IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 151857

JONATHAN R. CLARK

Petitioner/Appellant,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent/Appellee.

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED AND STANDARD OF REVIEW

This appeal presents two issues: (1) whether the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 *et seq.*, subjects States to suit in their own courts irrespective of their consent (Assignment of Error No. 2); and if so, (2) whether the federal Constitution's War Powers clauses empowered Congress to provide for this cause of action (Assignment of Error No. 1). Both are issues of law subject to de novo review. *Ramos* v. *Wells Fargo Bank, N.A.*, 770 S.E.2d 491, 493 (Va. 2015).

INTEREST OF *AMICUS CURIAE*

USERRA prohibits employment discrimination against members of the armed forces and ensures reemployment for servicemembers who must be absent from civilian employment due to military service. Congress has determined that providing servicemembers who are employed by States with a cause of action to enforce their USERRA rights is important to the country's "ability to provide for a strong national defense." H.R. Rep. No. 448, 105th Cong., 2d Sess. 5 (1998) (House Report).

The United States has a strong interest in defending USERRA's constitutionality. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4334, and has promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. The Attorney General enforces USERRA in court against public and private employers. 38 U.S.C. 4323. The United States has argued in multiple courts that Congress has authority, under its War Powers, to authorize private individuals to bring USERRA claims against state employers. See, *e.g.*, Brief for the United States as Amicus Curiae in Support of Appellee/Cross-Appellant, *Ramirez* v. *State ex rel. Children, Youth & Families Dep't*, 326 P.3d 474 (N.M. Ct. App. 2014) (*Ramirez I*) (No. 31820), rev'd *sub nom Ramirez v. State Children, Youth & Families Dep't*, No. S-1-

SC-34613, 2016 N.M. Lexis 87 (N.M. Apr. 14, 2016) (*Ramirez II*); Brief for the United States as Amicus Curiae in Support of Petitioner, *Ramirez II*, 2016 N.M. LEXIS 87 (N.M. Apr. 14, 2016) (No. S-1-SC-34613) (filed on Aug. 6, 2014); Brief for the United States as Intervenor-Appellee, *Walker* v. *Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748 (11th Cir. 2014) (filed in *Weaver* v. *Madison City Bd. of Educ.*, No. 13-14624); Brief for the United States as Intervenor, *McIntosh* v. *Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440).

ASSIGNMENTS OF ERROR

1. Because by enacting 38 U.S.C. § 4323(b)(2) in 1998 Congress clearly intended to subject state employers to suit in state court under USERRA pursuant to a valid exercise of the federal legislature's war powers, the trial court erred when it sustained VSP's amended special plea of sovereign immunity and dismissed Clark's complaint.

2. The trial court erred when it sustained VSP's amended special plea of sovereign immunity and dismissed Clark's complaint because Congress lawfully abrogated any sovereign immunity VSP purportedly retained with respect to USERRA actions in state court when the federal legislature enacted 38 U.S.C. § 4323(b)(2) in 1998, regardless of whether the Commonwealth of Virginia has consented to such suits.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

At issue in this case is whether USERRA's jurisdictional provision subjects all States to private suit in their own courts regardless of whether they have consented to suit, and if it does, whether Congress had the constitutional authority to provide for this cause of action under the War Powers clauses of the Constitution, which give Congress the power to declare war, raise and support an army and navy, and regulate the land and naval forces, U.S. Const. Art. I, § 8, Cls. 11-14 (the War Powers or the War Powers clauses). This Court should answer both questions in the affirmative.

1. Factual Background

Petitioner Jonathan R. Clark, a sergeant in the Virginia State Police (VSP), is a senior captain in the United States Army Reserve. (App. 2). Clark alleges that beginning in January 2008, VSP officials engaged in a pattern or practice of harassment and discrimination against him relating to his service in the Army, in violation of USERRA. Specifically, Clark alleges that from January 2008 through April 2008, VSP First Sergeant Robert J. Shupe made derogatory statements regarding Clark's service in the Army. (App. 3-4). From April 2008 through January 2011, Clark was mobilized in support of "Operation Enduring Freedom." (App. 4). When he returned to

VSP, Clark faced multiple baseless charges of misconduct, rendering him ineligible for a promotion for three years. (App. 4-5). On August 19, 2011, Clark filed a complaint under VSP's grievance procedures. (App. 13). On January 31, 2012, an independent state hearing officer found in favor of Clark and ordered that the disciplinary charges be removed from Clark's employment file. (App. 13-20).

Clark further alleges that, between August 2013 and November 2014, he applied for three vacant First Sergeant positions but was not selected. Clark alleges that he was denied these promotions due to his military duties and his previous exercise of his rights under USERRA. (App. 6).

2. Trial Court Proceedings

On January 20, 2015, Clark filed a Complaint in the Circuit Court of Henry County, alleging that VSP's actions violated USERRA. (App. 1-20). In response, VSP filed a Special Plea of Sovereign Immunity, arguing that Clark's USERRA claims were barred by the Eleventh Amendment. VSP also moved to transfer venue. (App. 21-22). The Circuit Court of Henry County granted the venue motion and transferred the case to the Circuit Court of Chesterfield County (Circuit Court), where VSP filed an Amended Special Plea of Sovereign Immunity on May 29, 2015. (App. 24-29). Clark opposed VSP's plea, arguing that Congress subjected state employers to

suit under USERRA pursuant to a valid exercise of its War Powers. (App. 30).

After oral argument, the Circuit Court sustained VSP's Amended Special Plea of Sovereign Immunity and entered a final order dismissing the action without written opinion on September 9, 2015. (App. 63). On December 4, 2015, Clark filed a petition for leave to appeal to this Court, which was granted on April 7, 2016.

ARGUMENT

The U.S. Supreme Court has frequently explained that determining whether Congress has abrogated state sovereign immunity depends on (1) whether Congress has made "its intention to abrogate unmistakably clear in the language of the statute," and (2) whether Congress acted "pursuant to a valid exercise of its power." See, *e.g.*, *Nevada Dep't of Human Res*. v. *Hibbs*, 538 U.S. 721, 726 (2003).

Both parts of this test are satisfied here, and the Circuit Court erred in ruling to the contrary. The text and legislative history of the 1998 amendments to USERRA make clear that Congress intended to, and did, provide servicemembers employed by state entities with a private cause of action in state court, regardless of whether a State has consented to suit.

That decision, moreover, was a valid exercise of Congress's War Powers. In *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 377 (2006), the Supreme Court explained that Congress can subject States to private lawsuits where doing so was "in the plan of the Convention." Careful historical analysis shows that Congress's ability to subject States to suit under the War Powers was well within that plan. Accordingly, this Court should reverse the decision of the Circuit Court.

I

LEGAL FRAMEWORK

This case requires this Court to consider the interaction between USERRA and the Eleventh Amendment to the United States Constitution. Because Congress enacted the relevant provision of USERRA in response to the U.S. Supreme Court's Eleventh Amendment jurisprudence, we discuss the evolution of that jurisprudence first.

The Eleventh Amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment has long been understood to affirm that States retained their sovereign immunity when they joined the union. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 97-99 (1984). While, on its

face, the Amendment is limited to suits brought by citizens of other States, it has long been understood to extend to suits brought by a State's own citizens. *Id*. at 98; see also *Hans* v. *Louisiana*, 134 U.S. 1, 10 (1890).

There are two exceptions to this regime. First, a State may be sued in state or federal court when it has waived its sovereign immunity. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99. Second, a State may be sued when Congress has abrogated state sovereign immunity pursuant to a valid exercise of Congress's constitutional powers. See *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). As discussed below, the Supreme Court's jurisprudence with respect to the latter exception has undergone significant changes over the past two decades.

Until the early 1990s, it was widely understood "that Congress has the authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 15 (1989). Thus, in *Union Gas*, the U.S. Supreme Court concluded that Congress has the power to allow individuals to sue States when it enacts legislation under the Commerce Clause. *Id*. at 23.

In 1996, the Supreme Court decided *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75, holding that Congress did not have the power under the Indian

Commerce Clause to subject States to suit in federal court. Specifically overruling *Union Gas*, the Court stated that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id*. at 72-73.

Because *Seminole Tribe* involved a federal lawsuit, courts generally interpreted the decision to restrict Congress's ability to subject States to suit in federal but not state court. See, *e.g.*, *United States ex rel. Long* v. *SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 887 n.20 (D.C. Cir. 1999) (after *Seminole Tribe*, stating that "the Eleventh Amendment does not apply in state courts"), cert. denied, 530 U.S. 1202 (2000); *Alston* v. *State Bd. of Med. Exam'rs*, 236 B.R. 214, 217 (Bankr. D.S.C. 1999) (same). Three years later, however, in *Alden* v. *Maine*, 527 U.S. 706, 754-759 (1999), the Supreme Court held that the limits on Congress's authority to abrogate States' sovereign immunity to suit in federal court apply equally to state-court actions.

In the years after *Seminole Tribe* and *Alden* were decided, the prevailing view was that Congress could never abrogate the States' sovereign immunity under its Article I powers. See, *e.g.*, *Burnette* v. *Carothers*, 192 F.3d 52, 59 (2d Cir. 1999), cert. denied, 531 U.S. 1052

(2000); *Alabama Dep't of Human Res.* v. *Lewis*, 279 B.R. 308, 317-319 (Bankr. S.D. Ala. 2002). But in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 362-363 (2006), the Court made clear that this was not the rule, holding that at least one Article I power—the Bankruptcy Clause—can provide a constitutional basis for Congress to subject States to private lawsuits. As explained in greater detail below, *Katz* instructs that whether Congress has authority to abrogate the States' sovereign immunity under an Article I power will depend on the history and intent of the power at issue.

USERRA was enacted in 1994, when *Union Gas* still represented the prevailing view on Congress's ability to subject States to suit by private individuals.[1] Thus, when first enacted, the statute gave federal courts

[1] There is no dispute that Congress enacted USERRA pursuant to its War Powers. Congress's stated purpose in enacting this statute was "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). Federal courts of appeals have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to its War Powers. See, *e.g.*, *Bedrossian* v. *Northwestern Mem'l Hosp.*, 409 F.3d 840, 843 (7th Cir. 2005); *Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1080-1081 (5th Cir. 1979); *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937-938 (7th Cir.), cert. denied, 441 U.S. 967 (1979).

jurisdiction over all USERRA actions, including actions brought against state employers.[2] See Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3165, amended by the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3329.

After the Supreme Court's decision in *Seminole Tribe*, various States challenged Congress's authority to subject them to private USERRA actions, and a few district courts held that USERRA's provision subjecting state employers to suit in federal court was unconstitutional. See, *e.g.*, *Velasquez* v. *Frapwell*, 994 F. Supp. 993, 1005 (S.D. Ind. 1998), vacated in part, 165 F.3d 593 (7th Cir. 1999); *Palmatier* v. *Michigan Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997).

Congress viewed States' assertions of sovereign immunity to USERRA claims in the wake of *Seminole Tribe* as a particular threat to national security so, in 1998, Congress amended the statute to ensure that it remained enforceable against state employers. See House Report 5. The House Report emphasized that the cases holding that States had immunity from private suit under USERRA "threaten not only a long-

[2] USERRA defines a "State" to include state agencies. 38 U.S.C. 4303(14).

standing policy protecting individuals' employment right[s], but also raise serious questions about the United States['] ability to provide for a strong national defense." *Ibid.* The House Report further explained that the proposed amendments to USERRA were designed to ensure "that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." *Ibid.*

As amended, the statute continued to authorize federal jurisdiction over USERRA suits against private employers. See 38 U.S.C. 4323(b)(3) (1998). But it withdrew federal jurisdiction over private suits against state employers and recognized two mechanisms for the statute's enforcement in this context. First, an aggrieved individual, following an administrative process, can request that the Attorney General file a complaint on the individual's behalf. See 38 U.S.C. 4323(a). Whether to undertake the representation is in the sole discretion of the Attorney General. If the Attorney General takes the case, she may file suit "in the name of the United States" in federal court. See 38 U.S.C. 4323(a) & (b)(1). Second, the amendment authorized an individual who is not represented by the Attorney General to file suit in state court. See 38 U.S.C. 4323(a)(3) & (b)(2); see also 20 C.F.R. 1002.305(b).

These were logical steps for Congress to take to ensure that USERRA would be enforceable against state employers. It had long been clear that the Constitution did not prevent the federal government from suing a State. Congress thus concluded (and courts have since agreed) that the Constitution does not prevent the United States from filing a USERRA suit against a State on behalf of an individual. See, *e.g.*, *United States* v. *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1328 (11th Cir. 2012).

Congress likewise reasonably concluded, under then-prevailing law, that allowing private individual suits against state employers in state court was an appropriate and effective way to address the problem created by *Seminole Tribe*; *i.e.*, because *Seminole Tribe* itself dealt only with the jurisdiction of *federal* courts, Congress believed that the case did not prevent individuals from suing state employers in *state* court.

But the Supreme Court's decision in *Alden* the very next year changed the legal landscape, making clear that a State enjoys the same sovereign immunity in state court as it retains in federal court. 527 U.S. at 754. Thus, in the years following *Alden*, courts unsurprisingly held that the Eleventh Amendment barred USERRA suits brought by private individuals against state employers, whether brought in state or federal court. See,

e.g., *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001).[3]

Then, in 2006, the U.S. Supreme Court decided *Katz*, which made clear that *Seminole Tribe* is *not* an absolute bar to Congress's power to subject States to suit when acting pursuant to an Article I power. *Katz*, 546 U.S. at 363. And, as explained below, the reasons for concluding that the War Powers give Congress authority to subject States to suit are even more compelling than the reasons for concluding that the Bankruptcy Clause gives Congress that authority.

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[3] Even so, there was some debate during this time as to whether the limitations recognized in *Seminole Tribe*, and later in *Alden*, would extend to Congress's War Powers. See *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill: Hearing Before the Subcomm. on Educ., Training, Emp't & Hous. of the H. Comm. on Veterans' Affairs*, 104th Cong., 2d Sess. 19-20 (1996) (statement of Rep. Buyer) (suggesting that *Seminole Tribe* would not apply to statutes enacted pursuant to Congress's War Powers); see also *id.* at 20 (Statement of Professor Jonathan Seigel) (concluding that "if any of Congress' Article I powers carry with them the ability to abrogate States' sovereign immunity, certainly, the military powers should be first on the list"); see also Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L. Rev. 999, 1032 (2004) (concluding, before *Katz* was decided in 2006, that "war powers abrogation provides the best case for the [Supreme] Court to recognize a limited exception to its general disapproval of Article I abrogation").

II

CONGRESS INTENDED TO SUBJECT STATES TO PRIVATE USERRA SUITS IN STATE COURT IRRESPECTIVE OF STATES' CONSENT (ASSIGNMENT 2)

Section 4323(b)(2) of USERRA provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. 4323(b)(2). VSP argues that the phrase "in accordance with the laws of the State" means that Congress intended for servicemembers to be able to sue state employers under USERRA only if the State that employs them has consented to suit.[4] (Def.'s Mem. in Support of Am. Special Plea of Sovereign Immunity 2; see also App. 38).

This argument fails for three reasons. First, the text of Section 4323(b)(2) does not support this construction. The most natural reading of

[4] This erroneous interpretation of the statute was first advanced in dicta by the Alabama Supreme Court. See *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (2001) (stating that Section 4323(b)(2) "arguably" includes deference to state laws dealing with waiver of immunity from suit). This dicta has since been endorsed by three other state courts. See *Smith* v. *Tennessee Nat'l Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), cert. denied, 133 S. Ct. 1471 (2013); *Anstadt* v. *Board of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868 (Ga. Ct. App.), cert. denied (Ga. Oct. 4, 2010); *Janowski* v. *Division of State Police*, 981 A.2d 1166 (Del. 2009).

the phrase in question is that it renders a litigant responsible for filing suit in the correct state court and for complying with all applicable rules and procedures. The text does not mention "waiver," "consent," or any other term that supports VSP's interpretation. "[I]f Congress had intended to authorize [suits only by consent], it could have said so in straightforward language." See *New Process Steel, L.P*. v. *NLRB*, 560 U.S. 674, 681 (2010).

Second, VSP's construction cannot be reconciled with the amendment's legislative history. See *Lewis* v. *City of Alexandria*, 756 S.E.2d 465, 473 (Va. 2014) ("When interpreting an ambiguous statute, courts may consult its legislative history."). The House Report's section-by-section analysis describes Section 4323(b) as "codify[ing] existing law that provides that state courts have jurisdiction to hear complaints brought by persons alleging that the State has violated USERRA." House Report 6. Nothing in the Report indicates that such jurisdiction arises only when a State consents.

Finally, VSP's strained interpretation of Section 4323(b)(2) would subvert Congress's intent in passing the amendment. As this Court has stated, "[t]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Commonwealth* v. *Amerson*, 706 S.E.2d

879, 882 (2011) (internal quotation marks and citation omitted). The legislative history shows that the purpose behind the 1998 amendment was to ensure that state-employed servicemembers could continue to enforce their USERRA rights after *Seminole Tribe*. The prevailing view at the time of the 1998 amendment was that the Eleventh Amendment simply did not apply in state court, see *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-205 (1991); *United States ex rel. Long* v. *SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 887 n.20 (D.C. Cir. 1999), cert. denied, 530 U.S. 1202 (2000), so interpreting the amendment to authorize suits only by consent would mean that it actually *narrowed* the options that servicemembers would have otherwise had. That result simply cannot be squared with Congress's intent.

For these reasons, the Court should reject VSP's interpretation of Section 4323(b)(2) and hold that the statute unequivocally subjects States to private suit irrespective of their consent. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the * * * legislative history of the * * * amendment.").

III

CONGRESS HAD THE AUTHORITY, PURSUANT TO ITS WAR POWERS, TO SUBJECT STATES TO USERRA ACTIONS (ASSIGNMENT 1)

The Circuit Court erred in sustaining VSP's Amended Special Plea of Sovereign Immunity based on an unduly narrow interpretation of *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 377 (2006). The War Powers are a solid constitutional foundation for Congress to subject States to suit under USERRA. Indeed, they provide an even stronger basis for Congressional authority than the bankruptcy power at issue in *Katz*.

A. The Circuit Court's Decision Was Based On An Unduly Narrow Interpretation Of *Katz*

The Supreme Court held in *Katz* that the Bankruptcy Clause—which, like the War Powers clauses, is found in Article I of the Constitution—gives Congress the authority to subject States to private suit in certain types of bankruptcy actions. 546 U.S. at 359. The Court examined the intent behind the inclusion of the Bankruptcy Clause in the Constitution, the States' understanding in ratifying the Constitution, and early congressional efforts to exercise authority under the clause. *Id.* at 362-373. Based on this evidence, the Court concluded that States had ceded their authority in the area of bankruptcy to the national government and thereby gave up their immunity to certain private suits. *Id.* at 373, 377-378. In other words,

as to certain bankruptcy proceedings, "the States agreed in the plan of the Convention not to assert [sovereign] immunity." *Id.* at 373. Thus, the Court held:

> The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.

Id. at 379 (citation and footnote omitted).

The Circuit Court erroneously interpreted *Katz* as "a very limited exception arising and pertaining to the Article I Bankruptcy Clause involving in rem jurisdiction." (App. 59). To be sure, the Court in *Katz* discussed the *in rem* nature of bankruptcy proceedings, but it did so only because that feature of bankruptcy proceedings informed the requisite historical analysis. See, *e.g.*, 546 U.S. at 378 ("In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."). Thus, it is simply incorrect to interpret *Katz* as having no effect outside the bankruptcy context.

Instead, *Katz* stands for two points that are central to the resolution of this case. First, *Katz* makes clear that the suggestion in *Seminole Tribe* v.

Florida, 517 U.S. 44 (1996), that Congress may never subject States to suit pursuant to an Article I power, was non-controlling dicta. *Katz*, 546 U.S. at 363. Second, as described below, *Katz* instructs that whether States may be subjected to suit depends on an historical analysis of the specific constitutional power under which Congress authorized the cause of action. *Id*. at 375-378.

B. The Historical Inquiry Required By *Katz* Shows That Congress's War Powers Encompass The Authority To Subject States To Private Suits In Their Own Courts

Several factors show that the States' surrender of all War Powers to Congress included a surrender of immunity to private suit. First, the Founding Fathers were focused not only on the need to make the federal government's War Powers exclusive, but also on preventing the powers from being inhibited in any way. Second, *The Federalist* essays set out a standard for ascertaining the narrow class of constitutional powers that include authority to subject States to suit—a standard that the War Powers clearly meet. Third, the U.S. Supreme Court has consistently interpreted the War Powers broadly and, to effectuate the Founders' intent, has avoided interpreting any other constitutional provision in a way that would limit those powers. And fourth, States never possessed war powers in the first place and therefore had no immunity to retain in that arena.

1. The Founding Fathers Sought To Ensure That Federal War Powers Authority Would Not Be Inhibited

Congress's War Powers allow it to declare war, raise and support an army and navy, and regulate the land and naval forces. U.S. Const. Art. I, § 8, Cls. 11-14. History reveals that these powers were understood not just as giving the federal government exclusive authority over War Powers, but also as preventing any interference with that authority.

The Founding Fathers recognized the unique importance of the power to wage and prepare for war and the need for that power to be uninhibited. All the powers enumerated in Article I are important to the government's effectiveness and vitality, but Congress's War Powers are singularly essential: The very survival of the nation depends on them. Having just fought a war for independence, the Founding Fathers were keenly aware that the Nation's continued existence depended on its ability to raise and support an army and a navy. To create a central government strong enough to defend the Nation, the Founding Fathers opted to locate *all* of the War Powers within the federal government.

The Founders highlighted the danger of limiting the Nation's ability to wage war. As Alexander Hamilton wrote in *The Federalist No. 23*, "[t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to

which the care of it is committed." *The Federalist No. 23*, at 147 (Jacob E. Cooke ed., 1982).[5] He also wrote: "[I]t must be admitted * * * that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES." *Id.* at 148. Similarly, in *The Federalist No. 41*, James Madison stated: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the f[e]deral councils. * * * It is in vain to oppose constitutional barriers to the impulse of self-preservation." *The Federalist No. 41*, at 269-270.

Madison and Hamilton were strong supporters of state sovereign immunity, but they appreciated the danger in allowing state sovereignty to interfere with Congress's execution of its War Powers. Allowing such interference, they observed, would place "constitutional shackles" on, and "oppose [a] constitutional barrier[]" to, Congress's exercise of its War Powers authority. See *The Federalist No. 23*, at 147 (Hamilton), and *The*

[5] All references to *The Federalist* are to the 1982 Jacob E. Cooke edition.

Federalist No. 41, at 270 (Madison). These observations provide compelling evidence that these powers were "understood to carry * * * the power to subordinate state sovereignty." See *Katz*, 546 U.S. at 377.

Denying state-employed servicemembers the ability to bring USERRA claims would allow state sovereign immunity to limit Congress's War Powers authority—the very result the Founding Fathers sought to prevent. Indeed, allowing States to force servicemembers to choose between their civilian jobs and military service would, if effected on a large scale, give States an effective veto over Congress's ability to wage war. Congress explicitly recognized this danger when it amended USERRA in the wake of *Seminole Tribe*, stating that judicial opinions allowing States to assert sovereign immunity to private USERRA claims "raise serious questions about the United States[']ability to provide for a strong national defense." House Report 5.

Katz relied on the Founders' recognition of the problem of overlapping jurisdiction in the area of bankruptcy and, consequently, of the need for uniformity in that area. 546 U.S. at 362-369. It was undoubtedly important, as the Court explained in *Katz*, to ensure that a person not be held responsible in one State for a debt that had already been discharged in another. *Id.* at 363. The *Katz* Court considered the founding

generation's concern about the problem of overlapping jurisdiction in the area of bankruptcy to be evidence of an acknowledgment, inherent in the plan of the Constitutional Convention, that state sovereign immunity must be subordinated to the need for uniformity. See *id*. at 372-373.

In the same vein, the Founders' recognition of the need to avoid any encumbrance on national authority in the area of war demonstrates their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims. As evidenced by Hamilton's and Madison's statements, the Founders sought to preclude any interference with the national government's ability to conduct war and to provide and maintain military forces. Indeed, the Framers' concern for federal exclusivity in the War Powers arena, and the need to prevent any interference with the War Powers, was far greater than the bankruptcy-related concerns at issue in *Katz*. As one scholar has recognized, while *The Federalist* essays are replete with discussions regarding the War Powers, "in the whole of *The Federalist Papers*, the Bankruptcy Clause is mentioned only once."[6]

[6] Maj. Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions*

(continued…)

2. The Standard Set Forth In *The Federalist* Indicates A Surrender Of State Sovereignty Under The War Powers

The Federalist essays set forth a framework for determining when state sovereignty is subordinated in the "plan of the Convention," and the War Powers fit squarely within this framework. In *The Federalist No. 81*, Alexander Hamilton penned an oft-quoted defense of state sovereign immunity, stating that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without* [*the sovereign's*] *consent*." *The Federalist No. 81*, at 548. He explained that this attribute of sovereignty "is now enjoyed by the government of every state in the union." *Id.* at 549. He concluded that "[u]nless[,] therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states." *Ibid*. The U.S. Supreme Court has frequently cited this passage for the point that immunity to private suit is a fundamental aspect of state sovereignty. See, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 283-284 (2011); *Alden* v. *Maine*, 527 U.S. 706, 716-717 (1999).

Although *The Federalist No. 81* certainly establishes that Hamilton viewed immunity to individual suit as a fundamental aspect of the

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is a Valid Exercise of the Congressional War Powers, 195 Mil. L. Rev. 91, 111 (2008).

sovereignty retained by the States, it also makes clear that this immunity is not absolute. Hamilton specifically recognized that state sovereignty may, in some cases, have been surrendered "in the plan of the convention." *The Federalist No. 81*, at 549. Hamilton did not explain in *The Federalist No. 81* what is necessary to effect such a surrender, but instead stated that "[t]he circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here." *Ibid*.

The article of taxation Hamilton referenced is found in *The Federalist No. 32*. In it, Hamilton discussed three circumstances in which the Constitution's grant of authority to the national government effects a corresponding "alienation of State sovereignty":

> [A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases[:] where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

The Federalist No. 32, at 200. This passage, read in conjunction with *The Federalist No. 81*, establishes that where the Constitution effects such an

"alienation of State sovereignty," *The Federalist No. 32*, at 200, that alienation includes a "surrender" of immunity "to the suit of an individual," *The Federalist No. 81*, at 548-549 (Hamilton); see also *In re Hood*, 319 F.3d 755, 766 (6th Cir. 2003) ("Hamilton's cross-reference to this discussion [in *The Federalist No. 32*] in *No. 81*'s discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*."), aff'd *sub nom*. *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004).

The War Powers easily fit within *The Federalist No. 32*'s "three cases." First, the Constitution expressly grants exclusive authority over War Powers to the federal government. Second, the Constitution forbids any State, except when invaded or in imminent danger, from engaging in war without the consent of Congress: "No State shall, without the Consent of Congress, * * * engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. Art. I, § 10, Cl. 3. And third, of course, it is difficult to conceive of anything that would be more "contradictory and repugnant" to national unity than the exercise of the War Powers by a patchwork of individual States. *The Federalist No. 32*, at 200. Thus, the War Powers effect an "alienation of State sovereignty" that

includes a surrender of state sovereign immunity "in the plan of the convention." *The Federalist Nos. 81*, *32*.

Application of this framework is fully consistent with *Katz*, which recognized that *The Federalist Nos. 32* and *81* together set out instances "where the Framers contemplated a 'surrender of [States'] immunity in the plan of the convention.'" 546 U.S. at 376 n.13 (alteration in original) (quoting *The Federalist No. 81*). Moreover, the framework set forth in *The Federalist* aligns with *Katz*'s instruction that whether a particular power enables Congress to subject States to private suit should be determined on a power-by-power basis. *The Federalist* framework sets legislation enacted under the War Powers apart from legislation enacted under, for example, the Commerce Clause, which was at issue in *Seminole Tribe* (Indian Commerce Clause) and *Alden* (Fair Labor Standards Act). States possess, and have always possessed, their own powers with respect to the intrastate regulation of commerce, and their authority has been exercised concurrently with the commerce powers of the federal government. This is not so with respect to the War Powers.

3. The U.S. Supreme Court Has Consistently Avoided Imposing Limits On Congress's War Powers

The U.S. Supreme Court's War Powers jurisprudence makes two points clear. First, Congress's War Powers authority is uniquely exclusive

and unfettered. Second, other constitutional provisions should not be interpreted to interfere with that authority.

The Court has consistently deferred to federal prerogatives, and has rejected attempts to interfere with or diminish federal authority, in the War Powers arena. For example, in *In re Tarble*, 80 U.S. 397 (1871), the U.S. Supreme Court rejected Wisconsin's attempt to retrieve—through a writ of habeas corpus—an individual who was in military custody for having deserted the Army. *Id.* at 411-412. Rejecting Wisconsin's authority to issue the writ, the U.S. Supreme Court described the federal War Powers as "plenary and exclusive." *Id.* at 408. The Court explained that "[n]o interference with the execution of th[e] power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency" of the military. *Ibid*.; cf. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 8-13 (1969) (concluding that it would be contrary to the Constitution to permit States to impose disadvantages upon individuals on the basis of membership in the military).

Since then, the Court has continued to emphasize that courts should "give Congress the highest deference in ordering military affairs." *Loving* v. *United States*, 517 U.S. 748, 768 (1996); accord *Weiss* v. *United States*,

510 U.S. 163, 177 (1994); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65, 70 (1981); see also *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

At the same time, the Court has instructed that other constitutional provisions, particularly the Tenth Amendment, should not be construed to limit the War Powers. In *Lichter* v. *United States*, 334 U.S. 742, 781 (1948), the Court declared:

> [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments.

Similarly, in *Case* v. *Bowles*, 327 U.S. 92 (1946), the Court concluded that Congress's War Powers are not limited by the Tenth Amendment, despite the fact that the Tenth Amendment was enacted after Article I. See *id.* at 102. To hold otherwise, the Court reasoned, would render "the Constitutional grant of the power to make war * * * inadequate to accomplish its full purpose." *Ibid*.

When the U.S. Supreme Court revitalized the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 854-855 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), it did not overrule *Case* v. *Bowles*. Instead, it was careful to note that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." *National League of Cities*, 426 U.S. at 854 n.18. Courts have since ruled that legislation enacted under the War Powers is exempt from the typical Tenth Amendment analysis. See, *e.g.*, *United States* v. *Onslow Cnty. Bd. of Educ*., 728 F.2d 628, 640 (4th Cir. 1984) ("Even if a Tenth Amendment violation would exist had the Relief Act been enacted under Congress' commerce power, we believe that the doctrine of *National League of Cities* has no applicability where Congress has acted under the War Powers.").

Against this backdrop, it makes little sense to interpret the Eleventh Amendment as constraining Congress's War Powers authority.

4. The States Never Possessed War Powers

Finally, unlike most powers enumerated in Article I, neither the States, nor the colonies before them, ever possessed any war powers. In *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the

Court explained that war powers were never an attribute of state sovereignty:

> As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.

Id. at 316. Thus, the Court reasoned:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. at 318. The Court made similar statements in *Penhallow* v. *Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-81 (1795). In discussing whether the Continental Congress had the authority to convene a tribunal with appellate jurisdiction over a state court of admiralty prior to the ratification of the Articles of Confederation, Justice Patterson declared that the supreme authority of exercising "the rights and powers of war and peace" was "lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it." *Id*. at 80.

The U.S. Supreme Court made clear in *Seminole Tribe* that the Eleventh Amendment is intended to embody "the background principle of state sovereign immunity." 517 U.S. at 72. As the opinions in *Curtiss-Wright Export* and *Penhallow* make clear, that background principle did not apply to the War Powers. Whether the War Powers were transmitted directly from the Crown to the colonies collectively or from the Crown to the people and then to the Continental Congress, they never belonged to the States. Because the States never possessed any war powers, they cannot have expected to retain sovereign immunity in this area when they joined the Union. Indeed, *The Federalist No. 32* explained that States "retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." *The Federalist No. 32*, at 200 (Hamilton). For this reason, even apart from the Constitution's alienation of States' sovereignty in the war powers area, immunity to the exercise of Congress's authority under the War Powers cannot be part of "the background principle of state sovereign immunity." *Seminole Tribe*, 517 U.S. at 72.

5. The Cases Cited By VSP Misconstrue Congress's Authority To Subject States To Private Suit Under Its War Powers

VSP cites several cases for the proposition that Clark's USERRA action is barred by sovereign immunity. (Def.'s Mem. in Support of Am.

Special Plea of Sovereign Immunity 3-5). These cases are not persuasive. *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001), was decided before the U.S. Supreme Court's decision in *Katz* made clear that *Seminole Tribe* does not serve as an outright bar on Congress's ability to subject States to suit pursuant to an Article I power. *Janowski* v. *Division of State Police*, 981 A.2d 1166 (Del. 2009), though decided after *Katz*, did not discuss *Katz* at all. *Smith* v. *Tennessee National Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), cert. denied, 133 S. Ct. 1471 (2013), not only ignored *Katz*, but failed to mention the War Powers clauses. In *Anstadt* v. *Board of Regents of University System of Georgia*, 693 S.E.2d 868, 870-871 (Ga. Ct. App.), cert. denied (Ga. Oct. 4, 2010), the plaintiff argued, for the first time on appeal, that USERRA abrogated state sovereign immunity pursuant to the War Powers. The Court of Appeals of Georgia held that the plaintiff had waived any argument based on *Katz* by failing to raise it below, while "not[ing]" without any meaningful analysis that the holding in *Katz* was "narrowly limited to bankruptcy cases." See *id.* at 871. None of these cases reflects the sort of legal analysis that would warrant deference from this Court.[7]

[7] The War Powers argument was also addressed in *Risner* v. *Ohio Department of Rehabilitation & Correction*, 577 F. Supp. 2d 953, 956 (N.D.

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The only case to have addressed this issue in any meaningful way is *Ramirez I*, 326 P.3d 474 (N.M. Ct. App. 2014), rev'd *sub nom. Ramirez II*, No. S-1-SC-34613, 2016 N.M. LEXIS 87 (N.M. Apr. 14, 2016).[8] In *Ramirez I*, the Court of Appeals of New Mexico recognized that the lesson of *Katz* is that the States' retention of sovereign immunity with respect to a particular piece of federal legislation depends on the history of the particular Constitutional power under which Congress acted. See *Ramirez I*, 326 P.3d at 481 ("It was therefore not the exclusive delegation of power to Congress itself that justified a limited subordination of state sovereignty, but rather an understanding among the states, *as evidenced by the history of bankruptcy jurisdiction*, that an exclusive delegation of this power to Congress inherently included a subordination of their sovereignty to

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Ohio 2008), a magistrate judge's recommendation that was adopted by a district court without objection. There, the court held that the *Katz* exception was "a narrow one" that was limited to the bankruptcy context. *Id.* at 963. But in that case, the plaintiff had not identified evidence that would support recognition of a similar exception in the War Powers context. *Ibid.* Here, in contrast, the United States has identified substantial evidence to that effect.

[8] During the oral argument below, the Circuit Court based its dismissal of Clark's case almost entirely on the Court of Appeals of New Mexico's opinion in *Ramirez I*. (App. 57-59).

accomplish its purposes.") (emphasis added); see also *ibid.* (the Supreme Court's retreat from *Seminole Tribe* in *Katz* was "justified by the *unique history of bankruptcy jurisdiction*") (emphasis added).

But then the *Ramirez I* court failed to undertake the necessary historical analysis, stating merely that it was "unlikely that the states, in ratifying the Constitution, would have considered that [the war] powers would be effectuated by a subordination of their sovereign immunity." 326 P.3d at 481. To support this statement, the court cited only *Velasquez* v. *Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998), vacated in part, 165 F.3d 593 (7th Cir. 1999), a pre-*Katz* decision that, like *Ramirez I* itself, overlooked the unique history of the War Powers, including the interplay of *The Federalist Nos. 81* and *32*.[9] Discussed above, this history should leave no

[9] The court in *Ramirez I* acknowledged the argument based on *The Federalist Nos. 81* and *32*, see *Ramirez I*, 326 P.3d at 479, but did not address it. Instead, it quoted *Seminole Tribe* for the proposition that state sovereign immunity "is not so ephemeral as to dissipate when the subject of the suit is an area * * * that is under the exclusive control of the Federal Government." *Ramirez I*, 326 P.3d at 480-481 (quoting *Seminole Tribe*, 517 U.S. at 72). But the *Ramirez I* court failed to appreciate that this language was substantially undermined by *Katz*, which specifically relied on "the Bankruptcy Clause's unique history, *combined with the singular nature of the bankruptcy courts' jurisdiction*," to conclude that the States had surrendered sovereign immunity in bankruptcy proceedings. *Katz*, 546 U.S. at 369 n.9 (emphasis added); *id.* at 376 n.13 ("the mandate to enact

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doubt that the Nation's Founders did not intend for States to retain immunity in an area where the Constitution "granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority." *The Federalist No. 32*, at 200 (Hamilton). If any such area exists, surely it is the War Powers.

Judge Bustamante dissented from the decision in *Ramirez I*, arguing that "[c]omparing the interests and history" of the Bankruptcy Clause with those of the War Powers clauses demonstrated that "the War Powers Clause presents the more compelling case" for subjecting States to suit. *Ramirez I*, 326 P.3d at 485. In particular, Judge Bustamante cited the fact that "the individual states did not possess war powers at the time of the Constitutional Convention" and therefore "had no sovereign interest to protect or cede when they approved the War Powers Clause." *Ibid.*

In any case, the Court of Appeals of New Mexico's decision was reversed by that State's Supreme Court, which specifically declined to

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'uniform' laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity" in bankruptcy proceedings); see also *Ramirez I*, 326 P.3d at 484 (Bustamante, J., dissenting) ("*Katz* is relevant when it discusses the need for national uniformity with regard to bankruptcy laws. In doing so, *Katz* revived uniformity as a valid topic of consideration in Article I jurisprudence.").

address whether Congress may subject States to suit by private individuals under its War Powers. 2016 N.M. LEXIS 87, at *13. Instead, the State's highest court held that New Mexico had surrendered its sovereign immunity by enacting a state statute applying the protections of USERRA to the New Mexico National Guard. *Id.* at *20-26.

Here, however, the plaintiff does not argue that the State has voluntary surrendered its sovereign immunity.[10] Thus, the Eleventh Amendment issue is squarely before the Court. For the reasons discussed above, the United States urges the Court to find that Congress validly exercised its War Powers when it chose to subject States to private USERRA actions.

[10] Clark argued in the Circuit Court that Annotated Virginia Code Section 44-93, which sets out reemployment rights for former members of the armed services of the United States or the National Guard, represented a voluntary abrogation of sovereign immunity for USERRA actions. (App. 34). This argument is not one of the assignments of error on which this Court granted a Writ of Appeal.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2016, I caused an electronic copy of this amicus brief to be filed, via VACES, and ten paper copies to be sent by Federal Express to the Clerk of the Supreme Court of Virginia. In addition, I caused an electronic copy of this amicus brief to be served by electronic mail and one paper copy via Federal Express on the following:

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CERTIFICATE OF COMPLIANCE WITH RULES 5:6 AND 5:26

I hereby certify that this brief was prepared in compliance with Rules 5:6 and 5:26 because it has been prepared in 14-point Arial font and contains 8,403 words, excluding the parts of the brief exempted under Rule 5:26(b), according to the count of Microsoft Word.

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