No. 34,613

IN THE SUPREME COURT OF NEW MEXICO

PHILLIP G. RAMIREZ, Jr.,

Plaintiff-Petitioner

v.

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

Defendants-Respondents

NEW MEXICO ATTORNEY GENERAL'S OFFICE,

Intervenor

ON WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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

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STATEMENT REGARDING NOTICE

Pursuant to Rule 12-215(B) of the New Mexico Rules of Appellate Procedure, I hereby certify that all counsel in this case were notified on July 17, 2014, more than 14 days before the submission of this brief, of the United States' intent to file this brief as *amicus curiae* in support of the petitioner in this case.

QUESTION PRESENTED

Whether Congress has authority, pursuant to its War Powers, to abrogate States' sovereign immunity to suit in their own courts under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335.

INTEREST OF THE UNITED STATES

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

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. 4321-4334, 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. 13-14624 (11th Cir.) (appeal pending), and *McIntosh* v. *Partridge*, 540 F.3d 315 (5th Cir. 2008). The United States also advanced this argument in its brief as *amicus curiae* filed in the court of appeals in this case.

SUMMARY OF PROCEEDINGS

Petitioner has been a member of the New Mexico National Guard since the early 1990s. *Ramirez* v. *State ex rel. Children, Youth & Families Dep't*, 2014-NMCA-057, ¶ 2, 326 P.3d 474. In 1997, he began working as a community support officer for defendant-respondent New Mexico Children, Youth, and Families Department (CYFD). *Ibid.* For years petitioner performed his job with CYFD and met his military obligations. *Ibid.* In 2005, petitioner was deployed to Iraq, where he served admirably. *Id.* ¶¶ 2-3. When he returned from active duty, CYFD re-employed him in his previous position. *Id.* ¶ 3. But he had new supervisors and, he asserts, these supervisors harassed him. *Ibid.* They set unrealistic goals for him, initiated unnecessary disciplinary action against him, and leveled unfounded charges of insubordination against him. *Ibid.* Petitioner complained to his supervisors and to their superiors. *Ibid.* The situation did not improve, and CYFD placed him on administrative leave and eventually fired him. *Ibid.*

Petitioner sued in state court, alleging CYFD violated several state and federal laws, including USERRA. *Ramirez*, 2014-NMCA-057, ¶ 4. CYFD argued before the trial court that it was immune, based on constitutional sovereign immunity, to the USERRA claim. *Ibid.* The trial court rejected that argument, and the case proceeded to trial. *Ibid.* At trial, petitioner prevailed only on his USERRA claim, and was awarded damages. *Ibid.*

CYFD appealed, arguing that it is constitutionally immune to private USERRA claims, and thus that the trial court erred in allowing the USERRA claim to proceed to trial. The New Mexico Court of Appeals issued its opinion on March 3, 2014. The majority (Judge Fry, joined by Judge Garcia) ruled for CYFD, concluding that Congress lacks authority to subject States to suit under USERRA in state court. *Ramirez*, 2014-NMCA-057, ¶¶ 7-18. Judge Bustamante dissented. He would have ruled that the War Powers,[1] like the Bankruptcy Clause, provide an exception to the general rule that Congress may not subject States to private suit when legislating under Article I of the Constitution. *Id.* ¶¶ 29-35.

The majority opinion relied on a restrictive interpretation of *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006). It read that decision as focused

[1] 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. These powers are collectively referred to as the War Powers.

chiefly on the *in rem* nature of certain bankruptcy proceedings, and concluded that this fact "counsels against extending the Court's rationale in *Katz* to recognize congressional authority to override state sovereign immunity under other Article I powers, such as the War Powers Clause." *Ramirez*, 2014-NMCA-057, ¶ 14. The court also reasoned that accepting the argument "that an exclusive delegation of war powers to the national government is sufficient to recognize a waiver of state sovereign immunity by constitutional design" would mean a return to the jurisprudence rejected by *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). *Ramirez*, 2014-NMCA-057, ¶ 15. The court concluded further that there was no evidence of an understanding among the States that exclusive delegation of the War Powers to Congress meant subordination of their sovereignty. *Id.* ¶ 17. The court determined that New Mexico had not waived its immunity. The court found it unnecessary to decide whether USERRA clearly subjects States to private suit even when they do not consent to suit. *Id.* ¶ 12 n.3.

Judge Bustamante would have ruled that Congress has authority under the War Powers to subject States to suit. He pointed out that *Katz* relied not only on the *in rem* nature of bankruptcy proceedings, but also on the historic recognition of the need for national uniformity with regard to bankruptcy laws. *Ramirez*, 2014-NMCA-057, ¶ 30 (Bustamante, J., dissenting). He concluded that a comparison between the history and interests that justified exempting Bankruptcy Clause

legislation from the general *Seminole Tribe* rule, and the history and interests that would justify a War Powers exemption, reveals that "the War Powers Clause presents the more compelling case." *Ramirez*, 2014-NMCA-057, ¶ 33 (Bustamante, J., dissenting).

ARGUMENT

CONGRESS, IN ENACTING USERRA PURSUANT TO ITS WAR POWERS, HAD AUTHORITY TO ABROGATE THE STATES' SOVEREIGN IMMUNITY FROM SUITS FOR DAMAGES IN THEIR OWN COURTS

Congress has determined that providing state-employed servicemembers with a cause of action to enforce their USERRA rights is important to the country's "ability to provide for a strong national defense." H.R. Rep. No. 448, 105th Cong., 2d Sess. 5 (1998). This case presents the question whether Congress had the constitutional authority to provide such a cause of action. Under *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), this Court should rule that Congress did have that authority. The court of appeals' contrary conclusion was founded upon an unduly narrow reading of *Katz*, and on an understanding of sovereign immunity fundamentally at odds with *Katz*. The inquiry required by *Katz* is whether "in the plan of the Convention," *id.* at 377, the War Powers included congressional authority to override state sovereign immunity. The relevant historical evidence reveals that the War Powers did provide that authority. As the U.S. Supreme Court has explained, "[n]o interference with the execution of

th[e] power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing" the efficiency of the military. *In re Tarble*, 80 U.S. 397, 408 (1871). Accordingly, the court of appeals' decision should be reversed.

A. Legal Framework

This case requires the Court to consider the interaction between USERRA and the United States Supreme Court's Eleventh Amendment sovereign immunity jurisprudence. Since the relevant part of USERRA was enacted in response to developments in the Court's Eleventh Amendment jurisprudence, we discuss the development of that 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, 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 that consent to a particular type of suit can be sued by individuals either in state court or in federal court. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99. The second is when Congress validly abrogates state sovereign immunity. The

U.S. Supreme Court's understanding of Congress's constitutional authority to subject States to private suit has evolved over the past 20 years.

Briefly, there are four relevant stages in the evolution of the 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 U.S. Supreme Court concluded that Congress had 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 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 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 Court's decision in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006). In *Katz*, the 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 Court thus made clear that, despite statements in both *Seminole Tribe* and *Alden* that indicate that no Article I power may provide a valid basis for Congress to authorize private suits against States, that categorical prohibition is actually not the rule. See *id.* at 363 (expressly rejecting *Seminole Tribe*'s categorical rule).

2. USERRA was enacted during the first stage in the sovereign immunity jurisprudence timeline. As indicated, it generally prohibits employment discrimination against members of the armed forces, and ensures their reemployment after active duty. When 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 "the 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 subject state employers, along with other employers, to private suit.

But some question about Congress's authority to subject state employers to suit emerged after the U.S. Supreme Court's decision in *Seminole Tribe*. USERRA had been enacted pursuant to Congress's Article I War Powers,[2] and *Seminole Tribe* 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 such assertions of state sovereign immunity to USERRA claims in the wake of *Seminole Tribe* as a particular threat to national security. If

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[2] It is undisputed that USERRA was enacted pursuant to Congress's War Powers. Congress's stated purpose in enacting this statute was "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). That purpose is directly relevant to Congress's War Powers authority to provide and maintain military forces.

state employers could not be held accountable for employment discrimination against servicemembers, a significant group of USERRA's intended beneficiaries would be left unprotected. In 1998, Congress responded by amending USERRA. See H.R. Rep. No. 448, 105th Cong., 2d Sess. (1998). The House Report stated that the cases in federal court that dismissed USERRA claims on sovereign immunity grounds "threaten not only a long-standing policy protecting individuals' employment right[s], 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 inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." *Ibid.*

In the 1998 amendment, Congress sought to ensure USERRA's continued application to state employers, and thereby to eliminate this threat to national security. To accomplish this, Congress changed USERRA's enforcement and jurisdictional provision. The provision continued to provide for federal jurisdiction in suits against private employers. See 38 U.S.C. 4323(b)(3). But it also provided separately for two types of suits against state employers. In the first type of suit against a state employer, an aggrieved individual, following a proscribed administrative process, may request the Attorney General to file suit on the individual's behalf. See 38 U.S.C. 4323(a). The Attorney General has complete

discretion to decide whether to undertake the representation; if the Attorney General decides to take the case, the Attorney General can file suit "in the name of the United States" in federal court. See 38 U.S.C. 4323(a) & (b)(1). In the second type of suit against a state employer, an individual who has decided not to seek representation by the Attorney General or who has been refused representation by the Attorney General can file a private suit in state court. See 38 U.S.C. 4323(a)(3) & (b)(2); see also 20 C.F.R. 1002.305(b).

These were logical steps for Congress to take in order to shore up enforcement of USERRA against state employers. It had long been clear that the Constitution did not prevent the federal government from suing a State. Congress thus concluded (and courts have since agreed) that the Constitution does not prevent the United States from filing a USERRA suit against a State on an individual's behalf. See, *e.g.*, *United States* v. *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1328 (11th Cir. 2012). But Congress enacted the provision allowing individual suits against state employers in state court based on a legal theory that subsequent events have proved incorrect. Specifically, allowing individual suits against state employers in state court was thought to be an appropriate way to address the problem *Seminole Tribe* created; *i.e.*, because *Seminole Tribe* dealt only with the jurisdiction of federal courts, it was thought not to foreclose the possibility that an individual could sue a State in state court. *Alden*

subsequently changed the legal landscape, however, making clear that a State's constitutional sovereign immunity for suits in state court generally parallels its Eleventh Amendment-based immunity to suits in federal court.

Yet, despite this change, it is nonetheless true that Section 4323(b)(2) constitutionally subjects States to private suit – though not, as Congress might have initially expected, because Congress limited these suits to state court. As it turns out, confining jurisdiction to state court was unnecessary, because (for the reasons discussed below) Congress has authority under its War Powers to subject States to individual suits in both state and federal court. Indeed, even in 1998, pre-*Katz*, it was questionable whether *Seminole Tribe* would have been interpreted to prevent abrogation of state sovereign immunity under the 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. of the H. Comm. on Veterans' Affairs*, 104th Cong., 2d Sess. 19-20 (1996) (statement of Rep. Buyer) (arguing that *Seminole Tribe* would not apply to statutes enacted pursuant to Congress's War Powers); see also *id.* at 20 (Statement of Professor Jonathan Seigel) (concluding that "if any of Congress' Article I powers carry with them the ability to abrogate states' sovereign immunity, certainly, the military powers should be first on the list"); see also Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34

Seton Hall L. Rev. 999, 1032 (2004) (concluding, before *Katz*, that "war powers abrogation provides the best case for the [Supreme] Court to recognize a limited exception to its general disapproval of Article I abrogation"). Now, *Katz* has made clear that *Seminole Tribe* is not an absolute bar to Congress's subjecting States to suit when acting pursuant to an Article I power. And, as we explain below, under the logic of *Katz* the reasons for concluding that the War Powers give Congress authority to subject States to suit are even more compelling than the reasons for concluding that the Bankruptcy Clause gives Congress that authority.

B. Pursuant To Its War Powers, Congress Has Authority To Subject States To Private USERRA Suits In Their Own Courts

In light of this legal framework, the court of appeals majority erred in concluding that Congress lacked the authority to subject CYFD to this private USERRA suit in New Mexico state court. Rather, as the dissent correctly observed, "the War Powers Clause * * * provide[s] Congress a font of power sufficient to subject the states to suit under USERRA." *Ramirez*, 2014-NMCA-057, ¶ 29 (Bustamante, J., dissenting). In our view, the dissenting judge correctly concluded that "national defense stands on higher ground and provides a stronger

basis to disallow state interference with Congress' will than that found in *Katz*." *Id.* ¶ 33.[3]

1. Under Katz, *Courts Should Look To History To Determine Whether An Article I Power Gives Congress Authority To Subject States To Private Suit*

As explained above, *Katz* ruled that the Bankruptcy Clause – which, like the War Powers, is found in Article I of the Constitution – gave Congress the authority to subject States to private suit in certain types of bankruptcy actions. 546 U.S. at 359. In so ruling, the U.S. Supreme Court expressly stated that the "assumption" in both the majority and dissenting opinions in *Seminole Tribe* that Congress could not subject States to private suit when acting under an Article I power was "erroneous." *Id.* at 363. Correctly interpreted, *Katz* shows that whether a particular Article I power supplies authority to subject States to private suit depends on the answer to this question: Was the States' surrender of immunity in a specific area (here the area of war powers) the type of surrender that included "in the plan of the Convention" a surrender of any immunity to private suit in that

[3] The few cases that have addressed Congress's War Powers authority to subject States to suit are unhelpful. Federal courts of appeals have not addressed the issue. State appellate courts that have decided the issue either: preceded *Katz*, see, *e.g.*, *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001); failed to discuss *Katz* at all, see, *e.g.*, *Janowski* v. *Division of State Police*, 981 A.2d 1166, 1170 (Del. 2009); or rejected *Katz*'s applicability without meaningful analysis, see *Anstadt* v. *Board of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 871-872 (Ga. Ct. App.), cert. denied (Ga. 2010).

area? *Katz* concluded that Congress had authority to subject States to private suit when it legislated under the Bankruptcy Clause, because historical evidence revealed that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere." *Katz*, 546 U.S. at 377. It was this fact that led the U.S. Supreme Court to "[t]he ineluctable conclusion * * * that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Ibid.* (citation omitted).

a. The Court Of Appeals Incorrectly Limited The Application Of Katz *To The Subject Of Bankruptcy*

The court of appeals' failure to conduct the proper historical analysis was caused by its unduly restrictive interpretation of the U.S. Supreme Court's decision in *Katz*. To be sure, the Court explained in *Katz* that because bankruptcy jurisdiction is "principally *in rem* jurisdiction * * * its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected." 546 U.S. at 369-370. The court of appeals cited this passage, and from it concluded that "[t]hus, unlike other Article I powers, 'the Bankruptcy Clause . . . simply [does] not contravene the norms [the United States Supreme Court] has understood the Eleventh Amendment to exemplify.'" *Ramirez*, 2014-NMCA-057, ¶ 14 (quoting *Katz*, 546 U.S. at 375). This statement misconstrues *Katz*. What the

U.S. Supreme Court actually said was that "*history strongly supports the view* that the Bankruptcy Clause of Article I * * * simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify." 546 U.S. at 375 (emphasis added). The Court determined based on historical evidence that States agreed in the plan of the Convention not to assert any sovereign immunity defense in the area of bankruptcy. *Id.* at 376-378. Only after reaching this key determination did the Court observe the helpful fact that this particular resignation of sovereign immunity was a relatively narrow one, because of the chiefly *in rem* nature of bankruptcy jurisdiction. *Id.* at 378. But the Court was careful to note that "some exercises of bankruptcy courts' powers * * * unquestionably involved more than mere adjudication of rights in a res." *Ibid.* In sum, it is simply incorrect to interpret *Katz* as dependent only on the *in rem* nature of bankruptcy jurisdiction, and thus inapplicable outside the bankruptcy context.[4]

[4] This Court has had occasion to discuss *Katz* just once, and then only briefly. This Court described *Katz* as having held "that based on the Bankruptcy Clause's history, including discussion of it at the Constitutional Convention, along with the limited jurisdiction of the bankruptcy court, the state cannot assert a sovereign immunity defense." *Manning* v. *New Mexico Energy, Minerals & Natural Res. Dep't*, 2006-NMSC-027, ¶ 27 n.5, 140 N.M. 528, 534 n.5, 144 P.3d 87, 93 n.5, cert. denied, 549 U.S. 1051 (2006). Thus, while acknowledging *Katz*'s partial reliance on "the limited jurisdiction of the bankruptcy court," this Court accurately indicated that the historical understanding of the Bankruptcy Clause was the U.S. Supreme Court's primary consideration.

b. The Court of Appeals Incorrectly Relied On An Understanding Of Sovereign Immunity That Katz *Discredits*

The court of appeals also relied on an erroneous pre-*Katz* understanding of sovereign immunity that considered immunity to be a wholly "independent attribute of sovereignty rather than an incident of the war power or of any other governmental power that a state might or might not have." See *Velasquez* v. *Frapwell*, 160 F.3d 389 (7th Cir. 1998), opinion vacated in relevant part, 165 F.3d 593 (7th Cir. 1999); *Ramirez*, 2014-NMCA-057, ¶ 17. To the extent that the vacated *Velasquez* opinion posits that States *could not* give up immunity to suit in a particular area by ceding all authority in that area to the federal government, it is incorrect. *Katz* makes that plain. It requires a power-by-power analysis: Congress may abrogate or subordinate state sovereign immunity when legislating under some powers (like the Bankruptcy Clause) but not others (like the Commerce Clause). Thus, accepting our argument does not require a return to the "explicitly rejected * * * idea that a delegation of power, by itself, was sufficient to abrogate state sovereign immunity." See *Ramirez*, 2014-NMCA-057, ¶ 15. It instead requires application of the history-based inquiry into the original understanding of the particular power at issue – *i.e.*, the inquiry that the U.S. Supreme Court relied on in *Katz*.

2. The Historical Inquiry Katz *Requires Shows That Congress's War Powers Authority Includes The Authority To Subject States To Private Suits In Their Own Courts*

Several factors show that States' surrender of whatever immunity they had in the war powers area included a surrender of any immunity to private suit as well. First, the Founding Fathers were focused not only on the need to make the federal government's war powers exclusive, but also on preventing the war powers from being inhibited in any way. Second, the Federalist Papers set out a standard for determining the narrow class of constitutional powers that include authority to subject States to suit, and the War Powers plainly meet that standard. Third, the U.S. Supreme Court has consistently interpreted the War Powers broadly and – consistent with the intent of the Founders – has avoided interpreting any other constitutional provision in a way that would limit federal war powers authority. And fourth, States never possessed war powers in the first place, and therefore had no immunity to retain in the war powers area.

a. The Founding Fathers Were Adamant That Federal War Powers Authority Not Be Inhibited

As indicated, Congress's War Powers provide it with authority to declare war, raise and support an army and navy, and regulate the land and naval forces. U.S. Const. Art. I, § 8, C1. 11-14. History reveals that these powers were understood not just as giving the federal government exclusive authority in this area, but also as preventing any interference with that authority.

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

The Founders particularly focused on the danger of limiting the nation's ability to wage war. As Alexander Hamilton wrote in Federalist No. 23, "[t]he circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." The Federalist No. 23, at 149 (Clinton Rossiter ed., 1961).[5] 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

[5] All references to the Federalist Papers are to the 1961 Clinton Rossiter edition.

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.

Madison and Hamilton were also strong supporters of state sovereign immunity. But it would be a mistake to conclude that they (and other Framers of the Constitution) intended to allow state sovereignty to interfere with Congress's execution of its War Powers. To allow such interference would certainly be to place "constitutional shackles" on and to "oppose [a] constitutional barrier[]" to Congress's exercise of its War Powers, and so to limit Congress's War Powers authority. See The Federalist No. 23, at 149 (Hamilton), and The Federalist No. 41, at 252-253 (Madison). More specifically, to conclude that despite Congressional authorization under the War Powers, state-employed servicemembers cannot bring their own USERRA claims would be to allow state sovereign immunity to limit Congress's War Powers authority. Indeed, Congress made that point clear when it amended USERRA in the wake of *Seminole Tribe*: It concluded that judicial opinions allowing States to assert sovereign immunity to

private USERRA claims "raise serious questions about the United States[']ability to provide for a strong national defense." H.R. Rep. No. 448, 105th Cong., 2d Sess. 5 (1998). The Framers' manifest intent that War Powers not be limited, and particularly not by a constitutional barrier, is compelling evidence that the War Powers were "understood to carry with [them] the power to subordinate state sovereignty." See *Katz*, 546 U.S. at 377.[6]

Moreover, the Framers' concern for federal exclusivity in the war powers area, and with preventing any interference with the war powers, was far greater than the bankruptcy-related exclusivity concern at issue in *Katz*. *Katz* 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. It was undoubtedly important, as the Court in *Katz* explained, to ensure that persons not be held responsible in one State for a debt that had already been discharged in another. But it was also essential – as Hamilton's and Madison's statements show – to ensure that the States not interfere with the national government's ability to conduct war and to

[6] To be sure, the Constitution does include some constraints on Congress's War Powers, such as the stipulation that "no Appropriation of Money to [raise and support Armies] shall be for a longer Term than two Years." See U.S. Const. Art. I, § 8, Cl. 12. But the Framers' decision to expressly set out some limitations on Congress's War Powers authority indicates that they did not intend that authority to be otherwise constrained.

provide and maintain military forces. The Court considered the founding generation's concern about the problem of overlapping jurisdiction in the area of bankruptcy to be evidence of a recognition, inherent in the plan of the Constitutional Convention, that state sovereign immunity must be subordinated to the need for uniformity. See *Katz*, 546 U.S. at 372-373. Similarly, the Founders' clear recognition of the need to avoid any encumbrance on national authority in the area of war shows their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims.

b. War Powers Meet The Federalist Papers Test

The second reason War Powers include the power to subordinate state sovereignty is that the Federalist Papers set out a test for when state sovereignty is subordinated in the "plan of the Convention," and the War Powers clearly meet that test. The test is found in Federalist No. 81 and Federalist No. 32. In Federalist No. 81, Alexander Hamilton wrote a frequently quoted defense of state sovereign immunity. He explained that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without [the sovereign's] consent*," and that this attribute of sovereignty "is now enjoyed by the government of every State in the Union." The Federalist No. 81, at 486-487. He concluded that "unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States." *Id.* at 487. The U.S. Supreme Court has frequently cited

this passage to show that immunity to private suit is a fundamental aspect of States' sovereignty. See, *e.g.*, *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1657 (2011); *Alden*, 527 U.S. at 716-717.

Although Federalist No. 81 certainly establishes that Hamilton saw immunity to individual suit as a fundamental aspect of the sovereignty retained by the States, it just as clearly shows that that immunity is not absolute. Specifically, Hamilton allowed that state sovereign immunity may, in certain respects, have been surrendered "in the plan of the convention." The Federalist No. 81, at 487. Hamilton did not explain in Federalist No. 81 what is necessary to effect such a surrender, but instead referred to prior explanation of that point: "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." *Ibid.* This prior discussion is found in Federalist No. 32.

In Federalist No. 32, Hamilton discussed the three circumstances in which the Constitution's grant of authority to the national government effects a corresponding "alienation of State sovereignty":

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

> like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

The Federalist No. 32, at 194. This passage, read in conjunction with Federalist No. 81, establishes that where the Constitution effects such an "alienation of State sovereignty," that alienation includes a "surrender" of immunity "to the suit of an individual." The Federalist No. 32, at 194, No. 81, at 486-487 (Alexander Hamilton); see also *In re Hood*, 319 F.3d 755, 766 (6th Cir. 2003), aff'd and remanded *sub nom. Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004) ("Hamilton's cross-reference to this discussion [*i.e.*, the discussion from Federalist No. 32 quoted above] in No. 81's discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in No. 32 implies ceding sovereign immunity as discussed in No. 81.").

The War Powers easily fit within the second of Federalist No. 32's "three cases." As indicated, 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. Thus, the War Powers effect an "alienation of State sovereignty" that includes a surrender of state sovereign immunity "in the plan of the convention."

Application of this test is fully consistent with *Katz*. *Katz* did not find it necessary to rely on this test to determine whether Congress could subordinate state sovereign immunity under the Bankruptcy Clause. But *Katz* did describe Federalist Nos. 32 and 81 as together setting out instances "where the Framers contemplated a 'surrender of [States'] immunity in the plan of the convention.'" 546 U.S. at 377 n.13 (quoting Federalist No. 81). It thus adopted the understanding of the Federalist test set out above. Moreover, the Federalist test fits with *Katz*'s power-by-power framework for determining Congressional authority to subject States to private suit. Some Article I powers, such as the taxing power and the commerce power, plainly fail the test. And indeed, Hamilton's statement that the alienation of sovereignty he described "would *only* exist in three cases" indicates that he saw this test as quite a high bar. See The Federalist No. 32, at 194 (emphasis added).

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

The U.S. Supreme Court's interpretations of the War Powers make two points clear: first, Congress's War Powers authority is uniquely exclusive and

unfettered; and second, other constitutional provisions should not be construed in a way that interferes with that authority.

The Court has particularly deferred to federal prerogatives in the war powers area, and has consistently rejected any attempts to interfere with or diminish federal authority in that area. A good example of this is *In re Tarble*, 80 U.S. 397 (1871). That case did not involve state immunity to suit, but did involve a State's attempt to interfere in the war powers area. In the *Tarble* case, the U.S. Supreme Court rejected Wisconsin's attempt to retrieve – through a writ of habeas corpus – an individual who had enlisted in the Army, but then had deserted and so was being held in military custody. *Id.* at 398. It was alleged that the individual was a minor who enlisted without parental consent and that his enlistment was consequently illegal. *Ibid.* Rejecting Wisconsin's authority to issue the writ, the U.S. Supreme Court described federal war powers as "plenary and exclusive." *Id.* at 408. The Court explained that "[n]o interference with the execution of th[e] power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing" the efficiency of the military. *Ibid.;* cf. Charles L. Black, *Structure and Relationship in Constitutional Law* 8-13 (1969) (concluding that it would be contrary to the basic structure of the Constitution to

permit States to impose disadvantages upon individuals solely on the basis of membership in the military).

The U.S. Supreme Court's particular regard for federal war powers authority continues to the present day. It has repeatedly said that courts should "give Congress the highest deference in ordering military affairs." *Loving* v. *United States*, 517 U.S. 748, 768 (1996); accord *Boumediene* v. *Bush*, 553 U.S. 723, 832 (2008); *Weiss* v. *United States*, 510 U.S. 163, 177 (1994); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65, 70 (1981). See also *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

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

In fact, the development of Tenth Amendment jurisprudence in some respects parallels the development of state sovereign immunity jurisprudence. The U.S. Supreme Court 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). But the Court did not overrule *Case* v. *Bowles*, *supra*, and instead stated that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." *National League of Cities*, 426 U.S. at 855 n.18. Courts have since ruled that legislation enacted under the War Powers is exempt from the typical Tenth Amendment analysis. See, *e.g.*, *United States* v. *Onslow Cnty. Bd. of Educ.*, 728 F.2d 628, 640 (4th Cir. 1984) ("Even if a Tenth Amendment violation would exist had the Relief Act been enacted under Congress' commerce power, we believe that the doctrine of *National League of Cities* has no applicability where Congress has acted under the War Powers."). The

constitutional principle of state sovereign immunity similarly should not be interpreted to constrain federal war powers authority.

d. States Never Possessed War Powers

Finally, 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 powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.

Id. at 318. The Court made similar statements in *Penhallow* v. *Doane's 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 that the supreme authority of exercising "the rights and powers of war and peace" was "lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it." *Id.* at 80-81.

The U.S. Supreme Court made clear in *Seminole Tribe* that the Eleventh Amendment is intended to embody "the background principle of state sovereign immunity." 517 U.S. at 72. As the opinions in *Curtiss-Wright* and *Penhallow* make clear, that background principle did not apply to war powers. 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 sovereign immunity in the area of war powers 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) (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.

All four of these factors show that Congress's particularly expansive authority under the War Powers (unlike its authority under other Article I powers such as the Commerce Clause) includes authority to override state sovereign immunity. Thus, Congress may – if it wishes – subject States to private suits when acting under its War Powers. The court of appeals accordingly erred in concluding that Congress lacked the power to subject States to private USERRA suits in state court.

C. In Enacting USERRA, Congress Plainly Intended To Subject States To Suits By Private Individuals In State Court

Because the court of appeals held that Congress lacked authority to subject States to private USERRA suits in their own courts, it did not decide the question whether Congress intended to do so. See *Ramirez*, 2014-NMCA-057, ¶ 12 n.3.

There is little doubt, however, that Congress explicitly intended to authorize such actions. Section 4323(b)(2) of USERRA expressly 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." It is difficult to imagine a clearer statement of Congressional intent to authorize private USERRA suits against state employers in state courts.

Seizing on the words "in accordance with the laws of the State," CYFD has argued that Congress only intended to grant servicemembers a right to sue state employers that consent to suit – *i.e.*, a right they would clearly have anyway. This argument is meritless.

First, the text of Section 4323(b)(2) does not support it. The most natural reading of the Section 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).

CYFD's brief in opposition to certiorari misleadingly cited *Townsend* v. *University of Alaska*, 543 F.3d 478, 484 (9th Cir. 2008), cert. denied, 566 U.S. 1166 (2009), in support of its argument that the statute's use of the word "may" in Section 4323(b)(2), contrasted to its use of "shall" in the other jurisdictional provisions, means Congress did not intend to subject nonconsenting states to suit in state court. CYFD Br. in Op. 3. But *Townsend* merely concluded that Section 4323(b)(2)'s statement that an "action may be brought in a State court" did not

imply that an action also "may" be brought in federal court. 543 F.3d at 484. Indeed, *Townsend* said expressly that Congress "inten[ded] to limit USERRA suits against states to state courts." *Id.* at 485 (citation omitted).

Moreover, CYFD'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 purpose of the amendment was to ensure that state-employed servicemembers would continue to 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. And 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 be sued in federal court as well. In short, Section 4323(b)(2) cannot reasonably be interpreted merely to give servicemembers the right to sue consenting States – a right they indisputably had before and after *Seminole Tribe* in both state and federal court.

For these reasons, this Court should hold that 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.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

We certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER complies with Rule 12-305 of the New Mexico Rules of Appellate Procedure.

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Dated: August 6, 2014

CERTIFICATE OF SERVICE

We hereby certify that on August 6, 2014, upon filing an original and seven copies of this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER with this Court, we will serve it, in compliance with Rule 12-307 of the New Mexico Rules of Appellate Procedure, by first class mail on the following counsel of record:

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