No. 16-1269

IN THE

Supreme Court of the United States

KEVIN ZIOBER,

Petitioner,

v.

BLB RESOURCES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS M. SOBOL
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
(617) 482-3700

MATTHEW W.H. WESSLER
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

Counsel for Amici Curiae

May 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative materials

Administrative and regulatory materials

Other authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress, from both parties and both chambers, who have dedicated their careers to protecting the rights of those Americans who have sacrificed most for their country—service members, reservists, and veterans. *Amici* include members of the House and Senate committees on veterans' affairs. A complete list of *amici* appears in the appendix.

Amici file this brief to help the Court understand how, over the past seven decades, Congress has worked to create and protect a broad set of rights for veterans reentering the workforce, leading up to the 1994 passage of USERRA. This brief places USERRA in its proper historical context, demonstrating that Congress intended to provide a wide range of mechanisms for veterans to vindicate their reemployment rights, including efforts to hold their employers accountable in federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has long recognized that when someone puts on a uniform to serve in our military, we owe them certain obligations in return. One obligation is the assurance that, when they return home, they will be able reenter civil society without being penalized for serving our country.

To make good on this obligation, Congress enacted a series of laws over the years establishing a broad set of rights for veterans reentering the workforce. The most recent and comprehensive is the Uniformed Services Employment and Reemployment Rights Act.

---

[1] All parties were given notice of *amici*'s intent to file and consent to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Enacted in 1994, USERRA does three important things. It protects veterans against being fired or discriminated against by an employer based on their military service. It provides robust procedural rights, including the right to bring a claim in federal court. And it prevents employers from stripping veterans of their rights by forbidding the enforcement of "any" contract "that reduces, limits, or eliminates in any manner any right or benefit" under USERRA. 38 U.S.C. § 4302(b).

The Ninth Circuit's decision below misunderstands how these rights interact, and in doing so undermines them. It holds that employers may demand that veterans waive their right under USERRA to file suit in a federal court and instead force them into secret arbitration. But, as this brief shows, that is not what Congress intended. Congress wanted to ensure that veterans could vindicate their rights in the forum of their choice, and specifically expressed disapproval of the practice of employers inserting contractual barriers to the filing of a claim in court. Allowing mandatory pre-dispute arbitration frustrates the congressional intent behind USERRA because it thwarts the vindication of rights, hinders the development of the case law, and is inconsistent with the special solicitude that Congress has long afforded veterans. This Court should intervene.

STATEMENT

A. Petitioner Kevin Ziober is a lieutenant in the U.S. Navy Reserves. He has served since 2008. Pet. App. 37a. Four years into his service, in the fall of 2012, he was called into active duty—a one-year deployment to Afghanistan beginning in February 2013. *Id.* at 38a–39a.

At the time, Lieutenant Ziober had a job at BLB Resources, a real-estate company in Irving, California. *Id.* at 37a, 39a. He worked as a project manager, helping to market and manage property under a contract with the

U.S. Department of Housing and Urban Development. *Id.* Upon learning of his impending deployment, Ziober notified the company that he would be leaving for one year to serve his country overseas. *Id.* at 38a–39a. He expected to resume working upon his return, and repeatedly conveyed his desire to do so. *Id.*

On Ziober's last day at work before deploying, BLB Resources threw a farewell party in his honor. *Id.* at 39a. Dozens of colleagues, as well as the company's CEO and president, turned out for the celebration. *Id.* They watched as Ziober "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; *see also* Pet. App. 39a; Andrew Tilghman, *A new federal court ruling has huge significance for military reservists*, Military Times, Oct. 15, 2016, http://bit.ly/2ezGhVe. They feted him with balloons, cards, and a gift, *see* Pet. App. 39a—prompting him to text family members: "What a great sendoff!" Roosevelt, *Navy reservist wants a day in court*.

But just hours after the party ended, Lieutenant Ziober was summoned to a meeting with the head of human resources, as well as his direct supervisor and the company's attorney. Pet. App. 39a. They informed Ziober that he was being fired. *Id.* As explanation, the company cited the upcoming expiration of the contract for his project—a contract that has since been renewed. *Id.* at 39a–40a. No other BLB Resources employee has been terminated because of this contract. *Id.* at 41a.

B. After serving his tour of duty, Lieutenant Ziober returned to civilian life in April 2014. That month, he filed suit against his former employer in the U.S. District Court for the Central District of California, alleging that BLB Resources had violated USERRA and the Califor-

nia Military and Veterans Code, and had fired him in violation of public policy intended to protect service members. Pet. App. 34a–48a.

BLB Resources immediately sought to keep Ziober's claims out of court by forcing him into arbitration. In so doing, the company cited a take-it-or-leave-it contract that it demanded he sign six months after beginning his work there. This document purported to waive Ziober's right to a trial by jury, and to mandate that all future disputes would be subject to private arbitration.

After the district court compelled arbitration, *see* Pet. App. 32a–33a, the Ninth Circuit affirmed. The court held that the company could strip Ziober of his constitutional right to a jury because USERRA does not clearly protect a service member's right to bring suit in federal court. The court "acknowledge[d] the possibility that Congress did not want 'members of our armed forces to submit to binding, coercive arbitration agreements,'" but concluded that this Court's decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), "forecloses the argument that USERRA includes a non-waivable procedural right to a judicial forum." *Id.* at 9a, 15a.

Judge Watford, however, wrote separately to express "doubts about whether [the panel was] reaching the right result." *Id.* at 15a. He observed that there is a "strong argument" that USERRA contains a "congressional command" that veterans' claims may not be forced into arbitration against their will, because it "contains a provision that renders unenforceable any contract or agreement that 'reduces, limits, or eliminates in any manner any right . . . provided by this chapter.'" *Id.* at 16a. In Judge Watford's view, the employer's contract "certainly 'limits'—and for all practical purposes 'eliminates'—[Ziober's] right to litigate [his] claims in court." *Id.* And whereas the statute in *CompuCredit* (the Credit

Repair Organizations Act) "did *not* confer the right to bring an action in court," Judge Watford explained that USERRA includes "a provision conferring the right to bring an action in court." *Id.* at 16a–17a. It confers a right to "commence an action" under the statute, and provides that "the district courts of the United States shall have jurisdiction of the action." 38 U.S.C. § 4323(a)(3) & (b)(3). So "that case is not on all fours with this one." Pet. App. 16a. But because Judge Watford determined that the "proper interpretation" of that provision is "open to debate," he joined the majority. *Id.* at 17a.

ARGUMENT

I. Congress intended broadly to protect veterans and service members from discrimination based on their service to our country.

Over the last 75 years, Congress has repeatedly expanded and strengthened protections for veterans reentering the workforce after serving our country. It has done so out of a "sense of obligation"—a solemn recognition of the need "to compensate for the disruption of careers and the financial setback that military service meant for many veterans." 140 Cong. Rec. S7670–71 (June 27, 1994) (Statement of Sen. Rockefeller).

These legislative efforts began in 1940, when Congress first established a right to reemployment for draftees and voluntary enlistees in World War II, ensuring that they would not be punished for "serv[ing] their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Co.*, 328 U.S. 275, 284 (1946); *see* Selective Training and Service Act, Pub. L. No. 76-783, 54 Stat. 885, 890 (1940). When the war ended, Congress extended reemployment rights to reservists and National Guard members. *See Monroe v. Standard Oil Co.*, 452 U.S. 549, 554–55 (1981). Then, during the Vietnam War,

Congress enacted the Veterans' Reemployment Rights Act of 1974 (or VRRA), further protecting veterans' reemployment rights. *See* Vietnam Era Veterans' Readjustment Assistance Act, Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974).

But this was not enough. Because of the critical importance of providing broad reemployment protection to veterans, Congress kept a watchful eye on the development of this area of law. In the two decades following the VRRA's enactment, "more than 600 court cases" were issued interpreting its scope, and "occasional confusion resulted." 137 Cong. Rec. S6058–66, S6065 (May 16, 1991) (Statement of Sen. Specter). Congress eventually came to the conclusion that the statute was too "complex and difficult to understand," 139 Cong. Rec. H2203–12, H2209 (May 4, 1993), and was "sometimes ambiguous, thereby allowing for misinterpretations," H.R. Rep. No. 103-65, at 18 (1993). These misinterpretations took too narrow a view of the law, thwarting the ability of veterans to vindicate their rights. As Senator Rockefeller explained in 1993: "over the last 53 years the VRR 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). In 1988, an interagency task force began to explore possible reforms. H.R. Rep. No. 103-65, at 18.

The result was USERRA. Enacted in 1994—three years after the Persian Gulf War served as a fresh reminder of the urgent need for reform—the law aims to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights

provisions." *Id.*; *see* 137 Cong. Rec. H2972–80, H2978 (May 14, 1991) (Statement of Rep. Penny) ("The activation of over 200,000 members of the Selected Reserve in connection with the Persian Gulf war has reminded all of us of the importance of employment and reemployment protection for members of the uniformed services."). The statute's text identifies three core purposes: (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 in the uniformed services." 38 U.S.C. § 4301(a).

USERRA achieves these ends through both substantive and procedural means. On the substantive side, the statute guarantees service members an expansive right to take military leave from their civilian jobs, to be promptly reemployed upon returning, and to be free of discrimination based on service to our country. *Id.* §§ 4311, 4312, 4313, 4316. On the procedural side, it confers a right to "commence an action for relief" against a private employer in the "district court for any district in which the private employer . . . maintains a place of business"—without the need to file an administrative action—and prohibits the application of any statute of limitations, as well as the charging of fees or costs to a service member. *Id.* §§ 4323(a)(3), (b)(3), (c)(2), (h)(1), 4327(b). And, as further indication of the statute's broad sweep, Congress ensured that USERRA—unlike most federal employment statutes—applies to private and public sector employers of all sizes, including federal, state, and local governments. *See id.* §§ 4314(a), (d).

But Congress didn't stop there. It also included a robust anti-waiver provision, prohibiting the enforcement

of "any" contract or state law "that reduces, limits, or eliminates in *any* manner *any* right or benefit provided by this chapter." *Id.* § 4302(b) (emphases added). Congress specifically intended for this provision to apply to both the statute's substantive and procedural protections, "including the establishment of additional prerequisites to the exercise of any [statutory] right or the receipt of any such benefit." *Id.*) Only by broadly safeguarding service members' rights could Congress ensure their vindication—and thus "provide[] the mechanism for manning the Armed Forces of the United States." *Alabama Power Co. v. Davis*, 431 U.S. 581, 583 (1977).

II. Congress was specifically concerned about ensuring that veterans be able to enjoy these protections notwithstanding employers' contractual efforts to force them into arbitration.

The Ninth Circuit thought that the "limited legislative history" of USERRA failed to demonstrate that "Congress intended to preclude a waiver of a judicial forum." Pet. App. 6a, 12a. That is wrong. USERRA's voluminous congressional record reflects just the opposite—that Congress, when passing the law, specifically sought to prohibit employers from forcing veterans to sacrifice their right to freely litigate their claims in a forum of their choosing.

Congress made this point explicit in its discussion of USERRA's anti-waiver provision, section 4302(b). That provision, the House (through the Veterans' Affairs Committee) emphasized, was designed to "reaffirm" the "general preemption" of any "employer practices and agreements" that "provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights." H.R. Rep. No. 103-65, at 20. And the Senate was no less clear about the expansive reach of USERRA's anti-waiver provision:

"New section 4302(b) would clarify that chapter 43 preempts any State law or any plan, contract, policy, or practice that would limit chapter 43 rights or benefits or that impose any additional prerequisites on the exercise of those rights or the receipt of those benefits." S. Rep. No. 103-158, at 41 (1993). Taken together, these statements make clear that Congress intended section 4302(b) to function as a powerful injunction against an employer-driven effort to alter—in any way—a veteran's rights under USERRA. *See id.* ("The rights under chapter 43 belong to the employee and, as such, can only be waived through unambiguous and voluntary action by the employee.").

There can be little doubt that an employer's effort to shunt a veteran's case out of court falls within the scope of USERRA's anti-waiver provision. As Judge Watford explained, an employer's contract that "requires [a veteran] to submit USERRA claims to final and binding arbitration . . . certainly 'limits'—and for all practical purposes 'eliminates'—his right to litigate those claims in court"—and directly contravenes the purpose of section 4302(b). Pet. App. 16a. The Veterans' Affairs Committee report directly reinforces the point. There, Congress specifically stressed that section 4302(b) "would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required." H.R. Rep. No. 103-65, at 20.

And Congress actually went even further—insisting that, under USERRA, "even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law." *Id.* That clear mandate has led key federal regulators to express the similar view that USERRA's "broad prohibition against waivers of statutory rights" includes "a prohibition against the waiver in an arbitration agreement of an

employee's right to bring a USERRA suit in Federal court." 70 Fed. Reg. 75246, 75257 (Dec. 19, 2005).

III. USERRA enshrined Congress's longstanding special solicitude for veterans and their rights.

Although the legislative history provides a compelling reason on its own to read USERRA as forbidding the enforcement of pre-dispute arbitration clauses, there is another reason why that is the best reading of the statute: the time-honored "special solicitude" that Congress has "for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009).

As this Court has explained, "[t]he solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). It recognizes that a veteran "has performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412. And, for more than a century, this solicitude has led Congress to "place a thumb on the scale in the veteran's favor" when enacting legislation focusing on veterans and their families. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). Ultimately, Congress's "special solicitude" embodies a guarantee that those who have served our country are able "to have their claims decided fairly and fully." 146 Cong. Rec. H6786, H7688 (July 25, 2000) (statement of Rep. Evans); *see, e.g.*, 146 Cong. Rec. 19229, 19230 (Sept. 5, 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").

This Court's decisions have consistently respected this understanding. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (agreeing to "presume" that Congress legislates in the veterans'-rights arena with this background "understanding"). In fact, based on

Congress's special solicitude for veterans, the Court has adopted its own version of the same principle—embracing a form of statutory construction that "liberally construe[s]" veterans' laws "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Under this interpretive canon, when deciding questions over the meaning of veterans' laws, the Court has made clear that a statute's "separate provisions" must be "construe[d]" as "parts of an organic whole" and given a "liberal [] construction for the benefit of the veteran." *Fishgold*, 328 U.S. at 285; *see also King*, 502 U.S. at 220 n.9 (discussing "the canon" that veterans' laws "are to be construed in the beneficiaries' favor"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Alabama Power Co.*, 431 U.S. at 584.

USERRA undoubtedly incorporates both Congress's own solicitude for veterans and this Court's reinforcing interpretive canon. For starters, Congress's "primary goals" for USERRA were "to clarify and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." 137 Cong. Rec. H2977 (May 14, 1991); *see also id.* (observing that the purpose was to "assure a smooth transition from military service to the civilian work force"). As explained earlier, Congress determined that USERRA was necessary because the preexisting employment and redeployment rights laws had become "antiquated and cumbersome" and "sometimes ambiguous"—which "allow[ed] for misinterpretations." *Id.*; H.R. Rep. No. 103-65, at 18; *see also* 139 Cong. Rec. S14865–87, S14887 (Nov. 2, 1993) (explaining that the bill "would improve and update provisions of law which date from the World War II years, while maintaining time-tested provisions of those laws") (Statement of Sen. Murkowski).

But Congress never wavered from its understanding that the updated provisions embodied in USERRA "reflect[ed]" the "great debt of gratitude" owed to those who served, and "signif[ied]" Congress's "respect" for "the people who served us so well." 137 Cong. Rec. H2965 (May 14, 1991) (Statement of Rep. Mazzoli). Because "Congress has long recognized that the support of civilian employers is necessary if the uniformed services are to be able to recruit and retain noncareer personnel," USERRA signifies a renewed effort to guarantee that veterans would not face undue difficulty in safeguarding their civilian jobs. 140 Cong. Rec. S13626–42, S13634 (Sept. 28, 1994) (Statement of Sen. Rockefeller); *see also* 137 Cong. Rec. H2980 (May 14, 1991) (Statement of Rep. Smith) (explaining, as motivation for USERRA, that "[i]t would be a tragedy if the men and women who have risked their lives for their fellow Americans were penalized as a result of their services in our Armed Forces").

That view explains why, when Congress passed USERRA, it went out of its way to "stress that the extensive body of case law that has evolved . . . remains in full force and effect in interpreting" the provisions of the law. H.R. Rep. No. 103-65, at 19. Many in Congress saw the preexisting veteran-reemployment law as "one of the most important measures enacted to ensure the readjustment of veterans to civilian life following military service." 140 Cong. Rec. H9117–43, H9133 (Sept. 13, 1994) (Statement of Rep. Montgomery). Because USERRA simply "continue[d] what has been our national policy for over 50 years"—to "assure[] the citizen-soldier that he or she can return to the civilian job held prior to entering military service," *id.*—Congress made clear that the preexisting body of law should "remain[] in full force and effect." H.R. Rep. No. 103-65, at 19. And that was "particularly true of the basic principle estab-

lished by the Supreme Court that the Act is to be 'liberally construed.'" *Id.* (specifically citing *Fishgold*); *see also* 139 Cong. Rec. S5181–91, S5182 (Apr. 29, 1993) (explaining that USERRA was meant both "to restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law").

By interpreting USERRA narrowly to restrict a veteran's right to fully and freely litigate their claims in a forum of their choosing, the Ninth Circuit fundamentally lost sight of these core principles.

CONCLUSION

This Court should grant the petition and vacate the decision of the court of appeals.

Respectfully submitted,

MATTHEW W.H. WESSLER
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

THOMAS M. SOBOL
HAGENS BERMAN SOBOL SHAPIRO LLP
55 Cambridge Parkway, Suite 301
Cambridge, MA 02142
(617) 482-3700

Counsel for Amici Curiae

May 24, 2017

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Amici include the following members of Congress:

- Senator Richard Blumenthal (Connecticut)
- Senator Sherrod Brown (Ohio)
- Representative Matthew Cartwright (Pennsylvania)
- Representative David N. Cicilline (Rhode Island)
- Representative John Conyers, Jr. (Michigan)
- Representative Ted Deutch (Florida)
- Senator Al Franken (Minnesota)
- Representative Tulsi Gabbard (Hawaii)
- Senator Mazie K. Hirono (Hawaii)
- Representative Pramila Jayapal (Washington)
- Representative Henry C. "Hank" Johnson, Jr. (Georgia)
- Representative Walter B. Jones, Jr. (North Carolina)
- Senator Patty Murray (Washington)
- Representative Jerrold Nadler (New York)
- Representative Jamie Raskin (Maryland)
- Representative Bradley Scott Schneider (Illinois)
- Representative Jackie Walorski (Indiana)
- Representative Timothy J. Walz (Minnesota)
- Senator Sheldon Whitehouse (Rhode Island)
- Representative Joe Wilson (South Carolina)