IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 04-11360

MICHAEL T. GARRETT,

Plaintiff – Appellee

v.

CIRCUIT CITY STORES, INC.,

Defendant – Appellant

Appeal from the United States District Court
For the Northern District of Texas
(USDC No. 3:04-CV-556-M)

BRIEF OF *AMICUS CURIAE* RESERVE OFFICERS ASSOCIATION IN SUPPORT OF PLAINTIFF – APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE OPINION OF THE DISTRICT COURT

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MICHAEL T. GARRETT

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CIRCUIT CITY STORES, INC.

Defendant - Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Plaintiff and his attorney:
a) Michael T. Garrett, Plaintiff;
b) Robert E. Goodman, Attorney for Plaintiff;

Defendant and its attorneys:
c) Circuit City Stores, Inc., Defendant;
d) John G. Harrison and the firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Attorneys for Defendant;

Amicus Curiae in support of Defendant-Appellant:
e) Texas Employment Law Council, *Amicus Curiae* in support of Defendant
f) Christopher H. Hahn and Terry D. Roberts and the firm of Vinson & Elkins, L.L.P., Attorneys for *Amicus Curiae* Texas Employment Law Council;

Amicus Curiae in support of Plaintiff-Appellee:
g) Reserve Officers Association, *Amicus Curiae* in support of Plaintiff
h) John S. Odom, Jr. and the firm of Jones, Odom, Davis & Politz, L.L.P., and Samuel F. Wright, Attorneys for *Amicus Curiae* Reserve Officers

Association

_____

John S. Odom, Jr.
Attorney for Reserve Officers
Association, *Amicus Curiae*

I.
IDENTITY OF THE *AMICUS CURIAE*, RESERVE OFFICERS ASSOCIATION, ITS INTEREST IN THE CASE AND AUTHORITY TO FILE THIS *AMICUS CURIAE* BRIEF

This *amicus curiae* brief is filed on behalf of the Reserve Officers Association with the consent of all parties to this litigation. Undersigned counsel appeared at the oral argument before the district court in Dallas, Texas, on August 17, 2004.

The Reserve Officers Association ("ROA") was established in 1922 and subsequently chartered by Congress in 1950.[1] The purpose of the ROA, as set forth in its Congressional charter is "to support and promote the development and execution of a military policy for the United States that will provide adequate national security." The ROA is a professional organization that represents over 75,000 dues-paying members of the seven Reserve components of the United States Armed Forces: Marine Corps Reserve, Army Reserve, Army National Guard, Naval Reserve, Air Force Reserve, Air National Guard and Coast Guard Reserve. The plaintiff in this case, Michael T. Garrett, is a Lieutenant Colonel in the United States Marine Corps Reserve and is a member of ROA.

Throughout the 80+ years of its existence, the ROA has promoted reliance

[1]Public Law 81-595.

upon the nation's Reserve components as a cost-effective way of providing adequate national defense. During times when the nation is not involved in combat operations abroad, Reserve and Guard members are only paid for the days when they perform actual military duty or training, thus saving precious resources and providing for additional contingency strength without being an undue burden on the taxpayers. While the cost of recruiting, training, compensating and equipping the Reserve components accounts for only about 10% of the budget of the Department of Defense, the seven Reserve components make up nearly 50% of the nation's total military strength.

Following the end of the Vietnam War, Congress abolished the draft and established the Total Force Policy under which the nation became more dependent than ever on Reserve components. This became evident during Operations Desert Shield and Desert Storm (the Gulf War) in 1990-91. Those combat operations in Kuwait and Iraq resulted in the largest mobilization of Guard and Reserve forces since the Korean War, forty years earlier.

Since the attacks on the United States on September 11, 2001, more than 400,000 Americans have been called to active duty in the Reserve components.[2] At

[2]As of June 24, 2004, according to the *Daily Labor Report*, page A-11, more than 373,000 Guard and Reserve members had been recalled to active duty. On August 17, 2004, the date of oral argument before the district court, 151,820 Guard and Reserve personnel were on duty fighting in the Global War on Terror. As of May 18, 2005, according to a News Release

present, over 40,000 of the 140,000 troops on the ground in Iraq are mobilized members of the Guard and Reserve. The Nation is at war and it is the mission of the ROA to support in every way possible the men and women of the Reserve components who are fighting in the Global War on Terror.

Among the laws that protect servicemembers and veterans, the two most important for Reserve component members who are mobilized are the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-596 ("SCRA"), and the Uniformed Services Employment and Reemployment Act, 38 U.S.C. §§4301-4333 ("USERRA").[3] This case deals with the question of whether or not a 1925 statute[4] can require a servicemember, protected by both USERRA and SCRA, to submit any employment-related dispute to mandatory, binding arbitration. To the ROA, this case presents issues of vital importance to not only all of the ROA's members, but also to all members of the Reserve components whether they belong to the

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from the Department of Defense (http://www.defenselink.mil/news/Aug2004/d20040818ngr.pdf.), the current number of Guard and Reserve personnel on active duty is 159,702.

[3]USERRA was enacted in 1994 as a replacement for the Veterans' Reemployment Rights Law ("VRR"), which had been codified at 38 U.S.C. §§2021-26 (1988). A comprehensive article on the history of the VRR and its predecessor statutes can be found in a law review article on the ROA website, <http://www.roa.org/home/law_review_104.asp>. The author of the article, Samuel F. Wright, is co-author of this *amicus* brief and, while an attorney with the Department of Labor, was one of two co-authors of the interagency task force work product that became USERRA. Congress amended USERRA in 1996, 1998 and 2000.

[4]The Federal Arbitration Act, 9 U.S.C. §§1-15 ("FAA").

ROA or not.

The position of the ROA is that the decision of the district court was correct and that a requirement for binding arbitration, regardless of whether it is required by a collective bargaining agreement or a private agreement between employer and employee, is preempted by the provisions of USERRA. The ROA urges this Court to affirm the ruling of the district court.

II.
ARGUMENT

A. The Supreme Court requires a liberal interpretation of USERRA in favor of the servicemember in the application of USERRA and other statutes related to veterans.

The starting point for any analysis of USERRA is the admonition of the Supreme Court of the United States in *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946) that:

> "This legislation is to be *liberally construed for the benefit of those who left private life to serve their country in its hour of great need*. See Boone v. Lightner, 319 U.S. 561, 575, 63 S. Ct. 1223, 1231, 87 L. Ed. 1587. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and *give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the*

separate provisions permits." (Emphasis added.)[5]

The Supreme Court in *Fishgold* was interpreting one of the predecessor statutes to USERRA, specifically Section 8(c) of the Selective Training and Service Act of 1940, as amended, 50 U.S.C. App. §308(c), which protected a veteran against discharge within one year after restoration of his job following military service. That provision in the Selective Training and Service Act ("STSA") is much the same as the protection found in USERRA at 38 U.S.C. §4316(c).

The case cited by the Supreme Court in *Fishgold*, *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 1231, 87 L. Ed. 1587 (1943), was a case interpreting provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 ("SSCRA"), the predecessor statute to the current Servicemembers Civil Relief Act, 50 U.S.C. App. §§501-596 ("SCRA"). By referring to an SSCRA case when discussing the requirement for liberal construction in favor of the veteran in a veterans' reemployment rights case, the Supreme Court has clearly indicated that the SSCRA (and its successor, the SCRA) and the STSA (and its successors, the VRR and USERRA) must be read in conjunction with one another and liberally interpreted

[5]The mandate in *Fishgold (*"liberal construction" in favor of the veteran and citizen-soldier) has been cited with approval and followed in countless subsequent VRR and USERRA cases, including *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977) and *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n.9 (1991).

in favor of veterans.[6]

Unquestionably, both Congress and the Supreme Court have put veterans and citizen-soldiers – persons entitled to the protections of USERRA and the SCRA – in a protected classification apart from other non-military citizens and have determined that they are to be accorded greater rights in certain limited areas than non-military citizens. In short, going to work for the Marine Corps accords one different, and in some ways greater, protections than going to work for Circuit City Stores. With the increased protections in the area of civil obligations and employment protections, however, come increased risks to one's personal safety, separations from home and family and, in many cases, a decrease in active duty pay and allowances over what the citizen-soldier was making before mobilization.

The reason why there is a distinction between members of the Armed Forces and members of civilian society is clear: the employees of Circuit City, patriotic though they may all be, are not routinely called upon to risk their lives for the company. The members of the United States Marine Corps (and the men and women of all other branches of the United States Armed Forces) are, on a daily basis, called upon to risk their lives for the Nation. *It is that enormous difference*

[6]Specific reasons, based on the SCRA, why USERRA must preempt the FAA are discussed at Section II E, *infra.*

in potential risk that entitles veterans and others protected by SCRA and USERRA to a "liberal construction" in their favor of the law that protects their right to reemployment, protects their right to go into federal court to seek a jury decision enforcing their rights and protects them against anyone placing on them "additional prerequisites to the exercise" of their rights under USERRA.

With respect, the argument advanced by Appellant-Circuit City that the FAA supercedes USERRA is not supported by the plain language of §4302(b), the legislative history of USERRA and the VRR or any reported court decision. Attempts to parse the various sections of USERRA and divide "substantive" rights from "procedural" rights hardly amount to the "liberal construction" in favor of the servicemember that *Fishgold* and its progeny mandate.

B. The clear language of 38 U.S.C. §4302(b) precludes mandatory arbitration.

At issue in this case is whether or not §4302(b) of USERRA precludes mandatory arbitration when there is an employer-employee agreement stating that any employment-related claims would be sent to binding arbitration rather than to court.[7] The section provides:

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[7]For reasons that are never explained, Circuit City in its brief seems to make a distinction between a requirement for mandatory arbitration resulting from a collective bargaining agreement and a requirement for mandatory arbitration resulting from a private agreement between an employer and an employee. The statute certainly makes no such distinction and Circuit City never explains how a distinction is made between the two different types of

> "(b) This chapter [meaning Chapter 43 of Title 38 of the U.S. Code, the text of USERRA] supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."[8]

Circuit City argues that the Associate Issue Resolution Package it served on its employees beginning on April 5, 1995 (more than a year after Garrett had gone to work for Circuit City) constitutes a "binding agreement to arbitrate all employment disputes." Appellant's Brief p.7. If USERRA does not preempt that "binding agreement", then the words of §4302(b) are meaningless. It would be hard to imagine a clearer statement of Congressional intent that USERRA establishes its own system of enforcement that preempts any agreement, whether it is a private one between employer and employee or a result of collective bargaining between the employer and the union representing its workers.

Circuit City suggests that Garrett must submit his claim (that he was discharged because of his protected military service) to an arbitrator whose decision would be final and unappealable. If Circuit City is correct, virtually all of the substantive provisions of USERRA and all of the case law interpreting

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arbitration requirements.

[8]38 U.S.C. §4302(b).

USERRA (and the VRR before it) would be meaningless, since the arbitrator would decide everything.

A requirement that Garrett submit his claim to an arbitrator for binding arbitration cannot be reasonably viewed as anything other than the establishment "of additional prerequisites to the exercise" of his full range of rights under USERRA. Whether Circuit City calls the Associate Issue Resolution Package a contract, an agreement, a policy, a plan or a practice, there can be no question but that it establishes an additional prerequisite (that is, mandatory arbitration) on Garrett before he can exercise his rights under USERRA[9] to bring suit in the federal district court and have his case resolved by a jury. As such, the employer-employee agreement mandating binding arbitration of all employment disputes prevents him from exercising his rights under USERRA and is therefore prohibited.

There is no need to go further than the clear and unambiguous language of §4302(b). The statute does not differentiate between collective bargaining agreements that mandate arbitration and private agreements that mandate

[9]Under §4323 of USERRA, those rights would include, *at the option of the servicemember,* hiring private counsel to sue or requesting that the Attorney General of the United States represent the member in a suit at no charge. The rights would also include seeking reinstatement, compensatory damages in the form of lost wages and liquidated/punitive damages and attorneys fees. Because the determination of whether or not the employer acted in bad faith requires a fact finding determination, the servicemember is also entitled to a jury trial.

arbitration: either one is preempted when an eligible veteran seeks to enforce his or her rights under USERRA by suit in state or federal court.

C. The legislative history of USERRA precludes mandatory arbitration agreements that would put additional conditions on the servicemembers' rights under USERRA.

If this Court deems it necessary to go beyond the plain language of §4302(b), then the language from the House Committee report in the legislative history of USERRA also supports affirming the district court's ruling that no binding arbitration can be imposed in a USERRA case. All parties have quoted the following language from the House Committee Report on USERRA:

> "Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York*, 675 F. Supp. 847 (S.D.N.Y. 1987), and *Fishgold, supra*, 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney v. Missouri-Kansas-Texas Railway Co.*, 357 U.S.265, 270 (1958); *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under this Act resorts to arbitration, any arbitration decision shall not be binding as a matter of

> law. *See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).
>
> "The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights that are already in existence may be waived. *See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). An 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 the Committee bill and would be void."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453 (hereinafter "House Report No. 103-65").

Circuit City argues that the quoted language from House Report No. 103-65 (" this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required") must be read as applying only to arbitration mandated by collective bargaining agreements. The House Report does not limit the statement in that manner and this Court should not do so either.[10]

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[10]In an interesting irony of history, the Supreme Court case most frequently quoted in discussions of USERRA, *Fishgold v. Sullivan Drydock and Repair Corp., supra,* actually came to the Supreme Court *after it had been previously arbitrated* and the veteran actually lost before both the arbitrator and the Supreme Court. The decision of the arbitrator was not deemed binding on the federal courts that subsequently considered Mr. Fishgold's declaratory judgment

D. Garrett has a Seventh Amendment right to a jury trial on his allegations of violation of §4323(c)(1)(A), and that right would be lost if arbitration was mandated.

One of the aspects of damages Garrett has demanded and to which he is entitled under USERRA is liquidated damages (equal to his lost wages) upon a finding of willful violation of the Act by Circuit City. *See* 38 U.S.C. §4323(c)(1)(A). Under the circumstances, those damages would be punitive in nature and, therefore, the Plaintiff would be entitled to a jury trial under the Seventh Amendment to the U. S. Constitution. The line of prior cases ruling that there was no entitlement to a jury trial under the predecessor statutes, such as the VRR,[11] are easily distinguished by pointing out that no liquidated or punitive damages were available as a remedy under any of the veterans' reemployment statutes until the enactment of USERRA.

Since the adoption of USERRA, at least two federal courts have ruled that the plaintiff-veteran was entitled to a jury trial. *See Spratt v. Guardian Auto.*

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complaint to have his rights under the Selective Training and Service Act of 1940 ("STSA") determined. The STSA had no provision similar to §4302(b) and, therefore, the facts in *Fishgold* are clearly distinguishable from Lt Col Garrett's dispute with Circuit City.

[11]*See, e.g., Troy v. Hampton,* 756 F. 2d 1000, 1003 (4th Cir. 1985), *cert. denied sub nom. Blackmon v. Observer Transp. Co.,* 474 U.S. 864, 88 L. Ed 2d 151, 106 S. Ct. 182 (1985) (claims under VRR are equitable in nature and must be tried to the court). *But see Steffen v. Farmers Elevator Serv. Co.* , 109 F. Supp. 16, 20 (D. Iowa 1952) (veteran suing for money damages under VRR was entitled to a jury trial) and *Chance v. Dallas County Hospital District,* 176 F. 3d 294 (5th Cir. 1999) in which a USERRA case was tried to a federal jury, although the jury's verdict in favor of the veteran was subsequently overturned by the magistrate judge.

Prods., 997 F. Supp. 1138, 1141 (N.D. Ind. 1998) and the very recent decision in *Duarte v. Agilent Technologies, Inc.*, ___ F. Supp. 2d ____ (D. Colo. 2005), 2005 WL 878455, 2005 U.S. Dist. LEXIS 1988. In *Duarte*, the court reviewed the punitive wages provisions of USERRA and found them analogous to the liquidated damages provisions available under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b), which also requires a finding of willfulness on the part of the defendant. The Supreme Court ruled in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125, 105 S. Ct. 613, 83 L. Ed. 2d 532 (1985) that liquidated damages under the ADEA were meant to be punitive and are conditioned on a finding of willfulness of the defendant. Therefore, reasoned the court in *Duarte,* plaintiff was entitled to a jury trial based on his claim for liquidated damages under USERRA. The court in *Duarte* concluded:

> "In reaching this conclusion, I am mindful that '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt,* 293 U.S. 474, 486, 55 S. Ct. 296, 79 L. Ed. 603 (1935)."

Duarte, supra on page 3 of the opinion at 2005 WL 878455.

Circuit City has cited no precedents that would justify denying Garrett his right to a jury trial for his USERRA. He would be denied just that if this Court

sent the matter to mandatory, binding arbitration. The district court in this case opined that Garrett was entitled to a jury trial and, with respect, the ROA urges this Court to conclude likewise.

E. If arbitration was ordered, the servicemember would not have the protections of the SCRA to stay the proceedings.

On December 19, 2003, President Bush signed legislation which enacted the Servicemembers Civil Relief Act, 50 U.S.C. App. §§501-596, a complete re-write of the former Soldiers' and Sailors' Civil Relief Act. The SCRA is applicable to civil proceedings in any "court or an administrative agency of the United States or of any State (including any political subdivision of a State), whether or not a court or administrative agency of record."[12] However, by its definition, the SCRA does *not* apply to private arbitration proceedings.

One of the significant differences between the old SSCRA and the new SCRA is the provision concerning stays of proceedings. Pursuant to 50 U.S.C. App. §522, if a servicemember is unable to attend court or official administrative agency proceedings as a result of his or her military duties, and if the servicemember and their commanding officer communicate this fact to the court, a stay of the proceedings *must* be granted for a minimum of 90 days. The stay can be extended for the duration of the servicemember's inability to attend the

[12]50 U.S.C. App. §511(5).

proceedings. Under the old SSCRA, the issue of whether to grant a stay in the proceedings or not was merely a matter within the sound discretion of the court. *Neither the SCRA nor its predecessor, the SSCRA, apply to private arbitration proceedings.*

If this Court were to overturn the district court's opinion and send this matter to mandatory, binding arbitration, all discovery would have to be completed within 90 days.[13] In the event Garrett was serving on active duty with the Marine Corps when the arbitrator ordered the matter to proceed, he would not be able to participate and attend the proceedings and would not have the protections of the SCRA to mandate a stay of the proceedings. Giving up the protections of the SCRA (which would result from this Court ordering mandatory arbitration) could be potentially devastating to Garrett and all others similarly situated.

In point of fact, this is not a hypothetical issue. At the present time, Garrett is serving an extended tour of active duty with the U.S. Marine Corps and is stationed in the Horn of Africa. Military leave would not, in all likelihood, be granted for him to return and attend a private arbitration hearing. However, while the matter is pending in the United States District Court for the Northern District of Texas, the SCRA would protect Lieutenant Colonel Garrett under the stay

[13]Brief of Circuit City p. 34.

provisions of 50 U.S.C. App. §522 if he requested a stay.

According Garrett the protections of the SCRA to stay proceedings in his USERRA claims currently pending before the district court is perfectly in keeping with the requirement, initially espoused by the *Fishgold* court, to give the statutes a "liberal construction" in favor of the veteran. That cannot be accomplished if this Court orders the matter to proceed in mandatory arbitration.

F. Congress treats servicemembers and veterans differently than civilians for certain civil obligations and employment rights.

The main thrust of Circuit City's entire argument is that *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) mandates application of the FAA to any and all agreements to arbitrate.[14] With respect, Congress has, by enacting both the SCRA and USERRA, indicated its intention that veterans and servicemembers be treated differently from civilians regarding certain types of civil obligations and employment matters.

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[14]For purposes of the argument, ROA will concede that an agreement to arbitrate was formed when Garrett failed to opt out of the Circuit City arbitration plan. However, he could not have known at that time that he would have a USERRA claim in the future and a waiver of any rights under USERRA requires at least an "awareness of the statutory right and an expressed intent to waive the right . . . . *See Loeb [v. Kivo, 169 F. 2d 346 (2nd Cir. 1948]).*" *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1132 (W. D. Mich. 2000). Garrett may have agreed to arbitrate other matters concerning his employment relationship with Circuit City, but not his rights under USERRA. There was no specific, clear, knowing waiver of his rights to a jury trial, his right to sue without paying court costs, his right to penalty wages as punitive damages, his rights to full discovery provided by the Federal Rules of Civil Procedure and his protections under the SCRA if the dispute arose while he was on active duty in the Marine Corps.

Pursuant to the SCRA, for example:

• The interest rate on a pre-service obligation bearing interest at a rate higher than six percent is reduced to a maximum of six percent interest if the ability of the servicemember to pay the debt is materially affected by his active duty service.[15]

•Statutes of limitations run neither in favor or against servicemembers for the entire period of their active duty service.[16]

•A default judgment cannot be entered against a servicemember absent certain procedural safeguards being taken by the opponent, including appointment of counsel for the servicemember and an automatic 90 day stay in the proceedings following the appointment of counsel.[17]

•A foreclosure or eviction cannot proceed without a court order and a court may stay those proceedings for so long as "justice and equity [may] require".[18]

•A lease on an automobile may be canceled without any penalty when the servicemember is transferred overseas or is deployed in support of a military operation for not less than 180 days.[19]

•A military member who is unable to pay in full his pre-service obligations as a result of his military service can apply to a court for debt relief, deferring some or all of his debts until after his discharge and the expiration of a period of reconstitution, conditioned on the obligation to repay the deferred amount amortized over the remaining

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[15]50 U.S.C. App. §527.

[16]50 U.S.C. App. §526.

[17]50 U.S.C. App. §521.

[18]50 U.S.C. App. §§531, 532, 533.

[19]50 U.S.C. App. §535.

life of the obligation.[20]

There are other, numerous protections that the SCRA accords to servicemembers, before, during and, in some instances, for periods after their military service.[21] No other statutes in the United States Code mandate the modification of civil contracts in the manner that is required by the SCRA. No other law can mandate a creditor to lower an interest rate to six percent and write off the interest in excess of that amount. The SCRA does just that. No other law can prevent a mortgagee, who holds the property under a deed of trust, from going through self-help foreclosure and repossession of the property, but the SCRA can and does. No other statute makes it a crime to knowingly repossess the automobile of a servicemember without a court order authorizing such seizure.
The SCRA does precisely that.

No persons are entitled to the protections of the SCRA except servicemembers.[22] As to their civil obligations that are within the scope of the SCRA's protection, they are treated differently and protected in different ways than other non-military citizens because, as the Supreme Court observed in *Boone v.*

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[20]50 U.S.C. App. §591.

[21]The importance of the stay of proceedings (in judicial and administrative agency proceedings) is discussed *supra* in Section IIE.

[22]50 U.S.C. App. §511(1).

Lightner, 319 U.S. 561, 575 (1943):

> "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."

According to the Supreme Court in *Fishgold, supra*, the same liberal construction is mandated when analyzing veterans' reemployment rights statutes, such as the STSA, the VRR and now, USERRA.[23]

There are certain provisions in USERRA that make it unique among all federal anti-discrimination statutes. Among them are:

> •USERRA applies to all employers, regardless of whether they have one employee or thousands.[24]
>
> •An employer may not initiate an action against the veteran or servicemember under USERRA. The only person who has standing to initiate an action under USERRA is the person claiming rights or benefits under USERRA.[25]
>
> •There are no filing fees or court costs assessed to any person brining

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[23]Historically, the additional consideration accorded servicemembers and veterans by statutes such as the SCRA and USERRA was acknowledged in President Lincoln's Second Inaugural Address in 1865, when he said that his goals were "to bind up the nation's wounds. To care for him who shall have borne the battle, and for his widow and his orphan." That phrase is, in part, the *raison d'être* for the Department of Veterans Affairs, the SCRA and USERRA.

[24]*See Cole v. Swint*, 961 F. 2d 58, 60 (5th Cir. 1992): "The Act [the VRR] does not have a threshold business size for coverage, unlike many other acts which incorporate such limiting provisions such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq."

[25]38 U.S.C. §4323(f).

an action under USERRA.[26]

•There is no statute of limitations in the statute for initiation of an action under USERRA and state statutes of limitations may not be applied to an action under USERRA.[27]

•An employee who is reemployed pursuant to USERRA cannot be terminated, except for cause, for either 180 days or one year following reemployment (depending on the length of service).[28]

As Congress has done with the SCRA regarding certain types of civil obligations and proceedings, USERRA provides employment protections for servicemembers and veterans that are simply not accorded to non-military citizens. Congress has determined that the sacrifices citizen-soldiers make for their country entitle them to vindication of their employment rights in the federal courts, regardless of any agreements to arbitrate they may have previously approved.

The fact that *Gilmer*, *supra*, extends mandatory arbitration to claims arising under the ADEA is not controlling on claims arising under USERRA. The employment claims of veterans and servicemembers are treated differently by Congress and the enforcement procedures outlined in USERRA preempt any private arbitration agreement.

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[26]38 U.S.C. §4323(h).

[27]38 U.S.C. §4323(i).

[28]38 U.S.C. §4316(c).

III.
CONCLUSION

At this very moment throughout the world, tens of thousands of Guard and Reserve members who have been mobilized to fight in the Global War on Terror are serving the nation, many in harm's way. By affirming the decision of the district court, this Court will recognize the need to protect the rights of those men and women in every manner authorized by law. One of the most important of those laws is USERRA. It provides for enforcement mechanisms that include the right to trial by jury in a federal court. Claims brought under USERRA are not subject to mandatory arbitration, regardless of whether the arbitration agreement arose from a collective bargaining agreement or from an agreement between the employer and the employee.

This is a clear test case: the issue is squarely before this Court. Now is the time to issue an appellate opinion that will make it clear to all, employers and employees alike, that USERRA claims are to be heard by courts and not arbitrators.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(A)(7).

1. Exclusive of the exempted portions of 5th Cir. R. 32.2, the Brief contains: 5532 words.

2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 12 in Times New Roman, 14 point. As permitted by 5th Cir. R. 32.1, footnotes are in 12 point.

3. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(A)(7), may result in the Court's striking the Brief and imposing sanctions against the person signed the Brief.

_____

John S. Odom, Jr.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the *Amicus Curiae* Brief of Reserve Officers Association has been served by U. S. Mail on this _____ day of May, 2005 to:

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All counsel have consented to service of the electronic version of this brief via e-mail and the brief has been transmitted to counsel in that manner.

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