mar. 28, 2014); *Scocos v. State Dept. of Veteran Affairs*, 2012 WI App 81, 343 Wis. 2d 648, 819 N.W.2d 360 (Wis. Ct. App. 2012); *Panarello v. State*, 2009 WL 301888 (R.I. Super. Ct. 2009).

¹⁴ For excellent law reviews on this subject, see Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions Is a Valid Exercise of the Congressional War Powers*, 195 Mil.L.Rev. 91 (2008); Hirsch, *Can Congress Use its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L.Rev. 999 (2004). See also Brief for The United States as *Amicus Curiae* in Support of Appellee/Cross-Appellant, *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014) (No. 31,820), available at <http://www.justice.gov/crt/about/app/briefs/ramirezbrief.pdf>.

¹⁵ *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006).

bankruptcy laws included authority to subject states to bankruptcy proceedings.¹⁶ Certainly, the case for Congress's War Powers overriding states' claims of sovereign immunity is stronger than under the bankruptcy powers.¹⁷ Indeed, the United States has taken the position that Congress's constitutional War Powers empower Congress to subject nonconsenting states to private suits under USERRA.¹⁸

As a result of the 1998 amendment replacing federal court jurisdiction over private suits against states under USERRA with state court jurisdiction, the issue whether the War Powers authorize Congress to subject nonconsenting states to private suits in federal court under USERRA was not fully litigated and thus never reached the Supreme Court. NELA believes jurisdiction should be restored to the federal courts so that the matter can be fully litigated with possible ultimate review by the Supreme Court.

Barriers To Access To Justice: Weak Remedies

NELA urges Congress to strengthen USERRA's remedies for violations of the Act.

Damages for violations of USERRA in suits against private, state, or local government employers are limited to lost wages and benefits, plus, if willfulness is shown, an equal amount as liquidated damages.¹⁹ In USERRA actions against federal employers, damages are restricted to lost wages and benefits; liquidated damages are not authorized.

These monetary remedies are inadequate to compensate employees for violations of their rights under USERRA. Employees unlawfully denied reemployment upon their return from military service or unlawfully fired because of their military obligations who fully mitigate their wage and benefit losses in other employment will have no recoverable damages under USERRA. Employees who suffer USERRA violations involving no lost compensation, such as employees who experience unlawful harassment in the workplace because of their military status or service, have no recoverable damages under USERRA. In each of these examples, liquidated damages cannot be awarded regardless of the willfulness of the violations because liquidated damages are unavailable under USERRA in the absence of a wage or benefit loss.

¹⁶ *Id.* at 379.

¹⁷ *Cf. Lichter v. United States*, 334 U.S. 742, 781 (1948) (“[Congress’s war] power, explicitly conferred and absolutely essential to the safety of the Nation, is not destroyed or impaired by any later provision of the constitution or by *any one of the amendments.*”) (quoting address by Hon. Charles E. Hughes) (emphasis added); *In re Tarble*, 80 U.S. 397, 408 (1871) (Congress’s war powers are “plenary and exclusive”).

¹⁸ See Brief for The United States as *Amicus Curiae* in Support of Appellee/Cross-Appellant, *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014) (No. 31,820), available at <http://www.justice.gov/crt/about/app/briefs/ramirezbrief.pdf>; United States’ Brief as Intervenor, *Weaver v. Madison City Bd. of Educ.*, 2013 WL 4433799 (N.D. Ala. Aug. 14, 2013) (No. 5:11-cv-03558-TMP), available at <http://www.justice.gov/crt/about/app/briefs/weaverndala.pdf>.

¹⁹ See 38 U.S.C. §§ 4323(d), 4324(c)(2).

NELA further notes that even when a USERRA plaintiff can prove a wage or benefit loss, there is no guarantee the plaintiff will be awarded liquidated damages. An employer's violation of USERRA is willful if the employer knowingly violated the plaintiff's USERRA rights or did so in reckless disregard of the plaintiff's USERRA rights.²⁰ The plaintiff bears the burden of proof on the issue of willfulness.²¹ This is a difficult and sometimes impossible burden to meet. For example, courts have declined to award liquidated damages in USERRA cases where the employer claimed it consulted with counsel about its USERRA obligations,²² or contended its violation of USERRA was an honest mistake.²³ Because the plaintiff solely bears the burden of proof, the plaintiff must disprove such allegations to show willfulness.²⁴

Furthermore, because USERRA does not authorize awards of compensatory damages beyond lost wages and benefits, no matter how much an employee is injured in other respects as a result of a USERRA violation—whether through emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses; pecuniary losses other than lost wages and benefits; or future pecuniary losses—there is no remedy to compensate for the injury under USERRA.

Moreover, the absence of a monetary remedy for a USERRA violation can result in denial of a servicemember's access to justice. Courts have held servicemembers lacked standing to bring USERRA claims when the alleged violation resulted in no loss of wages or benefits.²⁵

NELA encourages Congress take the following actions to strengthen USERRA's remedies: (1) remove the willfulness requirement for awards of liquidated damages, but authorize a court to deny or reduce liquidated damages if the employer proves to the satisfaction of the court that the act or omission giving rise to the USERRA violation was in good faith and that the employer had reasonable grounds for believing the act or omission was not a violation of USERRA (this approach is authorized for cases under the Fair Labor Standards

²⁰ 20 C.F.R. § 1002.312(c).

²¹ See *Davis v. Crothall Services Group, Inc.*, 961 F.Supp.2d 716,736 (W.D. Pa. 2013); *Paxton v. City of Montebello*, 712 F.Supp.2d 1017, 1021 (E.D. Cal. 2010).

²² See, e.g., *Paxton v. City of Montebello*, 712 F. Supp. 2d 1017, 1021 (C.D. Cal. 2010); *Reed v. Honeywell Int'l. Inc.*, 2009 WL 886844, *9 (D. Ariz. 2009). See also *Davis*, 961 F.Supp.2d at 737 (noting that "if a jury believed that Defendant's actions, including consulting with its in-house counsel . . . , were a good-faith attempt to comply with USERRA, it would not award liquidated damages to Plaintiff").

²³ See, e.g., *Brill v. AK Steel Corp.*, 2012 WL 893902, *13 (S.D. Ohio 2012); *U.S. v. Nevada*, 2012 WL 1530619, *2 (D. Nev. 2012).

²⁴ See *Davis*, 961 F.Supp.2d at 736 (declining to shift burden of proof to employer on its contention that it relied on advice of counsel).

²⁵ See, e.g., *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 Fed. App'x 49, 52–53 (11th Cir. 2010) (harassment claim); *Richards v. Canyon County*, No. 1:12-cv-424, 2014 WL 1270665 (D. Idaho Mar. 26, 2014) (claim alleging forced payout of vacation leave in violation of § 4316(d) of USERRA).

Act²⁶ and the Family and Medical Leave Act²⁷); (2) provide for awards of liquidated damages in a statutorily-mandated specific amount in cases where there is no wage or benefit loss (for example, a statutory amount could be set at \$25,000); (3) authorize awards of compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, past pecuniary losses, and future pecuniary losses; (4) authorize awards of punitive damages for USERRA violations that are done with malice or reckless indifference; and (5) make available to federal employees awards of liquidated damages.

By so strengthening USERRA's remedies, Congress will provide fuller relief for servicemembers who have suffered violations of their USERRA rights and also more effectively deter future violations of USERRA.

Barriers To Access To Justice: Discretionary Award Of Attorney's Fees

NELA urges Congress to amend USERRA's attorney's fees provisions to make mandatory awards of reasonable attorney's fees to plaintiffs who prevail in USERRA cases. USERRA currently provides that a prevailing plaintiff's reasonable attorney's fees "may" be awarded.²⁸ The absence of a mandatory-fee provision for prevailing plaintiffs can deter servicemembers with meritorious USERRA claims from suing out of concern a court would exercise its discretion to deny recovery of fees. Further, the absence of a mandatory-fee provision may deter attorneys from representing servicemembers who have meritorious USERRA claims.

Amending USERRA to provide for mandatory awards of reasonable attorney's fees for prevailing plaintiffs is not a novel concept. Courts are required to award reasonable attorney's fees to plaintiffs who prevail on claims under the Fair Labor Standards Act,²⁹ Family and Medical Leave Act,³⁰ and Age Discrimination in Employment Act.³¹

Barriers To Access To Justice: Burdensome, Unfair & Confusing Tax Consequences

Reforms to USERRA would not be complete without making corresponding reforms to the tax code. Current tax law penalizes all workers who successfully vindicate their workplace rights under various federal, state, and local laws. These laws include USERRA, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act Amendments Act, the Family and Medical Leave Act, whistleblower protection statutes, and those regulating any aspect of the employment relationship.

²⁶ See 29 U.S.C. §§ 216(b), 260.

²⁷ See 29 U.S.C. § 2617(a)(iii).

²⁸ 38 U.S.C. §§ 4323(h)(2), 4324(c)(4).

²⁹ 29 U.S.C. § 216(b).

³⁰ 29 U.S.C. § 2617(a)(3).

³¹ 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 216(b)).

Servicemembers who vindicate their rights under USERRA are especially affected because the only remedy currently available to them is back pay. Workers who recover compensation for multiple years of wages in one lump sum must pay taxes at higher rates because the payment is taxed entirely in the year received. For example, servicemembers who recover several years of back pay under USERRA are required to pay taxes on the entire amount for the year in which they receive payment, thus moving them into a higher tax bracket. The tax consequences for anyone receiving a lump sum recovery for lost wages in one year can be onerous. If the employer had not acted unlawfully, the worker's wages would have been earned and paid in the usual course of employment, and the worker would have been taxed at a lower rate. The artificial and temporary increase in annual income can also impact workers who have been forced to sell their homes to make ends meet or whose children are applying for college.

Senators Ben Cardin (D-MD) and Susan Collins (R-ME) have [reintroduced](#) bipartisan legislation, known as the **Civil Justice Tax Fairness Act (CJTFA, S. 1224)**, that would address this problem by mitigating the tax consequences of receiving and paying taxes on these back wages in one year. The bill would provide for income averaging. Also, S. 1224 would once again exempt from taxation compensatory damages received in [employment and civil rights matters](#), including USERRA cases. While USERRA currently does not provide compensatory damages, experts seem to agree that Congress should amend USERRA to provide compensatory damages. Since 1996, compensatory damages in employment and civil rights cases have been taxed. Oddly, and unfairly, compensatory damages recovered in personal injury claims, such as those arising from car or slip and fall accidents, are not taxed.

Companion legislation, H.R. 2509, was reintroduced in the House of Representatives by Representative John Lewis (D-GA). Mr. Lewis was joined by a bipartisan group of original cosponsors, including fellow Ways & Means Committee member Aaron Schock (R-IL) and Judiciary Committee members Jim Sensenbrenner (R-WI) and Bobby Scott (D-VA).

[NELA strongly supports the CJTFA. Organizations](#) joining NELA in urging Congress to enact the CJTFA include the Reserve Officers Association, the Military Officers Association of America, the American Bar Association, the Association of Corporate Counsel, and the Leadership Conference on Civil and Human Rights.

Thank you for convening this hearing and for considering our recommendations. NELA, its members, and Affiliates stand ready to assist Congress in ensuring access to justice for our nation's servicemembers.

Respectfully submitted,

Kathryn Piscitelli On Behalf Of The
National Employment Lawyers Association