No. 16-1043

In The Supreme Court of the United States

JONATHAN R. CLARK,

Petitioner,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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April 6, 2017

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RESTATED QUESTION PRESENTED

In 1974, Congress authorized servicemembers to sue State-government employers in federal court for employment discrimination based on military service. After this Court held in *Seminole Tribe of Florida v. Florida* that Congress may not use its Article I powers to override State immunity in federal court, 517 U.S. 44, 72 (1996), Congress amended the statute in 1998 to allow servicemembers to sue State employers in State court instead. 38 U.S.C. § 4323(b)(2). But this Court then held in *Alden v. Maine* "that the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. 706, 712 (1999). Every court to consider the question since then has concluded that the 1998 amendment does not override State immunity in State court.

The question presented is:

Whether the Supreme Court of Virginia correctly determined that nonconsenting States are immune from private suits for money damages brought under 38 U.S.C. § 4323(b)(2).

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SECONDARY SOURCES

MISCELLANEOUS

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STATEMENT OF THE CASE

1. Congress first took steps to protect the civilian jobs of returning servicemembers when it enacted the Selective Training and Service Act of 1940.[1] The 1940 Act required draft registration for males between the ages of 21 and 36 and provided for induction and training of those who qualified for military service.[2] Congress provided reemployment protection for those who left a position in the federal government or the private

[1] Pub. L. No. 76-783, 54 Stat. 885 (1940).

[2] *Id*. §§ 2-3, 54 Stat. 885-86.

sector.[3] The Act also empowered servicemembers to sue private employers in federal court for lost wages and benefits.[4] But the 1940 Act did not impose any legal obligations on States or allow private lawsuits against State employers. Instead, Congress "declared [it] to be the sense of the Congress" that State employees returning from the military "*should* be restored to such position or to a position of like seniority, status, and pay."[5] Congress restated that aspiration when it replaced the 1940 Act with the Selective Service Act of 1948.[6]

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 replaced the 1948 Act.[7] For the first time in history, Congress extended reemployment rights to State workers and permitted them to sue State employers in federal court to recover lost wages and benefits.[8] The 1974 Act also authorized United States Attorneys to bring such actions on a servicemember's behalf.[9]

Congress's ostensible authority to authorize private damage suits against States was bolstered in 1989, when a plurality of this Court ruled in *Pennsylvania v.*

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[3] § 8(b), 54 Stat. 890.

[4] § 8(e), 54 Stat. 891.

[5] § 8(b)(C), 54 Stat. 890 (emphasis added).

[6] Pub. L. No. 80-759, § 9(b)(C), 62 Stat. 604, 615-16 (1948).

[7] Pub. L. No. 93-508, § 404, 88 Stat. 1578, 1594 (1974) (codified at 38 U.S.C. §§ 2021 to 2026 (1976)).

[8] 38 U.S.C. §§ 2021(a)(B), 2022 (1976).

[9] 38 U.S.C. § 2022 (1976).

Union Gas Co. that Congress could use its Article I Commerce Clause powers to override State immunity as long as Congress clearly expressed its intention to do so.[10] Justice White concurred to provide the fifth vote, but he did not agree with the plurality's reasoning.[11] Nonetheless, as this Court later observed in *Alden v. Maine*, "in the wake of *Union Gas* . . . it may have appeared . . . that Congress' power to abrogate [State] immunity from suit in any court was not limited by the Constitution at all, so long as Congress made its intent sufficiently clear."[12]

In 1991, the First Circuit held in *Reopell v. Massachusetts* that the 1974 Act overrode State sovereign immunity.[13] The court reasoned that *Union Gas*'s "rationale for holding that Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Power abrogation."[14]

With its power to override State immunity apparently secure, Congress extended veterans' reemployment remedies in the Uniformed Services Employment

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[10] 491 U.S. 1, 13, 19-20 (1989) (plurality op.) (Brennan, J.). *See* U.S. Const. art. I, § 8, cl. 2.

[11] *Id*. at 57 (White, J., concurring).

[12] *Alden v. Maine*, 527 U.S. 706, 737 (1999).

[13] 936 F.2d 12, 15-16 (1st Cir. 1991).

[14] *Id*. at 16. *See* U.S. Const. art. I, § 8, cls. 10-15 (War Powers). The First Circuit also followed two pre-*Union Gas* decisions holding that the 1974 Act overrode State immunity. *Id*. at 15-16 (citing *Peel v. Fla. Dep't of Transp.*, 600 F.2d 1070, 1073 (5th Cir. 1979), and *Jennings v. Ill. Office of Educ*., 589 F.2d 935, 937-38 (7th Cir. 1978)).

and Reemployment Rights Act of 1994 (USERRA).[15] USERRA authorized servicemembers to seek assistance from the Secretary of Labor in a dispute with a public or private employer.[16] Servicemembers could also refer a complaint to the Attorney General, who was authorized to sue State employers in federal court on a servicemember's behalf.[17] Alternatively, servicemembers could sue an employer directly in federal court (including a State employer) to seek compliance with the statute, to recover lost wages and benefits, and to recover attorney's fees and costs.[18] For willful violations, the employee could recover liquidated damages in an amount equal to the compensatory award.[19]

But in its 1996 decision in *Seminole Tribe*, this Court overruled *Union Gas* and held that Congress may *not* use its Article I powers to subject nonconsenting States to private suits for money damages in federal court.[20] Several lower courts thereafter held that *Seminole Tribe* barred private USERRA suits in federal court against nonconsenting States.[21] The only

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[15] Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified as amended at 38 U.S.C. §§ 4301 to 4333). *See* 38 U.S.C. §§ 4321-23, 108 Stat. 3164-66.

[16] *Id.* § 4322, 108 Stat. 3164.

[17] *Id*. § 4323(a)(1), 108 Stat. 3165.

[18] *Id*. § 4323(a)(2), (c), 108 Stat. 3165.

[19] *Id*. § 4323(c)(1)(A)(iii), 108 Stat. 3165.

[20] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

[21] *See Velasquez v. Frapwell*, 160 F.3d 389, 394-95 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999); *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997); *Rotman v. Bd. of Trs. of Mich. State Univ*.,

outlier was *Diaz-Gandia*, where the First Circuit held that it was bound to follow its earlier precedent in *Reopell*, even though *Reopell* was based on *Union Gas*.[22]

Congress and the Executive Branch immediately recognized that *Seminole Tribe* likely "eliminate[d] the right of USERRA-protected individuals who are State employees to pursue their reemployment rights in Federal court."[23] So Congress enacted the Veterans Programs Enhancement Act of 1998, which amended § 4323(b) of USERRA to provide that, "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a *State court* of competent jurisdiction in accordance with the laws of the State."[24] Shortly after the 1998 Amendment, however, this Court ruled in *Alden* "that the powers delegated to Congress under Article I . . . do *not* include the power to subject

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No. 1:96-cv-988, 1997 U.S. Dist. LEXIS 10754, at *9 (W.D. Mich. June 20, 1997).

[22] *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 & n.9 (1st Cir. 1996).

[23] *See, e.g.*, *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill: Hearing Before the H. Subcomm. on Educ., Training, Emp't & Hous. of the H. Comm. on Veterans' Affairs*, 104th Cong. 3 (1996) (statement of Rep. Filner); *Pending Legislative Proposals in the Areas of Education, Training, & Employment: Hearing Before the H. Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 105th Cong. 12, 92 (1997) (statement of E. Borrego, Acting Assistant Sec'y, Dep't of Labor); H.R. Rep. No. 105-448, at 3 (1998); 144 Cong. Rec. 4458 (1998) (statement of Rep. Evans).

[24] Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3329 (codified at 38 U.S.C. § 4323(b)(2)) (emphasis added).

nonconsenting States to private suits for damages in state courts."[25]

In the wake of *Alden*, every court to consider the question has held that the 1998 Amendment does not authorize employees to sue nonconsenting States in State court.[26] Those cases include decisions after 2006, when this Court in *Katz* recognized the bankruptcy power as a limited exception to the general rule laid

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[25] 527 U.S. at 712 (emphasis added).

[26] *See Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 962-63 (N.D. Ohio 2008); *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-63 (Ala. 2001); *Janowski v. Div. of State Police, Dep't of Safety & Homeland Sec.*, 981 A.2d 1166, 1170 (Del. 2009); *Anstadt v. Bd. of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 870-71 & n.14 (Ga. Ct. App. 2010); *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 574-75 (Tenn. Ct. App. 2012), *cert. denied*, 133 S. Ct. 1471 (2013); *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 (Va. 2016). *See also Townsend v. Univ. of Alaska*, 543 F.3d 478, 483-84 & n.2 (9th Cir. 2008) (stating in dictum that Congress made State jurisdiction over such claims only permissive "for the apparent reason that 'the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts' ") (quoting *Alden*, 527 U.S. at 712); *United States v. Ala. Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1325 (11th Cir. 2012) (stating in dictum that "it is undisputed that sovereign immunity would have barred [the employee's] suit because a State cannot be sued by an individual without its consent"). *Cf. Ramirez v. New Mexico ex rel. Children, Youth & Families Dep't*, 326 P.3d 474, 479-82 (N.M. Ct. App. 2014) (holding that Congress could not use its War Powers to override State immunity from private suit), *rev'd on other grounds*, 372 P.3d 497, 503-05 (N.M. 2016) (holding that New Mexico affirmatively waived its immunity from suit under USERRA).

down in *Seminole Tribe* and *Alden*.[27] *Katz* concluded that the history of bankruptcy showed that the States understood at the founding that the Bankruptcy Clause of Article I authorized a "limited subordination of State sovereign immunity in the bankruptcy arena."[28]

To date, however, no court has found the War Powers analogous to the Bankruptcy Clause. In *Risner*, for instance, the court rejected the analogy because the plaintiff had "not identified comparable evidence of the history of the War Powers clauses, the reasons they were adopted, or legislation enacted immediately following ratification indicating that the states waived sovereign immunity in USERRA actions by ratifying Congress' Article I powers."[29]

2. Petitioner Clark is a sergeant in the Virginia State Police (VSP) and a captain in the United States Army Reserves. In 2015, Clark sued the VSP for money damages in Virginia State court, alleging that the VSP repeatedly denied him promotions in retaliation for a previous administrative grievance that he had successfully brought under USERRA, and "because of his military commitments and exercise of statutory rights

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[27] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006). For USERRA cases decided after *Katz*, see *Ala. Dep't of Mental Health*, 673 F.3d at 1324; *Townsend*, 543 F.3d at 483 & n.2; *Risner*, 577 F. Supp. 2d at 962-63; *Janowski*, 981 A.2d at 1170; *Anstadt*, 693 S.E.2d at 870-71 & n.14; *Ramirez*, 326 P.3d at 479-82; and *Clark*, 793 S.E.2d at 7.

[28] 546 U.S. at 363.

[29] 577 F. Supp. 2d at 963.

under USERRA."[30] Clark conceded in the trial court that Virginia's State-law employment protections of servicemembers "mirror those of USERRA."[31] And the Virginia Supreme Court observed that "Virginia law authorizes a statutory right of action in nearly identical circumstances as the federal USERRA."[32] Nonetheless, "Clark did not assert any claims against the VSP based upon Virginia law."[33] He proceeded only under USERRA.

The trial court sustained the Commonwealth's plea of sovereign immunity and the Supreme Court of Virginia affirmed. Citing the USERRA cases canvassed above, the Virginia Supreme Court noted that, "since *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent."[34] Basing its decision on *Alden*, the Virginia Supreme Court concluded:

> 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 States to private suits for damages in state courts." *Alden*, 527 U.S. at

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[30] Pet. at 15.

[31] Va. Sup. Ct. Record at 90.

[32] *Clark*, 793 S.E.2d at 2 n.1 (App. 2a).

[33] *Id*.

[34] *Id.* at 6 n.6 (App. 13a).

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.[35]

Clark filed a timely petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. There is no split of authorities on the question presented.

Certiorari is unwarranted because there is no split of authorities on whether the 1998 Amendment to USERRA overrides State immunity from private damage actions in State court. Every court to have considered that question has held that the 1998 Amendment does *not* abrogate such immunity.[36] The Ninth and Eleventh Circuits reached the same conclusion, albeit in dicta.[37] And it bears mention that the Tennessee Court of Appeals in *Smith* avoided having to reach that question by reading the statutory language of USERRA to permit private suits against State employers only if

[35] *Id*. at 7 (App. 15a-16a).

[36] *Risner*, 577 F. Supp. 2d at 962-63 (N.D. Ohio); *Larkins*, 806 So. 2d at 362-63 (Ala.); *Janowski*, 981 A.2d at 1170 (Del.); *Anstadt*, 693 S.E.2d at 870-71 & n.14 (Ga. Ct. App.); *Ramirez*, 326 P.3d at 479-82 (N.M. Ct. App.).

[37] *Ala. Dep't of Mental Health*, 673 F.3d at 1324 (11th Cir.); *Townsend*, 543 F.3d at 483 & n.2 (9th Cir.).

the State consents to waive its immunity.[38] This Court denied certiorari in *Smith*.[39]

Petitioner argues (Pet. 19-20) that the Court's 2006 decision in *Katz* altered the legal landscape by recognizing a Bankruptcy Clause exception from the normal rule established in *Seminole Tribe* and *Alden*, and that Congress should likewise be able to use its Article I War Powers to override State immunity. But *all* of the cases cited in the previous paragraph that rejected that claim were decided after *Katz*, except for the Alabama Supreme Court's decision in *Larkins*, rendered in 2001. Moreover, several of those courts explicitly considered and rejected the argument that Congress could use its War Powers authority to override State immunity.[40]

Conspicuously absent from Clark's petition is any mention of the cases he cited to the Supreme Court of Virginia in support of his claim that the War Powers override State immunity,[41] and the reason for that omission is apparent. All but one of those cases were decided before 1996, when *Seminole Tribe* overruled

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[38] *Smith*, 387 S.W.3d at 574-75.

[39] *Smith v. Tenn. Nat'l Guard*, 133 S. Ct. 1471 (2013) (No. 12-849).

[40] *Risner*, 577 F. Supp. 2d at 962-63; *Janowski*, 981 A.2d at 1170; *Anstadt*, 693 S.E.2d at 870-71; *Ramirez*, 326 P.3d at 480-82.

[41] Br. of Appellant at 15 n.6, *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1 (2016) (No. 151857) (citing *Diaz-Gandia*, 90 F.3d at 617 (1st Cir. 1996); *Reopell*, 936 F.2d at 16 (1st Cir. 1991); *Peel*, 600 F.2d at 1081 (5th Cir. 1979); and *Jennings*, 589 F.2d at 937 (7th Cir. 1978)).

Union Gas. For instance, the First Circuit's 1991 decision in *Reopell*, which found "near-conclusive support" in *Union Gas*, is obviously no longer good law after *Seminole Tribe*.[42]

In other words, the Virginia Supreme Court's decision below does not conflict with any case decided since the 1998 Amendment was enacted, including cases decided after *Katz*. Virginia's high court was correct that, "since *Katz*, no court has affirmatively held that Congress's war powers may abrogate the sovereign immunity of States without their express consent."[43]

The absence of any split of authorities on that question is a strong reason to deny certiorari. Sup. Ct. R. 10(a), (b).

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[42] 936 F.2d at 15. As noted in the Statement of the Case, shortly after *Seminole Tribe* was decided, the First Circuit in *Diaz-Gandia* permitted a USERRA claim to proceed against a State in federal court because the panel felt bound by *Reopell*. *Diaz-Gandia*, 90 F.3d at 616 & n.9. But *Diaz-Gandia* predated the 1998 Amendment at issue here, predated *Alden*, and was uniformly rejected by every other federal court to consider it. *See Velasquez*, 160 F.3d at 394 (finding *Diaz-Gandia* "not convincing"); *Palmatier*, 981 F. Supp. at 532 ("suspect"); *Risner*, 577 F. Supp. 2d at 963-64 ("undermined"); *Rotman*, 1997 U.S. Dist. LEXIS 10754, at *6 ("probably not good law").

[43] Pet. App. 13a n.6.

II. The ruling comports with *Seminole Tribe*, *Alden*, and *Katz*.

The Supreme Court of Virginia also was correct to conclude that its decision complies with the holdings of *Seminole Tribe* and *Alden*, and that *Katz* is easily distinguished.

A. *Seminole Tribe* and *Alden* established the general rule that Congress may not use its Article I powers to subject States to private suits for money damages.

Section 5 of the Fourteenth Amendment grants Congress the power to enforce its provisions "by appropriate legislation," which can include legislation that expressly abrogates the States' Eleventh Amendment immunity.[44] But Article I is a different matter.

Seminole Tribe and *Alden* made clear that Congress may not use its Article I powers to subject nonconsenting States to private suits for money damages absent a "'surrender of this immunity in the plan of the convention.'"[45] *Seminole Tribe* established that rule for suits against States in federal court.[46] *Alden* extended it to suits against States in State court.[47]

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[44] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (quoting U.S. Const. amend. XIV, § 5)).

[45] *Seminole Tribe*, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)). *See also id*. at 70 n.13; *Alden*, 527 U.S. at 716-17, 731.

[46] 517 U.S. at 68, 72-73.

[47] 527 U.S. at 754.

The phrase "surrender . . . in the plan of the convention" comes from *The Federalist No. 81*, in which Hamilton sought to defuse the antifederalists' criticism that a State could be sued in federal court by a private citizen who purchased the State's public securities. That criticism was "without foundation," Hamilton wrote, because State sovereign immunity inhered in the constitutional design:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. *Unless therefore, there is a surrender of this immunity in the plan of the convention*, it will remain with the States, and the danger intimated must be merely ideal.[48]

This Court's ruling in *Seminole Tribe* broadly curtailed Congress's ability to use its Article I powers to override State immunity. Although the case involved the Indian Commerce Clause, the Court expressly overruled *Union Gas*, which involved the Commerce Clause.[49] The Court held that, "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area," as with the Indian

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[48] *The Federalist No. 81*, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis altered).

[49] 517 U.S. at 72. Both clauses are found in Article I, § 8, cl. 2.

Commerce Clause, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[50] That broad holding indicated that Congress could not use its *other* Article I powers to override State immunity either.[51] Indeed, the dissent viewed the majority opinion to cover all of Article I.[52]

In 1999, the Court in *Florida Prepaid* applied *Seminole Tribe* to the Patent Clause, saying that "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause."[53] And in *Alden*, the Court used its broadest language yet:

> 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*.[54]

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[50] *Id*.

[51] *Id*. at 72 n.16.

[52] *Id.* at 77 n.1 (Stevens, J., dissenting).

[53] *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999). *See* U.S. Const. art. I, § 8, cl. 7.

[54] 527 U.S. at 754 (emphasis added).

B. *Katz* recognized a limited exception for the bankruptcy power in light of its unique history and structural requirements.

In 2006, the Court in *Katz* recognized the bankruptcy power as a narrow exception to the rule in *Seminole Tribe*, concluding that the Bankruptcy Clause in Article I "*was* intended not just as a grant of legislative authority to Congress, but also to authorize *limited subordination* of state sovereign immunity in the bankruptcy arena."[55] The Court "acknowledge[d] that statements in both the majority and the dissenting opinions in *Seminole Tribe* . . . reflected an assumption that the holding in that case would apply to the Bankruptcy Clause," but the Court said that "[c]areful study and reflection have convinced us . . . that that assumption was erroneous."[56]

What convinced the Court to change its mind was "[t]he 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."[57] The pre-ratification history showed that the States were attuned to the need for national bankruptcy courts. The Court described the travails of Jared Ingersoll, a Pennsylvania delegate to the Constitutional

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[55] 546 U.S. at 362-63 (emphasis added). *See* U.S. Const. art. I, § 8, cl. 3 (empowering Congress to establish "uniform laws on the subject of bankruptcies throughout the United States").

[56] 546 U.S. at 363.

[57] *Id*. at 362-63.

Convention who, as a practicing attorney in Philadelphia, experienced instances in which the absence of national bankruptcy courts showed the need for federal jurisdiction to operate across State lines.[58] Ingersoll's cases "illustrate[d] the backdrop against which the Bankruptcy Clause was adopted," and explained why the Framers saw the need to enact "uniform laws upon the subject of bankruptcies."[59]

In addition, because "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction," the Court noted that "its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected."[60] But even if the power to recover preferential transfers from creditors (including State creditors) were in the nature of an *in personam* (rather than *in rem*) proceeding, "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."[61] That authority "has been a core aspect of the administration of bankrupt estates since at least the 18th century."[62] And that power, "like the authority to issue writs of habeas corpus releasing debtors from state prisons . . .

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[58] *Id.* at 366-68.

[59] *Id.* at 368-69 (citation omitted).

[60] *Id*. at 369-70.

[61] *Id*. at 372.

[62] *Id*.

operates free and clear of the State's claim of sovereign immunity."[63]

The Court also placed great weight on the fact that "the very first Congresses considered, and the Sixth Congress enacted, bankruptcy legislation authorizing federal courts to, among other things, issue writs of habeas corpus directed at state officials ordering the release of debtors from state prisons."[64] The Court found significant that those deliberations took place while the country was recoiling from *Chisholm v. Georgia*, which held in 1793 that the Supreme Court could exercise original jurisdiction over suits against a State by a citizen of another State.[65] *Chisholm* "so 'shock[ed]' the country in its lack of regard for state sovereign immunity"[66] that Congress promptly proposed the Eleventh Amendment, which was ratified by the States by 1798.[67] And despite that those five years in between "were rife with discussion of States' sovereignty and their amenability to suit," the Court found "no record

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[63] *Id*.

[64] *Id.* at 363.

[65] *Id.* at 375. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450-51 (1793) (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 467 (Cushing, J.); *id.* at 475-79 (Jay, C.J.). *But see id*. at 435 (Iredell, J., dissenting).

[66] *Katz*, 546 U.S. at 375 (quoting *Principality of Monaco*, 292 U.S. at 325) (alteration in original). *See also Alden*, 527 U.S. at 720 ("'profound shock'") (quoting 1 Charles Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)); *Edelman v. Jordan*, 415 U.S. 651, 662 (1974) ("literally shocked the Nation").

[67] *See* 4 Annals of Cong. 476-77 (1794); 7 Annals of Cong. 809 (1798).

of any objection to the bankruptcy legislation or its grant of habeas power to federal courts based on an infringement of sovereign immunity."[68]

The weight of all that evidence convinced the Court to carve out the bankruptcy power from the general rule set forth in *Seminole Tribe*: "the *Bankruptcy Clause*'s unique history, combined with the singular nature of bankruptcy courts' jurisdiction . . . have persuaded us that the ratification of the *Bankruptcy Clause* does represent a surrender by the States of their sovereign immunity in certain federal proceedings."[69] "Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[70] And that was because "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere."[71]

C. The War Powers are not analogous to the bankruptcy power.

There is no similar history to show that the Founders understood that the War Powers in Article I empowered Congress to subject nonconsenting States to

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[68] *Katz*, 546 U.S. at 375.

[69] *Id.* at 369 n.9 (emphasis added).

[70] *Id*. at 373.

[71] *Id*. at 377.

private suits for money damages. Four considerations militate against any such inference.

First, unlike the bankruptcy legislation considered by the First Congress and adopted by the Sixth, it was not until 1974 that the Ninety-Third Congress tried for the first time to subject nonconsenting States to servicemembers' suits for money damages.[72] 1974 was also the year that Congress tried to abrogate State immunity in the Fair Labor Standards Act, at issue in *Alden*.[73] As Justice Kennedy observed for the Court there: "[a]lthough similar statutes have multiplied in the last generation 'they are of such recent vintage that they are no more probative than the [FLSA] of a constitutional tradition that lends meaning to the text.'"[74]

Such late-blooming congressional efforts strongly counsel against finding immunity-overriding authority here. The "'persuasive force'" of such recent statutes "'is far outweighed by almost two centuries of apparent congressional avoidance of the practice.'"[75] The United States won its existential conflicts—the Revolutionary War, the Civil War, and World War II (not to mention countless lesser conflicts)—without empowering private litigants to sue States for money

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[72] Pub. L. No. 93-508, § 404, 88 Stat. 1578, 1596 (1974) (§ 2022).

[73] 527 U.S. at 808.

[74] *Id*. at 744 (quoting *Printz v. United States*, 521 U.S. 898, 918 (1997)).

[75] *Id*. (quoting *Printz*, 521 U.S. at 918).

damages. And the two predecessors to the 1974 Act—the 1940 and 1948 Acts—omitted any legal remedy to enforce their encouragement of States to reemploy returning servicemembers.[76] The respect shown to States in those World-War-II era laws better reflects the nation's historic understanding of State immunity from private suit. Indeed, "the Nation survived for nearly two centuries without the question of the existence of such power ever being presented."[77]

Second, the pre-ratification history of the War Powers is entirely different from that of the bankruptcy power and does not show that the States understood that Congress could override State immunity. The Articles of Confederation granted the "United States in Congress" the "sole and exclusive right and power of determining on peace and war."[78] "Although the fact is often overlooked, the Articles granted Congress a near-monopoly of overtly war-related and foreign relations powers."[79] Yet the States plainly understood that they retained their immunity from suit.

The case of *Nathan v. Virginia*[80] shows how jealously the States guarded their immunity. In 1781, shortly after the Articles were ratified, Simon Nathan

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[76] *See supra* notes 5-6 and accompanying text.

[77] *Seminole Tribe*, 517 U.S. at 71.

[78] Articles of Confederation, art. IX para. 1 (U.S. 1871).

[79] Charles A. Lofgren, *War Powers, Treaties, and the Constitution*, in *The Framing and Ratification of the Constitution* 242 (Leonard W. Levy & Dennis J. Mahoney, eds., 1987).

[80] 1 U.S. (1 Dall.) 77 (C. P. Phila. Cty. 1781).

obtained from the Philadelphia Court of Common Pleas a writ of attachment on a shipment of clothing belonging to Virginia and destined for "Troops of the State in the Continental Army."[81] Virginia's delegation to the Confederation Congress, led by James Madison, urged the Pennsylvania Executive Council to take action to block the attachment, asserting that no State should be forced to "abandon its Sovereignty by descending to answer before the Tribunal of another Power."[82] Pennsylvania's Attorney General, William Bradford, agreed,[83] as did the Executive Council, which ordered the Sheriff not to enforce the writ.[84] Nathan obtained a show-cause rule against the sheriff, however, and Bradford appeared and moved to dismiss the rule based on Virginia's immunity. He argued that,

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[81] Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), *reprinted in* 3 *The Papers of James Madison* 184 (William T. Hutchinson & William M.E. Rachel, eds., 1963), http://founders.archives.gov/documents/Madison/01-03-02-0092, *and* 9 *Pa. Archives* 260-61 (1852), https://archive.org/details/pennsylvaniaarch09harruoft.

[82] *Id*.

[83] Letter from Attorney General William Bradford, Jr., to President Joseph Reed (July 12, 1781), 9 *Pa. Archives* 272 (1852), https://archive.org/details/pennsylvaniaarch09harruoft ("We are all of Opinion That the Commonwealth of Virginia being an independent & Sovereign power, cannot be compelled to appear or answer in any Court of Justice within this State.").

[84] Minutes of the Supreme Executive Council (July 13, 1781), 13 *Colonial Records of Pa.* 1, 2 (1853), https://archive.org/stream/colonialrecordsov13harr#page/n17/mode/2up (finding the attachment "derogatory to the rights and sovereignty of the Commonwealth of Virginia as a free sovereign and independent State, and that farther procedure thereon ought not be had").

although the States had "ceded many of the prerogatives of sovereignty to the United States," the States not only remained "exempt from each other's jurisdiction" but were "accountable to no power on earth, unless with their own consent."[85] The court dismissed the rule.[86]

Nathan was well known to the Founders.[87] Edmund Pendleton—who wrote in 1792 that "I have been taught by all writers on the Subject, that there is no Earthly Tribunal before whom Sovereign & independent Nations can be called & compelled to do justice"—recalled *Nathan* as support for the "General principle" of immunity.[88] And Alexander Dallas printed the proceedings in *Nathan* in his first volume of the United States Reports, noting that the decision "may give some satisfaction to our sister States."[89]

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[85] 1 U.S. at 78.

[86] *Id*.

[87] *See* James M. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 586 (1994) ("Although the *Nathan* case has occasionally been noted in discussions of state sovereign immunity, its significance to the men who framed the Constitution has largely been overlooked.") (footnote omitted).

[88] Letter from Edmund Pendleton to Nathaniel Pendleton (May 21, 1792), 5 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 157 (1994). Pendleton presided over the Virginia convention that ratified the Constitution. *See* 1 Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 327 (1836).

[89] 1 U.S. at 77. Dallas's comment appears in the Lexis version but not the Westlaw version of *Nathan*.

Nathan stands in stark contrast to the pre-ratification history of the bankruptcy power described in *Katz*. The framers understood that having a national bankruptcy system required a limited subordination of State sovereignty. They had no similar understanding of the War Powers.

Third, while those who ratified the Eleventh Amendment voiced no objection to early bankruptcy legislation that impinged on State sovereignty, they never contemplated that the War Powers could be used to subject States to private lawsuits for money damages. As *Alden* explained, the members of Congress who debated the Eleventh Amendment consistently rejected all proposed exceptions, including an exception for "cases arising under treaties made under the authority of the United States."[90] There is no reason to suppose that they would have reacted more warmly to a War Powers exception. Indeed, the very "dispute that precipitated the constitutional holding in *Chisholm* concerned a debt that arose during the revolutionary war."[91] So it likely would have provoked great alarm to those who ratified the Eleventh Amendment had anyone proposed that *Congress* simply use its War Powers instead to authorize private lawsuits against States to collect on war debts.

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[90] 527 U.S. at 721; *see* 4 Annals of Cong. 30 (1794).

[91] *Documentary History of the Supreme Court*, *supra* note 88, at 127.

Fourth, the structural requirements necessitating legal actions against States in bankruptcy have no corollary in a military system established by Congress under its War Powers. As noted at oral argument in *Katz*, States are creditors in "probably the majority of bankruptcies around the country."[92] A national bankruptcy system would be badly impaired if sovereign immunity prevented bankruptcy trustees from recovering voidable preferences paid by debtors to State creditors,[93] or if, as at the founding, States could keep debtors locked up in debtor's prisons.[94]

No equivalent structural problem afflicts Congress's exercise of its War Powers. Even though immune from private damage suits, States still must comply with federal law.[95] And *Seminole Tribe* already rejected any general claim that subjecting States to private suit is essential to effectuating Congress's Article I powers:

> This argument wholly disregards other methods of ensuring the States' compliance with federal law: The Federal Government can bring suit in federal court against a State, *see*, *e.g., United States v. Texas*, 143 U.S. 621,

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[92] Tr. of Oral Arg. at 4, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (No. 04-885).

[93] *Katz*, 546 U.S. at 371-72.

[94] *Id*. at 363.

[95] *Alden*, 527 U.S. at 754-55 ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.").

> 644-645 (1892) (finding such power necessary to the "permanence of the Union"); an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law, *see*, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); and this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit, *see*, *e.g.*, *Cohens v. Virginia*, [19 U.S.] 6 Wheat. 264 (1821).[96]

Other enforcement avenues can be added to that list. USERRA itself empowers the Attorney General to sue a State to recover money damages on the servicemember's behalf.[97] And if Congress truly felt the need, it could require States to waive their immunity from private damage suits "in exchange for related federal money, such as National Guard funding."[98] Indeed, legislation to tie federal aid to the States' waiver of immunity for USERRA claims was introduced in 2004 but not enacted.[99]

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[96] 517 U.S. at 71 n.14.

[97] 38 U.S.C. § 4323(a)(1), (c)(1), (d).

[98] Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L. Rev. 999, 1044 (2004) ("[T]his route provides Congress with a simple and relatively quick means of reestablishing national protections for military employees."). *See also Alden*, 527 U.S. at 755 ("Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.").

[99] *See* S. 2088, § 201, 108th Cong. (2004).

It is no coincidence that one searches in vain for any "other federal statutes that rely upon private lawsuits as an essential mechanism to implement the federal war powers."[100] As one federal judge skeptically put it, "[p]rohibiting private USERRA lawsuits against State employers . . . does not imperil the Union."[101] But exempting States from bankruptcy proceedings would imperil the bankruptcy system.

D. *Seminole Tribe* already rejected Petitioner's argument based on the exclusivity of federal powers.

Petitioner cites neither history nor structural exigencies to show that the States knowingly surrendered their immunity when they agreed to the War Powers. Petitioner's only historical argument (Pet. 23-26) is the same one offered by Justice Souter in his dissent in *Seminole Tribe*.

Justice Souter combined excerpts from *The Federalist Nos. 32* and *81* to argue that the States retained their immunity from private suit *except* when the power was "'exclusively delegated to the United States.'"[102] Under the Indian Commerce Clause, at issue in *Seminole Tribe*, the power over Indian relations

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[100] *Velasquez v. Frapwell*, 994 F. Supp. 993, 1002 n.9 (S.D. Ind.), *aff'd*, 160 F.3d 389 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999).

[101] *Id*. at 1002.

[102] 517 U.S. at 146 (Souter, J., dissenting) (quoting *The Federalist No. 32*).

is "'the exclusive province of federal law.'"[103] Thus, "since the States have no sovereignty in the regulation of commerce with the tribes, on Hamilton's view there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce."[104] Petitioner makes exactly the same argument about the War Powers, although he fails to credit Justice Souter for coming up with it.

But the majority in *Seminole Tribe* flatly rejected the exclusivity of federal power as the test for whether the States retained their immunity from suit. It did not matter in that case that "the regulation of Indian commerce . . . is under the exclusive control of the Federal Government."[105] The Court held that:

> Even when the Constitution vests in Congress *complete law-making authority over a particular area*, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.[106]

This Court has followed that holding in interpreting other "exclusive" federal powers. Article I grants Congress "plenary authority over patents and copyrights," and "[n]early 200 years ago, Congress provided

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[103] *Id*. at 147 (quoting *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985)).

[104] *Id*. at 148.

[105] *Id*. at 72 (majority op.).

[106] *Id*. (emphasis added).

for exclusive jurisdiction of patent infringement litigation in the federal courts."[107] Yet the Court held in *Florida Prepaid* that Congress could not use that power to abrogate State immunity.[108] And the Court in *Federal Maritime Commission* likewise rejected the Government's argument that the Commission could adjudicate private claims against States on account of "the constitutional necessity of uniformity in the regulation of maritime commerce."[109] The Court invoked the same passage from *Seminole Tribe*, block-quoted above, in rejecting the exclusivity of federal power as the test for whether it can be used to override State immunity.[110]

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In short, Petitioner has not made the compelling case needed to exclude the War Powers from the normal rule of State immunity laid down in *Seminole Tribe* and *Alden.* In particular, Petitioner offers no historical evidence whatever to show that the States understood that ratifying the War Powers would enable Congress to subject them to private suits for money damages.

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[107] *Fla. Prepaid*, 527 U.S. at 648 (Stevens, J., dissenting).

[108] *Id.* at 636.

[109] *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 767 (2002) (citation omitted).

[110] *Id.* at 767-68.

III. As in other Eleventh Amendment cases, the Court should let the issue percolate.

Given the dearth of historical support for Petitioner's arguments and the absence of any split of authorities, the Court should decline certiorari here and wait for a better case to come along. "[T]his is exactly the sort of issue that could benefit from further attention" in lower courts.[111] This Court "should not rush to answer a novel question . . . in the absence of a pronounced conflict,"[112] a conflict that simply does not yet exist. As Justice Ginsburg has noted, this Court "in many instances [has] recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement of this Court."[113]

The Court has applied exactly that approach in other Eleventh Amendment cases. *Katz* is a prime example. The Court denied certiorari in 1998 in a case from the Fourth Circuit that applied *Seminole Tribe* to hold that the bankruptcy power did not override Eleventh Amendment immunity.[114] Over the next five years, the Third, Fifth, Seventh, and Ninth Circuits

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[111] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

[112] *Id*.

[113] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[114] *Schlossberg v. Comptroller of Treasury* (*In re Creative Goldsmiths of Washington, D.C.*), 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998) (No. 97-1363).

reached the same conclusion.[115] It was only in 2006, after the Sixth Circuit went the other way, that this Court granted certiorari in *Katz*.[116] The Court also denied certiorari in 2006 in a case in which the Sixth Circuit held that the self-care provision of the Family and Medical Leave Act did not override Eleventh Amendment immunity.[117] The Court did not decide that issue for another six years, when it granted certiorari in *Coleman* and held in 2012 that the self-care provisions did not override State immunity.[118]

The rights and interests of servicemembers will not be compromised in the meantime while the Court awaits a split of authorities and a petitioner who can offer better-developed historical arguments for a War Powers exception. As shown above, there are numerous ways to enforce the rights of State-employed servicemembers that do not depend on private suits for money damages; in particular, USERRA empowers the Attorney General to sue for damages on the service-member's

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[115] *Nelson v. La Crosse Cty. Dist. Att'y* (*In re Nelson*), 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Dep't of Pub. Welfare* (*In re Sacred Heart Hosp.*), 133 F.3d 237, 243 (3d Cir. 1998); *Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC* (*In re Fernandez*), 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997).

[116] *Katz*, 546 U.S. at 379.

[117] *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 399-400 (6th Cir. 2005), *cert. denied*, 546 U.S. 1173 (2006) (No. 05-752).

[118] *Coleman v. Ct. of Appeals of Md.*, 132 S. Ct. 1327, 1338 (2012).

behalf.[119] In addition, USERRA created an extensive administrative process—operated by the Veterans' Employment and Training Service of the Department of Labor—to resolve USERRA claims against both private and State employers, without the need for litigation.[120] The Department informed Congress in 1996 that 95% of those claims in the previous year were resolved without the need for a litigation referral to the Attorney General.[121] The Department's most recent report to Congress likewise touts the robust enforcement efforts by the Department of Justice, noting that DOJ "continues to ramp up its enforcement of USERRA against private, state and local employers through litigation, facilitated settlements, outreach, and advocacy."[122] Petitioner elected, however, not to seek any such assistance in this case.

As this Court observed in *Coleman*, States may choose not to waive their Eleventh Amendment immunity because they have elected instead to "create a parallel state law cause of action."[123] That is exactly what Virginia has done. As the Virginia Supreme

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[119] *See supra* notes 96-99 and accompanying text.

[120] *See* 38 U.S.C. § 4323.

[121] *Hearing on USERRA*, *supra* note 23, at 38 (Statement of Preston M. Taylor, Jr., Assistant Sec'y of Labor, Veterans Emp't & Training).

[122] Office of Assistant Sec'y for Veterans' Emp't & Training, *USERRA: FY 2015 Annual Report to Congress* 5 (2016), https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2015.pdf.

[123] 566 U.S. at 43.

Court noted below, "Virginia law authorizes a statutory right of action in nearly identical circumstances as the federal USERRA."[124] Petitioner himself conceded in the trial court that Virginia's State-law protections "mirror those of USERRA."[125] In a meritorious case, the employee is even entitled to be represented by the Office of the Attorney General.[126] But Petitioner chose not to avail himself of those State-law remedies.[127]

Virginia's generous legal remedies are consistent with its demonstrable commitment to veterans. Virginia ranks first in the nation in employing veterans in the labor force.[128] It gives otherwise-qualified servicemembers preference in State hiring.[129] In 2013, the General Assembly directed the Virginia Department of Veterans Services to develop a program to assist businesses "to attract, hire, train, and retain veterans."[130] The Department's "Virginia Values Veterans" or "V3" program[131] has since "grown to reach hundreds of companies . . . resulting in over 20,439 actual hires

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[124] App. 2a n.1 (citing, *inter alia*, Va. Code Ann. § 44-93.5 (2013)).

[125] Va. Sup. Ct. Record at 90.

[126] Va. Code Ann. § 44-93.5.

[127] App. 2a n.1.

[128] Va. Dep't of Veterans Servs., *Virginia's Veterans Population at a Glance* (2017), https://www.dvsv3.com/about/.

[129] Va. Code Ann. § 2.2-2903(A) (2014).

[130] Va. Code Ann. § 2.2-2001.2(A) (Supp. 2016).

[131] Va. Dep't of Veterans Servs., *Virginia Values Veterans, Program Overview* (2017), https://www.dvsv3.com/program-overview/.

reported so far."[132] In 2015, the legislature mandated that all State agencies become V3 certified or seek a waiver.[133] The VSP is nearing the completion of its V3 certification.

Because Petitioner cannot seriously claim that Virginia mistreats servicemembers and veterans, no exigency warrants considering prematurely the War Powers question presented here. Before this Court invalidated race-based peremptory strikes in its 1986 decision in *Batson v. Kentucky*, it declined certiorari in numerous cases presenting that question.[134] Justice Marshall lamented in 1983 that, while the Court decided to "postpone consideration of the issue until more state supreme courts and federal circuits have experimented" with it, "criminal defendants . . . [had] no legal remedy for what a majority of this Court agrees may well be a constitutional defect in the jury selection process."[135] Even so, Justice Stevens found it prudent, in the absence of a split of authorities, "to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."[136]

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[132] *Id*.

[133] 2015 Va. Acts ch. 318 (codified at Va. Code Ann. § 2.2-2001.2(B) (Supp. 2016)).

[134] 476 U.S. 79, 82 n.1 (1986) (collecting cases).

[135] *Gilliard v. Mississippi*, 464 U.S. 867, 869, 873 (1983) (Marshall, J., dissenting from denial of certiorari).

[136] *McCray v. New York*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari).

Given the myriad remedies available to servicemembers here, Justice Stevens's approach is the correct one. There is plainly no exigency that warrants addressing the issue prematurely, when there is no disagreement among lower courts, and when Petitioner has failed to compile the historical record essential to deciding the question presented. Indeed, Petitioner's failure to compile the necessary historical evidence would force the Court to be a "pioneer of novel legal claims," contrary to its long-standing rule that this "'is a court of final review and not first view.'"[137]

CONCLUSION

The petition for writ of certiorari should be denied.

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April 6, 2017

[137] *Omnicare, Inc. v. Laborer's Dist. Council Indus. Pension Fund*, 135 S. Ct. 1318, 1338 (2015) (Thomas, J., concurring) (quoting *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012)).