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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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Barbara Werner,  
*Petitioner,*

v.

The State of Washington, the Washington State Patrol,  
Jeffrey DeVere, Jay Cabezuela, Timothy Winchell,  
and John Batiste,  
*Respondents*

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**MEMORANDUM OF *AMICUS CURIAE*  
RESERVE ORGANIZATION OF AMERICA IN  
SUPPORT OF PETITION FOR REVIEW**

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## **I. INTEREST OF THE *AMICUS CURIAE***

The identity and interest of *amicus curiae* Reserve Organization of America is set forth in the Motion for Leave to File that accompanies this Memorandum.

## **II. INTRODUCTION**

This case concerns whether the State of Washington may lawfully discriminate against Reservist service members by diluting their paid leave time because of their service. Despite acknowledging that a slightly greater dilution would constitute an “end-run[] around the law” protecting Reservists’ rights, the court below upheld the dilution in this case because it is, in the court’s view, “reasonable.” Reservist service members of this State deserve better than to be subjected to any service-based discrimination that the State’s judges find reasonable. As the Petition explains, neither state nor federal law permits that result.

If left undisturbed, the decision below will hinder the military reserves' recruitment and retention efforts, which are essential to this State and the nation. United States military reserves date back to before the founding of the Republic when national citizen-soldier forces fought in the French and Indian War. State militias—which eventually became the National Guard—played a major role in the Revolutionary War. About 400,000 Guardsmen served in World War I, representing the largest state contribution to overseas military operations during the 20th century. Nearly 300,000 Guardsmen served in World War II. More than 200,000 Reservists contributed to the liberation of Kuwait in the Gulf War. And since September 11, 2001, more than one million Reservists and National Guardsmen have answered the call to serve their nation—some, many times over.

Reservists play a crucial role in the nation's military and in their home states and communities, including



Washington State. Today, the United States' Reserve Components have more than 1 million members and constitute nearly half of the total U.S. military force. They hail from all walks of life. They are public high school teachers, doctors, lawyers, and, like Petitioner, law enforcement officers. They are united not only by their undying devotion to the United States, but by their commitment to public service—many devoting their entire careers to working in state and local governments. Over 17,000 of these dedicated public servants call Washington State home.

Washington State has recognized the value these non-career servicemembers add to both the nation's armed forces and their home communities. Since 1939, in order to “preserv[e] . . . the peace, health, and safety of the [s]tate,” the Washington State Legislature has granted public employees military leave—“in addition to any vacation or sick leave to which [they were] entitled”—to

enable them to take part in military training and service. Over time, the Legislature has increased the amount of military leave available to Reservists, and today, the Washington Revised Code grants Reservists 21 days of military leave per year.

The U.S. Congress has likewise enacted a suite of reemployment protections designed to ensure that servicemembers called to serve their nation can return to their civilian jobs without being disadvantaged by their service. Decades of expanding federal reemployment rights culminated in a 1998 amendment to the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) that reaffirmed Reservists’ protections against adverse employment actions by state employers and authorized suits in state courts to vindicate those protections – a right recently confirmed by the United States Supreme Court. As federal regulation explains,

USERRA sets a floor for Reservist protections that employers may not disregard.

Yet, even while Reservists have become increasingly important to national security, they have faced increasing discrimination by civilian employers—including state and local governments—unwilling to accommodate their service. Section 2.020 of the Washington State Patrol’s Time and Report Manual (“TAR”) is the latest example: it flouts USERRA’s protection by forcing Reservist employees to count as leave time that would not be counted against them absent their military service. And the judgment below greenlights this discrimination, which will undoubtedly hinder military recruitment and retention efforts in this State if the judgment stands. This Court should review and reverse the judgment below to correct those problems and protect the military reserves’ ability to protect this country.

### III. ARGUMENT

#### A. **If Left Undisturbed, The Decision Below Will Hinder Recruitment And Retention Efforts For An Indispensable Military Component**

Every service branch except the newly created Space Force maintains a Reserve Component fully capable of supporting the nation’s military missions. From the standpoint of readiness, the Reserve Components provide a significant portion of the nation’s military forces. More than one million citizen-warriors—nearly half of the United States Armed Forces—serve in the Ready Reserve while maintaining their civilian employment. *See Defense Primer: Reserve Forces*, Cong. Rsch. Serv. 1 (updated January 17, 2023), [tinyurl.com/mwx5m867](https://tinyurl.com/mwx5m867); *id.* (the Ready Reserve—including the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard—“is the primary manpower pool of the reserve

components”). These public servants are crucial members of the nation’s military forces.

Indeed, the Reserve Components bear a significant burden in carrying out military operations and “provid[ing] critical combat power and support.” See Col. (Ret.) Richard J. Dunn, *America’s Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, The Heritage Found. (Oct. 5, 2015). In 2011, the Vice Chairman of the Joint Chiefs of Staff reported that “[d]uring a decade of sustained engagement in combat operations, the Reserve Components of our Armed Forces have been transformed . . . from a strategic force of last resort to an operational reserve that provides full-spectrum capability to the Nation.” Dep’t of Def., *Comprehensive Review of the Future Role of the Reserve Component*, Vol. I, at 1 (Apr. 5, 2011). As a result of this force transformation, a total of “34,511 [Reservists] were serving on active duty on August 24, 2021,” vastly

exceeding the number of Reservists mobilized at almost any point prior to September 11, 2001. Lawrence Knapp & Barbara Salazar Torreon, Cong. Rsch. Serv., RL30802 Reserve Component Personnel Issues: Questions and Answers at 8, n.33 (Nov. 2, 2021); *see also id.* (“Between September 11, 2001, and August 24, 2021, a total of 1,031,500 [R]eservists . . . served under voluntary or involuntary federal orders.”).

Since the Gulf War, Reservists have played a significant role in the United States military. “Reserve Component . . . service members have repeatedly deployed and operated in Bosnia, Iraq, Afghanistan, and participated in numerous other contingency, humanitarian, and homeland support missions.” Reserve Forces Pol’y Bd., *Improving the Total Force: Using the National Guard and Reserves*, RFPB Report FY17-01 11 (Nov. 1, 2016). In fact, over 1,000,000 Reservists have been activated since September 11, 2001—many multiple times. Knapp

& Torreon, *supra*, at 8 n.33. Since 2001, more than half of Reservists have been mobilized more than once, and 89 percent of these mobilizations were to combat zones. Reserve Forces Pol’y Bd., *supra*, at 25. Moreover, unlike earlier conflicts, soldiers being mobilized now are more likely to face increased time on active duty, thus putting their ability to return to their previous employment at greater risk. See Jeffery M. Hirsch, *Can Congress Use Its War Powers To Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L. Rev. 999 (2004). As the Department of Defense (“DoD”) recently concluded, “[u]nless we had chosen to drastically increase the size of the Active Components, our domestic security and global operations since September 11, 2001, *could not have been executed* without the activation of hundreds of thousands of trained Reserve Component personnel.” Dep’t of Def., *supra*, at 1–2 (emphasis added).

Washington State and the nation benefit greatly from Reservists' service. Reservists "bring unique capabilities and professional expertise to the Total Force gained through years of experience in the civilian sector," especially in professions that are typically too "cost-prohibitive to develop in the Active Component (i.e. doctors, nurses, lawyers, computer analysts, cyber experts, engineers, etc.)." Reserve Forces Pol'y Bd., *supra*, at 29. Further, Reserve units support thousands of jobs across Washington State and Reserve units' economic impact in the state can be measured in the hundreds of millions of dollars. *State of Washington Army Reserve Ambassador Program, Army Reserve*, <https://tinyurl.com/2e9c6bej> (last visited July 2, 2023). Moreover, maintaining a Reserve unit "requires significantly less overhead and infrastructure costs"—"typically less than one-third the cost of the Active Component." Reserve Forces Pol'y Bd., *supra*, at 18.



Yet, Reservists “have performed at a level on par with their Active Component[] counterparts and their performance has been consistently exceptional.” *Id.* at 11. Accordingly, the Reserve Components are an indispensable part of securing and protecting the national interest.

The ability to establish and maintain operational Reserve forces would be seriously impaired if employers did not allow their employees to serve or failed to accommodate employees who wish to serve as Reservists. *See* Jessica Vasil, *The Beginning of the End: Implications of Violating USERRA*, 11 DePaul J. Soc. Just. 1, 22 (2018) (“Due to an increased reliance on the Reserve/National Guard in a post[-]9/11 world, any violation of USERRA ultimately hurts national security.”); *see also* Comm’n on the Nat’l Guard & the Reserves, *Transforming the National Guard and Reserves into a 21st-Century Operational Force* 257–58 (Jan. 31, 2008) (explaining that

the reemployment protections “allay fears that may be a distraction in combat” and that “[a] service member’s thoughts of his or her family should always be a comfort, never a worry”) (*Transforming the Reserve Components*”).

Indeed, a 2019 survey of Reserve Component members reflected that, that only 65 percent of Reservists’ civilian employers have a favorable view of their service. See Off. of People Analytics, *2019 Status of Forces Survey of Reserve Component Members* 11, <https://download.militaryonesource.mil/12038/MOS/Surveys/2019-Status-of-Forces-Reserve-Briefing.pdf> (last visited July 27, 2023). Additional research shows that Reservists are less likely to be hired in the civilian sector. See Theodore F. Figniski, *Research: Companies Are Less Likely to Hire Current Military Reservists*, Harv. Bus. Rev. (Oct. 13, 2017), <https://hbr.org/2017/10/research->

companies-are-less-likely-to-hire-current-military-reservists.

Congress sought to combat these issues by enacting USERRA. Specifically, Congress sought to fortify American warfighting capabilities through “encourag[ing] noncareer service in the uniformed services” by “eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.” 38 U.S.C. § 4301(a)(1)). By ensuring that Reservists can retain their jobs and participate in the military without fear of reprisal by their civilian employers, USERRA’s reemployment protections are an indispensable element to DoD’s recruiting and retention efforts. TAR Section 2.020 undermines USERRA by discriminating against Reservists and harming efforts to recruit and retain them.

**B. Reservist Veterans Constitute A Great Number Of State And Local Government Employees And Increasingly Face Workplace Discrimination Upon Return From Service**

State and local governments employ high rates of Reservists and veterans. Approximately 21 percent of Reservists are employed either by a state or local government. See Susan M. Gates, et al., *Supporting Employers in the Reserve Operational Forces Era*, Rand Corp. 44 (2013). And in recent years, Reservists have alleged discrimination by these governments in greater numbers. For example, in fiscal year 2011, public-sector jobs—including federal, state, and local jobs—accounted for 27 percent of the 2,884 USERRA cases filed. See Steve Vogel, *Returning Military Members Allege Job Discrimination—by Federal Government*, Wash. Post (Feb. 19, 2012), <https://tinyurl.com/3zj5sevf>.

Across all employment sectors, moreover, alleged and proven discrimination by state and local governments

is wide-ranging. As the congressionally-chartered Commission on the National Guard and Reserves explained, “[a]s use of the reserve components has risen, reservists have become increasingly concerned that their service will harm their civilian employment.” *Transforming the Reserve Components*, at 258 (collecting data). These fears are justified. Public high school teachers have been terminated for attending pre-deployment planning sessions. *See, e.g., Dulfanian v. New York City Dep’t of Educ.*, No. 12-cv-6012, 2018 WL 4259976, at \*2 (E.D.N.Y. Sep. 5, 2018). State parole officers have been denied promotion because “if . . . called to active duty, [they would] be required to be away from the job for long periods of time.” *Risner v. Ohio Dep’t of Rehab. & Corr.*, 577 F. Supp. 2d 953, 957 (N.D. Ohio 2008); *cf. Ward v. Shelby Cnty.*, No. 2:20-cv-02407, 2022 WL 5242246, at \*6–7 (W.D. Tenn. Oct. 6, 2022) (recognizing that Shelby County, Tennessee, had violated

a jail employee’s USERRA rights). Police officers have been denied promotions for “focusing on [their] military career.” *Eichaker v. Vill. of Vicksburg*, 627 F. App’x 527, 530 (6th Cir. 2015); *see also Clark v. Va. Dep’t of State Police*, 793 S.E.2d 1 (Va. 2016). Faculty members at state universities have been terminated for no reason other than answering the call to serve their country. *See Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 518 (Minn. Ct. App. 2017); *Townsend v. Univ. of Alaska*, No. 3:06-cv-000171, 2007 WL 9734540, at \*1 (D. Alaska Oct. 11, 2007). And in this State—indeed, in earlier proceedings in this very case—a group of Washington State Patrol Troopers and applicants received the largest USERRA settlement in history after the Washington State Patrol wrongly denied them Veterans’ preference in the law enforcement agency’s hiring and promotion process. *See John Tymczyszyn, WSVBA Members Win Historic \$15M Lawsuit Against Washington State Patrol*, Wash. State

Veterans Bar Ass'n (May 10, 2017),  
[tinyurl.com/3pvy8fmj](https://tinyurl.com/3pvy8fmj).

\* \* \*

The decision below denies Reservists rights protected by USERRA. That not only harms these dedicated public servants but also intensifies a broader trend of discrimination against servicemembers that adds to the sacrifices they already make to serve their country. If left unchecked, this discrimination will reduce the number of Americans willing to join the Reserve Components, threatening the nation's combat readiness and the "lives, property[,] and . . . economy of Washington State." *Home, Wash. Nat'l Guard*, [tinyurl.com/3vvby5a9](https://tinyurl.com/3vvby5a9) (last visited July 2, 2023). In light of the critical importance of Reservists to the United States military, Washington State, and their civilian communities, as well as the increasing need to protect their reemployment

rights, this Court should grant review and reverse the decision below.

#### **IV. CONCLUSION**

This Court should review and reverse the decision below.

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## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 31, 2023, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

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