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## Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration

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## NOTE

### SHOTS FIRED: DIGGING THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OUT OF THE TRENCHES OF ARBITRATION

*Lisa Limb\**

*The Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted to protect servicemembers from discrimination by civilian employers and to provide servicemembers with reemployment rights. Recent circuit court decisions, however, have maimed these protections by ruling that mandatory arbitration is permissible under USERRA. This Note argues that such rulings conflict with USERRA's plain language, statutory structure, and purpose. Ultimately, in light of strong public policy considerations, this Note contends that mandatory arbitration should not be permissible under USERRA and proposes that Congress amend the Act to explicitly prohibit arbitration.*

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\* J.D. Candidate, May 2019, University of Michigan Law School. I am indebted to my excellent Notes Editors, Laura Beth Cohen and Aviv Halpern, and to the rest of the Volume 117 Notes Office for their diligent and thoughtful editing. I would also like to thank my friends for their constant support and encouragement. This Note is dedicated to our servicemembers, our veterans, and their families: thank you for your service to our country.

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## INTRODUCTION

Kevin Ziober recalls texting his family, “What a great sendoff!” after he was presented with cards, balloons, and a gift from his coworkers.<sup>1</sup> Kevin, a lieutenant in the U.S. Navy Reserve, worked as an operations director for BLB Resources (BLB), a real estate firm in California.<sup>2</sup> He was deploying to Afghanistan for a year, so his supervisor and colleagues at BLB threw him a farewell party.<sup>3</sup> But only a few hours after Kevin “dug into a cake decorated with an American flag and the words, ‘Best Wishes Kevin’ in red, white and blue,”<sup>4</sup> he was informed that he was being fired from BLB.<sup>5</sup>

Kevin had served in the Reserves since 2008.<sup>6</sup> In October 2012, he was called to active duty for a deployment to Afghanistan.<sup>7</sup> To give as much advance notice as possible, Kevin notified both his supervisor and human resources director at BLB that he was scheduled to deploy before even receiving his official orders;<sup>8</sup> the Uniformed Services Employment and Reemployment Rights Act (USERRA) required advance notice for Kevin to be guaranteed reemployment by BLB after his deployment.<sup>9</sup> According to BLB, Kevin was fired because BLB did not know how long its federal gov-

1. Margot Roosevelt, *Navy Reservist Wants a Day in Court, Not Arbitration*, ORANGE COUNTY REG. (June 6, 2016, 9:25 AM), <http://www.ocregister.com/2016/06/06/navy-reservist-wants-a-day-in-court-not-arbitration/> [https://perma.cc/BEH2-2VV8].

2. *Ziober v. BLB Res., Inc.*, No. SACV 14–00675–CJC(DFMx), 2014 WL 12700980, at \*1 (C.D. Cal. July 31, 2014), *aff'd*, 839 F.3d 814 (9th Cir. 2016).

3. Roosevelt, *supra* note 1.

4. *Id.*

5. Petition for a Writ of Certiorari at 4, *Ziober v. BLB Res., Inc.*, 137 S. Ct. 2274 (2017) (mem.) (No. 16-1269) [hereinafter *Ziober Petition for Writ of Certiorari*].

6. Complaint para. 15, *Ziober*, 2014 WL 12700980 (No. 8:14-cv-00675) [hereinafter *Ziober Complaint*].

7. *Id.* para. 28; see also Brief of Members of Cong. as *Amici Curiae* in Support of Petitioner at 2, *Ziober*, 137 S. Ct. 2274 (No. 16-1269), 2017 WL 2376427 [hereinafter *Amicus Brief of Congress in Support of Ziober*].

8. *Ziober Complaint*, *supra* note 6, para. 28.

9. *Ziober Petition for Writ of Certiorari*, *supra* note 5, at 4.

ernment contract would continue.<sup>10</sup> And yet, he was the only employee fired for this reason.<sup>11</sup> Now, along with shouldering the responsibilities and stress that accompany a deployment, Kevin had to worry about his employment prospects.

USERRA was designed to shield servicemembers from situations like Kevin's and alleviate concerns about their reemployment.<sup>12</sup> But when Kevin sought to enforce USERRA against BLB, the United States District Court for the Central District of California granted BLB's motion to compel arbitration.<sup>13</sup> Kevin had to sign an arbitration agreement to keep his job.<sup>14</sup> The Ninth Circuit affirmed the district court's decision and held that he had to arbitrate his USERRA claims because Congress did not explicitly manifest its intent in USERRA to prohibit mandatory arbitration.<sup>15</sup> The outcome of Kevin's arbitrated case is unknown, since many arbitration decisions are not published due to their private nature and confidentiality provisions.<sup>16</sup> But because arbitration generally lacks procedural safeguards and because employers have a repeat-player advantage,<sup>17</sup> Kevin was probably not successful in his legitimate claim against BLB.

Unfortunately, this scenario is common for veterans returning home from deployments.<sup>18</sup> When servicemembers are forced to arbitrate, USERRA's antidiscrimination provisions do not provide them with meaningful protection. Deprived of their day in court, the servicemembers may be left without jobs and with little or no recourse against their employers—all because they decided to serve their country. The problem is compounded for military reservists who, unlike their active-duty counterparts, need to pursue full-time civilian careers to supplement their part-time military income.<sup>19</sup> And because reservists can be called to long-term active duty at any time, their military status poses a hurdle in finding civilian employment: employers have few incentives to hire or rehire an employee who may be forced to

10. See Ziober Complaint, *supra* note 6, para. 34.

11. Ziober Petition for Writ of Certiorari, *supra* note 5, at 5.

12. 38 U.S.C. § 4301 (2012).

13. Ziober v. BLB Res., Inc., No. SACV 14-00675-CJC(DFMx), 2014 WL 12700980, at \*1 (C.D. Cal. July 31, 2014), *aff'd*, 839 F.3d 814 (9th Cir. 2016).

14. Ziober Petition for Writ of Certiorari, *supra* note 5, at 5.

15. Ziober v. BLB Res., Inc., 839 F.3d 814, 821 (9th Cir. 2016).

16. See Notice No. 915.002, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EEOC (July 10, 1997) [hereinafter EEOC, Notice No. 915.002], <https://www.eeoc.gov/policy/docs/mandarb.html> [<https://perma.cc/YW5Z-VZNK>].

17. See *id.*

18. See Alison St. John, *National Guard Members Struggle to Keep Civilian Careers*, NPR (Apr. 22, 2015, 3:47 AM), <https://www.npr.org/2015/04/22/401025857/national-guard-members-struggle-to-keep-civilian-careers> (on file with the *Michigan Law Review*).

19. See *Army Reserve Salaries*, U.S. ARMY, <https://www.goarmy.com/reserve/benefits/money.html> [<https://perma.cc/8PVN-9J2A>] (listing pay for an entry-level enlisted reservist with less than two years of service as \$3,431.43 per year).

leave at a moment's notice.<sup>20</sup> If reservists are fortunate enough to find employment, there is still a risk that their employers will terminate them if the reservist is called to active duty.<sup>21</sup>

This Note argues that claims under USERRA should supersede mandatory arbitration clauses. Part I explains how USERRA's history and statutory construction show Congress's intent to provide broad protections to servicemembers. Part II argues that the circuit courts have misinterpreted the statute's text, undermining Congress's intent by subjecting USERRA claims to arbitration under the Federal Arbitration Act (FAA). Part III contends that the recent volley of circuit courts' decisions against servicemembers will have far-reaching public-policy implications that will negatively affect our servicemembers and, ultimately, our national defense capabilities.

#### I. THE FAA UNDERMINES CONGRESS'S INTENT TO PROTECT SERVICEMEMBERS THROUGH USERRA

Since 1940, Congress has continuously expanded and strengthened protections for servicemembers and veterans reentering the civilian workforce after serving our nation.<sup>22</sup> But recently, the Supreme Court has increasingly favored arbitration,<sup>23</sup> and circuit courts have followed this tendency to compel arbitration under USERRA.<sup>24</sup> Section I.A explains how USERRA's history and statutory construction reflect an intent to provide broad protections for servicemembers and impose stringent standards on employers. Section I.B provides a brief background of the FAA and argues that arbitration agreements overwhelmingly favor employers—stripping employees of important legal protections.

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20. See Theodore F. Figinski, *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> [<https://perma.cc/BBM9-USQ3>].

21. See *id.* (describing how if an employer hires a replacement worker for the reservist, the employer is faced with either retaining the returning reservist and the replacement or losing the investment made in the replacement, especially for jobs involving specialized skills).

22. Amicus Brief of Congress in Support of Ziober, *supra* note 7, at 5.

23. See Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> (on file with the *Michigan Law Review*) (explaining how the Roberts Court's rulings have been "far friendlier to business than those of any court since at least World War II"); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (on file with the *Michigan Law Review*) (discussing how before his appointment in the Supreme Court, Chief Justice Roberts was a prominent corporate defense lawyer representing businesses in enforcing arbitration agreements).

24. See, e.g., *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 561–62 (6th Cir. 2008).

A. *USERRA's History and Statutory Construction*

Although USERRA was signed into law in 1994, its history goes back to the Selective Training and Service Act of 1940 (STSA),<sup>25</sup> the first federal statute to provide servicemembers with reemployment rights.<sup>26</sup> In the early 1970s, as conscription was coming to an end, the Department of Defense adopted the “Total Force Policy,” which provided that reservists “will be the initial and primary source of personnel to augment the active forces.”<sup>27</sup> As the military shifted to an all-volunteer force and “relied to an extraordinary degree” on its reservists,<sup>28</sup> Congress further extended the scope of employment protections by passing USERRA in 1994.<sup>29</sup>

Congress designed USERRA to accomplish three critical goals: (1) to encourage noncareer military service by “eliminating or minimizing the disadvantages to civilian careers and employment,” (2) to provide reemployment rights in order “to minimize the disruption to the lives of” servicemembers, and (3) to prohibit employment discrimination against servicemembers.<sup>30</sup> Congress gave USERRA teeth by including both a “savings” clause and a “nonwaiver” provision: § 4302(a) of the statute saves agreements and laws that are “more beneficial” to servicemembers, while § 4302(b) is a nonwaiver

25. 20 C.F.R. § 1002.2 (2017).

26. See Daniel J. Bugbee, *Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries*, 12 CHAP. L. REV. 279, 281 (2008). Although the STSA only applied to those drafted into military service, Congress passed the Service Extension Act in 1941, expanding the STSA’s reemployment provisions to individuals who voluntarily left their jobs to enter the service. See Service Extension Act of 1941, ch. 362, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627 (repealed 1956). Congress modified and renamed the STSA as the Veterans’ Reemployment Rights Act (VRRRA) during the Vietnam War. Bugbee, *supra*, at 281–82. The VRRRA allowed servicemembers to request an unpaid leave of absence from their employers to go on active duty and guaranteed their same position upon return. See 38 U.S.C. § 2024(d) (1988), repealed by Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3159.

27. Title III—Operation and Maint.: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Servs., 101st Cong. 136 (1989) (Statement of Richard A. Davis, Director, Army Issues, U.S. General Accounting Office) [hereinafter *Role of the Reserves in the Total Force Policy*] (delivering a prepared statement describing the role of the reserves in the “Total Force Policy”).

28. Sean M. Hardy, *A Fighting Chance: The Proposed Servicemembers Access to Justice Act & Its Potential Effects on Binding Arbitration Agreements*, 10 PEPP. DISP. RESOL. L.J. 329, 329–30 (2010).

29. See 20 C.F.R. § 1002.2 (“In enacting USERRA, Congress emphasized USERRA’s continuity with the VRRRA and its intention to clarify and strengthen that law.”); Konrad S. Lee, “When Johnny Comes Marching Home Again” Will He Be Welcome at Work?, 35 PEPP. L. REV. 247, 256–57 (2008) (explaining how VRRRA protections depended upon whether the reservist entered active duty status voluntarily and involuntarily, whereas USERRA disregarded such distinctions).

30. 38 U.S.C. § 4301 (2012).

provision that prevents agreements and laws from reducing, limiting, or eliminating rights provided by the Act.<sup>31</sup>

When interpreting these provisions, courts have resolved ambiguities in favor of the servicemember, as in *Kane v. Town of Sandwich*.<sup>32</sup> Timothy Kane served in the Air Force Reserve while employed by the Sandwich Police Department as a police officer.<sup>33</sup> He was repeatedly denied promotions due to his military status.<sup>34</sup> Kane sued Sandwich, asserting discrimination claims under both USERRA and Massachusetts's antidiscrimination statute.<sup>35</sup> Sandwich claimed that the Act preempted Kane's state law claims and that Kane was required to exhaust state administrative remedies before filing his federal USERRA claim.<sup>36</sup> The district court disagreed. It held that state law claims were preserved under USERRA's savings clause<sup>37</sup> but that state laws requiring a servicemember to meet additional prerequisites before filing a USERRA claim were superseded by the Act.<sup>38</sup>

As discussed in *Kane*, Congress intended USERRA to "establish[] a floor, *not* a ceiling, for the employment and reemployment rights and benefits of those it protects" by including both the savings clause and a robust nonwaiver provision.<sup>39</sup> The Senate Veteran Affairs Committee noted that the nonwaiver provision was meant to have an expansive reach: § 4302(b) would preempt any state law or contract that would limit USERRA rights or impose any additional prerequisites on the exercise of the Act's rights and benefits.<sup>40</sup> The House Report also emphasized that the nonwaiver provision was meant to "reaffirm" the preemption of any employer agreements that provide fewer

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31. *Id.* § 4302 (2012); see *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1322 (11th Cir. 2016) (referring to § 4302(b) as the "non-waiver" provision); *id.* at 1330 (Martin, J., dissenting) (referring to § 4302(a) as the "savings" clause).

32. 123 F. Supp. 3d 147 (D. Mass. 2015). Kane had received the highest score possible on the Massachusetts Civil Service Sergeant's Exam out of all the potential candidates for promotion, but the promotion panel selected another candidate with a lower score. *Id.* at 151–52. Furthermore, when Kane was under military orders to report to a military base, the Chief of Police charged Kane with insubordination and launched an internal investigation against him when Kane refused to comply with the Chief's order to report to the Department instead. *Id.* at 152–153.

33. *Id.* at 151.

34. See *id.* at 151, 153.

35. *Id.* at 153.

36. *Id.* at 160.

37. *Id.* (discussing how under § 4302(a), USERRA did not preempt Kane's state law claims because "Congress [did not] intend[] it to be a veteran's exclusive means to combat discrimination based on military status").

38. *Id.* ("[A]s a matter of law, USERRA supersedes state laws that require a plaintiff to meet additional prerequisites before filing a federal USERRA claim.").

39. 20 C.F.R. § 1002.7 (2017) (emphasis added). The nonwaiver provision prohibits the enforcement of "any" contract or state law "that reduces, limits, or eliminates in *any* manner *any* right or benefit provided" by USERRA. 38 U.S.C. § 4302(b) (2012) (emphasis added).

40. S. REP. NO. 103-158, at 41 (1993).

rights than USERRA.<sup>41</sup> The House explained that “resort to mechanisms such as . . . arbitration . . . is not required,” and that “any arbitration decision shall not be binding as a matter of law.”<sup>42</sup> Despite Congress’s clear intent, expressed in both the plain language of the statute and its legislative history, some circuit courts have held that mandatory arbitration of USERRA claims is permissible under the FAA.<sup>43</sup>

B. *Congress’s Intent to Preclude Employment Contracts from the FAA and How the FAA Hurts Public Policy by Disadvantaging Employees*

The FAA was passed in 1925 because courts were generally hostile to arbitration agreements and reluctant to enforce them.<sup>44</sup> There was a “perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.”<sup>45</sup> Congress intended the FAA to have the relatively limited effect of placing arbitration agreements “upon the same footing as other contracts.”<sup>46</sup> The FAA explicitly excludes jurisdiction over employment contracts,<sup>47</sup> but recent judicial interpretations have vitiated this language.<sup>48</sup>

The Supreme Court handed down a string of proarbitration decisions in the 1980s, establishing that employment contracts should be interpreted as mandating arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court upheld the arbitration of statutory claims.<sup>49</sup> It reasoned that by arbitrating a statutory claim, a party did not lose any of the statute’s substantive rights; rather, the party merely agreed to resolve the case

41. H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

42. *Id.*

43. *Ziober v. BLB Res. Inc.*, 839 F.3d 814, 817 (9th Cir. 2016) (collecting cases).

44. See 9 U.S.C. § 2 (2012); Russell D. Feingold, Policy Essay, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 285 (2002). The “old judicial hostility to arbitration” was based on the “agency” theory (that either party could revoke the arbitrator’s authority at will because arbitrators were dual agents of the parties) and the “ouster of jurisdiction” theory (that a private agreement should not prevent a court from deciding a dispute otherwise within its jurisdiction). David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 74 (quoting *Kulkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

45. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting).

46. H.R. REP. NO. 68-96, at 1 (1924).

47. *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting) (noting that the FAA was intended to “exclude arbitration agreements between employees and employers”).

48. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (limiting the FAA’s employment exemption to transportation workers).

49. 473 U.S. 614 (1985).

in an arbitral forum, rather than a judicial one.<sup>50</sup> The Court reinforced this principle in *Gilmer v. Interstate/Johnson Lane Corp.*, in which it held that a plaintiff, who sued under the Age Discrimination in Employment Act (ADEA), was compelled to arbitrate under a previous agreement.<sup>51</sup> The Court justified its holding by emphasizing that there was no evidence of Congress's intent to "explicitly preclude arbitration" within the ADEA,<sup>52</sup> just as some circuit courts have done with USERRA.<sup>53</sup>

In recent years, the Supreme Court has continued to decide cases in favor of compelling arbitration. In *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that the FAA extended to all employment contracts unless explicitly exempted and that employers could require employees to arbitrate employment-discrimination claims.<sup>54</sup> Following *Circuit City*, "courts have routinely enforced boilerplate, mandatory arbitration provisions in employment contracts, even where there is clear evidence that, due to the disparity in bargaining power, the employee had no meaningful right to reject binding arbitration."<sup>55</sup>

Supporters of arbitration defend it on three main grounds: streamlined procedures, cost-effectiveness, and confidentiality.<sup>56</sup> Arbitration's "advantages" are gained, however, at the expense of the procedural and substantive safeguards that courts generally provide.<sup>57</sup> This negatively affects employees. Although the burden of proof in an arbitration proceeding is the same as in court, employees' ability to produce evidence is significantly curtailed due to a severely limited and rushed discovery process.<sup>58</sup>

The confidentiality of arbitration agreements is also concerning. Whereas courts are subject to review by both appellate courts and Congress, binding arbitration is not subject to any such corrective measures.<sup>59</sup> The private

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50. *Mitsubishi*, 473 U.S. at 628 (holding that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history").

51. 500 U.S. at 35 (majority opinion).

52. *Id.* at 29.

53. *Ziober v. BLB Res. Inc.*, 839 F.3d 814, 817 (2016) (collecting cases).

54. 532 U.S. 101, 119 (2001).

55. Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 819 (2009). And unlike a decision to arbitrate after a dispute arises, "employee[s] faced with a pre-dispute arbitration agreement [are] less likely to either appreciate the importance of choice of forum or consult counsel." TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 1003 (3d ed. 2015).

56. See, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 454–56 (1996).

57. *Id.* at 456–57; Feingold, *supra* note 44, at 289.

58. See EEOC, Notice No. 915.002, *supra* note 16; Schwartz, *supra* note 44, at 61; Victoria J. Craine, Note, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion?*, 8 B.U. PUB. INT. L.J. 537, 549 (1999).

59. EEOC, Notice No. 915.002, *supra* note 16.

nature of arbitration makes it difficult to evaluate whether discrimination laws are being fairly enforced.<sup>60</sup> This issue is compounded because arbitrators do not have to apply the relevant law, and judicial review is only available in limited circumstances.<sup>61</sup> Confidentiality benefits employers at the expense of employees, and it limits public accountability of employers who have violated the law, weakening the deterrent effect of antidiscrimination statutes like USERRA.<sup>62</sup> Sealing arbitration decisions also prevents the legislature from assessing whether certain industries or the individual employers' practices are in need of reform.<sup>63</sup> Furthermore, the party imposing mandatory arbitration—in most cases, the employer—usually hires the arbitrator, incentivizing arbitrators to favor repeat and wealthy players.<sup>64</sup> Since the arbitrator's authority is appointed and defined by private agreement, rather than by public law, employers can dictate the terms of the agreement to their advantage.<sup>65</sup>

Arbitration's detrimental effect on employees is exemplified by the "arbitration-litigation outcome gap."<sup>66</sup> A 2015 study of federal-court employment-discrimination litigation found that employees had a 35.7% lower success rate in arbitration than in federal court.<sup>67</sup> Employees are similarly disadvantaged with respect to damages awarded. Damages awarded in arbitration, on average, amounted to only 16% of the damages awarded in federal court and a mere 7% of the average damages awarded in state court.<sup>68</sup> These gaps can also affect plaintiffs' ability to obtain legal counsel. Attorneys

60. *Id.*

61. See Feingold, *supra* note 44, at 289; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (on file with the *Michigan Law Review*). The parties may also contract into appellate review within the arbitral setting, but they cannot contract into expanded federal court review. See Robert N. Rapp & Alexander B. Reich, *AAA Shakes Up ADR with New Rules to Permit Appeals of Arbitration Awards*, LEXOLOGY (Nov. 6, 2013), <https://www.lexology.com/library/detail.aspx?g=1d466bd0-aeff-43e5-96b9-def338ff7baf> [<https://perma.cc/ZL34-Q9D8>].

62. See EEOC, Notice No. 915.002, *supra* note 16.

63. *Id.*

64. See *id.*; KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC 22 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/45KZ-VPSR>]. Employers can even specify in contracts with their employees that all arbitration cases will be handled exclusively by one particular arbitration firm. See Silver-Greenberg & Corkery, *supra* note 61.

65. EEOC, Notice No. 915.002, *supra* note 16. And because these arbitral mechanisms limit public accountability of arbitrators, there are few controls ensuring that arbitrators are acting independently and in an unbiased manner. See U.S. GEN. ACCOUNTING OFF., GAO/GDD-92-74, SECURITIES ARBITRATION 6 (1992); Craine, *supra* note 58, at 551.

66. See STONE & COLVIN, *supra* note 64, at 19–20.

67. *Id.* at 19.

68. *Id.*

accepted, on average, almost 16% of potential litigation cases, while they accepted only about 8% of potential claims subject to mandatory arbitration.<sup>69</sup>

Arbitration, therefore, cannot advance the same social purposes as litigation.<sup>70</sup> Unfortunately, many employees are faced with the choice of either submitting to mandatory arbitration or potentially foregoing employment altogether.<sup>71</sup> This can hardly be called a choice.<sup>72</sup> In the face of unequal bargaining power,<sup>73</sup> employees are forced to relinquish “fundamental legal protections” when resolving employment-discrimination claims.<sup>74</sup>

## II. CIRCUIT COURTS HAVE MISINTERPRETED USERRA

In 2006, a circuit court decided a USERRA claim involving a mandatory arbitration agreement for the first time.<sup>75</sup> In *Garrett v. Circuit City Stores, Inc.*, the Fifth Circuit held that USERRA claims are subject to arbitration under the FAA.<sup>76</sup> Since *Garrett*, three other circuit courts have followed suit.<sup>77</sup> Section II.A discusses pre-*Garrett* federal district court decisions. Section II.B explains the *Garrett* decision and its progeny. Section II.C contends that *Garrett* and its progeny were incorrectly decided.

### A. Pre-*Garrett* Federal District Court Decisions

Before the Fifth Circuit’s *Garrett* decision, some federal district courts held that compulsory arbitration agreements were superseded by USERRA.<sup>78</sup> In *Lopez v. Dillard’s, Inc.*, a district court in Kansas held that, although an employee would not give up any of her substantive rights under USERRA by

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69. *Id.* at 22.

70. *See id.* at 26–27. *Contra* Ziober v. BLB Res., Inc., 839 F.3d 814, 820 (9th Cir. 2016) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991)).

71. *See, e.g.*, Melina Delkic, *How Forced Arbitration Agreements Cheat Women in the Workplace*, NEWSWEEK (Oct. 25, 2017, 3:59 PM), <http://www.newsweek.com/how-forced-arbitration-agreements-women-work-692702> [https://perma.cc/8U4C-QGS3] (describing how a reporter was forced to arbitrate her sexual harassment claim because she had signed an arbitration agreement, knowing that “refusing the arbitration agreement would have meant refusing her job”).

72. *See* Feingold, *supra* note 44, at 291.

73. *Garrett v. Hooters–Toledo*, 295 F. Supp. 2d 774, 782 (N.D. Ohio 2003).

74. *See* Feingold, *supra* note 44, at 292.

75. Bradford J. Kelley, Practitioner’s Note, *All Quiet on the Employment Front: Mandatory Arbitration Under the USERRA*, 34 HOFSTRA LAB. & EMP. L.J. 367, 389 (2017).

76. 449 F.3d 672, 681 (5th Cir. 2006).

77. *See* Ziober v. BLB Res., Inc., 839 F.3d 814 (9th Cir. 2016); *Bodine v. Cook’s Pest Control Inc.*, 830 F.3d 1320 (11th Cir. 2016); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008).

78. *See* *Breletic v. CACI, Inc.—Fed.*, 413 F. Supp. 2d 1329, 1337 (N.D. Ga. 2006); *Lopez v. Dillard’s, Inc.*, 382 F. Supp. 2d 1245, 1249 (D. Kan. 2005). And some federal district courts have so held after *Garrett*. *E.g.*, *Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837, 844 (N.D. Ind. 2007) (holding that plaintiff failed to prove that Congress intended to preclude arbitration of USERRA claims).

arbitrating her claim, § 4302(b) of the Act prohibited the imposition of mandatory arbitration on the employee.<sup>79</sup> The plaintiff, Jacqueline Lopez, served in the National Guard while employed by Dillard's Corporation.<sup>80</sup> During her employment, Lopez was called to active duty, and Dillard's promised to keep her job open for her.<sup>81</sup> But when Lopez returned, Dillard's forced her to reapply for her old position and then did not rehire her.<sup>82</sup> Lopez filed a USERRA claim, and Dillard's filed a motion asking the court to compel arbitration under an arbitration agreement Lopez agreed to when Dillard's initially hired her.<sup>83</sup>

Although the arbitration agreement in this case empowered the arbitrator to grant the same remedies and apply the same substantive law as a federal court would, the district court nonetheless held that the agreement was superseded by USERRA.<sup>84</sup> Under the plain language of § 4302(b) of the statute, the provision superseded any contract or agreement that imposed additional prerequisites to the exercise of any USERRA benefit.<sup>85</sup> The court observed that Congress had not enumerated arbitration as a means to effectuate the Act's rights.<sup>86</sup> Instead, Congress provided that a servicemember asserting a USERRA claim could seek assistance from the Secretary of Labor and the Attorney General<sup>87</sup> or bring an action in a federal district court.<sup>88</sup> And because the arbitration agreement required that the plaintiff "seek relief in an arbitral forum," the court found that arbitration agreements posed an "additional prerequisite" to exercising USERRA rights.<sup>89</sup>

Similarly, in *Breletic v. CACI, Inc.—Federal*, a district court in Georgia held that USERRA superseded an arbitration agreement because the statute expressly granted the servicemember a right to pursue his claim in a judicial forum.<sup>90</sup> The plaintiff, John Breletic, was hired by CACI in 2000 and signed a mandatory arbitration agreement as a prerequisite to his employment.<sup>91</sup> In 2001, Breletic provided CACI with notification of his impending orders to active duty.<sup>92</sup> In 2003, when Breletic was released from active duty, CACI told Breletic that it could not reemploy him because his position had been

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79. *Lopez*, 382 F. Supp. 2d at 1248.

80. *Id.* at 1245.

81. *Id.*

82. *Id.*

83. *Id.* at 1246.

84. *Id.* at 1248.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. 413 F. Supp. 2d 1329, 1337–38 (N.D. Ga. 2006).

91. *Breletic*, 413 F. Supp. 2d at 1331.

92. *Id.* at 1332.

eliminated—even though CACI was advertising for positions nearly identical to the one Breletic had held in 2001.<sup>93</sup>

In assessing whether USERRA preempted the arbitration agreement, the district court acknowledged that the Supreme Court had held that statutory claims may be subject to arbitration under the FAA.<sup>94</sup> Following the Supreme Court's precedent in *Gilmer*, the court first looked at USERRA's text before turning to the statute's legislative history.<sup>95</sup> The court noted that the plain language of § 4302(b) explicitly states that USERRA supersedes any "agreement . . . that reduces, limits, or eliminates *in any manner* any right or benefit provided by" USERRA.<sup>96</sup> Accordingly, the court held that the Act superseded any arbitration agreements that diminish USERRA rights.<sup>97</sup> Basing its decision in part on the House Report on § 4302(b), the court found that the congressional intent behind USERRA's antiwaiver provision was to "preempt employer-employee agreements that limit rights provided under USERRA or put additional conditions on those rights."<sup>98</sup> Because CACI's arbitration agreement required Breletic to waive his USERRA right to bring his claim in a judicial forum, the court held that the agreement was against the public policy behind by the Act.<sup>99</sup>

### B. *Garrett and Its Progeny*

*Garrett* was the first federal appellate decision to hold that mandatory arbitration was permissible under USERRA.<sup>100</sup> While employed by Circuit City, Michael Garrett also served in the Marine Corps Reserves.<sup>101</sup> A year after Garrett was hired, Circuit City adopted binding arbitration agreements for its employees.<sup>102</sup> Garrett and the other employees were given an opt-out form, which gave an employee thirty days to exercise his opt-out right, and a receipt form.<sup>103</sup> Garrett acknowledged receipt of the form, but he did not opt-out of the arbitration provision within the thirty-day timeline.<sup>104</sup> Between December 2002 and March 2003, as the military began combat operations in Iraq, Garrett started receiving unjustified criticism and disciplinary

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93. *Id.*

94. *Id.* at 1335 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

95. *Id.*

96. *Id.* at 1336 (quoting 38 U.S.C. § 4302(b) (2000)).

97. *Id.* (citing *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003)).

98. *Id.* at 1337.

99. *Id.* at 1337–38.

100. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 673 (5th Cir. 2006); Kelley, *supra* note 75, at 389.

101. *Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717, 719 (N.D. Tex. 2004), *rev'd*, 449 F.3d 672 (5th Cir. 2006).

102. *Id.*

103. *Id.*

104. *Id.*

actions from his supervisors, ultimately resulting in his termination in March 2003.<sup>105</sup>

Garrett sued under USERRA, claiming that his termination was due to his status as a reservist.<sup>106</sup> Circuit City responded by filing a motion to compel arbitration, contending that Garrett's failure to opt-out of the binding arbitration provision waived his right to a judicial forum.<sup>107</sup> As in *Lopez* and *Breletic*, the district court determined that the antiwaiver provision of § 4302(b) invalidated binding arbitration contracts.<sup>108</sup> The district court noted, however, that there is "nothing in USERRA that precludes non-binding arbitration *prior* to jury trial in federal court."<sup>109</sup> Circuit City appealed the denial of its motion to compel arbitration.<sup>110</sup>

Relying on the FAA and the Supreme Court's line of arbitration cases, the Fifth Circuit reversed the district court's decision, finding that USERRA claims could be subject to mandatory arbitration.<sup>111</sup> Citing *Gilmer*<sup>112</sup> and *Mitsubishi*,<sup>113</sup> the court applied a strict approach to USERRA's text.<sup>114</sup> It noted that § 4302(b) does not explicitly mention the FAA or mandatory arbitration.<sup>115</sup> The court reasoned that because Congress was on notice of the *Gilmer* decision—which was issued three years before USERRA was enacted—Congress's failure to address arbitration in § 4302(b) was "not a clear expression of Congressional intent concerning the arbitration of service-members' employment disputes."<sup>116</sup> Therefore, § 4302(b) defined substantive rights, rather than procedural ones providing an exclusive judicial forum.<sup>117</sup> The court buttressed this interpretation by finding that an arbitration agreement is "effectively" a procedural forum selection clause, meaning that USERRA's substantive rights could still be enforced through arbitration.<sup>118</sup>

When Garrett pointed to § 4302's legislative history, the court summarily dismissed his argument, stating that this "snippet" of "scant" legislative history had no precedential value and that it "hardly prove[d] Congress's in-

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 722.

109. *Id.* (emphasis added).

110. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674 (5th Cir. 2006).

111. *Id.* at 681.

112. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

113. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

114. *See Kelley*, *supra* note 75, at 390.

115. *Garrett*, 449 F.3d at 677.

116. *Id.*

117. *Id.* at 678.

118. *Id.* In support of its reasoning, the court analogized USERRA to other discrimination statutes, such as the ADEA (employment protections for the elderly) and Title VII (employment protections against employment discrimination based on race, color, religion, sex, or national origin), which the Supreme Court has held are subject to arbitration. *Id.* at 680–81.

tention toward all cases involving arbitration.<sup>119</sup> Garrett also unsuccessfully contended that arbitration inherently conflicts with USERRA: because USERRA granted the Department of Labor and the Attorney General's office the authority to enforce claims, arbitration would conflict with this remedial scheme.<sup>120</sup> In rejecting Garrett's argument, the court likened USERRA to other employment-discrimination statutes, like Title VII and the ADEA, under which an employee could still be subject to arbitration even though she retained the right to file a private cause of action or have an agency pursue a civil action.<sup>121</sup>

The Fifth Circuit's holding in *Garrett* set a precedent that disadvantaged servicemembers in other courts.<sup>122</sup> The Sixth Circuit was next to address the issue, in *Landis v. Pinnacle Eye Care, LLC*.<sup>123</sup> Timothy Landis, an optometrist serving in the National Guard, signed a binding arbitration agreement as part of his employment contract with Pinnacle.<sup>124</sup> When Landis returned from his deployment, Pinnacle demoted him and threatened additional disciplinary actions if Landis continued serving in the military.<sup>125</sup> Landis filed suit in district court under USERRA, but the district court granted Pinnacle's motion to arbitrate.<sup>126</sup> Landis appealed to the Sixth Circuit, which affirmed the district court's order to compel arbitration.<sup>127</sup> Relying on the Fifth Circuit's holding in *Garrett*, the Sixth Circuit concluded that USERRA's text did not indicate a congressional intent to preclude mandatory arbitration and that there was no inherent conflict between arbitration and USERRA's underlying purposes.<sup>128</sup> Like the Fifth Circuit, the court gave short shrift to USERRA's legislative history.<sup>129</sup>

But unlike the *Garrett* opinion, *Landis* included a concurrence. Although he agreed with the majority's judgment, Judge Guy Cole wrote separately to "acknowledge the odd result this holding produces and to encour-

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119. *Id.* at 679.

120. *Id.* at 680–81.

121. *Id.* at 680–81. In *EEOC v. Waffle House, Inc.*, the Supreme Court held that under the FAA, the presence of an enforceable arbitration agreement did not infringe on the Equal Employment Opportunity Commission's (EEOC) authority nor limit any remedies available to the EEOC if it decided to pursue a lawsuit on behalf of disabled victims of discrimination. 534 U.S. 279, 297–98 (2002). Similarly, the Fifth Circuit reasoned that nothing in USERRA would preclude the Attorney General from representing Garrett in arbitration. *Garrett*, 449 F.3d at 681.

122. *See, e.g.*, *Will v. Parsons Evergreene, LLC*, No. 08–cv–00898–DME–CBS, 2008 WL 5330681, at \*3–4 (D. Colo. Dec. 19, 2008) (finding that the arbitration clause was not a prerequisite, because it operated as a waiver of a judicial forum, and that there was no indication that USERRA rights could not be fully realized in arbitration).

123. 537 F.3d 559 (6th Cir. 2008).

124. *Landis*, 537 F.3d at 560.

125. *Id.* at 561.

126. *Id.*

127. *Id.*

128. *Id.* at 562–63.

129. *Id.*

age Congress, when this issue comes up again, to be a bit more clear.”<sup>130</sup> In parsing § 4302(b)’s language, Judge Cole noted that its latter clause, which precludes “the establishment of additional prerequisites,” manifested Congress’s intent to prohibit employers from requiring their employees to resort to additional mechanisms—such as arbitration.<sup>131</sup> He found that the legislative history further cemented Congress’s intent to include arbitration as an “additional prerequisite[.]”<sup>132</sup> Thus, the majority’s interpretation produced an incongruous result, since USERRA was intended to give employees—not employers—the right to choose the forum in which to pursue their claims, but mandatory arbitration requires the employee “to *substitute* federal court with arbitration.”<sup>133</sup> In closing his opinion, Judge Cole criticized Congress’s poor drafting, stressing that if Congress had intended to preclude arbitration as a replacement for a judicial forum, it should “do so with language that is unmistakably clear.”<sup>134</sup>

The Eleventh Circuit also sided with *Garrett* in *Bodine v. Cook’s Pest Control Inc.*, holding that USERRA’s antiwaiver provision does not conflict with the FAA because both statutes “provide a mechanism for striking from an arbitration agreement a term in conflict with USERRA.”<sup>135</sup> The servicemember, Rodney Bodine, argued that the arbitration agreement in question had two terms that directly violated USERRA: (1) the arbitration agreement allowed the arbitrator to reapportion fees, including attorney’s fees, between the parties; and (2) the agreement imposed a six-month statute of limitations.<sup>136</sup> Because USERRA explicitly proscribes a statute of limitations and declares that costs or fees cannot be imposed on the plaintiff, Bodine challenged the validity of the entire arbitration agreement.<sup>137</sup> In support of his argument, Bodine contended that § 4302(b)’s use of the word “supersede” was intended to automatically invalidate any contractual agreement that reduces, limits, or eliminates USERRA’s substantive rights.<sup>138</sup> The court rejected Bodine’s argument; instead, it interpreted “supersede” to mean “replacing one thing with another, rather than causing something to be cancelled or invalidated without replacement.”<sup>139</sup> The court reasoned that construing § 4302(b) as replacing all of the terms that conflict with the Act while keeping all of the terms that are more beneficial than USERRA would result in the most favorable interpretation for servicemembers.<sup>140</sup> In her dissent, how-

130. *Id.* at 564 (Cole, J., concurring).

131. *Id.* (quoting 38 U.S.C. § 4302(b) (2006)).

132. *Id.* (quoting 38 U.S.C. § 4302(b) (2006)).

133. *Id.*

134. *Id.* at 565.

135. *Bodine v. Cook’s Pest Control Inc.*, 830 F.3d 1320, 1327 (11th Cir. 2016).

136. *Id.* at 1323.

137. *Id.*

138. *Id.* at 1326.

139. *Id.* at 1327.

140. *Id.*

ever, Judge Beverly Martin pointed out that the majority's holding would actually "*weaken*[]" the rights of veterans based on a statute intended to give them strength" because it would "foster employer overreaching."<sup>141</sup>

The most recent circuit court decision came from the Ninth Circuit ruling against Kevin Ziober.<sup>142</sup> In *Ziober v. BLB Resources, Inc.*, the Ninth Circuit held that USERRA claims were subject to mandatory arbitration agreements.<sup>143</sup> Citing *Garrett, Landis, and Bodine*, the Ninth Circuit agreed that neither the Act's text nor its legislative history manifested a congressional intent to preclude compelled arbitration of USERRA claims.<sup>144</sup> The court further justified its conclusion by maintaining that Kevin did not lose any substantive protections by arbitrating his claims.<sup>145</sup> Lastly, the court reasoned that because Congress did not include a plain statement precluding arbitration, USERRA did not include "a non-waivable procedural right to a judicial forum."<sup>146</sup>

C. *The Circuit Courts Are Reaching the Wrong Conclusion Due to an Erroneous Reading of USERRA and an Unjustified Disregard for USERRA's Legislative History*

The circuit courts are incorrect in holding that servicemembers must submit to coercive arbitration agreements.<sup>147</sup> Despite claiming a strict textualist interpretation of § 4302(b), the circuit courts have instead twisted USERRA's plain language, gutting the Act of its protections and disregarding Congress's intent in passing USERRA. As the *Breletic* court noted, § 4302(b) states in plain language that it supersedes *any contracts* that infringe on USERRA rights, including those that pose an additional prerequisite to exercising those rights.<sup>148</sup> Arbitration agreements are contracts, but they pose additional prerequisites by requiring servicemembers to arbitrate before pursuing their USERRA claim in a judicial forum.<sup>149</sup> Therefore, the Act supersedes any mandatory arbitration agreement.<sup>150</sup> Furthermore, the courts' reasoning relies on the assumption that arbitration can provide a platform for servicemembers to substantively vindicate their claims, but this Note argues

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141. *Id.* at 1328, 1333 (Martin, J., dissenting) (emphasis added).

142. See *supra* Introduction for the discussion and factual background of *Ziober*.

143. 839 F.3d 814, 816 (9th Cir. 2016).

144. *Ziober*, 839 F.3d at 817.

145. *Id.* at 818.

146. *Id.*

147. See *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring).

148. *Breletic v. CACI, Inc.—Fed.*, 413 F. Supp. 2d 1329, 1336 (N.D. Ga. 2006).

149. *Id.* at 1334, 1336.

150. *Id.* at 1336. A servicemember could agree to arbitration if they so choose. See H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.A.N. 2449, 2453 (noting that a USERRA plaintiff may waive rights if the waiver is "clear, convincing, specific, unequivocal, and not under duress").

that arbitration is an inadequate replacement and not substantively comparable.

In *Bodine*, the Eleventh Circuit strained to interpret the word “supersedes” to have as restrictive a definition as possible.<sup>151</sup> The majority first cited *Black’s Law Dictionary*, which defines “supersede” as “[t]o annul, make void, or repeal by taking the place of,” before turning to two other dictionaries.<sup>152</sup> Rather than accepting the first definition, which supported Bodine’s argument, the majority found ambiguity despite this plain definition.<sup>153</sup> As dissenter Judge Martin pointed out, § 4302(b)’s use of the word “supersede” is not so ambiguous that courts should freely speculate about Congress’s intent.<sup>154</sup> She also noted that the majority’s reading of § 4302(b) would leave its companion clause, § 4302(a), superfluous: if § 4302(b) only voids the illegal parts of a contract, rather than invalidating the entire contract, then there would never be any “more beneficial” provisions for § 4302(a) to save.<sup>155</sup> Under Supreme Court precedent, courts must be “hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”<sup>156</sup>

Even if the Eleventh Circuit majority’s definition of “supersedes” is accepted, USERRA does “replac[e] one thing with another”<sup>157</sup>: it replaces arbitration with a judicial forum. As the Supreme Court noted in *Mitsubishi*, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>158</sup> By using the word “rather,” the Supreme Court indicates that arbitration can replace a judicial forum, and by that reasoning, an arbitral forum is replaceable by a judicial one.

Aside from the word “supersedes,” § 4302(b)’s latter clause, which prohibits the establishment of additional prerequisites,<sup>159</sup> is another decree against mandatory arbitration.<sup>160</sup> In *Ziober*, the Ninth Circuit reasoned that

151. See *Bodine v. Cook’s Pest Control Inc.*, 830 F.3d 1320, 1327 (11th Cir. 2016).

152. *Id.* at 1326 (emphasis added) (quoting *Supersede*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

153. See *id.* at 1326–27.

154. *Id.* at 1330 (Martin, J., dissenting).

155. *Id.* at 1330–31.

156. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988); see also *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299 n.1 (2006) (“[I]t is generally presumed that statutes do not contain surplusage . . . .”); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

157. *Bodine*, 830 F.3d at 1327.

158. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added).

159. 38 U.S.C. § 4302(b) (2012).

160. See *Lopez v. Dillard’s, Inc.*, 382 F. Supp. 2d 1245, 1249 (D. Kan. 2005) (“If the reference to prerequisites is to be given some meaning apart from preserving plaintiff’s substantive rights under the act (which it must in order to avoid rendering that language mere surplusage), it must be construed as invalidating procedural changes not authorized by Congress.”).

the Supreme Court's decision in *CompuCredit Corp. v. Greenwood*<sup>161</sup> stopped Ziober from arguing that USERRA created "a non-waivable procedural right to a judicial forum."<sup>162</sup> In *CompuCredit*, the Supreme Court had held that because the applicable statute was silent on the topic of arbitration, the FAA required courts to enforce signed arbitration agreements.<sup>163</sup> The Ninth Circuit interpreted *CompuCredit* to mean that a statute forecloses arbitration *only* if Congress uses the word "arbitration" in a statute's nonwaiver provision.<sup>164</sup> But the Supreme Court had merely observed in *CompuCredit* that when Congress "restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the [Credit Repair Organizations Act]."<sup>165</sup> Nowhere in *CompuCredit* did the Supreme Court state that a statute could not "describe *the process of arbitration* without using the word '*arbitration*.'"<sup>166</sup> Congress did exactly that with § 4302(b). As Judge Cole notes in his *Landis* concurrence, by "additional prerequisites," Congress meant to prohibit employers from requiring employees to resort to additional mechanisms such as arbitration.<sup>167</sup>

Moreover, although the *Garrett* court relied on Congress's failure to expressly refer to arbitration in USERRA after *Gilmer*, the court's single-minded focus on this is misplaced.<sup>168</sup> *Gilmer* did not involve an employment agreement; rather, it explicitly left open the question of the FAA's applicability to employment agreements.<sup>169</sup> It was not until 2001, almost seven years after USERRA was enacted, that the Supreme Court, in *Circuit City Stores, Inc. v. Adams*, finally decided that the FAA covered employment contracts.<sup>170</sup>

Aside from USERRA's plain text, there are other indications of congressional intent to preclude mandatory arbitration for the benefit of service-members in the Act's legislative history. For example, on the topic of § 4302(b)'s scope, the House Committee Report states that § 4302(b) would

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161. 565 U.S. 95 (2012).

162. *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 818 (9th Cir. 2016).

163. *CompuCredit*, 565 U.S. at 104.

164. *See Ziober*, 839 F.3d at 819.

165. *CompuCredit*, 565 U.S. at 103.

166. Plaintiff-Appellant's Reply Brief at 14, *Ziober*, 839 F.3d 814 (No. 14-56374), 2015 WL 1396699.

167. *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring) (citing H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453); 70 Fed. Reg. 75,246, 75,257 (Dec. 19, 2005) (reading § 4302(b) as including "a prohibition against the waiver in an arbitration agreement of an employee's right to bring a USERRA suit in Federal court."); *see also Ziober*, 839 F.3d at 822 (Watford, J., concurring) ("If USERRA confers the right to a judicial forum, then § 4302(b) arguably renders invalid any pre-dispute waiver of that right through an agreement to submit USERRA claims to arbitration."); *Lopez v. Dillard's, Inc.*, 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005).

168. *See KATHRYN PISCITELLI & EDWARD STILL, THE USERRA MANUAL* § 8:15 (2017).

169. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

170. PISCITELLI & STILL, *supra* note 168, § 8:15.

reiterate that resorting to additional mechanisms, like arbitration, would not be required: “It is the Committee’s intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law.”<sup>171</sup> Rather than crediting this evidence of Congress’s intent to preclude arbitration, the *Ziober* court concluded that Congress’s concerns applied to collective-bargaining agreements instead of individual agreements.<sup>172</sup> Yet the Report does not distinguish between union and non-union arbitration agreements—the Report states that “any arbitration decision shall not be binding.”<sup>173</sup>

Additionally, the “special solicitude” that Congress conferred on servicemembers also clashes with the circuit courts’ interpretations.<sup>174</sup> Congress’s “special solicitude” for veterans, in recognition of their important service for the nation, has led Congress to “place a thumb on the scale in the veteran’s favor” when enacting legislation concerning veterans.<sup>175</sup> The Supreme Court’s decisions have consistently recognized and respected this understanding.<sup>176</sup> The Court adopted a corollary principle by interpreting statutes in a manner that liberally construes reemployment rights for the benefit of servicemembers.<sup>177</sup>

The Ninth Circuit, however, misapplied this principle of liberal construction by holding that arbitration agreements do not require a party to forgo any substantive rights.<sup>178</sup> But this is an erroneous assumption: the canon of liberal construction holds that *all* interpretations are to be construed in favor of veterans,<sup>179</sup> without qualifying whether the statutory provision is substantive or procedural.<sup>180</sup> USERRA’s legislative history belies any distinc-

171. *Ziober*, 839 F.3d at 820 (quoting H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453).

172. See *id.* at 821.

173. H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453 (emphasis added).

174. Amicus Brief of Congress in Support of *Ziober*, *supra* note 7, at 10.

175. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)); see also *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (stating that as an acknowledgement of a servicemember’s sacrifice, the servicemember was “to gain by his service for his country an advantage which the law withheld from those who stayed behind”).

176. See, e.g., *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009).

177. *Fishgold*, 328 U.S. at 285. Under this principle, separate provisions of a statute are to be treated as “parts of an organic whole and [courts are to] give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.” *Id.*

178. *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 820 (9th Cir. 2016).

179. *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (“[W]e announced two principles that have governed *all* subsequent interpretations of the re-employment rights of veterans.” (emphasis added)).

180. *Ziober* Petition for Writ of Certiorari, *supra* note 5, at 31–32.

tion in applying this principle: in enacting the statute, Congress stated that “the Act is to be ‘liberally construed.’”<sup>181</sup>

Ultimately, Congress’s “special solicitude” and the Supreme Court’s canon of liberal construction for servicemembers embody a promise to those who serve our country that their claims will be fairly and fully decided.<sup>182</sup> Although the circuit courts insist that allowing compelled arbitration provides “the greatest benefit to our servicemen and women”<sup>183</sup> and that arbitration furthers the same social purposes as litigation,<sup>184</sup> these assumptions have proven to be inaccurate. As discussed previously,<sup>185</sup> mandatory arbitration lacks procedural protections, preventing employees from effectively vindicating their substantive rights.<sup>186</sup> This is exacerbated when, under the current circuit precedent, employers are free to insert boilerplate arbitration agreements into every employment contract, so that courts will essentially be stripped of their authority to enforce USERRA.<sup>187</sup> Such an outcome is antithetical to Congress’s intent in passing the statute, particularly when USERRA expressly refers to the “right of a person . . . to commence an action under § 4323.”<sup>188</sup>

### III. A POSSIBLE REMEDY FOR BINDING ARBITRATION’S THREAT TO NATIONAL DEFENSE

The trend of subordinating USERRA claims to mandatory arbitration agreements is especially alarming because of its potential impact on national security. Section III.A argues that stripping USERRA protections will have an adverse impact on military recruitment and retention, which will ultimately jeopardize our national defense capabilities. Section III.B identifies and addresses possible counterarguments and concludes with possible solutions to the USERRA and mandatory arbitration problem.

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181. H.R. REP. NO. 103-65, pt. 1, at 19 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2452 (emphasis added) (quoting *Fishgold*, 328 U.S. at 285); accord S. REP. NO. 103-158, at 40 (1993).

182. 146 CONG. REC. 16052–53 (2000) (statement of Rep. Evans); Amicus Brief of Congress in Support of Ziober, *supra* note 7, at 10; see also 146 CONG. REC. 19229–30 (2000) (statement of Sen. Rockefeller) (explaining that the systems designed to protect veterans “should not create technicalities and bureaucratic hoops for them to jump through”).

183. *E.g.*, *Bodine v. Cook’s Pest Control Inc.*, 830 F.3d 1320, 1327 (11th Cir. 2016).

184. *E.g.*, *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 820 (9th Cir. 2016).

185. See *supra* Section I.B.

186. *But see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

187. See *Bodine*, 830 F.3d at 1322 (Martin, J., dissenting).

188. 38 U.S.C. § 4327(a)(1)(B)(i) (2012).

A. *Military Recruitment and Retention Are Negatively Affected by Forced Arbitration of USERRA Claims*

Because the U.S. military structure is still based on the “Total Force Policy,”<sup>189</sup> it relies heavily on reservists.<sup>190</sup> Currently, reservists constitute approximately 38% of the nation’s total military force and a majority of Army forces.<sup>191</sup> In addition to combat operations, the nation depends on reservists to assist federal and state governments during a state of emergency,<sup>192</sup> acting as the frontline for responses to any major natural disaster.<sup>193</sup>

The military is having difficulty recruiting reservists.<sup>194</sup> This is concerning: reservists provide critical support to the common defense of the nation every day.<sup>195</sup> This problem has become even more pressing as the military actively attempts to further expand its forces.<sup>196</sup> If USERRA protections erode, service in the Reserves will be less economically feasible for potential recruits to the point that many individuals may choose to forgo service altogether.<sup>197</sup> Because “[t]he decision to serve in America’s military is not made in a patriotic vacuum,” potential recruits will inevitably weigh the benefits of service against the potentially fatal risks inherent in military service and the difficulties of maintaining a civilian career.<sup>198</sup> Socioeconomic status is one of the most significant predictors of military service: unsurprisingly, people

189. See *Role of the Reserves in the Total Force Policy*, *supra* note 27, at 136.

190. LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RESERVE COMPONENT PERSONNEL ISSUES 8 (2017).

191. U.S. DEP’T OF DEF., OFFICE OF THE ASSISTANT SEC’Y OF DEF. FOR READINESS AND FORCE MGMT., DEFENSE MANPOWER REQUIREMENTS REPORT: FISCAL YEAR 2018, at 2 tbl.1-1 (2017).

192. For example, during Hurricane Katrina, over fifty thousand National Guard soldiers were deployed to support states’ recovery and relief operations. See James Stuhltrager, *Send in the Guard: The National Guard Response to Natural Disasters*, NAT. RESOURCES & ENV’T., Spring 2006, at 21, 25.

193. *Id.* at 21.

194. E.g., David Vergun, *Army Sees Challenges Ahead to Recruiting Future Soldiers*, U.S. ARMY (Aug. 21, 2015), [https://www.army.mil/article/154299/Army\\_sees\\_challenges\\_ahead\\_to\\_recruiting\\_future\\_soldiers](https://www.army.mil/article/154299/Army_sees_challenges_ahead_to_recruiting_future_soldiers) [<https://perma.cc/CES9-A8ZH>].

195. Richard J. Dunn, III, *America’s Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, in 2016 INDEX U.S. MIL. STRENGTH 61, 61 (Dakota L. Wood ed., 2016), [https://s3.amazonaws.com/ims-2016/PDF/2016\\_index\\_of\\_US\\_Military\\_Strength\\_ESSAYS\\_DUNN.pdf](https://s3.amazonaws.com/ims-2016/PDF/2016_index_of_US_Military_Strength_ESSAYS_DUNN.pdf) [<https://perma.cc/YG3U-QBDS>].

196. See Joe Gould, *Mattis: Trump Military Buildup Begins in 2019*, DEFENSENEWS (June 12, 2017), <https://www.defensenews.com/congress/2017/06/13/mattis-trump-military-buildup-begins-in-2019/> [<https://perma.cc/GX7S-FQLF>].

197. See Bugbee, *supra* note 26, at 282–83. This problem is further compounded by the risk that reservists can have “their contractually agreed-to terms of service extended under the president’s ‘stop-loss’ authority.” Howard S. Suskin & Benjamin J. Wimmer, *Arbitrability of USERRA Claims: Battle on the Home Front*, LAW.COM (Oct. 15, 2008, 12:00 AM), <https://www.law.com/almID/1202425266219> (on file with the *Michigan Law Review*).

198. Suskin & Wimmer, *supra* note 197.

with lower family income are more likely to serve than people with higher family income.<sup>199</sup> Undermining the protections of USERRA by allowing employers to force claims into highly favorable arbitration proceedings exacerbates the already tenuous economic situation of military reservists. This will likely have a negative impact on recruitment. Unfortunately, sheer patriotism and a fervent desire to serve cannot overcome economic realities.

Retention may be similarly affected. Every military branch is already struggling with retaining qualified reservists.<sup>200</sup> USERRA's inadequate protections may serve as the breaking point for reservists,<sup>201</sup> who are faced more frequently with the possibility of deployment<sup>202</sup> while enticing civilian employment opportunities are also available.<sup>203</sup> Although the military has tried to boost its low retention numbers with bonuses,<sup>204</sup> these measures may not be very effective and may be excessively expensive.<sup>205</sup> For example, the House of Representatives recently passed the annual National Defense Authorization Act, authorizing \$700 billion in defense spending<sup>206</sup> to help im-

199. Amy Lutz, *Who Joins the Military? A Look at Race, Class, and Immigration Status*, 36 J. POL. & MIL. SOC. 167, 184 (2008); see also *Hungry Heroes: 25 Percent of Military Families Seek Food Aid*, NBC NEWS (Aug. 17, 2014, 7:43 PM), <https://www.nbcnews.com/feature/in-plain-sight/hungry-heroes-25-percent-military-families-seek-food-aid-n180236> [https://perma.cc/2SP3-7S98].

200. See, e.g., Chief of Naval Pers. Pub. Affairs, *CNP Issues Call to Action to Increase Navy Retention*, NAVY NEWS SERV. (Apr. 18, 2018, 12:55 PM), [http://www.navy.mil/submit/display.asp?story\\_id=105200](http://www.navy.mil/submit/display.asp?story_id=105200) [https://perma.cc/75CJ-PGCR] (Navy retention); Tim Kane, *How to Lose Great Leaders? Ask the Army*, WASH. POST (Feb. 5, 2013), [https://www.washingtonpost.com/national/on-leadership/how-to-lose-great-leaders-ask-the-army/2013/02/05/725f177e-6fae-11e2-ac36-3d8d9dcaa2e2\\_story.html?noredirect=on&utm\\_term=.5e042c347a6b](https://www.washingtonpost.com/national/on-leadership/how-to-lose-great-leaders-ask-the-army/2013/02/05/725f177e-6fae-11e2-ac36-3d8d9dcaa2e2_story.html?noredirect=on&utm_term=.5e042c347a6b) [https://perma.cc/U4K9-C4G4] (Army retention); David Thornton, *Air Force Needs More Manpower to Improve Readiness*, FED. NEWS RADIO (Mar. 23, 2017, 1:14 PM), <https://federalnewsradio.com/air-force/2017/03/air-force-needs-manpower-improve-readiness/> [https://perma.cc/V6Q3-Q323] (Air Force retention).

201. See Kelley, *supra* note 75, at 406.

202. See Jared Serbu, *Army Wants More Guard, Reserve Deployments in 2017*, FED. NEWS RADIO (Feb. 29, 2016, 5:55 AM), <https://federalnewsradio.com/army/2016/02/army-wants-guard-reserve-deployments-2017/> [https://perma.cc/AJ8A-663X].

203. VAINE CALDWELL, *WHY ARE FIRST TERM SOLDIERS LEAVING THE US ARMY RESERVE?* 16 (2010).

204. See, e.g., Hope Hodge Seck, *Marines to Offer Retention Bonuses for F-35, V-22, F-18 Pilots*, MILITARY.COM (Mar. 29, 2017), <http://www.military.com/daily-news/2017/03/29/marines-to-offer-retention-bonuses-for-f35-v22-f18-pilots.html> [https://perma.cc/5378-AU9R] (reporting that the Marine Corps is offering retention bonuses for aviators "to compete with the high-paying airline industry").

205. See Justin Joffrion & Nathan Wozny, *Military Retention Incentives: Evidence from the Air Force Selective Reenlistment Bonus* 20 (Upjohn Inst., Working Paper No. 15-226, 2015), [http://research.upjohn.org/cgi/viewcontent.cgi?article=1243&context=up\\_workingpapers](http://research.upjohn.org/cgi/viewcontent.cgi?article=1243&context=up_workingpapers) (on file with the *Michigan Law Review*).

206. Patricia Zengerle, *House Backs \$700 Billion Defense Policy Bill, Funding Uncertain*, REUTERS (Nov. 14, 2017, 6:22 PM), <https://www.reuters.com/article/us-usa-defense-congress/house-backs-700-billion-defense-policy-bill-funding-uncertain-idUSKBN1DE351> [https://perma.cc/BQL9-LT5P].

prove military readiness and low retention rates.<sup>207</sup> But such extravagant funding is antithetical to one of USERRA's purposes: lowering the federal government's military costs by "taxing" employers.<sup>208</sup>

B. *Counterarguments, Giving Servicemembers the Choice to Arbitrate, and Using a Stop-Gap to Combat Compelled Arbitration*

In his concurrence in *Ziober*, Judge Watford questioned whether the court was reaching the correct result.<sup>209</sup> He implied that he agreed with the majority partly because he did not want to create a circuit split, "particularly given the ease with which Congress can fix this problem."<sup>210</sup> However, Judge Watford is considerably overestimating Congress's ability, particularly in our current political climate, to pass even the most benign bills that theoretically should enjoy bipartisan support—such as providing servicemembers promised protections of reemployment.<sup>211</sup>

In 2008, Senator Robert Casey introduced the Servicemembers Access to Justice Act (2008 SAJA).<sup>212</sup> The 2008 SAJA was intended to overturn *Garrett* by amending USERRA to provide that any employment agreement requiring arbitration would be unenforceable.<sup>213</sup> SAJA would have also provided additional protections to servicemembers by allowing: (1) USERRA plaintiffs to bring claims against some state government employers in either federal or state court; (2) additional remedies for successful USERRA plaintiffs, such as punitive and liquidated damages; (3) mandatory attorney fees for successful USERRA plaintiffs; and (4) a more streamlined injunctive relief process to prevent terminations and expedite reemployment of returning servicemembers.<sup>214</sup> Despite then-Senator Barack Obama's heartfelt argument that "[o]ur returning service members and veterans should not have to fight another

207. See Brennan Weiss, *The New Proposed Defense Budget is Trying to Fix One of the Military's Biggest Problems*, BUS. INSIDER (Nov. 15, 2017, 2:10 PM), <http://www.businessinsider.com/military-to-add-thousands-troops-increase-pay-for-soldiers-2017-11> [<https://perma.cc/AMN5-MDZ5>].

208. See Suskin & Wimmer, *supra* note 197 (positing that by imposing reemployment duties on employers, the federal government in effect "taxes" employers, so that the government can afford a large military reserve while simultaneously encouraging military service).

209. *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 821 (9th Cir. 2016) (Watford, J., concurring).

210. *Id.* at 822.

211. Elahe Izadi & Clare Foran, *Why Congress Sometimes Can't Even Pass Moderate, Bipartisan Bills*, ATLANTIC (Sept. 15, 2013), <https://www.theatlantic.com/politics/archive/2013/09/why-congress-sometimes-cant-even-pass-moderate-bipartisan-bills/444849/> [<https://perma.cc/L3Y9-7DCK>] (describing Congress's inability to pass even the most

"[m]oderate, [b]ipartisan [b]ills" due to the legislative process and lack of productivity).

212. S. 3432, 110th Cong. §§ 1–9 (2008). In 2012, the SAJA was reintroduced. See S. 3236, 112th Cong. (2012).

213. S. 3432 § 3(a).

214. *Id.* §§ 2–5, 9.

battle at home for the benefits and rights they deserve,”<sup>215</sup> SAJA died in Congress’s Committee on Veterans Affairs.<sup>216</sup>

SAJA was briefly resurrected in 2012 (2012 SAJA), but it again stalled in the Committee on Veterans Affairs.<sup>217</sup> Although Congress’s inability to pass SAJA could reflect its agreement with current circuit precedent, the more likely cause is Congress’s extreme partisanship.<sup>218</sup> In an era where words like “hyper-partisan” and “unproductive” are the most common descriptors for Congress,<sup>219</sup> it is not surprising that Congress was unable to reach agreement on this issue.<sup>220</sup> Ardent advocates of arbitration and even moderates in Congress most likely opposed SAJA due to the sheer strength of protections it would suddenly provide servicemembers at employers’ expense. And because the 2012 SAJA was extremely similar to the 2008 SAJA, it is not surprising that it was dead on arrival.<sup>221</sup>

One possible solution would be to pass a less expansive version of SAJA, solely addressing the mandatory arbitration issue. One such attempt can be seen in Senator Richard Blumenthal’s introduction of the Justice for Servicemembers Act of 2017 (JSA).<sup>222</sup> Like SAJA, this bill would amend USERRA to explicitly prohibit arbitration unless the servicemember freely agrees to arbitration *after* the dispute arises.<sup>223</sup> The bill would preserve the *servicemembers’* choice in deciding whether to arbitrate their USERRA claims,<sup>224</sup> and it would equalize the bargaining power of current and pro-

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215. *Casey, Kennedy, Obama Introduce Bill to Help Servicemembers and Veterans Keep Their Jobs*, BOB CASEY (Aug. 1, 2008), <https://www.casey.senate.gov/newsroom/releases/casey-kennedy-obama-introduce-bill-to-help-servicemembers-and-veterans-keep-their-jobs> [<https://perma.cc/6YTW-CGTZ>] (statement of Senator Obama).

216. *See* S. 3424.

217. *See* S. 3236.

218. *See* Noel Rubinton, *In a Polarized Era, Efforts to Boost Bipartisanship in Congress*, WILLIAM & FLORA HEWLETT FOUND. (Oct. 13, 2016), <https://www.hewlett.org/making-bipartisanship-stick-in-congress/> [<https://perma.cc/EM92-7PPJ>].

219. *Id.*

220. This partisanship is exacerbated by the presence of pro-arbitration Republicans who are “categorically opposed to any efforts that could possibly chip away at the nation’s ardent pro-arbitration position.” Kelley, *supra* note 75, at 409; *see* John G. Jacobs, Letter to the Editor, *Why Arbitration Is a Rigged System*, N.Y. TIMES (Aug. 20, 2017), <https://www.nytimes.com/2017/08/20/opinion/why-arbitration-is-a-rigged-system.html> (on file with the *Michigan Law Review*).

221. *See* Kelley, *supra* note 75, at 409 (describing the 2012 SAJA as “essentially [a] carbon copy[ly]” of the 2008 SAJA).

222. *See* S. 646, 115th Cong. (2017). The bill currently has five cosponsors; the latest cosponsor, Senator Kirsten Gillibrand, signed on October 31, 2017. *Id.*; *Cosponsors: S.646 — 115th Congress (2017-2018)*, CONGRESS.GOV (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/646/cosponsors> [<https://perma.cc/AY7V-QYUL>].

223. S. 646 § 108.

224. Since USERRA has a “savings” clause (§ 4302(b)), an employer would not be able to choose trial if there was an arbitration agreement.

spective employees.<sup>225</sup> Further, placing the choice of whether to arbitrate in the hands of servicemembers more closely aligns with Congress's intent. Congress did not intend for servicemembers to be bound by coercive arbitration agreements; on the contrary, "Congress intended employees, not employers, to dictate the method or forum in which they pursue their rights under USERRA."<sup>226</sup> While SAJA is a superior bill, it likely stands little chance of passing the contemporary Congress. The JSA, albeit less protective, would go a long way toward restoring USERRA's substantive protections, and it should be passed by Congress for our servicemembers' sake.

Proponents of mandatory arbitration might protest that this would lead to an influx of claims, further burdening our judiciary.<sup>227</sup> But the specter of increased claims clogging the judiciary pales in comparison to the risk posed to our servicemembers and, ultimately, our national defense if we are unable to retain qualified reservists. Moreover, if arbitration actually is mutually favorable, servicemembers may elect to arbitrate to take advantage of its benefits. For example, there is currently no guarantee that a servicemember will be awarded attorney fees under USERRA even if they prevail.<sup>228</sup> If the servicemember elects arbitration, however, the employer will bear the costs.<sup>229</sup> Even if the majority of servicemembers forego arbitration in favor of trial, an increase in claims is unlikely to have a noticeable impact on the judiciary because of the limited number of servicemembers. Additionally, any nonmeritorious claims can easily be dismissed by courts, whereas leaving servicemembers with no path to recovery would result in a greater monetary value of inefficiency. More importantly, a huge spike in USERRA claims would alert legislators and the public that employment discrimination against servicemembers is a widespread problem.

There might also be concerns about the unexpected side effects of allowing servicemembers to opt out of arbitration. Employers may decide not to hire any servicemembers at all to avoid the risk of losing a reservist employee to deployment. Or, employers may perceive an increased risk of liability without the protections of mandatory arbitration and price that risk into their business model, lowering wages as a result. But these potential consequences can be mitigated by stringently enforcing USERRA. Not hiring ser-

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225. See Feingold, *supra* note 44, at 292 ("With the threat of not getting a job or a promotion, these [arbitration] agreements effectively, by withholding work, coerce individuals into relinquishing fundamental legal protections.").

226. *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring).

227. There is also no definitive evidence that the number of USERRA claims brought to in federal court would noticeably increase. See Liptak, *supra* note 23.

228. 38 U.S.C. § 4323(h)(2) (2012) ("In any action or proceeding to enforce a provision of this chapter by a person . . . who obtained private counsel for such action or proceeding, the court *may* award any such person who prevails . . . reasonable attorney fees . . ." (emphasis added)).

229. *Id.* § 4323(h)(1) ("No fees or court costs may be charged or taxed against any person claiming rights under [USERRA].").

vicemembers or paying them lower wages because of their military service is exactly the type of discrimination that USERRA forbids. Admittedly, this puts the onus on employers to bear the costs of hiring and employing servicemembers,<sup>230</sup> but employers are likely better situated to minimize and spread these costs than individual servicemembers are.

In lieu of legislation or a Supreme Court ruling, diverting funds to the Attorney General's office can act as a stopgap. In *EEOC v. Waffle House, Inc.*, the Supreme Court held that the EEOC may still sue an employer in court on its own, even if there is an arbitration agreement, because the EEOC has "independent statutory authority" to "vindicate the public interest."<sup>231</sup> Similarly, the Attorney General's office may be able to bring a USERRA claim against an employer, even in the face of an arbitration agreement.<sup>232</sup> Despite reviewing 930 new cases in fiscal year 2016, however, the Department of Labor only referred sixty-one cases to the Attorney General, and the Attorney General filed only four USERRA complaints in federal court.<sup>233</sup> If the Attorney General is bringing so few claims because of a lack of funds,<sup>234</sup> diverting some money from the Department of Defense's retention budget to the Attorney General's office may help increase the number of USERRA claims the Attorney General can bring. For example, expanding the Attorney General's staff would allow the office to investigate more referrals and file more lawsuits. And since the Attorney General has a policy of resolving referrals expeditiously through settlements whenever possible, even a slight increase in the number of available staff would yield tangible benefits to a greater number of servicemembers.<sup>235</sup>

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230. See CONG. BUDGET OFFICE, THE EFFECTS OF RESERVE CALL-UPS ON CIVILIAN EMPLOYERS 17–20 (2005), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/63xx/doc6351/05-11-reserves.pdf> [<https://perma.cc/N95S-D2ZU>].

231. 534 U.S. 279, 290 (2002) (quoting *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 809 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002)).

232. The Fifth Circuit discussed the possibility of having the Attorney General pursue a claim for a servicemember in rejecting Garrett's argument that mandatory arbitration conflicted with USERRA. See *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 681 (5th Cir. 2006); see also *supra* notes 88–89.

233. U.S. DEP'T OF LABOR, FY 2016 USERRA ANNUAL REPORT TO CONGRESS 8 (2017), [https://www.dol.gov/vets/programs/userra/USERRA\\_Annual\\_FY2016.pdf](https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2016.pdf) [<https://perma.cc/8ZWM-KAWA>].

234. See Josh Gerstein, *Trump Justice Budget Targets Illegal Immigration*, POLITICO (May 23, 2017, 6:40 PM), <https://www.politico.com/blogs/under-the-radar/2017/05/23/trump-justice-department-immigration-238738> [<https://perma.cc/Q8N8-YLKJ>] ("The Trump administration is proposing a \$27.7 billion [sic] for the Justice Department in fiscal 2018, down \$1.1 billion . . . from the . . . previous year.")

235. U.S. DEP'T OF LABOR, *supra* note 233, at 6–7. Additionally, just having the weight of the Attorney General behind a servicemember would probably create an incentive for the employer to settle as soon as possible.

## CONCLUSION

Deployments are difficult for any servicemember, regardless of whether the servicemember is on active duty or a reservist.<sup>236</sup> Reservists, however, face an additional difficulty. Not only do reservists worry about their family left behind, their responsibilities to the soldiers in their care, and their own safety, they also worry about whether they will have a job if they return. As Kevin Ziober put it, “[n]o service member who is asked to serve their country should have to worry about fighting for their job when they return home from war.”<sup>237</sup> Despite Congress’s recognition of servicemembers’ vulnerabilities, USERRA cannot provide adequate protections if the judiciary continues to subvert congressional intent.<sup>238</sup> The government needs to defend our servicemembers at home so that our servicemembers can focus on defending our nation. Prohibiting mandatory arbitration agreements, whether by Congress explicitly amending USERRA or by the judiciary interpreting USERRA as intended, would be a significant step toward showing our servicemembers that we too are willing to fight.

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236. Marcy L. Karin & Katie Onachila, *The Military’s Workplace Flexibility Framework*, 3 AM. U. LAB. & EMP. L.F. 153, 188–89 (2013).

237. Megan Leonhardt, *Democrats Are Trying to Make It Easier for People to Take Their Employers to Court*, TIME (Mar. 7, 2017) (statement of Kevin Ziober), <http://time.com/money/4694256/democrats-employers-court-mandatory-arbitration/?xid=homepage> [<https://perma.cc/NEC4-GKN3>].

238. See *Milhauser v. Minco Prods. Inc.*, 701 F. 3d 268, 272–73 (8th Cir. 2012) (holding that deployed servicemembers returning home are not necessarily entitled to reemployment under USERRA because if the servicemember would have been terminated even if he had never deployed, the layoff was completely justified and legal); Shaun So, *Can You Believe This Is Legal? Military Guard and Reserve Employees Can Be Laid Off During Deployments*, FORBES (Apr. 4, 2013, 11:20 AM), <https://www.forbes.com/sites/shaunso/2013/04/04/can-you-believe-this-is-legal-military-guard-and-reserve-employees-can-be-laid-off-during-deployments/#4d9ab3452beb> (on file with the *Michigan Law Review*) (explaining how the Eighth Circuit’s holding creates a loophole that employers can use to wrongly fire servicemembers).

