No. 07-20440

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JONATHON C. MCINTOSH, DDS,

Plaintiff-Appellant

v.

DAVID PARTRIDGE, MD, in his official capacity,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

RENA J. COMISAC
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CONSTITUTION: **PAGE**

STATUTES:

REGULATION:

RULE:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20440

JONATHON C. MCINTOSH, DDS,

Plaintiff-Appellant

v.

DAVID PARTRIDGE, MD, in his official capacity,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

JURISDICTION

As explained in this brief, the district court did not have jurisdiction over the plaintiff's claim against the defendant under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The district court otherwise had jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. 1331. The plaintiff filed a timely notice of appeal, and this Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

QUESTIONS PRESENTED

1. Whether USERRA grants federal courts jurisdiction over claims by private parties against state employers.

2. Whether Congress has the authority to grant federal courts jurisdiction over private USERRA claims against state employers.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

According to his complaint, plaintiff Jonathan McIntosh has served as the director of dentistry at the Richmond School, a Texas-run home for people with mental and physical disabilities. USCA5[1] at 10. McIntosh is also a member of the United States Navy Reserve, and was on active duty in Kuwait and Iraq in 2004 and 2005. USCA5 at 10. While McIntosh was deployed, the Texas Department of Aging and Disability Services, which runs the Richmond School, hired another dentist to take his place. USCA5 at 153 (Defendant's Motion for Summary Judgment). McIntosh alleges that he notified the defendant that he wished to resume his duties as director of dentistry after returning from his service abroad in October 2005. USCA5 at 10. The defendant, David Partridge, is the medical director at the Richmond School. USCA5 at 9. In response to McIntosh's notification of his desire to return to his duties, Partridge informed him that his clinical privileges had been suspended due to professional incompetence and violations of applicable standards of care, and instructed him not to return to the Richmond School campus until further notice. USCA5 at 10. McIntosh alleges that he had never before been accused of professional incompetence or violations of standards of care. USCA5 at 10-11.

---

[1] References to "USCA5 at __" are to pages in the sequentially paginated district court record lodged with this Court.

Partridge claimed in the district court that he refused to reinstate McIntosh upon his return because of evidence of malpractice that surfaced while McIntosh was on active duty. USCA5 at 154. When McIntosh returned from his active duty service, Partridge placed him on paid administrative leave and filed a complaint against him with the State Board of Dental Examiners. USCA5 at 154.

On December 23, 2005, McIntosh filed suit in federal district court against Partridge in his individual and official capacities, alleging violations of USERRA, the Constitution, and various state laws, and seeking damages and injunctive relief. USCA5 at 9-13. McIntosh claims that Partridge's allegations about the quality of his work are pretextual. USCA5 at 11. Partridge filed a motion for summary judgment, arguing both that McIntosh failed to present evidence that he was placed on administrative leave because of his military service, and that Partridge, as a state official, is immune under the Eleventh Amendment to plaintiff's USERRA claim. USCA5 at 152-160.

The district court considered the Eleventh Amendment issue first, and found that Partridge is not immune to plaintiff's USERRA claims. USCA5 at 283-284. The court rejected Partridge's argument that Congress did not intend to allow private individuals to sue state entities in federal court under USERRA. USCA5 at 283. The court went on to find that Congress not only intended to abrogate States' Eleventh Amendment immunity to USERRA claims, but did so effectively pursuant to its constitutional authority under the War Powers. USCA5 at 284. Turning to the merits of McIntosh's claims, the district court held in favor of

Partridge, finding that McIntosh failed to demonstrate that his suspension was motivated by his military service. USCA5 at 284-288.

McIntosh filed a timely notice of appeal. Partridge filed a notice in this Court pursuant to Federal Rule of Appellate Procedure 44(a) stating its intention to assert its Eleventh Amendment immunity to plaintiff's USERRA claim on appeal. The United States moved to intervene in order to defend the constitutionality of USERRA, and this Court granted that motion.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly held that, before Congress may subject States to private suit in federal court, Congress must unequivocally express its intent to do so. Congress did not express such an intent in USERRA. Quite the contrary: Congress explicitly granted jurisdiction over private USERRA claims against state employers to state courts, not to federal courts. Thus, while plaintiff may refile his claim in state court, the district court was incorrect in concluding that it had jurisdiction as a statutory matter over plaintiff's USERRA claims.

If this Court disagrees, and believes instead that the district court had statutory jurisdiction over plaintiff's USERRA claims, the Court should hold that Congress has authority to authorize private USERRA claims against States pursuant to its War Powers. As the Supreme Court recently explained, the Eleventh Amendment is intended to embody the background principle of state sovereign immunity embodied in the plan of the Constitution. When the States joined the Union, they had never possessed any war powers, were not granted any

such powers by the Constitution, and had no expectation that they would have any such authority as an aspect of their sovereignty. Consequently, the States "agreed in the plan of the [Constitutional] Convention not to assert [sovereign] immunity" in the face of Congress's assertion of its War Powers. *Central Virginia Cmty. College* v. *Katz*, 546 U.S. 356, 373 (2006). Congress therefore has the constitutional authority pursuant to the War Powers to subject States to private suits in federal or state court if it chooses to do so.

STANDARD OF REVIEW

This Court reviews de novo the district court's legal conclusions regarding whether USERRA authorizes private suits against state employers in federal court and whether Congress has the authority to authorize such suits. See *Ysleta Del Sur Pueblo* v. *Laney*, 199 F.3d 281, 285 (5th Cir.), cert. denied, 529 U.S. 1131 (2000).

ARGUMENT

I

CONGRESS DID NOT GRANT FEDERAL COURTS JURISDICTION TO HEAR PRIVATE USERRA CLAIMS AGAINST STATE EMPLOYERS

The district court in this case held that Congress authorized individuals to bring claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA) against state employers in federal court when it used permissive language in stating that such claims "may be brought in a State court of competent jurisdiction." 38 U.S.C. 4323(b)(2). The Supreme Court has repeatedly held that, when Congress intends to subject States to private suit in

federal court, it must make its intent unmistakably clear. *E.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-228 (1989); *Atascadero* v. *Scanlon*, 473 U.S. 234, 243 (1985). When Congress amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1998, Congress did *not* express its intent to authorize such suits. On the contrary, Congress expressed its intent that private USERRA claims against state employers be brought in state court rather than federal court. Thus, the district court lacked jurisdiction over plaintiff's USERRA claim and erred in concluding otherwise.

Prior to 1998, USERRA authorized individuals to file suit in federal court to vindicate their rights, and included States among the entities subject to suit. See 38 U.S.C. 4323(c)(1)(A) (1994); *Velasquez* v. *Frapwell*, 160 F.3d 389, 390-391 (1998) (*Velasquez I*), rev'd in part, 165 F.3d 593 (7th Cir. 1999). Congress amended USERRA in 1998, however, and revoked the authority for private individuals to sue state employers in federal court. The 1998 amendment altered USERRA in three respects. First, it authorized the United States to bring suit in its own name on behalf of individuals against state employers. Second, it authorized the United States to substitute itself as the plaintiff in any case in which an individual sues a state employer and is represented by the United States. Finally, it replaced the general authorization to sue in federal court with the following three jurisdictional rules:

> (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

> (2) In 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.
>
> (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

38 U.S.C. 4323(b). The effect of this amendment was to divest the federal courts of jurisdiction over private USERRA suits against state employers (while permitting the United States to become the named plaintiff in suits against state employers when it sees fit), and to authorize plaintiffs to bring such suits in state courts. *Velasquez* v. *Frapwell*, 165 F.3d 593, 593-594 (7th Cir. 1999) (*Velasquez II*).

In holding that it had jurisdiction to consider plaintiff's USERRA claim, the district court relied on the language in 38 U.S.C. 4323(b)(2) stating that an action by an individual against a state employer "*may* be brought in a State court of competent jurisdiction" (emphasis added). The district court reasoned that Congress's use of the word "may" – a word the court described as "permissive" rather than "exclusive or mandatory" – did not indicate that private USERRA claims against state employers could only be filed in state court, and never in federal court. USCA5 at 283. Rather, the court held that the "statute allows for state-court jurisdiction without requiring it in suits by individuals against states," noting that, "[i]f Congress had wanted to restrict cases, it would have said that actions *must* be brought in state courts." USCA5 at 283.

In so holding, the district court turned the proper test on its head. The Supreme Court has stated repeatedly that a State cannot be subject to private suit in federal court unless Congress "unequivocally express[es] its intention to" provide for such suits. *Dellmuth*, 491 U.S. at 227-228; *Atascadero*, 473 U.S. at 243. The clear statement test applies not only in the Eleventh Amendment context, but wherever Congress intends to alter "the usual constitutional balance between the States and the Federal Government." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 461, 467 (1991) (correct test is whether Congress affirmatively expressed its intent to alter the traditional balance, not whether Congress failed to express its intent to maintain that balance). Rather than asking whether Congress had in fact expressed such an intent in USERRA, the district court asked whether Congress had unequivocally expressed its intention that private individuals *not* be permitted to sue state employers in federal court. Such reasoning cannot be squared with any of the recent cases examining Congress's authority to authorize private suits against States in federal courts.

Thus, even if one agrees with the district court that the language of 38 U.S.C. 4323(b)(2) is ambiguous, that ambiguity is fatal to the district court's jurisdiction. The district court does not have jurisdiction unless it is unmistakably clear from the language of the statute that Congress intended federal courts to have jurisdiction over private USERRA claims against state employers. The express language of the statute indicates that Congress intended that litigants such as

plaintiff bring USERRA claims in state court, not federal court, and plaintiff may refile his claims in Texas's state courts.[1]

Because it is clear that the district court did not have jurisdiction, as a statutory matter, over plaintiff's USERRA claim, this Court does not have jurisdiction to reach the question whether Congress has the constitutional authority to authorize individuals to bring USERRA claims against state employers in federal court. The Supreme Court has repeatedly admonished that federal courts have a "'deeply rooted' commitment" and obligation "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective*

---

[1] Plaintiff argues in his reply brief (at 6-8) that Congress authorized private parties to bring USERRA claims against States in federal courts in 38 U.S.C. 4323(j), by stating that "the term 'private employer' includes a political subdivision of a State." Plaintiff is incorrect and bases his analysis on a misunderstanding of the term "political subdivision." As is clear from the Department of Labor's USERRA regulations, "political subdivision" in the statute includes entities such as "counties, parishes, cities, towns, villages, and school districts." 20 C.F.R. 1002.39. Such entities do not enjoy Eleventh Amendment immunity to private claims in federal court. The term "political subdivision" does not include agencies of the State itself, such as plaintiff's employer, which are neither political entities nor subdivisions of the State.

Ass'n, 485 U.S. 439, 445 (1988). Because the jurisdictional issue in this case can be resolved as a statutory matter, this Court should not reach the constitutional authority question.

II

CONGRESS HAS THE AUTHORITY PURSUANT TO ITS WAR POWERS TO SUBJECT STATE EMPLOYERS TO PRIVATE USERRA CLAIMS

The defendant argues in the alternative that, even if Congress did authorize individuals to bring USERRA claims against state employers in federal court, it did not have the constitutional authority to do so. The defendant is mistaken. If this Court disagrees that the district court lacked jurisdiction over plaintiff's USERRA claims, and considers it necessary to determine whether Congress has the authority to subject state employers to private USERRA suits in federal court, it should find that Congress does, in fact, have that constitutional power.

USERRA protects members of the armed forces from employment discrimination on the basis of such membership or on the basis of any duties performed while in the service. 38 U.S.C. 4304. The statute also grants service members the right to be reemployed upon return when their "absence from a position of employment is necessitated by reason of service in the uniformed services," provided that an affected employee notify his or her employer of any impending absence and is not absent for more than five years. 38 U.S.C. 4312. Congress enacted USERRA "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). Because today's national defense depends on a volunteer army and an extensive system of volunteer reserves, USERRA plays a central role in maintaining Congress's ability to raise and support an Army and Navy. Safeguarding veterans and reservists from suffering adverse employment action on the basis of their military status is essential to ensuring a steady supply of volunteers for the armed forces and reserves, many members of which are actively engaged in military activity abroad.

The Constitution grants to Congress a number of powers known collectively as the War Powers. Article I authorizes Congress to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] * * * the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 11-14. Courts of appeals, including this Court, have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to its War Powers. See, *e.g.*, See *Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Reopell* v. *Commonwealth of Mass.*, 936 F.2d 12, 15-16 (1st Cir.), cert. denied, 502 U.S. 1004 (1991); *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). Protecting the employment rights of returning veterans is plainly encompassed within Congress's War Powers. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 376 (1974) (legislation providing educational benefits to veterans "is plainly within Congress' Art. I, § 8 powers 'to raise and support Armies'").

The Supreme Court, in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 73 (1996), stated that Congress's authority pursuant to "Article I [of the Constitution] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." While this language seems on its face to preclude use of the War Powers to abrogate state sovereign immunity, more recent pronouncements from the Supreme Court, as well as the origin and nature of the War Powers, demonstrate that Congress remains free to subject States to private suit in federal court pursuant to its War Powers. Although the Court in *Seminole Tribe* used broad language that seemed to restrict Congress's authority under all of its various Article I powers, the only Article I grants of authority actually at issue in that case were the Indian Commerce Clause and the Interstate Commerce Clause.[2] 517 U.S. at 47. Nevertheless, numerous courts of appeals, including this Court, assumed that the Court's decision in *Seminole Tribe* precludes Congress from using any of its Article I powers to subject States to private suits in federal courts. See, *e.g.*, *Nelson* v. *La Crosse County Dist. Atty.*, 301 F.3d 820, 832 (7th Cir. 2002); *In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Ysleta Del Sur Pueblo* v. *Laney*, 199 F.3d 281, 285 (5th Cir.), cert. denied, 529 U.S. 1131 (2000); *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237, 243 (3d Cir. 1998). That assumption

---

[2] The statute at issue in *Seminole Tribe* was passed pursuant to Congress's authority under the Indian Commerce Clause alone, and the Court explicitly overruled its previous holding in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), that Congress could abrogate States' Eleventh Amendment immunity pursuant to its authority under the Interstate Commerce Clause. 517 U.S. at 66-72.

was proven incorrect, however, when the Supreme Court issued its decision last year in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006).

The Supreme Court's decision in *Central Virginia Community College* v. *Katz* demonstrates that the language and holding of *Seminole Tribe* do not apply to every power that Congress has under Article I. The Court in *Central Virginia Community College* considered whether Congress has the power pursuant to the Bankruptcy Clause to subject States to private suit in federal court. After acknowledging that its prior statements in *Seminole Tribe* "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause," the Court concluded, based on "[c]areful study and reflection * * *, that that assumption was erroneous." *Central Virginia Cmty. College*, 546 U.S. at 363. In order to understand the nature of the Bankruptcy Clause, the Court examined the intent of the Framers in drafting and including the Bankruptcy Clause in the Constitution, the understanding of the States in ratifying the Constitution, as well as early congressional efforts to exercise authority under the Clause. *Id.* at 363-373. Based on that information, the Court concluded that, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction * * * implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity." *Id.* at 373. Thus, the Court ultimately held that:

> 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 (internal citation and footnote omitted).

The same is true with respect to Congress's authority under the war power clauses. Congress's War Powers are qualitatively different from most other Article I powers. Although other enumerated powers are essential to the federal government's effectiveness – and, therefore, to the nation's vitality – the very survival of the nation depends directly on Congress's ability to exercise its War Powers. Having just fought a bitter war for independence, the Founding Fathers were painfully aware that the nation's existence depended on its ability to raise and support an army and a navy. In order 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, allotting certain powers to Congress and others to the President.

The Founders understood the danger of limiting the nation's ability to wage war; as Alexander Hamilton wrote in Federalist No. 23: "The 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." *3 The Founders' Constitution* 137 (Philip B. Kurland and Ralph Lerner eds., 1987). 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, is any matter

essential to the *formation*, *direction*, or *support* of the NATIONAL FORCES". *Ibid.* Similarly, in 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 foederal councils. * * * It is in vain to oppose constitutional barriers to the impulse of self-preservation." *Id.* at 150.

The Supreme Court has long recognized the unique importance of Congress's War Powers and has repeatedly declared that later amendments should not be construed to limit those powers. In *Lichter* v. *United States*, 334 U.S. 742, 781 (1948), the Court asserted that:

> [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.

Moreover, in *Case* v. *Bowles*, 327 U.S. 92, 102 (1946), the Court concluded that Congress's War Powers are not limited by the Tenth Amendment, in spite of the fact that the Tenth Amendment was enacted after Article I. To hold otherwise, the Court reasoned, would render "the Constitutional grant of power to make war * * * inadequate to accomplish its full purpose." *Ibid.*[3]; see also *Rostker* v.

---

[3] Even when the Court later reinvigorated the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 855 n.18 (1976), rev'd on other grounds, *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), the Court explicitly noted that it was not overruling *Case* v. *Bowles*, stating that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war

Goldberg, 453 U.S. 57, 67 (1981) ("[T]he tests and limitations [of the constitution] to be applied may differ because of the military context."). The Court has also repeatedly noted that it "give[s] 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*, 453 U.S. at 64-65, 70. 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 ex rel. Langer*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

Unlike with most other 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 at no time 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.

299 U.S. at 316. Thus, the Court reasoned that:

---

powers."

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power 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 (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:

> In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. * * * If it be asked, in whom, during our revolutionary war, was loged [sic], and by whom was exercised this supreme authority? No one will hesitate for an answer. It 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. * * * The truth is, that the States, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now.

Id. at 80-81 (Patterson, J., seriatim opinion).[4]

The Supreme Court made clear in *Seminole Tribe* that the Eleventh Amendment is intended to embody "the background principle of state sovereign

---

[4] See also *3 The Founders' Constitution* at 102 ("Did the several states possess the power of declaring war, or of commencing hostility without the consent of the whole, the union could never be secure of peace[.]") (St. George Tucker, *Blackstone Commentaries* 1:App. 269-72 (1803)); *id.* at 120 (noting that the power to declare war "could not be left without extreme mischief, if not absolute ruin, to the separate authority of the several states") (Joseph Story, *Commentaries on the Constitution* 3:1164-72 (1833)).

immunity." 517 U.S. at 72. As the opinions in *Curtiss-Wright* and *Penhallow* make clear, whether 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, war powers never belonged to the States. Indeed, the Constitution itself explicitly *forbids* any State from engaging in war without the consent of Congress. U.S. Const. Art. I, § 10. Because the States never possessed any war powers, they cannot have expected to retain any such authority as an aspect of their sovereignty when they joined the Union. For this reason, immunity to the exercise of Congress's authority under the War Powers cannot be part of the "background principle of state sovereign immunity." Like the Bankruptcy Clause, therefore, the clauses that make up the War Powers "simply did not contravene the norms th[e Supreme] Court has understood the Eleventh Amendment to exemplify." *Central Virginia Cmty. College*, 546 U.S. at 375.

In light of the unique nature of Congress's authority under the War Powers, it is clear that Congress may – if it wishes – subject States to private suits in federal court under those powers without contravening the restriction on federal judicial power incorporated in the Constitution.[5]

---

[5] The same authority that justifies Congress's ability to authorize private USERRA suits against state employers in federal court justifies Congress's authorization of such suits in state court in 38 U.S.C. 4323(b)(2). In *Alden* v. *Maine*, 527 U.S. 706 (1999), the Supreme Court considered whether and when Congress has the authority to subject States to private suits in their own courts. The Court in *Alden* held that States retain a "residual" sovereign immunity to private suits in their own courts that is similar to States' immunity to private suits in federal courts. *Id.* at 715, 722. The Court confirmed, however, that this

CONCLUSION

This Court should reverse the district court's holding that it had jurisdiction over plaintiff's USERRA claim, and remand for the district court to dismiss the complaint. If the Court concludes that the district court had jurisdiction, it should affirm the district court's holding that Congress has authority to subject States to private USERRA claims in federal court.

Respectfully submitted,

RENA J. COMISAC
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

---

background principle of sovereign immunity extends only as far as the structure of the Constitution permits. See *id.* 713, 727-734. For the reasons discussed above, the design of the federal system and the Constitution itself assume that States are not immune to the exercise of Congress's War Powers. The Court in *Alden* affirmed that Congress may subject States to private suits in state court to the same extent that it may do so in federal court. *Id.* at 755-756. Thus, Congress has the authority to subject state employers to private USERRA suits in state court, and did so when it amended the statute in 1998.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, this brief contains 4,936 words.

2. This brief has been prepared in proportionally spaced typeface using WordPerfect 12.0 in Times New Roman 14-point font.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking this brief and imposing sanctions against the person signing this brief.

Date: November 16, 2007

_____
SARAH E. HARRINGTON
Attorney

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR, along with an electronic version of the brief on a diskette, were served via overnight mail on the following counsel of record on November 16, 2007.

Joseph Rutherford Willie, II
Willie & Associates
4151 SW Freeway, Suite 490
Houston, TX 77027
713-659-7330

Daniel L. Geyser, Assistant Solicitor General
Office of the Attorney General of Texas
Solicitor General's Office (MC-059)
209 W. 14th St., 7th Floor
Austin, Texas 78701
512-936-1897

Craig H Russell
Thomas J Turner
Office of the Attorney General for the State of Texas
General Litigation Division
300 W 15th Street
William P Clements Building
Austin, TX 78701
512-463-2120

_____
SARAH E. HARRINGTON
Attorney