No. 31820

IN THE COURT OF APPEALS OF NEW MEXICO

PHILLIP RAMIREZ,

Appellee/Cross-Appellant

v.

STATE OF NEW MEXICO CHILDREN YOUTH AND FAMILIES DEPARTMENT, *et al.*,

Appellants/Cross-Appellees

ON APPEAL FROM THE ELEVENTH JUDICIAL DISTRICT COURT IN MCKINLEY COUNTY, NEW MEXICO
THE HONORABLE CAMILLE MARTINEZ-OLGUIN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE/CROSS-APPELLANT

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STATEMENT REGARDING NOTICE

Pursuant to Rule 12-215(B), I hereby certify that all counsel in this case were notified on December 27, 2012, 14 days before the submission of this brief, of the United States' intent to file this brief as *amicus curiae* in support of the Appellee/Cross-Appellant in this case.

INTRODUCTION AND SUMMARY

The issue before the Court is whether a servicemember may sue the State of New Mexico in state court under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 *et seq*. That issue breaks down into three questions for this Court to consider: 1) Whether Congress subjected all States to suit in state court when it amended USERRA, or only States that consent to suit; 2) Whether Congress has the authority to subject States to suit in state court without their consent when it legislates pursuant to its War Powers; and 3) Whether New Mexico consented to suit. We urge this Court to conclude first that Congress, in 38 U.S.C. 4323(b)(2), plainly subjected all States to suit in their state courts – not just those that consent to suit, and second, that Congress does have the authority to subject States to suit under its Article I War Powers. If it reaches those conclusions, this Court will not need to decide – and so this brief does not address – whether New Mexico has consented to USERRA suits filed in state court.

Congress used its power to subject States to suit in state court when it enacted Section 4323(b)(2), which provides: "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." Neither the text of this provision, nor its history, nor common sense, support the notion that it is

meant to apply only to the States – just one by New Mexico's reckoning – that consent to suit. Instead, the statute's text and history, and logic, very clearly demonstrate that Congress intended to give servicemembers the right to sue state employers in state court.

This Court should hold that Congress has the authority under its War Powers to authorize private USERRA suits against state employers. Because the Founding Fathers did not want the federal government to be limited in its ability to wage war, the Constitution delegates war powers to the national government exclusively and prohibits States from going to war without the approval of Congress (except in very limited circumstances). Where exclusive power is given to the Federal Government, States' sovereignty – including immunity to private suit – is subordinate to national authority.

INTEREST OF THE UNITED STATES

The United States has a strong interest in defending USERRA's constitutionality. The Secretary of Labor has substantial administrative and enforcement responsibilities under USERRA, 38 U.S.C. 4321-4333, and has promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. The Attorney General enforces USERRA in court against state and private employers. 38 U.S.C. 4323. The United States has intervened in several federal USERRA cases in order to argue that Congress has constitutional authority, under its War

Powers, to authorize private individuals to bring USERRA claims against state employers. See, *e.g.*, *Weaver* v. *Madison City Bd. of Educ.*, No. 5:11-cv-03558 (N.D. Ala.), and *McIntosh* v. *Partridge*, 540 F.3d 315 (5th Cir. 2008).[1]

ARGUMENT

A SERVICEMEMBER HAS A RIGHT TO SUE THE STATE OF NEW MEXICO IN STATE COURT UNDER USERRA REGARDLESS OF WHETHER THE STATE CONSENTS TO SUIT

A. Legal Framework

This case presents a legal issue that requires this Court to interpret both the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 *et seq.*, and the United States Supreme Court's Eleventh Amendment sovereign immunity jurisprudence.[2] Since the relevant part of the statute was enacted in response to developments in the Supreme Court's sovereign immunity jurisprudence, we discuss sovereign immunity jurisprudence first.

1. The Eleventh Amendment of the United States Constitution has long been understood to affirm that, in general, States retained their immunity when they joined the union. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89,

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[1] As this issue is a purely legal one, and the parties briefs recount the factual and procedural history of this case, this brief does not include a "summary of proceedings" section. See Rule 12-213(B) NMRA.

[2] The United States agrees with the parties that this Court should review *de novo* the purely legal issue raised in this case.

97-99 (1984). This immunity includes immunity to "a suit brought by a citizen against his own State." *Id.* at 98; see also *Hans* v. *Louisiana*, 134 U.S. 1, 10 (1890). There are two circumstances in which a State may, despite its sovereign immunity, be sued by an individual. The first is when the State consents to the suit: States can clearly be sued by individuals in either state court or federal court if they consent to the suit. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99. The second is when Congress validly abrogates state sovereign immunity. But Congress's authority to override state sovereign immunity is limited, and the Supreme Court's understanding of those limits has evolved in recent years.

There are four relevant stages in the evolution of the Supreme Court's sovereign immunity jurisprudence. During the first stage, which lasted at least through the early-1990s, it was widely held "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). In *Union Gas*, the 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.

The second stage came when the Supreme Court overruled *Union Gas* in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 66 (1996). 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. At the time, courts interpreted this statement to be a categorical rule that no Article I power could provide valid authority for Congress to subject States to suit by private individuals.

The third stage in this evolution broadened the sovereign immunity protected by the Constitution. The Supreme Court, in *Alden* v. *Maine*, 527 U.S. 706, 741 (1999), considered "[w]hether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts," and decided that it does not. *Id.* at 745 ("[T]he States do retain a constitutional immunity from suit in their own courts."). The Court thus held that the same limits on Congress's authority to subject States to suit that apply in federal court also apply in state court. *Id.* at 754-759.

Finally, the fourth stage came with the Supreme Court's decision in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006). In *Katz*, the Supreme Court ruled that at least one Article I power, the Bankruptcy Clause, can provide a basis for subjecting States to suits by individuals. *Id.* at 362-363. The Supreme Court thus made clear that, despite statements in both *Seminole Tribe* and *Alden* that indicate that no Article I power may ever provide a valid basis for Congress to authorize private suits against States, that is, in fact, not the rule.

2. USERRA was enacted during the first stage in the sovereign immunity jurisprudence timeline. It generally prohibits employment discrimination against members of the armed forces and ensures their reemployment after active duty. When it was first enacted, it gave federal and state courts jurisdiction over all USERRA actions, including actions against a state employer. See Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165, amended by the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (providing that "[t]he district courts of the United States shall have jurisdiction" over all USERRA actions, including suits against a State employer). At that time, there was no question that Congress had the authority to enact the provision.

But there was some question about Congress's authority once the second stage began with the Supreme Court's decision in *Seminole Tribe*. USERRA was enacted pursuant to Congress's Article I War Powers,[3] and *Seminole Tribe*

[3] It is clear that USERRA was enacted pursuant to Congress's War Powers. USERRA protects members of the armed forces from employment discrimination and grants them a right to reemployment when they return from military service. 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). That purpose is directly relevant to Congress's War Powers authority. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 376 (1974) (legislation providing educational benefits to veterans "is plainly within Congress' Art. I, § 8, power 'to raise and support Armies'"). Federal courts of appeals have uniformly held that

(continued…)

indicated that Congress lacked authority to subject States to suit when acting pursuant to an Article I power. Indeed, applying *Seminole Tribe*, some federal district courts held that USERRA's provision subjecting state employers to suit in federal court was unconstitutional. See *Velasquez* v. *Frapwell*, 994 F. Supp. 993 (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 (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. In 1998, Congress responded by amending USERRA. See H.R. Rep. No. 448, 105th Cong., 2d Sess. 6 (1998). The House Report stated that the cases dismissing USERRA claims on sovereign immunity grounds "threaten not only a long-standing policy protecting individuals' employment right, but also raise serious questions about the United States['] ability to provide for a strong national defense." *Id.* at 5. The Report explained further that the proposed legislation was "to assure that the policy of maintaining a strong national defense is not

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(…continued)
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); *Reopell* v. *Massachusetts*, 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).

inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." *Ibid.*

The amendment replaced the original enforcement and jurisdictional provision with language that provides successive distinct statements of jurisdiction for different kinds of cases. The provision states:

> (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). Under Subsections 4323(b)(1) and (3), federal courts are given jurisdiction over suits against non-state parties and over suits brought by the United States against state employers. Section 4323(b)(2) authorizes suits by private individuals against state employers in state court.

The developments in the Supreme Court's sovereign immunity jurisprudence that occurred in the third and fourth stages described above directly affect the USERRA enforcement provision Congress enacted in response to *Seminole Tribe*. First, under *Alden*, it is now clear that a State's constitutional sovereign immunity is the same for suits in state court as it is for suits in federal court; as a result, if Congress lacks the power to subject States to private federal

USERRA suits, it also lacks the power to subject them to private state-court USERRA suits. In other words, while Congress was concerned after *Seminole Tribe* about its authority to subject States to suit under its War Powers, it reasonably thought it could sidestep the issue by authorizing suit in state courts rather than in federal court. After all, *Seminole Tribe* did not purport to impose any limit on Congress's authority to authorize suit in state courts. But *Alden* made this attempt to avoid the impact of *Seminole Tribe* ineffective by revealing that States enjoy the same constitutional sovereign immunity in state court as in federal court.

Second, it is however now also clear in view of *Katz* that *Seminole Tribe* is not an absolute bar to Congress's subjecting States to suit when acting pursuant to an Article I power. Congress clearly thought that it was, or at least that it very likely was, when it amended USERRA in 1998.[4] That was the whole reason for

[4] During a hearing before the House Committee on Veterans' Affairs that ultimately led to the 1998 amendment of USERRA's enforcement provision, one member of Congress specifically argued that *Seminole Tribe* would *not* apply to statutes enacted pursuant 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, and Hous., 104th Cong., 2d Sess. 19-20 (1996) (statement of Rep. Buyer). The witness, George Washington Law Professor Jonathan Seigel, responded "personally, I find the argument that you've just made quite persuasive," and opined 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." *Id.* at 20.

the amendment. Now, however, we know that at least one Article I power, the Bankruptcy Clause, can supply a valid basis for Congress to subject States to private suit. Other Article I powers, such as the Commerce Clause, plainly may not be used to subject States to private suit. This Court should conclude that the War Powers, like the Bankruptcy Power, give Congress the authority to subject States to private suit.

These developments mean that, in the end, it turns out there was really no need for Congress to have limited private suits against States to state court. After *Alden*, it is clear that Congress's authority to subject States to private suit is the same in state court as it is in federal court. As explained below, *Katz* provides a compelling basis to conclude that Congress has authority under its War Powers to subject States to suit. But *Katz* does not alter *Alden* and therefore that conclusion necessarily applies to Congress's authority in both state and federal court. Thus, if Congress were to revisit the issue in light of *Alden* and *Katz*, it could once again authorize private USERRA suits against States in both state and federal court.

It is accordingly instructive that Congress has recently considered amending USERRA to give servicemembers the right to sue state employers in federal court as well as in state court. Two bills introduced during the 112th Congress proposed replacing the current Section 4323(b)(2) with a provision that reads: "In the case of an action against a State (as an employer) by a person, the action may be

brought in the appropriate district court of the United States or State court of competent jurisdiction." See S. 3233, 112th Cong. § 2(a)(2) (2012); H.R. 6015, 112th Cong. § 2(a)(2) (2012). While the 112th Congress did not act on these proposals, they may be reintroduced and acted upon during the 113th Congress.

3. The Supreme Court has frequently explained that determining whether Congress has abrogated state sovereign immunity requires a two-part inquiry. Courts must decide whether Congress has made "its intention to abrogate unmistakably clear in the language of the statute" and whether Congress acted "pursuant to a valid exercise of its power." See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 726 (2003). Both parts of the test are satisfied here, and we discuss them in turn.

B. Section 4323(b)(2) Subjects All States To Private Suits In State Court, Not Only States That Have Consented To Suit

Section 4323(b)(2) of Title 38 provides "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." New Mexico argues that the words "in accordance with the laws of the State" are a caveat that

means that Congress only intended servicemembers to be able to sue to enforce USERRA rights against state employers if they live in a State that consents to suit.[5]

The argument fails for several reasons. First, the plain text of Section 4323(b)(2) does not support it. The most natural reading of the provision as a whole is that it provides that the suit "may be brought in a State court," but that the litigant is responsible for filing the suit in the correct state court and must comply with the applicable procedures and rules when filing. Legislative history supports this reading. The House Report's section-by-section analysis describes Section 4323(b)(2) 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." See H.R. Rep. No. 448, 105th Cong., 2d Sess. 6 (1998).

Second, New Mexico's strained reading of Section 4323(b)(2) interprets Congress's 1998 amendment of USERRA as accomplishing precisely the opposite of what Congress intended. The clear, and expressly stated, purpose of the amendment was to ensure that state-employed servicemembers would continue to

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[5] This erroneous interpretation of the statute was first tentatively advanced in dicta by the Alabama Supreme Court and has been adopted by three other state court since. See *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (Ala. 2001); see also *Smith* v. *Tennessee Nat'l Guard*, No. M2012-00160-COA-R3CV, 2012 WL 3249600 (Tenn. Ct. App. Aug. 8, 2012); *Anstadt* v. *Board of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868 (Ga. Ct. App.), reconsideration denied (Apr. 7, 2010), cert. denied (Oct. 4, 2010); *Janowski* v. *Division of State Police*, 981 A.2d 1166 (Del. 2009).

be able to enforce their USERRA rights after *Seminole Tribe*. It accordingly makes no sense to conclude that Congress changed the law to provide that States can only be sued if they choose to be. Indeed, if this were Congress's intent, there would have been no reason to limit suits against States to state court because a State that waives its sovereign immunity can clearly be sued in federal court as well.

New Mexico acknowledges that, in its 1998 amendment of the statute, Congress was attempting to avoid the "*Seminole* problem" (Br. 15). If this is true, and it is, then Section 4323(b)(2) cannot be interpreted to give servicemembers a right they indisputably had before and after *Seminole Tribe* in both state and federal court – the right to sue a State that consents to the suit. The way that Congress was attempting to avoid the "*Seminole* problem" when it enacted Section 4323(b)(2) was to give servicemembers a right to sue in state court. As explained above, *Seminole Tribe* seemed, at the time, to indicate that War Powers, because they are in Article I, could not be used to subject States to private suit in *federal* court. *Seminole Tribe* did not, however, say anything about Congress's authority to subject States to suit in state court. So it made perfect sense for Congress to suppose they still had authority to subject States to private USERRA suits in state court, even if they did not have the same authority in federal court. Indeed, the one federal court of appeals to address Congress's War Powers authority to subject

States to suit stated – in an opinion that was vacated after Congress amended the statute – "since the Eleventh Amendment does not bar suits against states in state courts, * * * [the plaintiff] *could have brought his USERRA suit in an Indiana state court*." *Velasquez* v. *Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998), opinion vacated in part, 165 F.3d 593 (7th Cir. 1999) (emphasis added).

Indeed, even the Alabama Supreme Court, where this argument originated, did not seem to be actually convinced that Section 4323(b)(2) gives States carte blanche to choose whether to be subject to USERRA suits. It said only that Section 4323(b)(2) "arguably" includes deference to state laws dealing with waiver of immunity from suit, and "[t]o the extent that" this is true, the provision is constitutional. *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (Ala. 2001).

This Court should reject New Mexico's strained reading of the Section 4323(b)(2) that is so at odds with the reason for its enactment and which effectively renders it a nullity.

C. Acting Pursuant To Its War Powers, Congress Validly Subjected States To Private USERRA Suits

1. In *Katz*, the Supreme Court based its conclusion that the Bankruptcy Clause authorizes Congress to subject States to private suit on a historical analysis. It examined the intent of the Founding Fathers 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. *Katz*, 546 U.S. at 362-373. The Court concluded that States largely 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 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 (citation and footnote omitted).

2. A historical analysis of the origin of Congress's authority to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] * * * the land and naval Forces" leads to the same conclusion. The Founding Fathers plainly did not want the nation to be limited in its ability to wage war. For that reason, the Constitution delegates war powers to the national government exclusively and prohibits States from making war absent consent of Congress (except in very limited circumstances). In addition, the individual States never possessed war powers and therefore could not retain sovereignty in that area.

a. 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 qualitatively different. 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." The Federalist No. 23, at 149 (Clinton Rossiter ed., 1961). He also wrote: "[I]t must be admitted * * * that there can be no limitation of that authority[,] which is to provide for the defense 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 149-150. 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 federal councils. * * * It is in vain to oppose constitutional barriers to the impulse of self-preservation." The Federalist No. 41, at 252-253 (Clinton Rossiter ed., 1961).

The Constitution's framework evidences the Founders' intent to give the War Powers exclusively to the national government and to prevent interference by the States with those powers. The Constitution gives Congress the authority 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, C1. 11-14. The Constitution also explicitly 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.

This exclusive national authority regarding war supersedes state sovereignty, including a State's sovereign immunity to individual lawsuits. The clearest evidence of this is found in the Federalist Papers. In Federalist No. 81, Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and

> the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. * * * The 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.

The Federalist No. 81, at 486-487 (Clinton Rossiter ed., 1961). The Supreme Court has adopted Hamilton's view. In *Hans* v. *Louisiana*, 134 U.S. 1, 18-20 (1890), it cited this passage in full, and concluded that it was in accord with the views of James Madison and John Marshall. Indeed, this passage from Federalist No. 81 has become central to the Supreme Court's Eleventh Amendment jurisprudence, and the court has cited it dozens of times. See, *e.g.*, *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1657 (2011); *Alden*, 527 U.S. at 716-717. Thus, in view of the Founders, immunity to private suit is a fundamental aspect of States' sovereignty.

But, Hamilton also clearly stated that that immunity is not absolute, and he allowed that it may, in certain respects, have been surrendered "in the plan of the convention." The Federalist No. 81, at 486-487 (Clinton Rossiter ed., 1961). Hamilton did not explain in Federalist No. 81 what is necessary to effect such a surrender, but instead referred to a previous discussion of "[t]he circumstances which are necessary to produce an alienation of State sovereignty," which is found in Federalist No. 32. See *Katz*, 546 U.S. at 377 n.13; see also *Seminole Tribe*, 517

U.S. at 145-146 (Souter, J., dissenting). In Federalist No. 32, Hamilton discussed the three circumstances in which the Constitution gives exclusive authority to the national government and 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 194 (Clinton Rossiter ed., 1961). The War Powers plainly fall into the second category: In Article I, Section 8, the Constitution delegates the War Powers to Congress and in Article I, Section 10, it prohibits the States from "exercising the like authority." *Id.* at 194. And Federalist No. 81 tells us that this "alienation of State sovereignty" includes a "surrender" of immunity "to the suit of an individual." The Federalist No. 81, at 486-487 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under the design of the Constitution as understood by the Founders, States' sovereign immunity gives way in the face of the national government's exclusive authority in the War Powers area. Thus, as in the area of bankruptcy, "Congress' determination that

States should be amenable to such proceedings [that is, to private suit] is within the scope of its" War Powers. See *Katz*, 546 U.S. at 379.

In keeping with the Founders' intent and the Constitution's design, 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 the power to make war * * * inadequate to accomplish its full purpose." *Ibid.*[6]; see also *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) ("[T]he tests and limitations [of the

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[6] When the Supreme Court later revitalized the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 855 n.18 (1976), overruled on other grounds, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), it did not overrule *Case* v. *Bowles*. Indeed, it stated that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." *Ibid.*

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*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

This evidence of the unique importance and exclusivity of the War Powers compares favorably to the evidence the Supreme Court relied on in *Katz*. In *Katz*, the Court relied significantly on the Founders' recognition of the problem of overlapping jurisdiction in the area of bankruptcy and, consequently, of the need to establish uniform law in that area. 546 U.S. at 363-369. But the Founders' exclusivity concern was even more pronounced in the war powers area. It is important, as the Court in *Katz* pointed out, that persons not be held responsible in one State for a debt that has already been discharged in another. It is far more important to ensure that the States will not interfere with the national government's ability 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, C1. 11-14. The Court considered the founding generation's concern about the problem of overlapping jurisdiction in the area of bankruptcy evidence of a recognition, inherent in the plan of the Constitutional Convention, that state sovereign immunity must take a back seat to the need for uniformity. See *Katz*, 546 U.S. at 372-373. Similarly, the Founders' clear recognition of the need for uniformity and singular national authority in the area of war reveals their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims.

b. Additionally, unlike 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.

Id. at 316. Thus, the Court reasoned that:

> [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 Administrators*, 3 U.S. (3 Dall.) 54, 80 (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 revolution[ary] 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.

The 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* 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. 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. Indeed, 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 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). 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.

3. Accordingly, because of the unique nature of Congress's authority under the War Powers, Congress may – if it wishes – subject States to private suits under those powers without violating States' sovereign immunity. This means that Congress had the power to subject States to private USERRA suits in both federal and state court. As explained above, p. 6, *supra*, in *Alden* the Supreme Court ruled that States have constitutionally protected sovereign immunity in state court as well as in federal court. 527 U.S. at 751-754. *Alden* also made clear that a State's constitutional sovereign immunity is subject to the same limitations in state court as exist in federal court. *Id.* at 754-756. Specifically, just like in federal court, a State may be sued in state court if it consents to the suit or if Congress subjected States to suit and had the constitutional power to do so. Thus, because, as explained above, Congress's War Powers provide it a valid basis for subjecting

States to lawsuits by individuals, it follows that Congress may subject States to suit in either state or federal court or both. That means Section 4323(b)(2), which subjects States to private suits in state court to enforce USERRA, is a constitutional exercise of Congress's War Powers.

4. Most of the cases New Mexico cites did not address directly the War Powers argument made here. The few that did decided the issue incorrectly.

Before *Katz*, the Alabama Supreme Court addressed the War Powers argument. *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001). The court ruled that the United States Supreme Court's decision in *Alden* "forecloses, on constitutional grounds, resort to Article I as the basis for subjecting the State of Alabama to suit in a state court." *Id.* at 362-363. In *Janowski* v. *Division of State Police*, 981 A.2d 1166, 1170 (Del. 2009), the Supreme Court of Delaware adopted *Larkins*' "holding that that legislation could not abrogate state sovereign immunity, because Congress passed that law pursuant to its Article I, Section 8 war powers." The court did not cite or discuss *Katz*. As New Mexico points out (Br. 17), a Georgia appeals court cited *Seminole Tribe* for the proposition that "Congress cannot generally abrogate state sovereign immunity using powers authorized prior to the enactment of the Fourteenth Amendment, including war powers." *Anstadt* v. *Board of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 n.14 (Ga. Ct. App.), reconsideration denied (Apr. 7, 2010), cert.

denied (Oct. 4, 2010). But, in reality, *Seminole Tribe* said nothing at all about Congress's War Powers authority. In short, none of the state cases New Mexico cites address the argument we have made above.

The merits of the War Powers argument have been addressed only once since *Katz* was decided, in a magistrate judge's report and recommendation that was adopted by the District Court for the Northern District of Ohio without review because neither party objected to it. *Risner* v. *Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 956 (N.D. Ohio 2008). In *Risner*, the magistrate reasoned that the *Katz* exception to the general rule that Congress lacks authority to subject States to private suit when acting pursuant to its Article I powers "is a narrow one." *Id.* at 963. He then concluded that "[t]his case is an USERRA action and not a bankruptcy case, thus, this narrow exception does not apply." *Ibid.* It is certainly true that the *Katz* exception is narrow, but, as explained above, the reasons for applying it in the War Powers context are very strong – even stronger than the reasons for making an exception in the bankruptcy context. Moreover, in *Risner*, the Magistrate also noted that *Katz* relied on historical evidence, and stated that the plaintiff in that case had not identified comparable historical evidence to support a similar exception for War Powers legislation. The United States has identified such evidence.

The War Powers argument was also addressed by the Seventh Circuit in an opinion issued long before *Katz* that was later vacated in relevant part. *Velasquez* v. *Frapwell*, 160 F.3d 389 (7th Cir. 1998), opinion vacated in part, 165 F.3d 593 (7th Cir. 1999). That decision rejected the War Powers argument in part because "[i]t's a lot simpler to have a rule that the Eleventh Amendment applies to all federal statutes based on Article I than to have to pick and choose among the numerous separate powers conferred on Congress by that article." *Id.* at 394. After *Katz*, this is clearly not a justification for rejecting the War Powers argument set out above. Other bases for this pre-*Katz* vacated opinion are also unpersuasive, as is the reasoning of the unpublished pre-*Katz* district court opinion that New Mexico cites, which simply relied on *Seminole Tribe*'s statement that Congress cannot abrogate state sovereign immunity pursuant to an Article I power. See *Rotman* v. *Board of Trustees of Mich. State Univ.*, No. 1:96-cv-088, 1997 U.S. Dist. LEXIS 10754, at *6-7 (W.D. Mich. June 19, 1997).

This court accordingly must decide this important issue by applying *Katz* and sovereign immunity jurisprudence generally to determine whether Congress's War Powers supply constitutional authority to subject States to private suit. We urge this court to conclude that they do.[7]

[7] Because Congress validly subjected States to suit in state court when it enacted Section 4323(b)(2) and did not premise such suits upon state consent, New

(continued…)

CONCLUSION

This Court should hold that New Mexico is not immune to a private USERRA suit filed under 38 U.S.C. 4323(b)(2) in state court and, accordingly, should exercise jurisdiction over this case.

Respectfully submitted,

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(...continued)
Mexico is subject to suit whether it has consented to suit or not. The United States takes no position on the consent issue. Of course, if New Mexico has consented to suit, then the suit may be maintained even if the Court concludes that Congress did not validly subject States to private USERRA suit in state court.

CERTIFICATE OF COMPLIANCE

We certify that this BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE/CROSS-APPELLANT complies with Rule 12-305.

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Dated: January 10, 2013

CERTIFICATE OF SERVICE

We hereby certify that on January 10, 2013, upon filing by hand delivery an original and six copies of this BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE/CROSS-APPELLANT with this Court, we will serve it, in compliance with Rule 12-307, by first class mail on the following counsel of record:

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