IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 34,613

PHILLIP G. RAMIREZ, JR.,

Plaintiff-Petitioner,

v.

STATE OF NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT, DORIAN DODSON, in her individual and official capacities, RON WEST, in his individual and official capacities, BARBARA AUTEN, in her individual and official capacities, ROGER GILLESPIE, in his individual and official capacities, TED LOVATO, in his individual and official capacities, TIM HOLESINGER, in his individual and official capacities, DANIEL BERG, in his individual and official capacities,

Defendants-Respondents,

and

NEW MEXICO ATTORNEY GENERAL'S OFFICE,

Intervener.

BRIEF OF *AMICI CURIAE* THE RESERVE OFFICERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER-APPELLANT

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> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

> The intent of the New Mexico Military Code **and all laws and regulations of the state affecting the military forces** is to reasonably conform to all laws and regulations of the United States affecting the same subjects, except as otherwise expressly provided with respect to military justice.

NMSA 1978 § 20-1-2 (1987) (emphasis added).

> In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

38 U.S.C. § 4323 (b)(2) (1998).

> The rights, benefits **and protections of the federal Uniformed Services Employment and Reemployment Rights Act of 1994** [38 USCS § 4301 et seq.] **shall apply to a member of the national guard** ordered to federal or state active duty for a period of thirty or more consecutive days.

NMSA 1978, § 20-4-7.1 (B) (2004) (emphasis added).

I. SUMMARY OF PROCEEDINGS

The Reserve Officers Association of America ("ROA") defers to the nature and score of the case and proceedings and statement of facts as presented by the Plaintiff-Petitioner, Sergeant First Class ("SFC") Ramirez in the pending appeal and record below.

II. SUMMARY OF ARGUMENT

The State of New Mexico Children, Youth, and Families Department ("CYFD") argues that the Uniformed Services Employment and Reemployment Rights Act, ("USERRA") cannot be enforced against the state by a state by a state employee. The ROA disagrees.[1] The position of CYFD conflicts with both the intents of USERRA and New Mexico law. USERRA does not allow a state to avoid its protections, especially when, as is the case here, state law incorporates USERRA's protections.[2] If the Court accepts the CYFD's argument then state employees who are members of the New Mexico National Guard called to federal active duty will have no means by which to enforce their reemployment rights.

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* NMSA 1978, § 20-1-2 (1987); NMSA 1978, § 20-4-7.1 (2004); NMSA 1978, § 28-15-1 (1941); NMSA 1978, § 28-15-2 (1941); NMSA 1978, §28-15-3 (1941).

III. ARGUMENT

A. THE HISTORY OF THE VETERANS' REEMPLOYMENT RIGHTS STATUTE SUPPORTS A LIBERAL CONSTRUCTION FOR THE BENEFIT OF THOSE WHO SERVE OUR NATION IN UNIFORM.

Our Nation has a long history of enacting and enforcing service-member reemployment laws. In 1940 Congress enacted the Selective Training and Service Act of 1940[3] (STSA). The STSA drafted millions of young men for service in World War II. In enacting the STSA, Senator Elbert Thomas of Utah advocated for legislation requiring civilian employers of those drafted to reemploy the draftee/veteran upon completing of military service. Senator Thomas explained his reasoning as follows:

> [I]f Congress has the power to raise an army that power can be effectively exercised only if Congress can take such measures as are necessary to make it an efficient army and to prevent undue hardships upon the persons who constitute the army.... no one can deny that if we guarantee [veterans] their jobs when their military service is completed we have taken a long step in providing the Army and Navy with patriotic men who are willing and anxious to serve their country ... it is not unreasonable to require the employers of such men to rehire them upon completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in the United States are defended by such service.[4]

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[3] Pub. L 76-783, 54 Stat. 885, 890. The reemployment statute had many different formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). In this brief ROA will use VRRA to refer to the reemployment statute in effect prior to 1994, when Congress enacted USERRA as a long-overdue re-codification of the VRRA.

[4] 96 Cong. Rec. 10573 (remarks of Sen. Thomas), quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8th Cir. 1991).

To that end, section 8 of the STSA accorded reemployment rights to those drafted to serve in the War. Section 7 of the Service Extension Act of 1941[5] amended the reemployment provision to accord persons, who voluntarily enlisted in the armed forces after May 1, 1940, the same reemployment rights as draftees.[6] Beginning in the 1950s, Congress expanded the law to accord reemployment rights to persons who left civilian jobs for training or service in the NG&R. In 1955, section 2(f) of the Reserve Forces Act of 1955[7] amended the VRRA to accord reemployment rights to persons who left civilian jobs to perform 3-6 months of initial active duty training (IADT, e.g. basic training) in the NG&R.

After successfully completing IADT, a member of the NG&R is generally required to perform inactive duty training (IDT, e.g. the "one weekend per month 'drill'" associated with NG&R service), usually but not always on weekends, and active duty for training (ADT), usually for about two weeks once per year. In 1960, Congress amended the VRRA to accord reemployment rights to NG&R members returning to work after IDT and ADT.[8]

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[5] Pub. L. 77-213, 55 Stat. 626, 627.

[6] Although the VRRA applied to voluntary enlistees as well as draftees, this law remained part of the draft law until 1974. The draft law was called the Selective Training and Service Act of 1940. Congress changed the name to the Selective Service Act of 1948, Pub. L. 80-759, 62 Stat. 604. Three years later, Congress changed the name to the Universal Military Training and Service Act of 1951, Pub. L. 82-51, 65 Stat. 75. The final name for the draft law was the Military Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100.

[7] Pub. L. 84-305, 69 Stat. 598, 602.

[8] Pub. L. 86-632, 74 Stat. 467.

After the 1960 amendment, NG&R personnel had the right to absent themselves repeatedly from their civilian employment for periodic military training. Some employers perceived these repeated absences to be a nuisance, and some employers rid themselves of the nuisance by firing or otherwise discriminating against NG&R members. Accordingly, in 1968, Congress made it unlawful for an employer to deny a service member retention in employment, promotion, incident or advantage of employment because of the employee's obligations as a member of a reserve component of the armed forces.[9] In 1986, Congress expanded that provision to outlaw discrimination in hiring as well.[10]

In 1974 Congress made significant changes to the law. Section 9(c)(3) of the VRRA became section 2021(b)(3) - - - the precursor to section 4311 of USERRA, the section that is relevant to the case at bar. That same year, Congress also disconnected the reemployment statute from the draft law, moving the reemployment statute from title 50, National Defense, to title 38, Veterans Benefits. These enactments became the Vietnam Era Veterans Readjustment Assistance Act[11] (VEVRAA), which made the law applicable to state and local governments.[12]

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[9] Section 1 of Pub. L. 90-491, 82 Stat. 790.

[10] Section 331 of the Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. 99-576, 100 Stat. 3248, 3279.

[11] Section 404 of the VEVRAA, Pub. L. 93-508, 88 Stat. 1578, 1594-1600.

[12] Section 2021(a)(2)(B) of the VRRA, as amended by VEVRAA, added States and their political subdivisions to the kinds of employers subject to this law. The

The Supreme Court of the United States has addressed the reemployment statute numerous times.[13] Shortly after World War II ended, the Court interpreted the reemployment provision of the STSA for the first time in *Fishgold v. Sullivan Drydock & Repair Corp.*[14] The decision states a purpose for the Act:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.[15]

The decision continues with the Court's mandate to construe the law in favor of the veteran: "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."[16] *Fishgold* is

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reemployment statute has applied to the Federal Government and to private employers since 1940.

[13] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946); *Trailmobile Corp. v. Whirls,* 331 U.S. 40 (1947); *Aeronautical Industrial District Lodge 727 v. Campbell,* 337 U.S. 521 (1949); *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278 (1949); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Diehl v. Lehigh Valley Railroad Co.,* 348 U.S. 960 (1955); *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265 (1958); *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169 (1964); *Brooks v. Missouri Pacific Railroad Co.,* 376 U.S. 182 (1964); *Accardi v. Pennsylvania Railroad Co.,* 383 U.S. 225 (1966); *Eagar v. Magma Copper Co.,* 389 U.S. 323 (1967); *Foster v. Dravo Corp.,* 420 U.S. 92 (1975); *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977); *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1980); *Monroe v. Standard Oil Co.,* 452 U,S. 549 (1981); and *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991); *see also* Category 10.1 at www.roa.org/law_review notes on these cases.

[14] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946).

[15] *Id.* at 284.

[16] *Id.* at 285.

now the seminal case for interpreting statutes involving veterans' employment.[17]

The Supreme Court decided *Fishgold* on May 6, 1946: a date contemporaneous with the return of millions of U.S. service members to their civilian jobs and a date in close proximity to events, like the raising of the U.S. flag on *Mount Suribachi* on Iwo Jima, which are now immortalized in our national conscience.[18] Accordingly, the United States Supreme Court's first 14 cases applying the VRRA involved persons who were drafted or who voluntarily enlisted in the regular armed forces.

However, the last three Supreme Court cases (1981, 1991 and 2011) dealt with the application of this law to NG&R members. This is not surprising. After Congress abolished the draft in 1973, the Department of Defense adopted its "Total Force Policy" and greatly increased reliance on NG&R personnel.

In *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), the Court addressed the situation of Roger D. Monroe, a junior enlisted member of the Ohio Army National Guard. Mr. Monroe worked for the Standard Oil Co. at its refinery in Lima, Ohio. The refinery operated 24-hours per day, 365 days per year. Mr. Monroe and his colleagues worked five consecutive eight-hour days per week, but not always Monday through Friday, weekend work distributed to all employees.

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[17] *See* Recent Decisions, *Veterans. Re-Employment under Selective Service Act. Protection of Seniority*, 33 VA. L.REV. 2, 219 (1947).

[18] February 23, 1945, by photographer Joe Rosenthal, *see http://www.iwojima.com/raising/lflaga2.gif.*

As a member of the National Guard, Mr. Monroe was required to participate in one weekend of IDT (drills) each month, and his drill weekend frequently conflicted with his scheduled work at the refinery. When this occurred, Standard Oil complied with the VRRA and granted him an unpaid military leave of absence for the days when his military training obligation prevented him from working at the refinery. Monroe complained that reporting for required National Guard training cost him money given that his Army pay for a weekend of training was substantially less than what he earned for working weekends at the refinery.

Monroe contended that section 2021(b)(3) of the VRRA required the refinery to schedule his work around his drill weekends and requested that the refinery do the same. When the employer refused to make this accommodation, Monroe sued, and prevailed, in the United States District Court for the Northern District of Ohio.[19] Standard Oil appealed and prevailed in the Court of Appeals.[20]

The Supreme Court granted certiorari because of an apparent conflict among the Circuit Courts.[21] In a 5-4 decision written by Justice Potter Stewart, the Court affirmed the Sixth Circuit's dismissal of Monroe's claim. After reviewing the legislative history of section 2021(b)(3), the Court held, "The legislative history thus indicates that section 2021(b)(3) was enacted for the significant but limited

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[19] *Monroe v. Standard Oil Co.*, 446 F. Supp. 616 (N.D. Ohio 1978).
[20] *Monroe v. Standard Oil Co.*, 613 F.2d 641 (6th Cir. 1980).
[21] The Court referred to *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980).

purpose of protecting the employee-Reservist against discriminations like discharge and demotion, motivated *solely* by Reserve status."[22] The Supreme Court did not hold that an employee challenging a discharge under section 2021(b)(3) would be required to prove that he or she was fired *solely* because of NG&R obligations.

In fact, that interpretation of *Monroe* was not only *dictum* but was taken out of context. Nonetheless, the Tenth Circuit relied on this out-of-context *dictum* in reversing a District Court decision for a Naval Reservist who had been fired.[23] In *Sawyer* the District Court found that the reservist had established that his reserve obligations constituted at least one of the reasons for the firing, and that the firing was unlawful. However, the Tenth Circuit held that the reservist was required to prove that his reserve obligations constituted *the sole reason* for the firing.

A statute that requires the fired employee to prove that he or she was fired *solely* because of military obligations is of little value. As is explained more fully below, Congress forcefully dealt with the *Sawyer* problem when it enacted USERRA in 1994.

After *Monroe,* a decade passed before the Supreme Court addressed the next case regarding the reemployment statute.[24] William "Sky" King was a senior

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[22] *Monroe,* 452 U.S. at 559 (emphasis supplied).
[23] *Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988).
[24] *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

enlisted member of the Alabama Army National Guard. The National Guard selected him for the position of Sergeant Major of the Alabama National Guard, a position that would require him to serve full-time for three years as the senior enlisted advisor to the Adjutant General of Alabama. King informed his civilian employer that he would be leaving his job for approximately three years of full-time military service. The employer strenuously objected to the duration and contended that King would not have the right to reemployment upon completion of such a lengthy period of service. King informed the employer that he would be reporting for full-time military service as ordered and that the question of his reemployment rights could be resolved upon his return from service. The employer was unwilling to wait and filed suit against King in the United States District Court for the Northern District of Alabama, seeking a declaratory judgment to the effect that King would not have reemployment rights upon his completion of service.[25] In an unreported decision, the District Court granted the declaratory judgment requested by St. Vincent's Hospital, and the Eleventh Circuit affirmed.[26]

The VRRA had a four-year limit on the duration of *active duty,* but no limit on the duration of *active duty for training* (ADT). The typical ADT period is

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[25] Section 4323(f) of USERRA, 38 U.S.C. 4323(f), specifically precludes such employer-initiated lawsuits under the new law.

[26] *St. Vincent's Hospital v. King,* 901 F.2d 1068 (11th Cir. 1990).

approximately two weeks, but starting in the 1970s the services starting asking some of their NG&R members to participate in substantially longer ADT periods or more than one ADT period per year.

In 1981, the Fifth Circuit decided that a Reserve Component member did not have the right to unpaid military leave under the VRRA for a lengthy training period that the court found to be unreasonably burdensome on the employer.[27] Later, the Third Circuit agreed with this judicially created "rule of reason" under the VRRA.[28] In 1990, the Fourth Circuit firmly rejected the argument that a civilian employer was required to accommodate the military service of employees who were NG&R members only if a court found the resulting burden on the employer to be "reasonable."[29]

The Supreme Court granted *certiorari* to resolve this conflict. In a decision by Justice David Souter, the Court unanimously rejected the employer's argument that a "rule of reason" limited the right of employees like King to take unpaid military leave from their civilian jobs for military service:

> The inference that Congress intended no such limits as the hospital espouses is buttressed by a joint House-Senate Conference Committee's disapproval of a shift in position taken by the Department of Labor on this

[27] *Lee v. City of Pensacola,* 634 F.2d 886 (5th Cir. 1981).
[28] *Eidukonis v. Southeastern Pennsylvania Transportation Authority,* 873 F.2d 688, 694 (3rd Cir. 1989).
[29] *Kolkhorst v. Tilghman,* 897 F.2d 1282 (4th Cir. 1990), *cert. denied* 502 U.S. 1029 (1992).

> question. See United States Department of Labor, *Veterans' Reemployment Rights Handbook* 111 (1970). After *Lee v. City of Pensacola,* 634 F.2d 886 (5th Cir. 1981), the department adopted the different view that section 2024(d) applied only to leaves of 90 days or less. *See* H.R. Rep. No. 97-782, page 8 (1982). Subsequently, a House-Senate Conference Committee Report announced that the House and Senate Veterans' Affairs Committees "did not agree that the 90-day limit was well-founded either as legislative interpretation or application of the pertinent case law." 128 Cong. Rec. 25513 (1982). Coming as it did in the aftermath of Congress' decision to place AGR participants under the coverage of section 2024(d), this statement is decidedly at odds with the hospital's position and confirms the conclusion that the enactment of the AGR program was not intended to modify the ostensibly unconditional application of section 2024(d).[30]

The VRRA served our nation well, but by the 1980s numerous piecemeal amendments had made the law confusing and cumbersome. The Department of Labor (DOL) and the Department of Defense (DOD) drafted a proposed new reemployment statute and forwarded it to the White House.

On August 2, 1990, Iraq invaded and quickly occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew a "line in the sand" and made clear his determination to protect Saudi Arabia and liberate Kuwait. Part of his response included the first significant call-up of National Guard and Reserve personnel since the Korean War. The call-up focused national attention on perceived deficiencies in laws (including the VRRA) to protect mobilized Guard

[30] *King,* 502 U.S. at 222.

and Reserve personnel. As a result, President Bush forwarded the DOL-DOD draft to Congress in February 1991. Both the Senate and House of Representatives acted on the presidential initiative during the 102nd Congress, but the differences between the two versions were not resolved before the end of that Congress.

Near the end of the 103rd Congress, the differences were resolved and the legislation was presented to President Clinton for his signature. On October 13, 1994, he signed the Uniformed Services Employment and Reemployment Rights Act into law.[31]

USERRA's legislative history makes clear that USERRA is not a new law but an improvement upon a law that dates back to 1940:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment related discrimination, and protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.'* [32]

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[31] Pub. L. 103-353, 108 Stat. 3149.

[32] *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).

Like section 2021(b)(3) of the VRRA, section 4311(a) of USERRA[33] forbids discrimination against persons who seek or hold civilian positions of employment, but section 4311(a) is significantly broader in terms of who is protected.[34]

Congress sought to overrule the *dictum* from *Monroe* and the holding in *Sawyer* that the NG&R member challenging a personnel action must prove that anti-military animus was *the sole reason* for the denial of a benefit of employment. Section 4311(c) provides:

> An employer shall be considered to have engaged in actions prohibited—(1) under subsection (a) if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.[35]

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[33] 38 U.S.C. 4311(a).

[34] Under . 38 U.S.C. 4311(a):

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation

[35] 38 U.S.C. 4311(c) (emphasis supplied).

USERRA's legislative history explains the purpose of section 4311.

> Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person in the Delayed Entry Program, *Trulson v. Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee *intends that these provisions be broadly construed and strictly enforced.* ...
>
> Section 4311(b) would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

> This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[36]

No one has been drafted by the United States since 1973, when Congress abolished the draft and established the All-Volunteer Military (AVM). The Total Force Policy is an integral part of the AVM. The National Guard and Reserve have been transformed from a "strategic reserve" (available only for World War II) to an "operational reserve" routinely called to the colors for military operations like the ongoing operations in Iraq and Afghanistan.

Today, the U.S. military is an all-volunteer force of which SFC Ramirez was a member. The entire U.S. military establishment, including the National Guard and Reserve, accounts for less than three quarters of one percent of our nation's population. That their numbers are so small (in proportion to our national population that now doubles the World War II-era population) only increases the debt that our nation as a whole owes to those who serve.[37] One hopes that the

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[36] House Rep. No. 103-65, 1994 U.S.C.C.A.N. 2449, 2456-57 (emphasis supplied).
[37] On August 20, 1940, during the Battle of Britain, Prime Minister Winston Churchill said, "The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the

circumstances of the times and sentiments like these were reflected upon in 1946 when Justice Douglas delivered the opinion of Court in *Fishgold*:

> 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.[38]

It is against this backdrop, beginning in 1941, the New Mexico Legislature (like many other states) established similar state protections for its citizen-soldiers. Such protections incorporate by reference[39] the rights afforded under USERRA and inure to the benefit of New Mexico National Guard members who, like SFC Ramirez,[40] are called to federal service.[41]

British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few." *Never Give In: The Best of Winston Churchill's Speeches,* edited by Winston S. Churchill (grandson), Hyperion Publishers 2003, page 238. These eloquent words about the Royal Air Force apply equally to the members of the U.S. armed forces today.

[38] *Fishgold* , 328 U.S. at 285.

[39] New Mexico National Guard members on federal active duty are covered under USERRA and NMSA 1978, § 20-4-7.1 (2004).

[40] Under USERRA:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty [...]. 38 U.S.C. § 4303(13)

> The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard

B. THE NEW MEXICO LEGISLATURE UNEQUIVOCALLY EXPRESSED ITS INTENT TO WAIVE STATE SOVEREIGN IMMUNITY TO USERRA CLAIMS IN 2004 WHEN IT ENACTED NMSA 1978 § 20-4-7.1(B), WHICH SPECIFICALLY CITES THE LAW OF USERRA.

When construing statutes, the guiding principle is to determine and give effect to legislative intent.[42] A statute is to be interpreted as the Legislature understood it at the time it was passed."[43] When enacting a statute the legislature is presumed to be well informed as to existing statutory and common law and does not intend to enact a nullity.[44] Further, the legislature is presumed to intend to change existing law when it enacts a new statute.[45] When several statutes relate to the same subject matter they must be construed in such a fashion as to give effect to every provision of each.[46]

In its decision, the Court of Appeals failed to take these important "temporal" cannons of construction into account when it attempted to determine

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> when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency. 38 U.S.C. § 4303(16).

[41] NMSA 1978, § 20-4-7.1 (2004).
[42] *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533 (2007).
[43] *Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.*, 1970-NMSC-156, ¶ 11, 82 N.M. 193 (1970).
[44] *Inc. County Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 4, 108 N.M. 633 (1989).
[45] *Id.*
[46] *See Id.*

the New Mexico Legislatures' intent. If it had done so, the only possible construction for NMSA 1978 §§ 20-1-2 (1987), 20-4-7.1(B) (2004), and 28-15-1 to 3 (1941), as a whole, or § 20-4-7.1(B) individually, is the Legislatures' unequivocally expressed intent to waive sovereign immunity. Instead, the Court of Appeals concluded that, "the statutes relied upon by Plaintiff do not meet the **requisite specificity required**[47] to determine the Legislature intended to waive the State's constitutional sovereign immunity to private suits for damages."[48] While the Court of Appeals does acknowledge that the provisions of New Mexico's oldest service member protections statutes, §§ 28-15-1 and 28-15-3, do waive sovereign immunity against the state as an employer, and the intent of § 20-1-2 is to conform "New Mexico law on military matters to federal law on the same subject" the court, nevertheless failed to harmonize those statutes to give any effect with regard to the provision of NMSA 1978 § 20-4-7.1, even though each of these statutes specifically address the same subject matter. The decision provides no analysis of the Legislatures' understanding of the statutory or common law at the time. When viewed in light of what the Legislature understood at the time of its

[47] *Ramirez v. State ex rel. Children, Youth and Families Dept.*, 2014-NMCA-057, ¶ 19, 326 P.3d 474, *cert. granted,* 2014-NMCERT-5 (emphasis added in bold).

[48] At footnote 4 of its decision, the Court proposes that a sufficiently specific waiver of sovereign immunity would be crafted in a fashion like that of the State of Minnesota. The statute cited, Minn. Sta. Ann. 105.05(5) was enacted in 2012, long after the wake of post-*Alden* decisions. Thus, in enacting that statute, the Minnesota Legislature had the benefit of an additional eight years of jurisprudence in the matter.

enactment of § 20-4-7.1, the intent to provide a remedy, pursuant to USERRA, for all New Mexico citizens in state court is clear.

In 2004 the New Mexico legislature amended NMSA 1978 § 20-4-7.1 to read, in part:

> B. The rights, benefits and protections of the federal Uniformed Services Employment and Reemployment Rights Act of 1994 [38 USCS § 4301 et seq.] shall apply to a member of the national guard ordered to federal[49] or state active duty for a period of thirty or more consecutive days.[50]

This statute explicitly states the protections of USERRA apply to members of the New Mexico National Guard. The importance of the Legislatures' choice of words at that time cannot be understated because the Legislature was well aware of the legal landscape and what was happening in the world when it enacted this statute in 2004.[51]

By mid-2004, the number of U.S. troops deployed to Iraq had nearly doubled from a year earlier, reaching a peak of 130,600.[52] The National Guard and

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[49] Contrary to the plain language, the Court of Appeals interprets the statute to extend the protections of USERRA only "national guard members called into state service." *Ramirez,* 2014-NMCA-057, ¶22.

[50] NMSA 1978, § 20-4-7.1 (2004).

[51] At the same time, in 2004, Sergeant First Class Ramirez and his New Mexico National Guard, HHC 111th MEB of Rio Rancho, NM, along with thousands of National Guard members across the United States were preparing for yet another 13 month deployment to Iraq.

[52] CRS Report for Congress, Troop Levels in the Afghan and Iraq Wars, FY2001-FY2012: Cost and Other Potential Issues at 13, Amy Belasco, (July 2, 2009).

reserve consisted of more than 44 percent of the U.S. troops in Iraq in 2004.[53] This was the perspective and setting in which the Legislature enacted § 20-4-7.1. The plain words state that, the federal Uniformed Services Employment and Reemployment Rights Act of 1994 [38 USCS § 4301 et seq.] shall apply to a member of the national guard ordered to federal or state active duty."

In 2004, the Legislature knew that it had waived sovereign immunity against the state as an employer in 1941 with the passage of NMSA 1978 §§ 28-15-1 and 28-15-2 (1941). The legislature understood that in 1987 it had already conformed "New Mexico law on military matters to federal law on the same subject."[54] The Legislature also knew that as of 1998 the plain language of 38 U.S.C § 4323(b)(2) grants jurisdiction for private suits against states only[55] to state courts, "in accordance with state law."[56] Whenever possible, a court must read different legislative enactments as harmonious, instead of as contradicting one another.[57] When read in harmony, the existing New Mexico and federal laws of

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[53] *Id., see also* Commission on the National Guard and Reserves. 2007, Second Report to Congress at 18 (April 18, 2007).
[54] NMSA 1978 § 20-1-2 (1987).
[55] "The amendment to USERRA, so far as bears on this case, adds a new section conferring only on state courts jurisdiction over suits against a state employer, 38 U.S.C. § 4323(b)(2), and makes the new jurisdictional provision applicable to pending cases, Pub. L. No. 105-368, § 211(b)(1), and hence to this case." *Velasquez v. Frapwell,* 165 F.3d 593, 593-594 (7th Cir. Ind. 1999).
[56] *Ibid.*
[57] *Quintana v. New Mexico Dept. of Corrections,* 1983-NMSC-066, ¶ 11, 100 N.M. 224 (1983)("When interpreting a statute we presume that the Legislature was

the time make clear that the Legislature intended for USERRA to apply to all New Mexican National Guard members.

C. ASSUMING *ARGUENDO* THE NEW MEXICO LEGISLATURE DID NOT EXPRESSLY WAIVE STATE SOVEREIGN IMMUNITY TO USERRA CLAIMS, THE ENACTMENT OF NMSA 1978 § 20-4-7.1(B), STILL CONSTITUTES A WAIVER OF SOVEREIGN IMMUNITY.

This Court has previously found a waiver of sovereign immunity without an express waiver.[58] All that is needed is for the Legislature to enact a new law that provides a private right of action against the State.[59] The Legislature is not required to amend all previous inconsistent legislation.[60]

The issue of waiver arose in *Luboyeski v. Hill* because the Legislature amended its Human Rights Act to include a private right of action against the State for discrimination claims.[61] However, New Mexico has never expressly waived its sovereign immunity regarding "discrimination" claims.[62] This Court was therefore asked to decide whether the State waived its immunity to discrimination suits by amending the HRA to include a new cause of action against the State for discrimination claims. This Court concluded that all that is necessary for the State

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informed as to existing law, and that the Legislature did not intend to enact a law inconsistent with any existing law.").

[58] *Luboyeski v. Hill*, 1994-NMSC-032, 117 N.M. 380 (1994).

[59] *Id.* at ¶ 14.

[60] *Id.* at ¶ 11.

[61] 1983 N.M. Laws, ch. 241, §5.

[62] *See*, 1976 N. M. Laws, ch. 58, §§ 1 – 19.

to waive immunity is for the Legislature to enact a new law that provides a right of action against the State.[63]

This Court stated in pertinent part:

> We note that the language of the exclusive-remedy provision of the Tort Claims Act, which states that the Act provides the exclusive remedy "for any tort for which immunity has been waive under the Tort Claims Act" (emphasis added), does not foreclose the possibility that the legislature also waived immunity under another act, and we conclude that this is exactly what happened: Section 28-1-13(D) constituted and constitutes a waiver of sovereign immunity for liability imposed on public entities by the Human Rights Commission...[64]

This waiver issue, along with the result in the above-cited case, and the application the rule has to the case at bar, comes into focus with a short review of the history of the relevant statutes. New Mexico statute initially granted sovereign immunity to "[a] governmental entity and any public employee while acting within the scope of duty" for any tort excepting those for which immunity is waive." N.M. Laws, ch. §§ 41-4-5 through 41-4-12.

In 1969, New Mexico enacted its Human Rights Act to eliminate "unlawful discriminatory practices" and to create a comprehensive scheme through which claims of discrimination could be adjudicated. 1969 N.M. Laws. Ch. 196, §§ 1-15.

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[63] *Luboyeski v. Hill*, 1994-NMSC-032, ¶ 14.
[64] *Id.* at ¶ 11.

Then, in 1975, *Hicks* abrogated immunity. *Hicks v. State*, 88 N.M. 588 (1975), order and opinion on rehearing, 88 N.M. 588 (1976). Shortly thereafter, in 1976, to conform to the *Hicks* decision, the N.M. Legislature passed New Mexico's Tort Claims Act ("TCA").[65] However, New Mexico's TCA is not a blanket waiver of immunity.[66] Instead, the waiver is "quite specific" to a limited number of enumerated causes of action.[67] New Mexico's TCA provides the exclusive remedy for suits against the State.[68]

Discrimination is not one of the specifically enumerated causes of action listed in the TCA. However, in 1983, years *after* the enactment of the HRA *and* the TCA, the N.M. Legislature amended the HRA to add the following provision: "In any action or proceeding under this section if the complainant prevails, the courts in its discretion may allow actual damages and reasonable attorney's fees, **and the state shall be liable the same as a private person.**"[69] Therefore, after the amendment, the State was subject to suit for discrimination, despite the fact that *discrimination* is not one of the specifically enumerated causes of action waived through the TCA.

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[65] *See*, 1976 N. M. Laws, ch. 58, §§ 1 – 19.
[66] *Id.*
[67] *Luboyeski*, 1994-NMSC-032, ¶ 8, *citing* 1976 N. M. Laws, ch. 58, §§ 1 – 19.
[68] *Id.*
[69] *Id.* at ¶ 9, *citing* 1983 N.M. Laws, ch. 241, §5 (emphasis added).

Given the above, this Court was presented with two conflicting statutes; one that did not waive immunity for discrimination suits, and one that specifically provided for a cause of action against the State for discrimination claims. New Mexico never expressly stated that the State intended to waive its immunity regarding discrimination claims. The State also did not amend the TCA to add discrimination to the specific list of causes of action allowed against the State. The New Mexico legislature simply amended the HRA to include a new cause of action against the State.

In *Luboyeski*, this led the State to argue that it could not be subjected to liability under the HRA because *discrimination* is not specifically waived under the TCA. The State argued that New Mexico's TCA overrides or supersedes New Mexico's HRA, despite the fact that the HRA was amended to include a cause of action against the State *years after* enactment of the TCA. This Court refused to rule in a manner that would have produced an absurd result.

In so doing, this Court acknowledged that New Mexico's Tort Claims Act is the "...exclusive remedy against a governmental entity..." in the State of New Mexico.[70] This Court also acknowledged that: "The areas for which immunity is waived in the Tort Claims Act are quite specific."[71] However, this Court gave great deference to the Legislature, and stated in pertinent part: "...we presume that

[70] *Id.* at ¶ 8.
[71] *Id.*

the legislature was aware of other statutes in existence at the time a statute was enacted."[72] This Court also stated:

> We think it reasonable to presume that the legislature was aware of a law as important and pervasive as is the Tort Claims Act, especially in light of the fact that it amended the Act in 1981, 1982, and 1983. Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another.[73]

Finally, this Court stated:

> When Section 28-1-13(D) was enacted in 1983, the legislature, presumably aware of the Tort Claims Act and of its exclusive-remedy provision, clearly and unequivocally stated that...the state shall be liable the same as a private person.[74]

The Court's ultimate ruling was stated as: "Accordingly, we hold that sovereign immunity has been waived by the Human Rights Act to the extent needed to permit recovery under the Act against the state and its political subdivisions."[75] Applying these same standards to the case at bar should lead to a similar result.

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[72] *Id.* at ¶ 10, *citing New Mexico Beverage Co. v. Blything*, 1985-NMSC-039, ¶ 3, 102 N.M. 533 (1985).
[73] *Id.* at ¶ 10, *citing Quintana v. New Mexico Dept. of Corrections*, 1983-NMSC-066, ¶ 11, 100 N.M. 224 (1983).
[74] *Id.* at ¶ 10, (internal citations omitted).
[75] *Id.* at ¶ 14.

In this case, the CYFD argues that the State of New Mexico may not be sued in its own courts for violations of the USERRA because the suit is not "in accordance with the laws of the State," *see* 38 U.S.C. § 4323(b)(2). The Court of Appeals seemed to agree (with the exceptions of §§ 28-15-1 to -3), and concluded that the CYFD was immune from liability because no provision of the pertinent statutes waives the immunity otherwise enjoyed by the State.[76]

Much like *Luboyeski*, the question before this Court is whether the explicit language of § 20-4-7.1(B) incorporating USERRA into state law constitutes a waiver of sovereign immunity. And the answer should be, yes. The statutory scheme contained within § 28-15-1 to -3, abrogates the States sovereign immunity by providing for an award of any loss of wages or benefits suffered by reasons of such employer's or official's unlawful action. The separate scheme composed of § 20-11-2 states the Legislatures' intent to reasonably conform all "laws and regulations of the state affecting military forces" to "all laws of the United States affecting the same subjects."[77] At the time the separate statute § 20-4-7.1(B) was enacted, incorporating USERRA into New Mexico law, these laws already existed. Further, like the statutes in *Luboyeski*, § 20-4-7.1(B) was an entirely separate legislative action providing a new cause of action.

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[76] *Ramirez v. State ex rel. Children, Youth and Families Dept.*, 2014-NMCA-057, ¶¶ 9, 19 (emphasis added in bold).
[77] *Ibid.*

It is only reasonable to presume that in 2004 the legislature was aware of the laws it enacted in 1941 to protect service member rights, especially in light of the fact that it amended these laws at least three times in the intervening years. "When interpreting a statute we presume that the Legislature was informed as to existing law, and that the Legislature did not intend to enact a law inconsistent with any existing law."[78] When § 20-4-7.1(B) was enacted in 2004, the Legislature was presumptively aware of USERRA, and its provision providing an exclusive remedy for claims against states in state courts.[79]

D. IF THE CYFD IS GRANTED SOVEREIGN IMMUNITY FROM SECTION 20-4-7.1, THEN PLAINTIFF IS WITHOUT A REMEDY.

Sergeant First Class Ramirez properly brought his USERRA claims in New Mexico State court because the provisions of USERRA and Section 20-4-7.1 provide that the State court is the only venue for a remedy. The CYFD improperly argues that New Mexico is immune from claims brought by its own employees under USERRA. In other words, the CYFR interpretation would allow *only non-state employees* of the New Mexico National Guard to have a remedy in New Mexico state court under Section 20-4-7.1. However, as noted above, a New Mexico State employee may bring claims against the State to

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[78] *Quintana v. New Mexico Dept. of Corrections,* 1983-NMSC-066, ¶ 11, 100 N.M. 224 (1983).

[79] 38 U.S.C. § 4323 (b)(2) (1998).

protect their service member reemployment rights,[80] and New Mexico law illustrates a long history of protecting the rights of its National Guard and Reserve citizens. Accordingly, the prospect that the state left its own employees out --- with no venue to enforce their rights--- is, in the view of the ROA, absurd.

IV. CONCLUSION

WHEREFORE, the ROA respectfully requests that this Court reverse the Court of Appeals decision, and affirm the decision of the District Court that the State of New Mexico is not immune from USERRA claims by its own employees.

Respectfully submitted,

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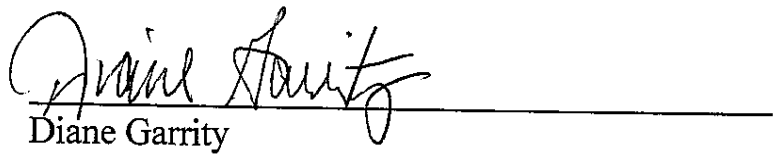

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