

SCOTUS Decision Supports Veterans' Rights to Sue States for Employment Discrimination

June 30, 2022

Washington, DC –Wiley, a preeminent Washington, DC law firm, filed separate amicus briefs for the case, *Torres v. Texas Department of Public Safety*, that were used to help the U.S. Supreme Court hold that states cannot assert sovereign immunity from suits for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The briefs were filed on February 8, 2022 on behalf of Professor Jeffrey M. Hirsch and the Reserve Organization of America (ROA), supporting a challenge to state sovereign immunity by a former military member, Le Roy Torres, who alleges that his former employer, the Texas Department of Public Safety, unlawfully discriminated against him on the basis of injuries he sustained while deployed to Iraq as a member of the United States Army Reserve.

The Supreme Court's Decision can be read [here](#).

"The Court's decision affirms the importance of reemployment rights to the national defense," said Wiley partner Scott Felder, Chair of Wiley's Veterans' Affinity Group and part of the team representing ROA. "This reinforces that USERRA ensures that those who choose to serve our country are not disadvantaged in the workforce, strips states of their ability to claim sovereign immunity to the protections offered to veterans, and helps ensure uniformity in the application of USERRA, both from state-to-state and from employer-to-employer."

The amicus brief filed on behalf of Professor Hirsch, a legal scholar with expertise in sovereign immunity, argues that the states surrendered their sovereign immunity with respect to war powers under the "plan of the Convention" when they ratified the Constitution.

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Indeed, the brief argues that the states surrendered their immunity in war-related matters even under the earlier Articles of Confederation. The Constitution simply affirmed that earlier alienation. The states accordingly have no sovereign immunity defense to assert against actions brought under legislation enacted pursuant to Congress' war powers, regardless of whether Congress purports to abrogate that immunity or not. The Court's opinion generally follows the structure and argument of Professor Hirsch's brief.

The Hirsch amicus brief was written by Richard A. Simpson, a partner in Wiley's Issues and Appeals, Litigation, and Insurance practices, and Insurance associate Elizabeth E. Fisher, along with co-counsel F. Andrew Hessick of the University of North Carolina School of Law, assisted by law student Sarah Benecky.

The amicus brief filed on behalf of the ROA likewise argues that the states surrendered sovereign immunity with respect to military matters when they ratified the Constitution. The ROA amicus brief highlights that allowing states to assert sovereign immunity against actions brought under USERRA erodes the United States' warfighting capabilities because it directly impacts the military's ability to recruit and retain Reservists when service members are denied the ability to remedy adverse employment actions by state employers upon returning from service. It also argues that the only other option for service members denied adequate reemployment opportunities – namely, a request that the U.S. Department of Justice seek enforcement against the state – is ineffective for the vast majority of service members.

The ROA amicus brief was written by Theodore A. Howard, Wiley's Pro Bono Partner; Scott A. Felder, a partner in Wiley's Government Contracts and Intellectual Property practices; and Wiley associates Lukman S. Azeez, Harsh Sancheti, and Nicole C. Hager, along with Jonathan Sih of the Reserve Organization of America.