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"Examining the Future of Workforce Protections for Servicemembers"

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Chairman Van Orden, Ranking Member Levin, and distinguished members of the Subcommittee: Thank you for inviting me to testify today. My name is Jonathan Taylor. I am a principal at Gupta Wessler PLLC, a law firm focused on Supreme Court and appellate advocacy. Since joining the firm over a decade ago, I have argued some of the most important cases under the Uniformed Services Employment and Reemployment Rights Act, including *White v. United Airlines*, 987 F.3d 616 (7th Cir. 2021), *Travers v. Federal Express*, 8 F.4th 198 (3d Cir. 2021), and *Clarkson v. Alaska Airlines*, 59 F.4th 424 (9th Cir. 2023). I have also represented parties in several key arbitration cases, including *American Express v. Italian Colors Restaurant*, 570 U.S. 228 (2013). And I have represented a bipartisan group of 20 members of Congress, including past members of this Committee, in a case at the intersection of these two subjects—*Ziober v. BLB Resources*, 137 S. Ct. 2274 (2017).

My testimony today makes a few basic points:

First, USERRA's provisions are essential to protecting reservists and National Guard members—and thus to protecting the nation as a whole. USERRA has never been more important than it is today. Since September 11th, our military has relied heavily on reservists and National Guard members to defend us at home and abroad. These servicemembers work civilian jobs, while simultaneously devoting countless hours to ensuring military readiness so they can be deployed at a moment's notice. USERRA helps them balance their civilian lives with their military responsibilities, providing a broad set of substantive and procedural protections.

In doing so, USERRA also helps fulfill its primary goal: "to encourage 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). As a Senate Report put it in 2008: "Because the National Guard and Reserves have become an essential part of the military's operational force, it is imperative that employers comply with USERRA."

But employers often fail to comply with USERRA. And when that happens, Congress has given servicemembers the tools to protect themselves: They can go straight to court. There, they can shine a light on their employer's

practices, make their case to a neutral judge and a jury of their peers, and obtain a written decision that can be appealed, if necessary, and reviewed by the political branches to ensure the proper development of the law. But none of that will happen if they are forced, against their will, into secret arbitration.

Which leads to point two: Forced arbitration threatens reservists and National Guard members—stripping them of their freedoms and immunizing violations of their rights—and thus threatens the nation as a whole. Even as USERRA has grown in importance, it has never been more at risk than it is today. When USERRA was enacted in 1994, forced arbitration was barely a thing. Now it's everywhere. Big corporations have learned from their lawyers that they can escape public accountability for violating the law simply by inserting fine print into their take-it-or-leave-it contracts. As a result, getting a job increasingly requires checking one's rights at the door: More than half of nonunion private-sector employees in the United States—over 60 million American workers—are now subject to forced arbitration.

Servicemembers are no exception. Despite strong statutory language to the contrary, several courts have held that (as currently written) USERRA permits employers to impose forced arbitration on servicemembers. That is incompatible with USERRA's text and purpose. But more than that: It is

immoral and unwise. So it is of vital importance that Congress clarify what should already have been clear: forced arbitration has no place in USERRA.

Third, this is not a partisan issue. Overwhelming majorities of Democrats, Republicans, and independents—80% or more of each—support federal legislation to end forced arbitration across the board. But if there's any area where those numbers should approach total agreement, it is for the hundreds of thousands of patriots who risk their lives in service to our country.

If nothing else, basic fairness dictates as much. These men and women fight for our freedom and for our Constitution. The least we can do is preserve *their* freedom to decide for themselves how to protect their own interests, and *their* constitutional rights to a day in court and a civil trial by jury. Forced arbitration is the opposite of these bedrock values. As the Bush Department of Defense observed in 2006: "Waiver isn't a matter of 'choice' in take-it-or-leave-it contracts of adhesion." And the very reason the Constitution has a Bill of Rights in the first place is because the original document lacked a right to a civil jury trial. As John Adams once said: "[R]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds." We should all be able to

agree that, if anyone deserves constitutional fortification against such a fate, it's the men and women who voluntarily serve in our nation's military.

But eliminating forced arbitration for USERRA claims isn't just about fairness to individual servicemembers; it's also about empowering them as a group and protecting our country as a whole. The reality (and this is backed up by empirical data) is that forced arbitration doesn't channel cases into a better system for resolving disputes. It extinguishes cases altogether. And for those precious few cases that actually get arbitrated, the secret nature of the proceeding means that, even if the servicemember can beat the odds and prevail, *no one else* will benefit. No one will become aware of the unlawful practice or the fact that they might have a claim. Nor will Congress have any idea about how the statute is being applied in such proceedings, and hence whether it needs to be strengthened or amended. Add it all up and the upshot is plain: Forced arbitration badly undermines compliance with USERRA.

And ultimately, it makes us less safe. USERRA is critical to military recruiting and retention efforts. "If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces." S. Rep. No. 110-449, at 24 (2008). Congress must act and reverse that trend.

I.

Congress has long recognized that when someone puts on a uniform to serve in our military, we owe them certain obligations in return. One of the most basic obligations is the assurance that, when they have discharged their duties, they will be able to return to their jobs without being penalized for serving their country—an obligation, in other words, "to compensate for the disruption of careers and the financial setback [from] military service." 140 Cong. Rec. S7670–71 (June 27, 1994) (statement of Sen. Rockefeller).

To make good on this solemn obligation—and to advance a "national policy to encourage service in the United States Armed Forces," H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998)—Congress has repeatedly expanded and strengthened workplace protections in "a long line of federal veterans' rights laws enacted" since World War II. *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 174 (7th Cir. 2014). The most recent and comprehensive of these statutes is USERRA, which Congress passed in 1994 to "strengthen existing employment rights of veterans of our armed forces." *Id.* at 174–75.

In the run-up to USERRA, Congress kept a watchful eye on the development of this area of law. During the 1970s and 80s, "more than 600 court cases" were issued interpreting the scope of USERRA's predecessor

statute and "occasional confusion resulted." 137 Cong. Rec. S6058–66, S6065 (May 16, 1991) (Statement of Sen. Specter). Congress eventually concluded that the existing statute was too "complex and difficult to understand," 139 Cong. Rec. H2203–02, H2209 (May 4, 1993), and was "sometimes ambiguous, thereby allowing for misinterpretations," H.R. Rep. 103–65(I), at 18 (1993). These misinterpretations took too narrow a view of the law, thwarting the ability of veterans and reservists to vindicate their rights. As Senator Rockefeller explained in 1993: "over the last 53 years the [law] has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions that, at times, hinder the resolution of claims." 139 Cong. Rec. S5181–91, S5182 (Apr. 29, 1993). Congress felt the need "to restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law," while correcting the misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston).

The result was USERRA. Enacted just three years after the Persian Gulf War served as a fresh reminder of the urgent need for reform, the statute sought to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103–65(I) at 18. Its text identifies three core objectives: (1) "to encourage

noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," (2) to "provid[e] for the prompt reemployment of such persons upon their completion of such service," and (3) "to prohibit discrimination against persons because of their service." 38 U.S.C. § 4301(a). These objectives have taken on "particular interest" and importance in the years since USERRA's passage "because of the large number of reservists [that were] called up for military duty as a result of the conflicts in Iraq and Afghanistan." *Gordon v. Wawa, Inc.*, 388 F.3d 78, 79–80 (3d Cir. 2004); *see Army Reserve: A Concise History*, Office of Army Reserve History 15 (2013), https://perma.cc/3UHS-D5UN (noting that many hundreds of thousands National Guard members and reservists have served on active duty in the War on Terror).

USERRA seeks to accomplish its broad objectives by establishing a broad set of substantive and procedural rights. Substantively, the statute guarantees servicemembers the right to be promptly reemployed upon return from military service, to be free from discrimination based on military service, to take military leave from civilian jobs, and to receive (while on such leave) any benefits that their employer provides to employees on comparable forms of leave. 38 U.S.C. §§ 4311, 4112, 4113, 4316. Further, unlike most federal

employment statutes, USERRA applies to all public and private employers in the United States, regardless of their size. *Id.* §§ 4303(4), 4314(a), (d).

To make these rights real, Congress created a "broad remedial scheme." *Davis v. Advoc. Health Ctr. Patient Care Express*, 523 F.3d 681, 684 (7th Cir. 2008). The scheme is premised on the idea that the best way to protect servicemembers is to empower them to protect themselves. USERRA doesn't require soldiers to first plead their case to a bureaucrat in Washington, DC, or otherwise exhaust administrative remedies. To the contrary, it authorizes them to go straight to court, to "commence an action for relief" in any district where their private employer has a place of business, 38 U.S.C. § 4323(a)(3), (b)(3), (c)(2), and "authorize[s] suits against state employers." *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2466 (2022). USERRA also forbids the assessment of fees or costs, *id.* § 4323(h)(1), and has no statute of limitations, *id.* § 4327(b). And, on top of all this, Congress included a robust anti-waiver provision, barring enforcement of "any" contract or state law "that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA]." *Id.* § 4302(b). Congress intended for this provision to apply to both substantive and procedural rights, "including the establishment of additional prerequisites to the exercise of any [statutory] right" or benefit. *Id.*

These expansive substantive and procedural provisions don't just protect our servicemembers. They also protect our country. Experience has shown that, at any point, the United States may be required to wage war anywhere in the world. Experience has also shown that creating a massive peacetime standing army, backed by a national draft, is undesirable and infeasible. So our military has instead turned (with ever increasing reliance) to reservists and National Guard members to ensure that we have the fighting force necessary to meet modern challenges and defend against global threats.

Today, about 800,000 people—nearly half the country's two million servicemembers—are reservists or National Guard members. These people make enormous personal sacrifice for our country. Most days, they go about their lives like anyone else—working their day jobs, caring for their families, worried about their finances, volunteering in their communities, and so on. But they're also trained soldiers who balance their roles as civilians with ongoing military obligations that allow them to stand ready to be called into active duty. By doing so, they "provide[] the mechanism for manning the Armed Forces of the United States." *Ala. Power Co. v. Davis*, 431 U.S. 581, 583 (1977).

That's where USERRA comes in: To convince people to shoulder these burdens and sign up for the reserves, Congress has recognized that we must

offer them some assurances in return. USERRA is indispensable to this effort: "Because the National Guard and Reserves have become an essential part of the military's operational force, it is imperative that employers comply with USERRA. . . . . If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces." S. Rep. No. 110-449, at 24; *see also* S. Rep. No. 104- 371, at 27-28 (1996) (similar); H.R. Rep. No. 105-448, at 2 (1998) (emphasizing that USERRA is "particularly important today to such persons who are integral to this country's defense" because "the Guard and Reserve are frequently called to active duty to carry out missions integral to the national defense"). Undermining USERRA thus "threaten[s] not only a long-standing policy protecting individuals' employment rights, but also raise[s] serious questions about the United States' ability to provide for a strong national defense." H.R. Rep. No. 105-448, at 5-6.

Or as counsel for the United States told the U.S. Supreme Court just last year:

> "[Reservists and National Guard members] never been more important to the military than they are right now.
>
> And one of the first questions that [a prospective reservist] will ask when they're considering whether to join the military is, well,

> do I get to keep my job? You know, does my employer have to let me take leave for training exercises or be deployed?
>
> And it really does matter in the real world for the Army to be able to tell them, yes, your employer does have to do that. In fact, . . . the brochure that the Army gives to its recruits lists the USERRA protections as part of the incentive package that they receive to join the military. And it would matter a great deal in the real world if it was harder for the United States to recruit Guardsmen and Reservists for the military. Obviously, . . . the national security needs are unpredictable, and the government doesn't know when it's going to need to deploy troops overseas, and being able to have a supply . . . of forces to defend the nation is one of the most existential jobs of the federal government in the first place."

Tr. of Oral Argument in *Torres v. Tex. Dep't of Pub. Safety*, at 67–68.

II.

The War on Terror isn't the only pertinent development in the years since USERRA's passage. Since 1994, many employers have begun quietly stripping their employees (including their servicemember employees) of their legal rights through forced-arbitration clauses. These clauses are added to the fine print of take-it-or-leave-it form contracts and require employees to give up their right to a day in court and instead pursue their cases in forced arbitration. Companies write these clauses in their favor, picking their preferred arbitral forum. The arbitrators are often selected by the companies (or else have a financial incentive to side with them to secure their business in the future). Arbitrators also conduct their work in secret, and their decisions

are exceedingly difficult to reverse in court given the highly deferential standard of judicial review.

A few years ago, the Economic Policy Institute estimated that more than half of nonunion private-sector employees in the United States are now subject to forced arbitration. *See* Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute (April 6, 2018), https://perma.cc/A3FZ-7LLJ/. That's roughly 60 million American workers—a number that has been steadily rising each year. Further, forced arbitration is more common in low-wage workplaces and among larger employers and has disproportionate effects on women and Black employees. *Id.*

Although Congress might not have had forced arbitration firmly in mind when it enacted USERRA, there should be little doubt that forced arbitration is utterly incompatible with the statute. Yet several courts of appeals have held otherwise. Relying on a 1925 law called the Federal Arbitration Act—and more recent Supreme Court decisions that have interpreted that statute far beyond its text and original meaning—these courts have held that USERRA permits employers to force servicemembers out of court and into arbitration. *See Ziober v. BLB Resources*, 839 F.3d 814, 816 (9th Cir. 2016) (citing cases).

One of these cases involved was brought by a Navy reservist named Kevin Ziober. In 2012, four years into his service, Lieutenant Ziober was called into active duty—a one-year deployment to Afghanistan. He expected to fulfill his service obligations and then return to work once he returned home. On his last day of work before being deployed, Lieutenant Ziober's employer threw him an office-wide party to celebrate his military service. Dozens of colleagues, as well as the company's CEO and president, turned out for the celebration. They watched as he "dug into a cake decorated with an American flag and the words, 'Best Wishes Kevin' in red, white and blue." Margot Roosevelt, *Navy reservist wants a day in court, not arbitration*, OC Register, June 6, 2016, http://bit.ly/2qAaOuu. They feted him with balloons, cards, and a gift—prompting him to text family members: "What a great sendoff!" *Id.* But just hours after the party ended, Lieutenant Ziober was summoned to a meeting with the head of human resources, as well as his supervisor and the company's attorney. They told him that he was being fired. Then, when he tried to enforce his USERRA rights in court upon returning home, his employer compounded the indignity by telling him that he would have to arbitrate his claims instead.

This is plainly not what Congress envisioned when it enacted USERRA. But the good news is that Congress can do something about that. As judges

have noted, "Congress can fix this problem" with "ease." *Ziober*, 839 F.3d at 822 (Watford, J., concurring); *see also Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564–65 (6th Cir. 2008) (Cole, J., concurring) (expressing grave doubt that Congress "intended members of our armed forces to submit to binding, coercive arbitration agreements," and "encourag[ing]" Congress to make its intent "unmistakably clear" by amending the statute). Congress can do what it has done many times in the past: strengthen and clarify the statute to fix judicial decisions that have incorrectly limited servicemembers' rights.

III.

Congress shouldn't hesitate to do so. When Americans are polled about forced arbitration, it's no contest: they hate it. And despite the hyper-partisan era in which we now live, this sentiment is widely shared by voters across the political spectrum. Overwhelming majorities of Republicans, Democrats, and independents support federal legislation to end forced arbitration in general. In this context, in particular, public opinion surely approaches unanimity.

And for good reason: For one thing, eliminating forced arbitration for servicemembers is a moral imperative. Our servicemembers protect our freedom and defend our Constitution. It is not too much to ask that we protect *their* freedom and defend *their* constitutional rights. As the Military Coalition

put the point in supporting federal action to curb forced arbitration in 2016: "Our nation's veterans should not be deprived of the Constitutional rights and freedoms that they put their lives on the line to protect." Military Coalition Letter, Aug. 18, 2016, https://fairarbitrationnow.org/letter-military-coalition/.

For another thing, eliminating forced arbitration would help to ensure that USERRA's rights are made real. It would empower servicemembers to make their own choices about how to enforce their own rights and whether to avail themselves of the procedural protections under the statute. It would also empower them to protect the interests of their fellow servicemembers—whether by serving as a representative plaintiff in a class action, by seeking to enjoin an unlawful policy, by creating judicial precedent to govern future cases, or by providing a public record of illegality that can be used for the benefit of others. To strip servicemembers of their ability to serve their peers in these ways, as forced arbitration does, only compounds the harms that it inflicts. And it only further weakens USERRA—inhibiting development of the law, allowing violations to go unnoticed and unpunished, and reducing compliance.

For still another, eliminating forced arbitration would ensure that small-dollar cases, in particular, can be vindicated. For these cases, especially, forced

arbitration cuts off compensation and deterrence. This can be seen empirically by looking the results that people actually obtain out of arbitration. In the consumer context, for example, data compiled by the Consumer Financial Protection Bureau shows that few consumers with low-value cases are able to successfully advocate for themselves when forced to seek individual relief (which is what forced arbitration typically requires). And when I say "few," I mean that in an absolute sense—not a relative sense: Of the hundreds of millions of consumers that interact with banks, credit-card companies, payday lenders, student-loan providers, debt collectors, and other companies, only *four of them* (yes, you read that right) were able to win affirmative relief on cases of $1,000 or less in arbitration over a two-year period for the nation's leading arbitration forum (the American Arbitration Association).

By contrast, between 2008 and 2012, at least 34 million consumers of the same universe of companies received compensation through class actions. More than 400 consumer financial class-action settlements garnered more than $2 billion in cash relief for consumers and more than $600 million in in-kind relief. And those numbers don't capture the additional benefits of industry-changing injunctions and deterrence of future bad practices.

Given this disparity, it's not hard to see why so many companies—99% of payday lenders, for instance—have insisted on adding forced-arbitration clauses to their take-it-or-leave-it contracts with consumers and workers. It's not because forced arbitration encourages consumers and workers to bring their cases or because it leads to better outcomes for them. It's because the opposite is true: forced arbitration extinguishes cases and shields wrongdoing.

Finally, forced arbitration of USERRA claims undermines our national defense. As the military has emphasized, USERRA is critical to its recruiting and retention efforts. "[T]he brochure that the Army gives to its recruits lists the USERRA protections as part of the incentive package that they receive to join the military," so "it would matter a great deal in the real world" if those protections continue to be weakened through forced arbitration, by making it "harder for the United States to recruit Guardsmen and Reservists for the military." Tr. of Oral Argument in *Torres*, at 67–68; *see also* Military Coalition Letter (underscoring the "catastrophic consequences" that forced-arbitration clauses "pose for our all-voluntary military fighting force's morale and our national security," and urging that they be prohibited). "If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the

Reserve Forces." S. Rep. No. 110-449, at 24. Congress shouldn't let that happen. It's long past time to step in and stop this slide in its tracks.

If it did so, this would not be the first time that Congress has acted to protect national security by ensuring that servicemembers are not subject to forced arbitration. The bipartisan Military Lending Act of 2006 prohibits forced arbitration in consumer credit contracts with servicemembers. *See* 10 U.S.C. § 987(e) (making certain extensions of credit to servicemembers unlawful where "the creditor requires the borrower to submit to arbitration"); *id.* § 987(f)(1) (making a knowing violation a misdemeanor); 80 Fed. Reg. 43559 (July 22, 2015) (expanding definition of covered consumer credit and banning arbitration clauses in such products). Congress did so at the request of the Department of Defense, which found that this was a key part of protecting servicemembers from predatory lending—an issue that had threatened national security and war readiness. *See* Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents 7, 14, 21, 51 (Aug. 9, 2006). When the Department of Defense expanded the scope of the Military Lending Act's prohibition of forced arbitration to include a broader array of financial services, the Department reaffirmed that the personal financial wellbeing of servicemembers is "at the core" of

servicemember retention and maintaining national military readiness. 80 Fed. Reg. 43600 (July 22, 2015).

Congress should make a similar judgment as to the rights provided by USERRA. Doing so would simply clarify what the statute should already mean and restore servicemembers' ability to choose to enforce their rights in court, as envisioned by a bipartisan Congress. And it would impose no burden to, or cost on, the federal government. Congress should act without delay.