No. 16-1043

In the Supreme Court of the United States

JONATHAN R. CLARK, PETITIONER

v.

VIRGINIA DEPARTMENT OF STATE POLICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a private plaintiff may bring a suit for damages under the Uniform Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4323(a)(3), against a state agency in state court.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner is a sergeant in Virginia's state police force who is also a captain in the United States Army Reserve. Pet. Va. Sup. Ct. Br. 2. He alleges that respondent, the state agency that employs him, has violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* See Pet. Va. Sup. Ct. Br. 2-3. USERRA requires an employer, including a state agency, to accommodate military-related absences and prohibits an employer from discriminating against servicemembers. See 38 U.S.C. 4311-4319; see also 38 U.S.C. 4303(4)(A)(iii) (defining "employer" to include "a State").

In 2012, petitioner obtained relief through a state-law administrative-grievance procedure on a claim that he had been unfairly disciplined, and rendered ineligible for promotion, due to his military service. Pet. Va. Sup. Ct. Br. 2-3; see Va. Sup. Ct. App. 13-20. The state hearing officer's resolution of that claim in petitioner's favor relied in part on USERRA. See Va. Sup. Ct. App. 17-18. Petitioner subsequently applied for three openings at a higher rank. *Id.* at 6. He was interviewed each time, but ultimately was not selected. *Ibid.* Petitioner alleges that respondent "refused to promote [him] because of his membership in the [Reserve] and successful grievance challenge." Pet. Va. Sup. Ct. Br. 3. He accordingly claims that the hiring of other candidates for the open positions violated the antidiscrimination and antiretaliation provisions of USERRA. Pet. Va. Sup. Ct. App. 8-11; see 38 U.S.C. 4311(a) and (b).

2. USERRA does not rely solely on state-law mechanisms like Virginia's grievance procedure for enforcement, but instead also contains its own remedial scheme. See 38 U.S.C. 4321-4327. Under that scheme, an employee may file a complaint with the Secretary of Labor, who is required to investigate it and attempt to resolve any violation he determines to have occurred. See 38 U.S.C. 4322. If the Secretary finds a violation but is unable to resolve it, the employee may request that the matter be referred to the Attorney General, who may then bring suit against the employer on the employee's behalf. 38 U.S.C. 4323(a)(1) and (2); see 38 U.S.C. 4322(e). That suit may seek one or more types of remedies: injunctive relief, 38 U.S.C. 4323(d)(1)(A); compensatory relief "for any loss of wages or benefits" by the employee, 38 U.S.C. 4323(d)(1)(B); and, for willful violations, liquidated damages, 38 U.S.C.

4323(d)(1)(C). If the employer is a state agency, the suit is brought in the name of the United States. 38 U.S.C. 4323(a)(1); see 38 U.S.C. 4323(d)(2)(B) (providing any monetary recovery should go to the employee if possible).

In pursuing his latest USERRA claim, petitioner did not seek any state or federal administrative remedies, or request Attorney General representation. He instead invoked a USERRA provision under which an employee may himself bring an individual suit against his employer. Pursuant to 38 U.S.C. 4323(a)(3), an employee who forgoes requesting, or does not receive, favorable action from the Secretary of Labor or the Attorney General "may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer." 38 U.S.C. 4323(a)(3). USERRA additionally specifies 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). Petitioner filed his suit in county circuit court. Pet. 1.

3. The state trial court dismissed petitioner's suit on the ground that, in the absence of consent or waiver, it was barred by state sovereign immunity. Pet. App. 2a. Petitioner appealed, and the United States filed an amicus brief in support of that appeal. The Supreme Court of Virginia unanimously affirmed. *Id.* at 1a-16a.

The Supreme Court of Virginia first reviewed the history and "enduring role" of state sovereign immunity in the constitutional structure. Pet. App. 8a; see *id.* at 3a-10a. The court noted that the doctrine "is not without its qualifications," including its inapplicability to suits "in federal court seeking prospective relief against

a continuing violation of federal law by state officers," *id.* at 8a (citing *Ex parte Young*, 209 U.S. 123, 155-156 (1908)); suits "that seek to enforce civil rights laws enacted pursuant to Section 5 of the Fourteenth Amendment," *ibid.* (citing, *inter alia*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 59 (1996)); and suits in which "the United States, rather than a private citizen, brings an action in federal court against a State," *ibid.* (citing *Alden* v. *Maine*, 527 U.S. 706, 755 (1999)). But the court explained that a core feature of the doctrine, as explained by this Court in *Alden* v. *Maine*, *supra*, is that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Pet. App. 7a (quoting *Alden*, 527 U.S. at 712).

The Supreme Court of Virginia observed that the "only exception recognized to the general rule of sovereign immunity" announced in *Alden* "arises in the sui generis context of federal bankruptcy litigation." Pet. App. 9a. The court explained that in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), this Court determined that "the 'history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution' show that the Founders intended it 'not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena.'" Pet. App. 9a-10a (quoting *Katz*, 546 U.S. at 362-363). The state supreme court declined, however, to accept petitioner's argument that "USERRA should be * * * treated, as the bankruptcy power was in *Katz*, as an exceptional, but

nonetheless valid, congressional abrogation of the Commonwealth's sovereign immunity to suits in its own courts." *Id.* at 10a.

The Supreme Court of Virginia acknowledged that, unlike the statute at issue in *Alden*, USERRA was not enacted pursuant to Congress's Commerce Clause powers. Pet. App. 10a. Instead, it was enacted pursuant to Congress's "grant of war powers in Article I, Section 8," *ibid.*, which include the authority to "raise and support Armies" and to "provide and maintain a Navy," U.S. Const. Art. I, § 8, Cls. 12 and 13); see, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 377-378 (1968). The state supreme court concluded, however, that "neither the reasoning nor the holding of *Alden*" was limited to the Commerce Clause, Pet. App. 11a, and that "[t]wo aspects of *Katz* foreclose [petitioner's] view that *Alden* either has been or should be picked apart by further exceptions," *id.* at 12a. "First, *Katz* involved claims against States filed exclusively in federal bankruptcy court," not "'in their own courts.'" *Ibid.* (quoting *Alden*, 527 U.S. at 730). Second, "*Katz* involved a unique body of law governing '*in rem*' rights to bankrupt estates and the historic power of bankruptcy courts 'to issue ancillary orders enforcing their own *in rem* adjudications,'" a circumstance that did "'not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction.'" *Ibid.* (quoting *Katz*, 546 U.S. at 362, 370).

The Supreme Court of Virginia thus treated *Alden* as controlling, disclaiming any authority to "affirm []or disaffirm" petitioner's "prediction" that *Katz* was "the first in a series of retrenchments that" this Court "will make from the broad holding of *Alden*." Pet. App. 14a-15a. And "[g]iven the breadth of the holding in *Alden* and the narrowness of the exception recognized in

Katz," the court saw no need to "address in any detail [petitioner's] historical argument about the breadth of the Congressional war powers." *Id.* at 15a n.7. The court observed that "since *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent." *Id.* at 13a n.6.

DISCUSSION

The Supreme Court of Virginia's decision in this case does not warrant further review. The court reasonably rejected the particular arguments raised by petitioner; no conflict exists on the question presented; and state-law rights and procedures may provide an alternative avenue for claims like the one here. This Court's intervention is accordingly unnecessary.

1. a. In *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), this Court addressed a challenge to Congress's authority under the Indian Commerce Clause to authorize a suit in federal district court by an Indian tribe seeking prospective injunctive relief against a nonconsenting State. See *id.* at 53. The Court held that "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power." *Id.* at 47. The Court stated that the "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.

Three years later, in *Alden* v. *Maine*, 527 U.S. 706 (1999), the Court considered a suit seeking compensation from a State for overtime pay and liquidated damages under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 527 U.S. at 711-712. The suit had

originally been filed in federal court, but had been refiled in state court after *Seminole Tribe* "made it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts." *Id.* at 712. This Court held that state sovereign immunity barred the suit in the state forum as well, explaining that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts." *Ibid.*

b. Subsequently, in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), the Court "reject[ed] [a] sovereign immunity defense advanced" in federal bankruptcy court in a "proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies." *Id.* at 359. The Court "acknowledge[d] that statements in both the majority and the dissenting opinions in [*Seminole Tribe*] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause." *Id.* at 363 (citation omitted). But "[c]areful study and reflection * * * convinced" the Court that such an "assumption was erroneous." *Ibid.*

The Court declined to view the question in *Katz* as "whether Congress has 'abrogated' State's immunity in proceedings to recover preferential transfers," but instead viewed it as "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.'" 546 U.S. at 379 (quoting U.S. Const. Art. I, § 8, cl. 4). The Court explained that because "[b]ankruptcy jurisdiction, at its core, is *in rem*," it "does not implicate States' sovereignty to nearly the

same degree as other kinds of jurisdiction." 546 U.S. at 362; see *id.* at 369-370. And regardless of "whether actions to recover preferential transfers * * * are themselves properly characterized as *in rem*," orders arising from such actions are "ancillary to and in furtherance of the court's *in rem* jurisdiction." *Id.* at 372.

The Court concluded that "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property," even when the "orders directing turnover of preferential transfers" operate against States. *Katz*, 546 U.S. at 372-373. To the extent such orders "implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity." *Id.* at 373. The Court found that agreement to be "evidenced not only by the history of the Bankruptcy Clause, which shows that the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge, * * * but also by legislation considered and enacted in the immediate wake of the Constitution's ratification." *Ibid.*; see *id.* at 373-378.

2. In the Supreme Court of Virginia, petitioner essentially argued that respondent's sovereign-immunity defense in this case should fail *a fortiori* under *Katz*. His opening brief contended that Congress's "war powers, even more so than powers conferred by the Bankruptcy Clause, are unitary in nature" and "nearly absolute"; that those powers "historically necessitated state subordination to federal objectives"; and that they "provide[] an even stronger basis to prohibit state interference with Congress' decisions than the Bankruptcy Clause." Pet. Va. Sup. Ct. Br. 12-15. Similarly, his re-

ply brief contended that "*Katz* commands th[e] conclusion" that "Congress acted well within the scope of its historical authority when it subjected [respondent] to this USERRA suit"; that "[t]he historical approach espoused in *Katz* leads inexorably to the conclusion that Congress' exercise of its Article I war powers includes the authority to subject state agency employers to suits by servicemembers in the defendant state's courts"; and that "[n]ational defense provides an even stronger basis to prohibit state interference with [c]ongressional legislation than the commercial considerations analyzed by the *Katz* Court." Pet. Va. Sup. Ct. Reply Br. 7-9, 14.

The Supreme Court of Virginia correctly determined that *Katz* does not control this case. See Pet. App. 12a. As the decision below points out, see *ibid.*, the uniquely *in rem* nature of bankruptcy proceedings, which has no direct analogue in this case, was critical to *Katz*'s holding. See, *e.g.*, 546 U.S. at 369-373. Indeed, in light of the unique features of the bankruptcy proceedings at issue in *Katz*, the Court did not perceive the case even to present a question of Congress's authority to "'abrogate[]'" state sovereign immunity, but instead merely a question of Congress's authority to include States in the inherently litigious "proceedings" that the Bankruptcy Clause necessarily contemplates. *Id.* at 379. *Katz* also turned in part on the history of the Bankruptcy Clause and bankruptcy legislation, which are different from the history of the war powers and war-powers legislation. Compare *Katz*, *id.* at 373-378, with Pet. Va. Sup. Ct. Reply Br. 9-13.

Even assuming that aspects of *Katz*'s reasoning could apply outside the unique context of bankruptcy proceedings, at a minimum *Katz* requires that any limit

on state sovereign immunity be inherent in and necessary to the manner in which the relevant congressional power is exercised. And if such a limit is inherent in and necessary to the exercise of any of the war powers, it is not for the reasons that *Katz* identified in its particularized analysis of the Bankruptcy Clause. The core rationale of *Katz* is that Congress's authority to provide for centralized proceedings for the definitive resolution of bankruptcies necessarily includes the authority to provide for proceedings for the definitive resolution of any financial entanglements between a bankruptcy estate and a State. That rationale cannot be transposed to the war powers, which do not operate in an analogous way. Accordingly, if Congress has authority under its war powers to subject States to damages suits, the nature of that authority would be quite different from the nature of the authority recognized in *Katz*.

Petitioner has failed to present any meaningful argument that, independent of *Katz*, the nature of Congress's war powers means that the States at the convention agreed not to assert immunity against suits by servicemembers in their own courts. To the extent that petitioner's argument does not simply rely on *Katz*, it boils down to an argument that Congress must have the authority to abrogate state sovereign immunity in this context because the war powers are exclusive and important. See Pet. 15-28. But the central problem with petitioner's argument is that *all* Article I powers could be described as exclusive and important to at least some degree. Relying on that alone to support damages suits against a State would conflict with the results of *Seminole Tribe* and *Alden*. And although the United States' amicus brief below (which was not addressed in the Su-

preme Court of Virginia's decision) offered a more historically based argument, it did not identify sufficient reasons why the war powers necessarily allow for damages suits like the one at issue here. Accordingly, if this Court wishes to consider the question presented, this case is not an appropriate vehicle. Congress may have power to authorize damages suits against state entities under USERRA, but not on the basis of the arguments raised below or raised in the petition.

3. Moreover, the absence of any conflict in the lower courts and the infrequency with which the question arises indicate that this Court's review is not warranted.

a. Petitioner does not directly dispute the Supreme Court of Virginia's observation that, "since *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent." Pet. App. 13a n.6 (citing cases). He instead contends (Pet. 29) only that the decisions identified by the Supreme Court of Virginia "are either inapposite or rest on unpersuasive reasoning."

We are aware of only a single decision by a federal court of appeals or a state court of last resort that might be asserted to conflict with the decision below. In *Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609 (1996), which was issued shortly after *Seminole Tribe*, the First Circuit viewed itself still to be bound by pre-*Seminole Tribe* circuit precedent holding that "Congress, acting pursuant to its War Powers, * * * 'removed the Eleventh Amendment bar to damages actions'" in federal court under a predecessor to USERRA. *Id.* at 616 (quoting *Reopell* v. *Massachusetts*, 936 F.2d 12, 16 (1st Cir.), cert denied, 502 U.S. 1004 (1991)). But the

First Circuit arrived at that view based on a narrow interpretation of *Seminole Tribe*, see *id.* at 616 n.9, that did not have the benefit of subsequent decisions of this Court emphasizing the breadth of *Seminole Tribe*'s holding, see *Alden*, 527 U.S. at 712; see also *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 636 (1999) (describing *Seminole Tribe* as "mak[ing] clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers"). It is unlikely that the First Circuit would adhere to *Diaz-Gandia* if the issue were to arise again.

Other federal courts of appeals have declined to view Congress's war powers as an exception to the general rule of state sovereign immunity. See *Velasquez* v. *Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998) (reasoning that "no legislation enacted under any provision of Article I can abrogate the sovereign immunity of the states"), vacated on other grounds, 165 F.3d 593 (7th Cir. 1999); *Ysleta Del Sur Pueblo* v. *Laney*, 199 F.3d 281, 284 & n.3, 288 (5th Cir. 2000) (reasoning that *Seminole Tribe* forecloses argument "that abrogation is justified by Congress' War Powers").

The Supreme Court of Virginia's decision here likewise is in accord with the decisions of other state courts addressing USERRA claims against state agencies. The Supreme Court of New Mexico has allowed USERRA suits against state agencies, but only on the ground that New Mexico has affirmatively consented to such suits, not on the theory that Congress may authorize such suits against a nonconsenting State. See *Ramirez* v. *State Children, Youth & Families Dep't*, 372 P.3d 497 (2016). Other state courts of last resort have considered and rejected that theory. See *Janowski* v. *Division of State Police*, 981 A.2d 1166, 1170

(Del. 2009) (holding that USERRA "could not abrogate state sovereign immunity, because Congress passed that law pursuant to its Article I, Section 8 war powers"); *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-363 (Ala. 2001) (holding that "*Alden* forecloses, on constitutional grounds, resort to Article I as the basis for subjecting the State of Alabama to suit in a state court on a remedy based upon Congress's assertion of its powers with respect to military preparedness.").

b. The relative scarcity of decisions on the question presented suggests that suits alleging that state agencies have failed to comply with USERRA and analogous state laws are rare. The scarcity may also reflect the potential availability of remedies aside from damages suits under USERRA by individual employees against nonconsenting States.

The United States, for example, can bring suit under USERRA on behalf of an aggrieved employee, see 38 U.S.C. 4323(a)(1), and such a suit would not be barred by state sovereign immunity, see *Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."). USERRA also permits individual actions for injunctions, see 38 U.S.C. 4323(d)(1)(A), which might potentially be brought against state officials, see 38 U.S.C. 4303(4)(A)(i) (defining "employer" to include a "person" to whom an "employer has delegated the performance of employment-related responsibilities"); see also *Alden*, 527 U.S. at 757 (explaining that state sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief").

In addition, States may consent to individual USERRA damages suits or provide their own remedies, as Virginia has done by providing for suits by certain types of servicemembers, see Pet. App. 2a n.1, and by providing the grievance procedure that petitioner has previously utilized for resolving a USERRA claim, see Va. Code Ann. § 2.2-3004(A) (2014); Va. Sup. Ct. App. 13-20. Indeed, Congress is currently considering legislation that would require States receiving federal financial assistance to waive sovereign immunity in USERRA actions. Justice for Servicemembers and Veterans Act of 2017, S. 646, § 102, 115th Cong., 1st Sess. (2017). All of these considerations counsel against further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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