No. _____

In The
Supreme Court of the United States

JONATHAN R. CLARK,

Petitioner,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER BY ENACTING 38 U.S.C.S. § 4323(b)(2) (LAWYERS EDITION 2008) IN 1998 CONGRESS LAWFULLY SUBJECTED STATE EMPLOYEES TO SUIT IN STATE COURT UNDER USERRA PURSUANT TO A VALID EXERCISE OF THE FEDERAL LEGISLATURE'S WAR POWERS THAT WAS CONSISTENT WITH THE FRAMEWORK AND DESIGN OF THE CONSTITUTION?

II. WHETHER CONGRESS LAWFULLY ABROGATED ANY SOVEREIGN IMMUNITY THE VIRGINIA DEPARTMENT OF STATE POLICE PURPORTEDLY RETAINED WITH RESPECT TO USERRA ACTIONS IN STATE COURT WHEN THE FEDERAL LEGISLATURE ENACTED 38 U.S.C.S. § 4323(b)(2) (LAWYERS EDITION 2008) IN 1998?

III. WHETHER THE SUPREME COURT OF VIRGINIA ERRONEOUSLY AFFIRMED THE CIRCUIT COURT'S DECISION TO SUSTAIN THE VIRGINIA DEPARTMENT OF STATE POLICE'S AMENDED SPECIAL PLEA OF SOVEREIGN IMMUNITY AND DISMISS PETITIONER'S COMPLAINT?

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Filed with this Petition is the Opinion published by the Supreme Court of Virginia on December 1, 2016 ("Opinion") (Pet. App., 1a-16a).[1] The Opinion is reported as Clark v. Virginia Department of State Police, 793 S.E.2d 1 (Va. 2016).

JURISDICTIONAL STATEMENT

The Circuit Court of Chesterfield County had subject matter jurisdiction pursuant to 38 U.S.C.S. § 4323(b) (1998) (Lawyers Edition 2008) and VA. CODE ANN. §§ 8.01-184 to 194 (LEXIS Repl. Volume 2015) and 17.1-513 (LEXIS Repl. Volume 2015) over the civil action Petitioner Jonathan R. Clark ("Clark") filed against the Virginia Department of State Police ("VSP"). The circuit court entered a final judgment dismissing Petitioner's Complaint on September 9, 2015. Clark v. Virginia Department of State Police, No. CL15-1202, 2016 Va. LEXIS 179 (Chesterfield County, Sept. 9, 2015). On December 4, 2015, Petitioner filed a petition for leave to appeal to the Supreme Court of Virginia, which was granted on April 7, 2016.

The Supreme Court of Virginia had subject matter jurisdiction under 38 U.S.C.S. § 4323(b) (Lawyers Edition 2008) and VA. CODE ANN. § 17.1-310 (LEXIS Repl. Volume 2015). On December 1, 2016, the Supreme Court of Virginia in its Opinion

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[1] All references to the Appendix attached to this Petition are designated as "Pet. App." plus the relevant page numbers. All references to the Joint Appendix filed in the Supreme Court of Virginia are designated "Va. Sup. Ct. App." plus the relevant page numbers.

affirmed the circuit court's dismissal of Petitioner's Complaint. (Pet. App., 1a-16a.) Clark v. Virginia Dep't of State Police, 793 S.E.2d 1, 7 (Va. 2016). The court issued its mandate enforcing the Opinion on December 21, 2016. (Pet. App. 17a.)

The United States Supreme Court has jurisdiction to hear and adjudicate this Petition for Writ of Certiorari pursuant to 28 U.S.C.S. § 1257(a) (Lawyers Edition 2001). Virginia's highest court in the Opinion declared unenforceable and invalid a statute of the United States (38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008)) on the ground that this Act of Congress purportedly is repugnant to the United States Constitution. Clark seeks United States Supreme Court review of the Opinion pursuant to Rule 10(c) of the United States Supreme Court and other applicable law.

Because the constitutionality of 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008) is drawn into question by this proceeding, as it was in the court below, 28 U.S.C.S. § 2403(a) (Lawyers Edition 2013) may apply. Accordingly, this Petition has been served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, in accordance with Rules 14.1(e)(v) and 29(4)(b) of the Rules of the Supreme Court of the United States.[2]

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[2] While neither the United States nor any federal department, office, agency, officer or employee is a party to this Petition to the United States Supreme Court, the United States participated actively in the proceedings before the Supreme Court of Virginia. The Department of Justice sought and

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

CONSTITUTION:

U.S. Const. Amend. XI

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. Article I, Section 8, Clauses 11-16

> Clause 11
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> Clause 12
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> Clause 13
>
> To provide and maintain a Navy;

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received leave to file a Brief for the United States as Amicus Curiae in Support of Appellant. Both the undersigned Petitioner's counsel and the Department of Justice argued orally in support of Clark before the Supreme Court of Virginia.

Clause 14

To make Rules for the Government and Regulation of the land and naval Forces;

Clause 15

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Clause 16

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

STATUTES:

38 U.S.C.S. § 4323 (Lawyers Edition 2008 and Cum. Supp. 2016)

(a) Action for Relief. (1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title [38 USCS § 4322(e)] of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private

> employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [38 USCS §§ 4301 et seq.] for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.
>
> (2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall—
>
> > (A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision.

(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title [38 USCS § 4322(a)];

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction. (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.

(c) Venue. (1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies. (1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.].

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [38 USCS §§ 4301 et seq.] was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter [38 USCS §§ 4301 et seq.].

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall

be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity Powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter [38 USCS §§ 4301 et seq.].

(f) Standing. An action under this chapter [38 USCS §§ 4301 et seq.] may be initiated only by a person claiming rights or benefits under this chapter [38 USCS §§ 4301 et seq.] under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent. In any action under this chapter [38 USCS §§ 4301 et seq.], only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, court costs. (1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter [38 USCS §§ 4301 et seq.].

(2) In any action or proceeding to enforce a provision of this chapter [38 USCS §§ 4301 et seq.] by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Definition. In this section, the term "private employer" includes a political subdivision of a State.

38 U.S.C.S. §§ 4301(a)(1) (Lawyers Edition 2008)

(a) The purposes of this chapter [38 USCS §§ 4301 et seq.] are —

(1) 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;

STATEMENT OF THE CASE

Clark petitions for certiorari review by the United States Supreme Court of the Supreme Court of Virginia's Opinion affirming the Circuit Court of Chesterfield County's dismissal of his Complaint against VSP on sovereign immunity grounds.

Proceedings in the Circuit Court of Chesterfield County, Virginia

On January 20, 2015, Clark filed a Complaint in the Circuit Court of Henry County, Virginia, alleging that his employer, VSP, violated the Uniform Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3165, as amended and codified in 38 U.S.C.S. §§ 4301 et seq. (Lawyers Edition 2008 and Cum. Supp. 2016) ("USERRA"). (Va. Sup. Ct. App., 1-20.) VSP responded by filing a Special Plea of Sovereign Immunity, which it subsequently amended, arguing that Clark's USERRA claims were barred by the Eleventh Amendment to the United States Constitution. VSP also moved to transfer venue. (Va. Sup. Ct. App., 21-22.) The Circuit Court of Henry County transferred the action to the Circuit Court of Chesterfield County in Chesterfield County, Virginia. (Va. Sup. Ct. App., 28-29.) Clark opposed VSP's amended plea on the basis that Congress subjected state employers to suit under USERRA

pursuant to a valid exercise of the federal legislature's war powers. (Va. Sup. Ct. App., 30.)

The circuit court sustained VSP's Amended Special Plea of Sovereign Immunity and entered a final order dismissing the action without written opinion on September 9, 2015. Clark v. Virginia Department of State Police, No. CL15-1202, 2016 Va. LEXIS 179 (Chesterfield County, Sept. 9, 2015). (Pet. App., 18a-19a.)

Proceedings in the Supreme Court of Virginia

On December 4, 2015, Clark filed a petition for leave to appeal to the Supreme Court of Virginia. On April 7, 2016, the Supreme Court of Virginia awarded Clark an appeal with respect to the two assignments of error recited below.

I. BECAUSE BY ENACTING 38 U.S.C. § 4323(b)(2) IN 1998 CONGRESS CLEARLY INTENDED TO SUBJECT STATE EMPLOYEES TO SUIT IN STATE COURT UNDER USERRA PURSUANT TO A VALID EXERCISE OF THE FEDERAL LEGISLATURE'S WAR POWERS, THE TRIAL COURT ERRED WHEN IT SUSTAINED VSP'S AMENDED SPECIAL PLEA OF SOVEREIGN IMMUNITY AND DISMISSED CLARK'S COMPLAINT.

II. THE TRIAL COURT ERRED WHEN IT SUSTAINED VSP'S AMENDED SPECIAL PLEA OF SOVEREIGN IMMUNITY AND DISMISSED CLARK'S COMPLAINT BECAUSE CONGRESS LAWFULLY ABROGATED ANY SOVEREIGN IMMUNITY VSP PURPORTEDLY RETAINED WITH RESPECT TO USERRA ACTIONS IN STATE COURT WHEN THE FEDERAL LEGISLATURE ENACTED 38 U.S.C. § 4323(b)(2) IN 1998, REGARDLESS OF WHETHER THE COMMONWEALTH OF VIRGINIA HAS CONSENTED TO SUCH SUITS.

Following oral argument, on December 1, 2016, the Supreme Court of Virginia published its Opinion affirming the Circuit Court of Chesterfield County's decision to sustain VSP's Amended Special Plea of Sovereign Immunity and dismiss Clark's Complaint. (Pet. App., 1a-16a.) Like the circuit court, the Supreme Court of Virginia agreed with VSP that despite Congress' amendment of 38 U.S.C.S. § 4323(b) (Lawyers Edition 2008) in 1998 to provide state employees a right of action under USERRA in state court against their state-agency employers, nonconsenting state agencies remain immune to suits for in personam damages. (Pet. App., 1a-16a.); Clark, 793 S.E.2d at 7.

STATEMENT OF MATERIAL FACTS[3]

Clark is a sergeant in the VSP and a captain in the United States Army Reserve. (Va. Sup. Ct. App., 2.) Between April 2008 and January 2011 Clark was deployed or mobilized in support of the military's "Operation Enduring Freedom." (Va. Sup. Ct. App., 4.)

Upon his return to VSP, Clark's superiors engaged in a pattern and practice of harassment, retaliation and discrimination because of his service in connection with Operation Enduring Freedom. Clark had to defend himself against baseless charges of misconduct which teemed with retaliatory and discriminatory animus. (Va. Sup. Ct. App., 4-5.)

On August 19, 2011, Clark complained in a formal administrative grievance that VSP had violated his USERRA rights. (Va. Sup. Ct. App., 5.) On January 31, 2012, a hearing officer appointed by the Commonwealth of Virginia agreed with Clark and compelled VSP to remove the groundless disciplinary charges from Clark's personnel file. (Va. Sup. Ct. App., 5.)

In the aftermath of the state hearing officer's finding that VSP had violated USERRA, the state agency's retaliatory and discriminatory treatment of Clark continued apace. Between August 2013 and

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[3] This Statement of Material Facts is based on the factual allegations contained in Clark's Complaint. Under Virginia civil procedure principles, facts pled by Clark in his Complaint were deemed true below for purposes of adjudicating VSP's Amended Special Plea of Sovereign Immunity. See Keener v. Keener, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009).

November 2014, Clark applied for three vacant First Sergeant positions. Despite his superior qualifications for each of these First Sergeant posts, VSP selected other candidates, none of whom had engaged in protected activity under USERRA. (Va. Sup. Ct. App. 6.) VSP repeatedly refused to promote Clark to First Sergeant because of his military commitments and exercise of statutory rights under USERRA. (Va. Sup. Ct. App. 6.)

ARGUMENT

BECAUSE CONGRESS LAWFULLY SUBJECTED STATE EMPLOYERS TO SUIT IN STATE COURT UNDER USERRA PURSUANT TO A VALID EXERCISE OF THE FEDERAL LEGISLATURE'S WAR POWERS, THE SUPREME COURT OF VIRGINIA ERRED AS A MATTER OF LAW BY AFFIRMING THE CIRCUIT COURT'S DECISION TO SUSTAIN VSP'S AMENDED SPECIAL PLEA OF SOVEREIGN IMMUNITY AND DISMISS CLARK'S COMPLAINT.

USERRA is about national defense. USERRA prohibits employment discrimination and retaliation against civilians who are members of the armed forces and affords them a right to reemployment upon their return to the workplace from military service. 38 U.S.C.S. § 4311 (Lawyers Edition 2008). Congress' objective in enacting these USERRA safeguards was to encourage civilians to join and remain in the nation's armed services, including reserves and guard forces. 38 U.S.C.S. § 4301(a) (Lawyers Edition 2008).

The instant appeal turns on the constitutionality of a 1998 amendment to the enforcement section of USERRA, 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008). See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3329. The pellucid purpose of this 1998 amendment was to ensure service members employed by state employers could enforce their USERRA rights in state court. Congress determined that affording state employees who double as military service members a right of action under USERRA was essential to the United States' "ability to provide for a strong national defense." H.R. Report No. 448, 105 Cong., 2d Sess. 5 (1998).

As amended in 1998, USERRA vests federal courts with jurisdiction over enforcement actions against private sector and federal agency employers. 38 U.S.C.S. § 4323(b)(3) (Lawyers Edition 2008). State employees, in contrast, have no right under USERRA to sue their employers in federal court. Instead, a state employee has two, alternative avenues of enforcement. First, a state employee may petition the Attorney General of the United States to file a complaint in federal court on the employee's behalf. 38 U.S.C.S. § 4323(a) (Lawyers Edition Cum. Supp. 2016). Whether to sue on behalf of a state employee is a decision entrusted to the Attorney General's unreviewable discretion. 38 U.S.C.S. § 4323(a) and (b)(1) (Lawyers Edition 2008 and Cum. Supp. 2016). Second, a state employee who is not represented by the Attorney General may sue his agency employer in state court with the assistance of privately retained counsel. 38 U.S.C.S. § 4323(a)(3) and (b)(2) (Lawyers Edition 2008 and Cum. Supp. 2016). Clark followed this second statutory course.

The Virginia courts below held that a United States Supreme Court decision published the year after Congress' 1998 amendment of 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008) forecloses Clark's right to bring a USERRA enforcement action against VSP. Relying heavily upon the sovereign immunity analysis in Alden v. Maine, 527 U.S. 706 (1999), the Supreme Court of Virginia upheld the circuit court's conclusion that Congress's 1998 amendment to USERRA was an unconstitutional attempt to subject nonconsenting states such as Virginia to suit for money damages. Clark, 793 S.E.2d at 6-7 ("In sum, the trial court correctly held that sovereign immunity barred Clark's USERRA claim against the VSP, an arm of the Commonwealth, because 'the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting State to private suits for damages in state courts'") (quoting Alden, 527 U.S. at 712).

Contrary to the Supreme Court of Virginia's misguided reasoning, Congress acted well within the scope of its authority under the Constitution when it subjected state-agency employers to USERRA enforcement actions in their own courts. The Supreme Court of Virginia failed to appreciate fundamental distinctions between the federal statutory scheme considered in Alden, 527 U.S. at 712, and USERRA. The statute at issue in Alden was the Fair Labor Standards Act, 29 U.S.C.S. §§ 201 et seq. (Lawyers Edition 2013) ("FLSA"), which Congress created pursuant to the Commerce Clause of Article I of the Constitution. See U.S. Const. art. I, § 8, cl. 3. The Court in Alden held that ". . . the powers delegated to Congress under Article

I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court." Alden, 527 U.S. at 712.

Citing this sweeping language by the Alden Court, which tracked equally broad dicta in Seminole Tribe v. Florida, 517 U.S. 44 (1996), the Supreme Court of Virginia held that federal statutory schemes which Congress establishes pursuant to Article I of the Constitution may not subject nonconsenting states to suit by private citizens for damages in federal court.[4] Clark, 793 S.E.2d at 6-7. Congress enacted USERRA pursuant to the War Powers Clauses of Article I, the Supreme Court of Virginia observed correctly. Clark, 793 S.E.2d at 5 and note 5. See U.S. Const. art. I, § 8, cl. 11-16. USERRA is not a Commerce Clause statute. But the Supreme Court described this fundamental difference in origin between the FLSA and USERRA as a "distinction without a difference." Clark, 793 S.E.2d at 5. Because USERRA, like the FLSA, emanates from Congress' Article I authority, VSP is immune from the instant civil action, the Supreme Court of Virginia held. The 1998 USERRA amendment codified in 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008) was an unconstitutional bid to abrogate nonconsenting states' sovereign

[4] In Seminole Tribe, 517 U.S. at 44, the Supreme Court ruled that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, does not afford Congress the power to abrogate state sovereign immunity from private suits in federal court. See Seminole Tribe, 517 U.S. at 47. In Alden, 527 U.S. at 706, the Supreme Court extended Seminole Tribe to restrict Congress's power with respect to private suits arising under the Commerce Clause against state agencies in state courts.

immunity, the court below wrongly concluded. Clark, 793 S.E.2d at 6.

In striking down this USERRA private enforcement provision, 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008), the Supreme Court of Virginia misapplied the United States Supreme Court's recent sovereign immunity jurisprudence, particularly Central Virginia Community College v. Katz, 546 U.S. 356 (2006).[5] Significantly, Katz was decided after Seminole Tribe and Alden. In Katz, the United States Supreme Court distinguished Alden and Seminole Tribe, both of which analyzed statutes enacted under the Commerce Clause of Article I. The Katz Court was called upon to address the Bankruptcy Clause. See U.S. Const. art. I, § 8, cl. 4. Like the Commerce Clause analyzed in Alden and Seminole Tribe and the War Powers Clauses at issue here, the Bankruptcy Clause is enshrined in Article I. The Katz Court held that the Bankruptcy Clause of Article I authorizes Congress to subject states to private suit in bankruptcy-related actions. Katz, 546 U.S. at 359.

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[5] The United States Supreme Court in recent years has held Congress validly abrogated state sovereign immunity in the context of several employment statutes. Tennessee v. Lane, 541 U.S. 509 (2004) (holding Congress validly abrogated state sovereign immunity under Title II of the Americans with Disabilities Act); Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 721 (2003) (holding individuals can sue state employers for damages under the Family and Medical Leave Act). Courts have also upheld abrogation of state sovereign immunity under the Equal Pay Act of 1963. See e.g., Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000).

The Supreme Court of Virginia accepted VSP's argument that Katz represents a narrow exception "to the general rule of sovereign immunity" enunciated in Seminole Tribe and repeated in Alden. Clark, 793 S.E.2d at 5. In affirming the circuit court's dismissal of Clark's complaint, the Supreme Court of Virginia strictly circumscribed the reach of Katz to the confines of bankruptcy court jurisdiction. Clark, 793 S.E.2d at 6-7.

The Supreme Court of Virginia's sovereign immunity analysis rests on a misapprehension of this Court's holding in Katz and the scope of its precedential reach. The Katz Court's historical approach to state sovereign immunity extends beyond statutory causes of action rooted in the Bankruptcy Clause of Article I.

The broad holding in Katz was the distillation of a comprehensive historical analysis. The focus of this historical approach is the particular constitutional power Congress exercised in creating the right of action under review. Katz, 546 U.S. at 363. After Katz, whether any state may be sued by private citizens in its own courts requires an evaluation of the historical role the states as a whole played in the context of the particular congressional power underlying the cause of action in question.

Congress enacted USERRA pursuant to the War Powers Clauses, under which it is vested with authority to raise and support armies in furtherance of national defense. The constitutional principles articulated by the United States Supreme Court in Katz demonstrate that Congress acted well within the ambit of its historical authority when it

subjected VSP to suit for the state agency's USERRA violations.

Katz commands this conclusion. The question presented in Katz was whether an agency of the Commonwealth of Virginia as a creditor was shielded by sovereign immunity in a bankruptcy proceeding. Relying upon dicta in Seminole Tribe, 517 U.S. at 44, and Alden, 527 U.S. at 706, the Commonwealth of Virginia argued that because the Bankruptcy Clause forms part of Article I, Congress could not validly abrogate states' sovereign immunity. The Katz Court, however, was not persuaded by Virginia's reliance upon dicta from Seminole Tribe and Alden. Katz, 546 U.S. at 363.

Rejecting the Virginia agency's sovereign immunity defense, the Katz Court determined Congress acted within the scope of its constitutional authority under the Bankruptcy Clause of Article I when it enacted federal bankruptcy legislation that subjected states to suit to the same extent as other creditors. Katz, 546 U.S. at 377 n.13 ("As our holding today demonstrates, Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors."). At the heart of this conclusion was the Supreme Court's determination that the former colonies, with their "wildly divergent schemes for discharging debtors," recognized the need for federal control and national uniformity in the bankruptcy arena when they ratified the Constitution. Id. at 365. "The ineluctable conclusion, then, is 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'" Id. at 377 (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (observing that a State is not "subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention' ")).

The Supreme Court of Virginia expressly refused to undertake the rigorous historical analysis Katz requires and Clark requested.[6] Clark, 793 S.E.2d at 7 n.7 ("Given the breadth of the holding in Alden and the narrowness of the exception recognized in Katz, we need not address in any detail Clark's historical argument about the breadth of the Congressional war powers."). The court's refusal to conduct the historical inquiry mandated by Katz was an error of law that warrants certiorari review.

A. The Historical Inquiry Required By Katz Demonstrates Congress' War Powers Authorize The Federal Legislature To Subject States To Private Suits In Their Own Courts When Their Agencies Violate USERRA.

The historical approach the Supreme Court of Virginia refused to undertake leads to the inescapable conclusion that Congress' exercise of its Article I war powers includes the authority to

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[6] The federal government joined in Clark's request that the Supreme Court of Virginia undertake the historical review Katz requires. The Civil Rights Division of the Department of Justice filed a Brief for the United States as Amicus Curiae in Support of Appellant and participated at oral argument along with Clark's counsel in support of Clark's position.

subject state-agency employers to USERRA suits by service members in the defendant state's courts.

The Founders considered Congress' war powers essentially absolute with respect to the states. Before the Constitution was ratified, Alexander Hamilton in The Federalist No. 23 explained the universally held wisdom that "[t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." The Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1982). He also wrote: "[I]t must be admitted . . . that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES." Id. at 148.

Equally instructive is The Federalist No. 41, where James Madison stated: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the f[e]deral councils. . . . It is in vain to oppose constitutional barriers to the impulse of self-preservation." The Federalist No. 41, at 269-270 (James Madison) (Jacob E. Cooke ed., 1982).

The Federalist Nos. 81 and 32 established a framework for determining when state sovereignty is subordinated in the "plan of the convention." In The Federalist No. 81, Hamilton stated that "[i]t is

inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without* [*the sovereign's*] *consent*." The Federalist No. 81, at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1982). Hamilton explained that this attribute of sovereignty "is now enjoyed by the government of every state in the union." Id. at 549. He concluded that "[u]nless[,] therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states." Id.

At the same time, The Federalist No. 81 made clear that sovereign immunity is far from absolute. Hamilton specifically recognized that state sovereignty may, in some cases, have been surrendered "in the plan of the convention." The Federalist No. 81, at 549. Hamilton did not describe in The Federalist No. 81 the circumstances which bring about such a surrender. Hamilton instead declared that "[t]he circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here." Id.

The "article of taxation" to which Hamilton referred in The Federalist No. 81 is found in The Federalist No. 32. There, Hamilton discussed three instances in which the Constitution's grant of authority to the national government necessarily carries with it an "alienation of State sovereignty":

> [A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty

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

The Federalist No. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1982). This passage, read in conjunction with The Federalist No. 81, establishes that where the Constitution effects such an "alienation of State sovereignty," The Federalist No. 32, at 200, that alienation includes a "surrender" of immunity "to the suit of an individual," The Federalist No. 81, at 548-549 (Alexander Hamilton). See In re Hood, 319 F.3d 755, 766 (6th Cir. 2003) ("Hamilton's cross-reference to this discussion [in The Federalist No. 32] in No. 81's discussion of ceding sovereign immunity can only suggest that, in the minds of the Framers, ceding sovereignty by the methods described in No. 32 implies ceding sovereign immunity as discussed in No. 81."), aff'd sub nom. Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

The framework constructed by The Federalist Nos. 32 and 81 demonstrates that 42 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008) is consistent with the "plan of the convention." The war powers are well within the "three cases" identified in The Federalist No. 32. First, the Constitution in the War Powers Clauses expressly grants exclusive authority over war powers to the federal government. Second, the Constitution forbids any state, except when invaded or in imminent danger, from engaging in war without the consent of Congress: "No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, § 10, cl. 3. Third, allowing the various states instead of Congress to wield war powers would be "contradictory and repugnant" to national unity. The Federalist No. 32, at 200. Congress' Article I war powers, then, necessarily are associated with an "alienation of State sovereignty" that includes a surrender of state sovereign immunity "in the plan of the convention." The Federalist Nos. 81, 32.

This application of The Federalist Nos. 32 and 81 framework is fully consistent with Katz, which recognized that The Federalist Nos. 32 and 81 together set out instances "where the Framers contemplated a 'surrender of [States'] immunity in the plan of the convention.'" 546 U.S. at 376 n.13 (alteration in original) (quoting The Federalist No. 81). Moreover, the framework fixed in The Federalist aligns with Katz's clear direction that whether a particular Article I power enables Congress to subject states to private suit should be determined on a power-by-power basis. The Federalist framework distinguishes legislation enacted under

the War Powers Clauses from legislation enacted under, for example, the Commerce Clause, which was at issue in Seminole Tribe and Alden.

Along with The Federalist Papers quoted supra, a long line of United States Supreme Court precedent supplies compelling evidence that Congress' Article I war powers have historically been ". . . understood to carry . . . the power to subordinate state sovereignty." See Katz, 546 U.S. at 377. The Supreme Court consistently has accorded Congress' authority under the War Powers Clauses broad and controlling deference. See, e.g., Loving v. United States, 517 U.S. 748, 768 (1996); Weiss v. United States, 510 U.S. 163, 177 (1994); Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); Lichter v. United States, 334 U.S. 742, 781 (1948); Case v. Bowles, 327 U.S. 92 (1946); Selective Draft Law Cases of 1918, 245 U.S. 366, 383 (1918); Tarble's Case, 80 U.S. 397, 408 (1872). The primacy of congressional authority to exercise war powers is entirely unremarkable, as states never possessed war powers under the plan of the Constitution. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 80-81 (1795).

The decision below by the Supreme Court of Virginia permits state sovereign immunity considerations to prevail over Congress' authority to raise and maintain armed forces for the nation as a whole. Virginia's highest court thus stands the War Powers Clauses on their heads. The court below ignored the primary legislative purpose of USERRA, a remedial Act of Congress which encourages civilians to join and remain in the reserves and

guard forces. 38 U.S.C. § 4301(a) (Lawyers Edition 2008). Congress satisfied its Article I obligation to raise and support national defense forces by enacting USERRA to further these twin legislative objectives (recruitment and retention). See U.S. Const. art. I, § 8, cl. 12. By protecting reservists against discrimination and retaliation in their civilian employment, USERRA provides a critical incentive for servicemembers to enter and remain in the reserves and other defense forces. See 38 U.S.C. § 4301(a)(3) (Lawyers Edition 2008). USERRA, then, is a proper and constitutional exercise of Congress' war powers under Article I.

The private enforcement section of USERRA at the core of the case at bar, 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008), easily withstands scrutiny under the historical approach to state sovereign immunity enunciated in Katz, 546 U.S. at 356. Congressional war powers are at least as preemptive and unitary in nature as Congress' authority under the Bankruptcy Clause. National defense provides an even stronger basis to prohibit state interference with Congressional legislation than the commercial considerations analyzed by the Katz Court. Since its inception the United States has required highly uniform and closely integrated armed forces. This longstanding national imperative, which the Supreme Court of Virginia ignored, plainly requires state subordination to federal objectives. See Katz, 546 U.S. at 370.

B. The Post Katz USERRA Decisions Cited By The Supreme Court Of Virginia Are Inapposite Or Unpersuasive.

The Supreme Court of Virginia cited a handful of judicial opinions for the proposition that ". . . since Katz, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent." Clark, 793 S.E.2d at 6 and note 6. Those decisions, each of which is addressed below, are either inapposite or rest on unpersuasive reasoning.

The first decision cited by the court below, United States v. Alabama Department of Mental Health & Mental Retardation, 673 F.3d 1320 (11th Cir. 2012), is not directly on point. The USERRA action there was brought by the United States (not an individual plaintiff) against an Alabama state agency in *federal* court. The threshold question presented was "whether sovereign immunity bars the U.S. Department of Justice's (DOJ's) action against [Alabama Department of Mental Health & Mental Retardation]," which the Department of Justice filed in the United States District Court for the Middle District of Alabama. Id. at 1323. The United States Court of Appeals for the Eleventh Circuit ". . . affirm[ed] the district court's decision that Eleventh Amendment sovereign immunity does not bar the lawsuit." Id. at 1328. This decision offers little guidance in the instant USERRA action, which was filed by an individual (rather than the United States) in state court (rather than federal court).

Equally unavailing is Townsend v. University of Alaska, 543 F.3d 478 (9th Cir. 2008), the second

decision cited by the Supreme Court of Virginia in support of its closure of state courthouses to Clark. The plaintiff, Townsend, filed a private action against his public employer, the University of Alaska, in *federal* court. Id. at 481. Townsend ". . . argue[d] that Congress impliedly intended to authorize private actions against states in federal court." Id. at 484. In finding federal jurisdiction absent, the United States Court of Appeals for the Ninth Circuit confirmed that state-agency employees may bring USERRA actions against their employers in state court.

> USERRA expressly creates only two private causes of action: (1) an action brought by an individual against a State (as an employer), which as we have noted, may be brought in state court; and (2) an action brought against a private employer, which may be brought in both state and federal court. See 38 U.S.C. § 4323(a)(2).

Townsend, 543 F.3d at 486.

Townsend, then, lends no support to the Supreme Court's misguided reasoning that sovereign immunity considerations bar state-agency employees such as Clark from bringing USERRA actions against their employers in state court. Just the opposite is true. The Ninth Circuit's discussion of the various statutory causes of action Congress created with its 1998 USERRA amendment supports Clark's position that the Virginia courts below erred by shutting him out of the state judicial system.

Other post-Katz decisions cited by the Supreme Court of Virginia lack precedential import of any kind because by design or through oversight they failed to apply Katz. Janowski v. Division of State Police, 981 A.2d 1166 (Del. 2009) did not discuss Katz in the least. Smith v. Tennessee National Guard, 387 S.W.3d 570 (Tenn. Ct. App. 2012) cert. denied 133 S. Ct. 1471 (2013) failed to mention either Katz or the War Powers Clauses. In Anstadt v. Board of Regents of University System of Georgia, 693 S.E.2d 868, 870-71 (Ga. Ct. App. 2010) cert. denied (Ga. Oct. 4, 2010), the plaintiff waived arguments based on Katz or the War Powers Clauses by failing to raise those points below. Id. at 871.

Particularly curious is the Supreme Court of Virginia's citation to Ramirez v. State Children, Youth & Families Department, 372 P.3d 497 (N.M. 2016). There, the Supreme Court of New Mexico held the plaintiff employee could sue his state-agency employer in state court under 38 U.S.C.S. § 4323(b)(2) (Lawyers Edition 2008). The court held New Mexico had waived any purported sovereign immunity by consenting to be sued for USERRA violations. The court therefore did not reach the constitutional question presented here. Ramirez, 372 P.3d at 499-500; 503.

The Supreme Court of Virginia in its Opinion also pointed to Risner v. Ohio Department of Rehabilitation & Correction, 577 F. Supp. 2d 953 (N.D. Ohio 2008). The district court in that decision held the Katz exception was narrowly restricted to bankruptcy matters. Id. at 963. The plaintiff there, however, failed to identify evidence that would support recognition of a corresponding exception

under the War Powers Clauses. Id. Clark in contrast has identified compelling evidence in support of an exception under the War Powers Clauses, including The Federalist essays cited supra.

CONCLUSION

For the foregoing reasons, the Court should grant Jonathan R. Clark's Petition for a Writ of Certiorari, reverse the Opinion of the Supreme Court of Virginia and remand this matter for trial by jury in the Circuit Court of Chesterfield County, Virginia.

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APPENDIX

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[ENTERED: December 1, 2016]

PRESENT: All the Justices

JONATHAN R. CLARK

v. Record No. 151857

VIRGINIA DEPARTMENT OF STATE POLICE

OPINION BY
JUSTICE D. ARTHUR KELSEY
December 1, 2016

FROM THE CIRCUIT COURT OF
CHESTERFIELD COUNTY

Lynn S. Brice, Judge

A 1998 amendment to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), *see* 38 U.S.C. §§ 4301-4335, created a private right of action enforceable against States in their own courts, *see* 38 U.S.C. § 4323(b)(2). In this case, the trial court held that principles of sovereign immunity barred a USERRA suit filed by Jonathan R. Clark against the Virginia Department of State Police ("VSP"), an arm of the Commonwealth. We agree and affirm.

I.

Clark filed a USERRA claim against the VSP, alleging that he was denied a promotion because of his service in the United States Army Reserves. The VSP responded with a plea of sovereign immunity. As an agency of the Commonwealth, the VSP argued that it could not be sued on a federal right of action in state court absent a waiver of sovereign

immunity. Neither it nor the General Assembly, the VSP asserted, had waived sovereign immunity for USERRA claims filed in state court. The trial court agreed, granted the plea of sovereign immunity, and dismissed Clark's USERRA claim.

II.

On appeal, Clark contends that the trial court misapplied sovereign-immunity principles and thus erred in dismissing his USERRA claim. The United States, appearing as amicus, concurs with Clark and urges us to hold that the Commonwealth's sovereign immunity has been lawfully abrogated by 38 U.S.C. § 4323(b)(2). The VSP responds that the trial court correctly applied sovereign-immunity principles and had no choice but to dismiss the USERRA action. We hold that the trial court properly dismissed Clark's USERRA claim based upon the Commonwealth's sovereign immunity.[1]

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[1] Virginia law authorizes a statutory right of action in nearly identical circumstances as the federal USERRA. *See* Code § 44-93.5 (permitting military personnel suffering employer violations of Code §§ 44-93 to -93.4 to bring suit in circuit court and authorizing the Attorney General to represent such persons upon request); *see also* Code §§ 44-93(A) & -93.1(A) (entitling military personnel employed by the Commonwealth to leaves of absence for service without penalty, health insurance and benefits throughout service, and equivalent pay and seniority upon return from service).

Clark did not assert any claims against the VSP based upon Virginia law, arguing that relief under Virginia law is "specious" because "[w]hile [Code §] 44-93.4 is modeled on USERRA, this state statute applies only to Virginia guard forces [and] does not apply to [appellant]," a member of the U.S. Army Reserves. Reply Br. at 3-4. *But see* Code § 44-93(A) (referring to "members of the organized reserve forces of any of

A.

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Sossamon v. Texas*, 563 U.S. 277, 283 (2011) (citation omitted). "Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'" *Id.* (citation omitted). Federalism presupposes that the States retain exclusive sovereignty in some aspects of governance, share sovereign power with the federal government in other aspects, and yield their sovereign power only in those aspects of governance exclusively assigned to the federal government by the United States Constitution. *See generally Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (collecting cases).

Under the Constitution's segmentation of governmental power, States retain "a residuary and inviolable sovereignty" that precludes them from being "relegated to the role of mere provinces or political corporations" of a consolidated national government. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (first quote from The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed., 1961)). As James Madison explained, States possess "distinct and independent portions of the supremacy, no more

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the armed services of the United States"). In any event, because Clark did not assert any Virginia law claims, we do not address his entitlement to relief as an army reservist under Code § 44-93.5 or any other applicable provisions of Virginia law. *See Commonwealth v. Harley*, 256 Va. 216, 219-20, 504 S.E.2d 852, 854 (1998) ("[C]ourts are not constituted to render advisory opinions, to decide moot questions, or to answer inquiries which are merely speculative.") (alteration omitted) (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964)).

subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Id.* at 714 (quoting The Federalist No. 39, at 245).

From the beginning of the Republic, the doctrine of state sovereign immunity has been a mainstay of federalism principles. It was an axiom of English law that "the law ascribes to the king the attribute of sovereignty," and thus, "no court can have jurisdiction over him" because "jurisdiction implies superiority of power." 1 William Blackstone, Commentaries *241-42. "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Sossamon*, 563 U.S. at 283 (citation omitted). Based on that tradition, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715.

Alexander Hamilton considered it "inherent in the nature of sovereignty" for a state "not to be amenable to the suit of an individual *without its consent*." The Federalist No. 81, at 487 (A. Hamilton). "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 Union." *Id.* Speaking at the Virginia ratifying convention, James Madison agreed: "It is not in the power of individuals to call any state into court." 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (1827). John Marshall concurred, "It is not rational to suppose that the sovereign power [i.e., a State] should be dragged before a court." *Id.* at 555.

In 1793, roughly five years after the ratification of the Constitution, a South Carolinian filed suit in the United States Supreme Court against the State of Georgia seeking payment of a debt incurred during the American Revolution. In that case, *Chisholm v. Georgia*, 2 U.S. 419 (1793), Georgia protested that the federal judicial power in Article III did not abrogate States' sovereign immunity. "The suability of a State without its consent," Georgia no doubt assumed, "was a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). A majority of Justices on the Supreme Court disagreed, holding that Article III implicitly abolished state sovereign immunity by affirmatively granting federal courts the power to decide disputes between private citizens and States. *See Chisholm*, 2 U.S. at 452, 466, 467.[2]

Georgia's representatives were none too pleased. The day after the opinion was issued, the Georgia congressional delegation introduced a resolution in Congress that, while initially unsuccessful, would later become the Eleventh Amendment. *See Alden*, 527 U.S. at 721. Clarifying its views with further emphasis, the Georgia House

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[2] Following the tradition of English jurists, *see* William H. Rehnquist, The Supreme Court 40 (2d ed. 2001), the *Chisholm* Justices issued individual opinions in seriatim in ascending order of seniority. Chief Justice Marshall is credited with ending this practice, *see* M. Todd Henderson, From Seriatim to Consensus and Back Again: A Theory of Dissent, 2007 Sup. Ct. Rev. 283, 313-15 (2007), much to the consternation of Thomas Jefferson, *see* Letter from Thomas Jefferson to Judge Johnson (March 4, 1823), *in* 7 The Writings of Thomas Jefferson 276, 278 (H.A. Washington ed., 1854); *see generally* Letter from Thomas Jefferson to Judge Johnson (June 12, 1823), *in id.* at 290, 298.

of Representatives passed a bill stating that anyone who attempted to enforce *Chisholm* would be "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." *Id.* at 720-21 (citation omitted). Within a year, the Eleventh Amendment passed Congress with near unanimity and was swiftly ratified by the States. *Chisholm*, an opinion that "fell upon the country with a profound shock," *id.* at 720 (citation omitted), had one of the shortest tenures of any opinion ever issued by the Supreme Court.

Addressing only the *Chisholm* scenario, the literal text of the Eleventh Amendment limited only the "Judicial power of the United States" (the jurisdiction of Article III federal courts) and prohibited only suits against a State "by Citizens of another State" or citizens or subjects of a foreign state. U.S. Const. amend. XI. More than 200 years of precedent, however, has mined "history and experience" as well as "the established order of things," *Hans*, 134 U.S. at 14, to rediscover the "background principle" animating the Eleventh Amendment, that Congress may not authorize "suits by private parties against unconsenting States." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

That background principle received full recognition in *Alden v. Maine*. In that case, a group of Maine probation officers filed suit in a Maine state court alleging that their employer, the State of Maine, had violated overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. The Act purported to authorize private actions against States in their own courts. *Id.*

§§ 203(x), 216(b). The holding of *Alden* was emphatic: "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. at 712. Put differently, but no less unequivocally: "In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* at 754. Given "the historical record," the Supreme Court observed, "it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and to cede to the Federal Government a power to subject nonconsenting States to private suits in these fora." *Id.* at 743.[3]

Alden clarified that this form of "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself" and the "fundamental postulates implicit in the constitutional design." *Id.* at 728-29. Judicial

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[3] Clark concedes that the Commonwealth is "nonconsenting," *Alden*, 527 U.S. at 712, in the sense that it did not waive any sovereign immunity it might have in this case, *see generally Sossamon*, 563 U.S. at 284-85 ("Accordingly, 'our test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.' A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute. Only by requiring this 'clear declaration' by the State can we be 'certain that the State in fact consents to suit.' Waiver may not be implied. For these reasons, a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" (citations omitted)).

recognition of the "contours of sovereign immunity" necessarily must be "determined by the founders' understanding" of the constitutional design. *Id.* at 734. To rule otherwise, the Supreme Court explained, would endorse "the type of ahistorical literalism" employed by the "discredited decision in *Chisholm*." *Id.* at 730.

B.

The enduring role of sovereign immunity is not without its qualifications. It generally does not apply, for example, to suits filed in federal court seeking prospective relief against a continuing violation of federal law by state officers, *Ex parte Young*, 209 U.S. 123, 155-56 (1908),[4] or cases that seek to enforce civil rights laws enacted pursuant to Section 5 of the Fourteenth Amendment, *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, ___, 132 S. Ct. 1327, 1333 (2012) (plurality opinion); *Seminole Tribe*, 517 U.S. at 59. Nor does sovereign immunity apply when the United States, rather than a private citizen, brings an action in federal court against a State. *See Alden*, 527 U.S. at 755 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-39 (1934)).

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[4] Even this qualification has its own caveats. "The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. ___, ___, 135 S. Ct. 1378, 1385 (2015). Because of these limitations, *Ex parte Young* is a "narrow exception" to sovereign immunity, *Seminole Tribe*, 517 U.S. at 76, and is "narrowly construed," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984), *superseded on other grounds by statute*, 28 U.S.C. § 1367.

The *Alden* plaintiffs asserted their claims under the FLSA. The Congressional power to enact the FLSA arose from the Commerce Clause in Article I, Section 8. *Seminole Tribe* held that Congress's "Article I authority to regulate commerce" does not include the power to "abrogate a State's immunity" to suit in federal court. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 n.2 (2011) (citing *Seminole Tribe*, 517 U.S. at 65-66); *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999) (holding that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers," including "either the Commerce Clause or the Patent Clause"). *Alden* applied this principle to suits in state court. The "logic" of sovereign immunity, *Alden* reasoned, "extends to state-court suits as well." *Alden*, 527 U.S. at 733.

The only exception recognized to the general rule of sovereign immunity arises in the sui generis context of federal bankruptcy litigation. Because "[b]ankruptcy jurisdiction, at its core, is *in rem*," the United States Supreme Court held that "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction. That was as true in the 18th century as it is today." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (citation omitted). Unlike the constitutional history of other Article I, Section 8 powers, the "history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution" show that the Founders intended it "not just as a grant of legislative authority to

Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." *Id.* at 362-63. "In ratifying the Bankruptcy Clause," *Katz* held, "the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* at 378.

C.

Clark argues that USERRA should be exempt from the general sovereign-immunity rule of *Alden* and be treated, as the bankruptcy power was in *Katz*, as an exceptional, but nonetheless valid, congressional abrogation of the Commonwealth's sovereign immunity to suits in its own courts. In support, Clark points out that Congress enacted USERRA pursuant to its grant of war powers in Article I, Section 8, Clauses 11-16,[5] not its power to "regulate Commerce . . . among the several States" under Article I, Section 8, Clause 3, which

[5] *See* 144 Cong. Rec. H1396, H1398 (daily ed. March 24, 1998) (statement of Rep. Evans) (noting that "the authority for laws involving veterans['] benefits is derived from the War Powers clause"). *Compare* 20 C.F.R. § 1002.2 (2016) (describing USERRA as "the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940" with its "immediate predecessor" being the Veterans' Reemployment Rights Act (VRRA), former 38 U.S.C. §§ 2021-2027 (1988)), *with United States v. Nugent*, 346 U.S. 1, 9 (1953) (describing the Selective Service Act as "a valid exercise of the war power"); *Reopell v. Massachusetts*, 936 F.2d 12, 15-16 (1st Cir. 1991) (noting that Congress enacted the VRRA pursuant to its war powers); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1072 (5th Cir. 1979) (same).

authorized the Act addressed in *Alden*. For several reasons, we find this to be a distinction without a difference.

To begin with, neither the reasoning nor the holding of *Alden* addressed — much less turned on — the fact that the offending federal statute, the FLSA, was enacted pursuant to the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. As noted earlier, the Supreme Court made clear in *Alden* that its sovereign-immunity holding encompassed all congressional powers recognized in Article I not just the power over interstate commerce. "We hold that the *powers delegated to Congress under Article I* of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages *in state courts*." *Alden*, 527 U.S. at 712 (emphases added).

Relying exclusively on the "history, practice, precedent, and the structure of the Constitution," not the literal text or unique context of the Commerce Clause, the Court "h[e]ld that the States retain immunity from private suit *in their own courts*, an immunity beyond the congressional power to *abrogate by Article I legislation*." *Id.* at 754 (emphases added); *accord Florida Prepaid*, 527 U.S. at 636 (recognizing that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers," including the Patent and Copyright Clause).

In reply, Clark describes *Katz* as an exception to *Alden*'s broad, unqualified holding. After all, Clark correctly asserts, the congressional abrogation of sovereign immunity in *Katz* was authorized by the

Bankruptcy Clause — an Article I power found in Section 8, Clause 4. We appreciate the point (as did the four dissenting Justices in *Katz*) but are unpersuaded that it matters in Clark's case. Two aspects of *Katz* foreclose Clark's view that *Alden* either has been or should be picked apart by further exceptions.

First, *Katz* involved claims against States filed exclusively in federal bankruptcy court. In contrast, the broad, unqualified holding of *Alden* addressed claims against States "in their own courts." *See Alden*, 527 U.S. at 730, 742-43. No portion of *Katz* took issue with *Alden's* recognition of a State's sovereign immunity in its own courts. Moreover, *Katz* involved a unique body of law governing "*in rem*" rights to bankrupt estates and the historic power of bankruptcy courts "to issue ancillary orders enforcing their *in rem* adjudications." *Katz*, 546 U.S. at 370. *In rem* actions do "not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 362. *Alden* did not involve *in rem* proceedings, but rather *in personam* rights of action. The *Alden* holding, therefore, was not limited — much less implicitly overruled — by *Katz*. The former addressed federal claims against States in their own courts asserting *in personam* rights of action. The latter addressed federal claims against States in federal bankruptcy courts asserting *in rem* claims and ancillary remedies.

It could very well be, as Clark surmises, that *Alden*'s trajectory may eventually be redrawn by the United States Supreme Court and that the future effort may characterize *Katz* as the first necessary

course correction.[6] We offer no views on the subject because that task, if it should be undertaken at all,

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[6] That said, since *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent. *See, e.g.*, *United States v. Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1324 (11th Cir. 2012) (noting that if a private citizen had been the plaintiff, "it is undisputed that sovereign immunity would have barred his [USERRA] suit because a State cannot be sued [in federal court] by an individual without its consent"); *Townsend v. University of Alaska*, 543 F.3d 478, 484 n.2 (9th Cir. 2008) ("Congress did not use the terms 'must' or 'shall' with respect to state court jurisdiction over USERRA claims" because "the powers delegated to Congress under Article I of the United States Constitution [including the war powers] do not include the power to subject nonconsenting States to private suits for damages in state courts." (quoting *Alden*, 527 U.S. at 712)); *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 964 (N.D. Ohio 2008) (reasoning that the war powers are conferred by Article I, which *Seminole Tribe* made clear "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" (citation omitted)); *Janowski v. Division of State Police*, 981 A.2d 1166, 1170 (Del. 2009) (holding that "[USERRA] could not abrogate state sovereign immunity, because Congress passed that law pursuant to its Article I, Section 8 war powers"); *Anstadt v. Board of Regents of the Univ. Sys. of Ga.*, 693 S.E.2d 868, 871 & n.14 (Ga. Ct. App. 2010) (finding appellant's contention that "the enactment of USERRA abrogated the state's sovereign immunity because it was enacted pursuant to Congress's war powers [was] unavailing" on the authority of *Alden*, 527 U.S. at 712, and *Seminole Tribe*, 517 U.S. at 59-60); *Ramirez v. State Children, Youth & Families Dep't*, 372 P.3d 497, 499-500, 503 (N.M. 2016) (noting that "Congress created USERRA pursuant to its War Powers" and that in *Seminole Tribe* "the Supreme Court rejected Congress's authority under the powers granted by Article I . . . to abrogate a state's sovereign immunity," but ultimately not deciding the constitutional question because the state had waived immunity); *Smith v. Tennessee Nat'l Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012) (holding that "for an

is not ours to take. For us, it is enough that *Alden*'s holding was unqualified: Nonconsenting States cannot be forced to defend "private suits" seeking *in personam* remedies "in their own courts" based upon "the *powers delegated to Congress under Article I* of the United States Constitution." *Alden*, 527 U.S. at 712, 754 (emphasis added). We thus accept it at face value that sovereign immunity is simply "beyond the congressional power to abrogate by Article I legislation" under these circumstances. *Id.* at 754.

Clark not so subtly implies that we should recognize *Katz* as the first in a series of retrenchments that he predicts the United States Supreme Court will make from the broad holding of *Alden*. *See* Appellant's Br. at 11-12. We neither

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individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law" because USERRA's jurisdictional statute directs private claims against states to state courts "in accordance with the laws of the State" (quoting 38 U.S.C. § 4323(b)(2))).

Prior to *Katz*, most courts to consider the issue opined that Congress's Article I war powers did not authorize the abrogation of state sovereign immunity. *See, e.g.*, *Ysleta del sur Pueblo v. Raney*, 199 F.3d 281, 288 (5th Cir. 2000); *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated on other grounds*, 165 F.3d 593 (7th Cir. 1999) (per curiam); *Sacred Heart Hosp. v. Pennsylvania Dep't of Pub. Welfare*, 133 F.3d 237, 245 (3d Cir. 1998); *Rotman v. Board of Trs. of Mich. State Univ.*, 1997 U.S. Dist. LEXIS 10754, at *5-7 (W.D. Mich. June 19, 1997) (unpublished); *Larkins v. Department of Mental Health & Mental Retardation*, 806 So.2d 358, 363 (Ala. 2001). Other courts, however, held differing views. *See, e.g.*, *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 & n.9 (1st Cir. 1996); *Reopell*, 936 F.2d at 16; *Peel*, 600 F.2d at 1081; *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 937-38 (7th Cir. 1979); *Camacho v. Public Serv. Comm'n of P.R.*, 450 F. Supp. 231, 234-35 (D.P.R. 1978).

affirm nor disaffirm Clark's prediction. To us, the question is what the law is now, not what it may be in the future. We are not in the speculative business of plotting the future course of federal precedents.[7] And we take some comfort in knowing that the United States Supreme Court is no more interested in our doing so than we are. "[O]ther courts," the Supreme Court has said, should not "conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Instead, "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

III.

In sum, the trial court correctly held that sovereign immunity barred Clark's USERRA claim against the VSP, an arm of the Commonwealth, because "the powers delegated to Congress under

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[7] Given the breadth of the holding in *Alden* and the narrowness of the exception recognized in *Katz*, we need not address in any detail Clark's historical argument about the breadth of the Congressional war powers. Nor is it necessary, for that matter, to accept or refute the Solicitor General's rejoinder that none of Clark's historical sources specifically address waiver of sovereign immunity in the war powers context and that Congress first thought of doing so in 1974, *see* Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1596, nearly two centuries after the ratification of the Constitution. *See generally* Appellee's Br. at 5.

Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden*, 527 U.S. at 712; *id.* at 754 (repeating the opinion's "we hold" declaration). The *Katz* qualification, applicable only to claims arising within a federal bankruptcy court's *in rem* jurisdiction over a bankruptcy estate, does not apply to Clark's state-court claim for *in personam* damages. Therefore, the trial court did not err in dismissing Clark's suit on the basis of sovereign immunity.

Affirmed.

[ENTERED: December 21, 2016]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 21st day of December, 2016.

Jonathan R. Clark, Appellant,

against Record No. 151857
Circuit Court No. CL15-1202

Virginia Department of State Police, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no reversible error in the judgment from which the appeal was filed. Accordingly, the judgment is affirmed. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

[/s/ Patricia L. Harrington]

Clerk

[ENTERED: September 9, 2015]

VIRGINIA:

IN THE CIRCUIT COURT FOR
CHESTERFIELD COUNTY

JONATHAN R. CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CL15-1202
	)	
VIRGINIA	)	
DEPARTMENT OF	)	
STATE POLICE,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

This matter comes before the Court upon the Defendant's Amended Special Plea of Sovereign Immunity. This Court has carefully reviewed all the filings before the Court and considered oral argument heard on August 12, 2015. As set forth more fully in the attached transcript – incorporated into this Order by reference – this Court finds that the Defendant is entitled to sovereign immunity and is immune to the claims made in the Plaintiff's Complaint.

It is therefore ORDERED, ADJUDGED, and DECREED that the Defendant's Amended Special Plea of Sovereign Immunity is SUSTAINED and the Plaintiff's claims against the Defendant are DISMISSED WITH PREJUDICE.

This Order is final and the Clerk of this Court is authorized and directed to mail a certified copy of this Order to all counsel of record.

ENTERED: 9/9/2015

[/s/ Lynn S. Brice
Hon. Lynn S. Brice
Circuit Court Judge

I ASK FOR THIS:

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SEEN AND OBJECTED TO FOR REASONS STATED IN PLAINTIFF'S MEMORANDUM IN OPPOSITION AND AT THE AUGUST 12, 2015 ORAL ARGUMENT:

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