Department of Justice

STATEMENT FOR THE RECORD

THE CIVIL RIGHTS DIVISION AND
THE SERVICEMEMBERS AND VETERANS AFFAIRS INITIATIVE
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

FOR A HEARING ON

PENDING SERVICEMEMBERS AND VETERANS LEGISLATION

PRESENTED

JUNE 29, 2016

Statement for the Record
U.S. Department of Justice
Before the Committee on Veterans' Affairs
United States Senate
June 29, 2016

Chairman Isakson, Ranking Member Blumenthal, and distinguished Members of the Committee, thank you for the opportunity to present the views of the Department of Justice (the Department) on legislation currently pending before the Committee. The Department welcomes the Committee's focus on protections for servicemembers and veterans, as we share the priority of protecting the civil rights of our men and women in uniform. The Department especially thanks Senator Blumenthal for his commitment to expanding protections and preventing employment discrimination of our servicemembers through his introduction of legislation amending the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

Our servicemembers and veterans have made countless sacrifices around the world to ensure our freedom here at home. In return, the Department has the responsibility to protect them from fraud, job discrimination, financial scams, unsafe equipment, and unlawful voting restrictions.

That's why last year the former Attorney General launched the Servicemembers and Veterans Initiative (the Initiative). The Initiative is building a comprehensive legal and support network for servicemembers and veterans so they know their rights and know what to do if they suspect their rights have been violated. The Initiative's goal is to coordinate and expand the Department's existing efforts to protect servicemembers and veterans through outreach, enforcement assistance, and training. In the past year, the Initiative has held outreach events at eight major military installations nationwide and the first convening of the Judge Advocate Generals for all military branches. The Initiative prepared a legal toolkit, provided legal training to Assistant United States Attorneys, and launched a revamped website designed to educate servicemembers, veterans, military family members, and legal practitioners on the military statutes enforced by the Department, as well as the work of the Department's litigating components.

The Department protects servicemembers' rights, among other ways, by vigorously enforcing USERRA, which prohibits discrimination against persons based upon their military service. USERRA entitles servicemembers to return to their civilian employment upon completion of their military service with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed by their civilian employer. Since 2004, we have filed 95 USERRA lawsuits and favorably resolved 151 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. The Department's USERRA program is critically important because the cases typically involve small dollar amounts of back pay, and without the Department's help, many servicemembers would not be able to find or afford private attorneys to take their cases.

The Civil Rights Division has had numerous recent USERRA victories, including on March 13, 2015, when the Department settled its lawsuit with the Missouri National Guard (MNG) alleging that the MNG had violated the USERRA rights of its dual service technicians by forcing them to resign their civilian employment prior to entering into active duty. The Department alleged that MNG's refusal to place dual service technicians on furlough or leave of absence from their civilian jobs, by forcing a separation, resulted in the loss of paid military leave. Under the terms of the settlement agreement, which was approved by the district court, MNG has agreed to rescind its current policy requiring separation in order to enter active duty and to compensate 138 total Missouri National Guardsmen and women over 2000 days of paid leave for past alleged USERRA violations.

On December 9, 2014, the United States secured an appellate ruling in favor of Plymouth Police Department Officer Robert DeLee in *DeLee v. City of Plymouth*, No. 14 – 1970, where the United States Court of Appeals for the Seventh Circuit held that the City of Plymouth, Indiana, violated USERRA when it reduced DeLee's longevity payment while he was serving on active duty military leave. Officer DeLee, who was represented by the Department, initially sued the City in 2012 when it reduced his longevity payment in 2011 because he served time on active military duty. Initially the U.S. District Court for the Northern District of Indiana ruled that the benefit reduction did not violate USERRA because the longevity bonus was not a seniority-based benefit. On an appeal brought by the Department, the Seventh Circuit overturned the district court decision, ruling that the City's ordinance pro-rating the bonus violates USERRA because it fails to place the "servicemember at the 'precise point he would have occupied had he kept his position continuously' while away from the job for his military service."

The Department also has actively participated as *amicus curiae* in appeals involving the important rights of servicemembers, including the Supreme Court case of *Staub v. Proctor Hospital*, the Second Circuit appeal in *Serrichio v. Wachovia Securities*, and the First Circuit appeal in *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*. The Department also intervened and participated as *amicus curiae* on appeal to defend USERRA's constitutionality and applicability in *Clark v. Virginia Dept. of State Police*, No. 151857 (Vir. S. Ct. 2016), *Weaver v. Madison City Bd. of Educ.*, No. 13-14624 (11th Cir.), filed in 2014, and *Ramirez v. State of New Mexico Youth and Family Services*, No. S-1-SC-34613 (N.M. S. Ct.), filed in 2014. The United States also filed a statement of interest in 2014 in *Joseph v. Virgin Islands*, CV No. ST-11-CV-419, in order to defend Congress's authority to subject territories, like the United States Virgin Islands, to private suits in territorial courts under USERRA.

As part of our effort to grow and strengthen the USERRA enforcement program, the Civil Rights Division has also ramped up partnerships with U.S. Attorneys' Offices (USAOs) as a force multiplier for our efforts, and we have seen tangible results: since mid-2010, at least 46 USAOs have participated in the Department's USERRA/USAO program resulting in 30 of the 62 USERRA lawsuits this Administration has filed.

The Department believes that the amendments to USERRA this Committee is considering would provide the Department with critical enhanced enforcement capabilities and buttress current servicemember protections. Indeed, the dual goals of enhanced enforcement and stronger protections led the Administration in 2015, to formally transmit to Congress a package

of proposals to amend the Servicemembers Civil Relief Act (SCRA) and USERRA, as well as the Military Lending Act (MLA) and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which are attached. In addition to our legislative proposals, the Department stands ready to protect the rights of those who make such tremendous sacrifices for our nation and plans to expand our enforcement of USERRA, UOCAVA, and SCRA. The FY 2017 President's Budget request provides an increase of $587,000 and five positions to support the Department's capacity to effectively address this increased workload. The Department urges the Senate to take action in this Congress on these critical proposals.

In its previous and current servicemembers legislative package, the Department has proposed legislation that would significantly improve USERRA enforcement tools. This legislation is currently included in the proposed bill before the Committee. These proposals to amend USERRA include:

- **Allowing the United States to serve as a plaintiff in all suits filed by the Attorney General.** Presently, the U.S. can serve as a plaintiff only in suits filed against State employers. The proposed legislation also would preserve the right of the aggrieved persons to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit.

- **Providing the Department with pattern-or-practice authority to enforce USERRA.** The proposed legislation also would strengthen enforcement by granting independent authority to the Attorney General to investigate and file suit to challenge a pattern or practice in violation of USERRA. The pattern or practice language is modeled after Title VII of the Civil Rights Act of 1964 and would provide immediate support to our working servicemembers. On February 1, 2016, in a case brought by the Department, a court found that the Pension Plan of the Ironworkers of New England Pension Fund violated USERRA in *Thomas Shea v. Ironworkers of New England, et al*., *No*. 13-12725-NMG (D.Mass.). However, the Department can currently only represent the individual in this case against the Pension Fund. With self-starter authority, the Department could get relief for servicemembers around the country who work with similarly illegal pension plans.

- **Explicitly abrogating state sovereign immunity.** The proposed legislation would allow servicemembers to bring an action against a state employer in state court or federal district court. The United States has filed several *amicus* briefs in state court on this issue. One example of this work is the on-going litigation involving Jonathan R. Clark, a sergeant in the Virginia State Police (VSP) and a Senior Captain in the U.S. Army Reserve in *Clark v. Virginia Dept. of State Police*, No. 151857 (Vir. S. Ct. 2016). From 2008 through 2011, Capt. Clark served in Operation Enduring Freedom. In 2015, Capt. Clark filed a complaint alleging that the VSP had violated USERRA by engaging in a pattern or practice of harassment and discrimination against him related to his military service. Clark alleged that because of his service, VSP members made derogatory statements about his military commitments, filed baseless charges of misconduct against him, and denied him several opportunities for promotion. In response, VSP filed a special plea of sovereign immunity, arguing that because Clark was a state employee

trying to sue the Commonwealth of Virginia in a state court, his USERRA claims were barred by the 11th Amendment. The state court sustained that plea and entered a final order dismissing the action without written opinion on September 9, 2015. Clark then appealed to the Supreme Court of Virginia.

To help protect Capt. Clark's interests, the Department filed an amicus brief attached hereto, which argues that USERRA's jurisdictional provision subjects all states to private suit in their own courts, regardless of whether a state has consented to suit. The brief also argues that Congress has this authority under the War Powers clauses of the Constitution, which give Congress the power to declare war, raise and support an army and navy, and regulate the land and naval forces. Consequently, the state court made a mistake when it sustained VSP's amended special plea of sovereign immunity and dismissed Clark's complaint.

The United States has filed similar briefs in the Fifth and Eleventh Circuit Courts of Appeal and the New Mexico Supreme Court arguing that Congress has authority under its War Powers to authorize private individuals to bring USERRA claims against state employers.

- **Revising pension contribution calculations.** The proposed legislation would revise the pension contribution calculations for servicemembers in service over one year, and whose pension contributions during service are not reasonably certain, so that the servicemember's pension contribution is comparable to the average contribution of similarly-situated employees.

- **Adding compensatory and punitive damages.** The proposed changes to USERRA's damages provisions were reached as a result of negotiation and consideration. By replacing liquidated damages with compensatory and punitive damages, we were seeking to better compensate servicemembers for the losses they suffer from USERRA violations. Frequently servicemembers face non-wage damages from their USERRA violations, including emotional distress, pension and retirement benefit losses ancillary to the USERRA violation (i.e., servicemembers cashing out their benefits in order to replace lost income), and out of pocket medical bills caused by lost insurance. Currently these types of damages are not covered by the USERRA statute. In addition, the amendment allows for punitive damages when the employer acts with reckless indifference to the rights under the statute. This standard is well litigated under Title VII and will provide welcome relief to employees who work for employers who violate the statute in the same manner as liquidated damages did.

  With regard to the limits on the damages, this area is also well litigated. Even without statutory limits on damages, courts have imposed equitable limits on compensatory and liquidated damages, and thus the statutory limits provide a guide for courts.

Other helpful provisions that are included in this proposed USERRA legislation clarify the enforceability of arbitration agreements and the employers' burden with regard to latent service related disabilities. This USERRA amendment also provides for civil investigative

demand authority in the Department's USERRA investigations. The Department is especially supportive of the clarifying language regarding forced arbitration. USERRA gives servicemembers the right to enforce their rights under USERRA in federal court and to request legal representation from the Department of Justice. If servicemembers are forced into arbitration through one-sided employment agreements, these rights would be jeopardized.

The Department appreciates the opportunity to submit its views on servicemembers civil rights legislation currently pending before the Committee. We stand ready to provide any technical assistance on the bill discussed above and will strive to work with the Committee in advancing important legislative efforts to strengthen the cornerstone civil rights laws protecting servicemembers' rights.

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 151857

JONATHAN R. CLARK

Petitioner/Appellant,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent/Appellee.

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

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IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 151857

JONATHAN R. CLARK

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BRIEF FOR THE UNITED STATES AS
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QUESTIONS PRESENTED AND STANDARD OF REVIEW

This appeal presents two issues: (1) whether the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 *et seq.*, subjects States to suit in their own courts irrespective of their consent (Assignment of Error No. 2); and if so, (2) whether the federal Constitution's War Powers clauses empowered Congress to provide for this cause of action (Assignment of Error No. 1). Both are issues of law subject to de novo review. *Ramos* v. *Wells Fargo Bank, N.A.*, 770 S.E.2d 491, 493 (Va. 2015).

INTEREST OF *AMICUS CURIAE*

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

The United States has a strong interest in defending USERRA's constitutionality. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4334, and has promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. The Attorney General enforces USERRA in court against public and private employers. 38 U.S.C. 4323. The United States has argued in multiple courts that Congress has authority, under its War Powers, to authorize private individuals to bring USERRA claims against state employers. See, *e.g.*, Brief for the United States as Amicus Curiae in Support of Appellee/Cross-Appellant, *Ramirez* v. *State ex rel. Children, Youth & Families Dep't*, 326 P.3d 474 (N.M. Ct. App. 2014) (*Ramirez I*) (No. 31820), rev'd *sub nom Ramirez v. State Children, Youth & Families Dep't*, No. S-1-

SC-34613, 2016 N.M. Lexis 87 (N.M. Apr. 14, 2016) (*Ramirez II*); Brief for the United States as Amicus Curiae in Support of Petitioner, *Ramirez II*, 2016 N.M. LEXIS 87 (N.M. Apr. 14, 2016) (No. S-1-SC-34613) (filed on Aug. 6, 2014); Brief for the United States as Intervenor-Appellee, *Walker* v. *Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748 (11th Cir. 2014) (filed in *Weaver* v. *Madison City Bd. of Educ.*, No. 13-14624); Brief for the United States as Intervenor, *McIntosh* v. *Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440).

ASSIGNMENTS OF ERROR

1. Because by enacting 38 U.S.C. § 4323(b)(2) in 1998 Congress clearly intended to subject state employers 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.

2. 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.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

At issue in this case is whether USERRA's jurisdictional provision subjects all States to private suit in their own courts regardless of whether they have consented to suit, and if it does, whether Congress had the constitutional authority to provide for this cause of action under the War Powers clauses of the Constitution, which give Congress the power to declare war, raise and support an army and navy, and regulate the land and naval forces, U.S. Const. Art. I, § 8, Cls. 11-14 (the War Powers or the War Powers clauses). This Court should answer both questions in the affirmative.

1. Factual Background

Petitioner Jonathan R. Clark, a sergeant in the Virginia State Police (VSP), is a senior captain in the United States Army Reserve. (App. 2). Clark alleges that beginning in January 2008, VSP officials engaged in a pattern or practice of harassment and discrimination against him relating to his service in the Army, in violation of USERRA. Specifically, Clark alleges that from January 2008 through April 2008, VSP First Sergeant Robert J. Shupe made derogatory statements regarding Clark's service in the Army. (App. 3-4). From April 2008 through January 2011, Clark was mobilized in support of "Operation Enduring Freedom." (App. 4). When he returned to

VSP, Clark faced multiple baseless charges of misconduct, rendering him ineligible for a promotion for three years. (App. 4-5). On August 19, 2011, Clark filed a complaint under VSP's grievance procedures. (App. 13). On January 31, 2012, an independent state hearing officer found in favor of Clark and ordered that the disciplinary charges be removed from Clark's employment file. (App. 13-20).

Clark further alleges that, between August 2013 and November 2014, he applied for three vacant First Sergeant positions but was not selected. Clark alleges that he was denied these promotions due to his military duties and his previous exercise of his rights under USERRA. (App. 6).

2. Trial Court Proceedings

On January 20, 2015, Clark filed a Complaint in the Circuit Court of Henry County, alleging that VSP's actions violated USERRA. (App. 1-20). In response, VSP filed a Special Plea of Sovereign Immunity, arguing that Clark's USERRA claims were barred by the Eleventh Amendment. VSP also moved to transfer venue. (App. 21-22). The Circuit Court of Henry County granted the venue motion and transferred the case to the Circuit Court of Chesterfield County (Circuit Court), where VSP filed an Amended Special Plea of Sovereign Immunity on May 29, 2015. (App. 24-29). Clark opposed VSP's plea, arguing that Congress subjected state employers to

suit under USERRA pursuant to a valid exercise of its War Powers. (App. 30).

After oral argument, 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. (App. 63). On December 4, 2015, Clark filed a petition for leave to appeal to this Court, which was granted on April 7, 2016.

ARGUMENT

The U.S. Supreme Court has frequently explained that determining whether Congress has abrogated state sovereign immunity depends on (1) whether Congress has made "its intention to abrogate unmistakably clear in the language of the statute," and (2) whether Congress acted "pursuant to a valid exercise of its power." See, *e.g.*, *Nevada Dep't of Human Res*. v. *Hibbs*, 538 U.S. 721, 726 (2003).

Both parts of this test are satisfied here, and the Circuit Court erred in ruling to the contrary. The text and legislative history of the 1998 amendments to USERRA make clear that Congress intended to, and did, provide servicemembers employed by state entities with a private cause of action in state court, regardless of whether a State has consented to suit.

That decision, moreover, was a valid exercise of Congress's War Powers. In *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 377 (2006), the Supreme Court explained that Congress can subject States to private lawsuits where doing so was "in the plan of the Convention." Careful historical analysis shows that Congress's ability to subject States to suit under the War Powers was well within that plan. Accordingly, this Court should reverse the decision of the Circuit Court.

I

LEGAL FRAMEWORK

This case requires this Court to consider the interaction between USERRA and the Eleventh Amendment to the United States Constitution. Because Congress enacted the relevant provision of USERRA in response to the U.S. Supreme Court's Eleventh Amendment jurisprudence, we discuss the evolution of that jurisprudence first.

The Eleventh Amendment of the United States Constitution states:

> 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.

The Eleventh Amendment has long been understood to affirm that States retained their sovereign immunity when they joined the union. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 97-99 (1984). While, on its

face, the Amendment is limited to suits brought by citizens of other States, it has long been understood to extend to suits brought by a State's own citizens. *Id*. at 98; see also *Hans* v. *Louisiana*, 134 U.S. 1, 10 (1890).

There are two exceptions to this regime. First, a State may be sued in state or federal court when it has waived its sovereign immunity. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 99. Second, a State may be sued when Congress has abrogated state sovereign immunity pursuant to a valid exercise of Congress's constitutional powers. See *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). As discussed below, the Supreme Court's jurisprudence with respect to the latter exception has undergone significant changes over the past two decades.

Until the early 1990s, it was widely understood "that Congress has the authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 15 (1989). Thus, in *Union Gas*, the U.S. Supreme Court concluded that Congress has the power to allow individuals to sue States when it enacts legislation under the Commerce Clause. *Id*. at 23.

In 1996, the Supreme Court decided *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75, holding that Congress did not have the power under the Indian

Commerce Clause to subject States to suit in federal court. Specifically overruling *Union Gas*, the Court stated that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id*. at 72-73.

Because *Seminole Tribe* involved a federal lawsuit, courts generally interpreted the decision to restrict Congress's ability to subject States to suit in federal but not state court. See, *e.g.*, *United States ex rel. Long* v. *SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 887 n.20 (D.C. Cir. 1999) (after *Seminole Tribe*, stating that "the Eleventh Amendment does not apply in state courts"), cert. denied, 530 U.S. 1202 (2000); *Alston* v. *State Bd. of Med. Exam'rs*, 236 B.R. 214, 217 (Bankr. D.S.C. 1999) (same). Three years later, however, in *Alden* v. *Maine*, 527 U.S. 706, 754-759 (1999), the Supreme Court held that the limits on Congress's authority to abrogate States' sovereign immunity to suit in federal court apply equally to state-court actions.

In the years after *Seminole Tribe* and *Alden* were decided, the prevailing view was that Congress could never abrogate the States' sovereign immunity under its Article I powers. See, *e.g.*, *Burnette* v. *Carothers*, 192 F.3d 52, 59 (2d Cir. 1999), cert. denied, 531 U.S. 1052

(2000); *Alabama Dep't of Human Res.* v. *Lewis*, 279 B.R. 308, 317-319 (Bankr. S.D. Ala. 2002). But in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 362-363 (2006), the Court made clear that this was not the rule, holding that at least one Article I power—the Bankruptcy Clause—can provide a constitutional basis for Congress to subject States to private lawsuits. As explained in greater detail below, *Katz* instructs that whether Congress has authority to abrogate the States' sovereign immunity under an Article I power will depend on the history and intent of the power at issue.

USERRA was enacted in 1994, when *Union Gas* still represented the prevailing view on Congress's ability to subject States to suit by private individuals.[1] Thus, when first enacted, the statute gave federal courts

[1] There is no dispute that Congress enacted USERRA pursuant to its War Powers. Congress's stated purpose in enacting this statute was "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). Federal courts of appeals have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to its War Powers. See, *e.g.*, *Bedrossian* v. *Northwestern Mem'l Hosp.*, 409 F.3d 840, 843 (7th Cir. 2005); *Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1080-1081 (5th Cir. 1979); *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937-938 (7th Cir.), cert. denied, 441 U.S. 967 (1979).

jurisdiction over all USERRA actions, including actions brought against state employers.[2] See Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3165, amended by the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3329.

After the Supreme Court's decision in *Seminole Tribe*, various States challenged Congress's authority to subject them to private USERRA actions, and a few district courts held that USERRA's provision subjecting state employers to suit in federal court was unconstitutional. See, *e.g.*, *Velasquez* v. *Frapwell*, 994 F. Supp. 993, 1005 (S.D. Ind. 1998), vacated in part, 165 F.3d 593 (7th Cir. 1999); *Palmatier* v. *Michigan Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997).

Congress viewed States' assertions of sovereign immunity to USERRA claims in the wake of *Seminole Tribe* as a particular threat to national security so, in 1998, Congress amended the statute to ensure that it remained enforceable against state employers. See House Report 5. The House Report emphasized that the cases holding that States had immunity from private suit under USERRA "threaten not only a long-

[2] USERRA defines a "State" to include state agencies. 38 U.S.C. 4303(14).

standing policy protecting individuals' employment right[s], but also raise serious questions about the United States['] ability to provide for a strong national defense." *Ibid.* The House Report further explained that the proposed amendments to USERRA were designed to ensure "that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." *Ibid.*

As amended, the statute continued to authorize federal jurisdiction over USERRA suits against private employers. See 38 U.S.C. 4323(b)(3) (1998). But it withdrew federal jurisdiction over private suits against state employers and recognized two mechanisms for the statute's enforcement in this context. First, an aggrieved individual, following an administrative process, can request that the Attorney General file a complaint on the individual's behalf. See 38 U.S.C. 4323(a). Whether to undertake the representation is in the sole discretion of the Attorney General. If the Attorney General takes the case, she may file suit "in the name of the United States" in federal court. See 38 U.S.C. 4323(a) & (b)(1). Second, the amendment authorized an individual who is not represented by the Attorney General to file suit in state court. See 38 U.S.C. 4323(a)(3) & (b)(2); see also 20 C.F.R. 1002.305(b).

These were logical steps for Congress to take to ensure that USERRA would be enforceable against state employers. It had long been clear that the Constitution did not prevent the federal government from suing a State. Congress thus concluded (and courts have since agreed) that the Constitution does not prevent the United States from filing a USERRA suit against a State on behalf of an individual. See, *e.g.*, *United States* v. *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1328 (11th Cir. 2012).

Congress likewise reasonably concluded, under then-prevailing law, that allowing private individual suits against state employers in state court was an appropriate and effective way to address the problem created by *Seminole Tribe*; *i.e.*, because *Seminole Tribe* itself dealt only with the jurisdiction of *federal* courts, Congress believed that the case did not prevent individuals from suing state employers in *state* court.

But the Supreme Court's decision in *Alden* the very next year changed the legal landscape, making clear that a State enjoys the same sovereign immunity in state court as it retains in federal court. 527 U.S. at 754. Thus, in the years following *Alden*, courts unsurprisingly held that the Eleventh Amendment barred USERRA suits brought by private individuals against state employers, whether brought in state or federal court. See,

e.g., *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001).[3]

Then, in 2006, the U.S. Supreme Court decided *Katz*, which made clear that *Seminole Tribe* is *not* an absolute bar to Congress's power to subject States to suit when acting pursuant to an Article I power. *Katz*, 546 U.S. at 363. And, as explained below, the reasons for concluding that the War Powers give Congress authority to subject States to suit are even more compelling than the reasons for concluding that the Bankruptcy Clause gives Congress that authority.

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[3] Even so, there was some debate during this time as to whether the limitations recognized in *Seminole Tribe*, and later in *Alden*, would extend to Congress's War Powers. See *Hearing on USERRA, Veterans' Preference in the VA Education Services Draft Discussion Bill: Hearing Before the Subcomm. on Educ., Training, Emp't & Hous. of the H. Comm. on Veterans' Affairs*, 104th Cong., 2d Sess. 19-20 (1996) (statement of Rep. Buyer) (suggesting that *Seminole Tribe* would not apply to statutes enacted pursuant to Congress's War Powers); see also *id.* at 20 (Statement of Professor Jonathan Seigel) (concluding that "if any of Congress' Article I powers carry with them the ability to abrogate States' sovereign immunity, certainly, the military powers should be first on the list"); see also Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L. Rev. 999, 1032 (2004) (concluding, before *Katz* was decided in 2006, that "war powers abrogation provides the best case for the [Supreme] Court to recognize a limited exception to its general disapproval of Article I abrogation").

II

CONGRESS INTENDED TO SUBJECT STATES TO PRIVATE USERRA SUITS IN STATE COURT IRRESPECTIVE OF STATES' CONSENT (ASSIGNMENT 2)

Section 4323(b)(2) of USERRA provides 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." 38 U.S.C. 4323(b)(2). VSP argues that the phrase "in accordance with the laws of the State" means that Congress intended for servicemembers to be able to sue state employers under USERRA only if the State that employs them has consented to suit.[4] (Def.'s Mem. in Support of Am. Special Plea of Sovereign Immunity 2; see also App. 38).

This argument fails for three reasons. First, the text of Section 4323(b)(2) does not support this construction. The most natural reading of

[4] This erroneous interpretation of the statute was first advanced in dicta by the Alabama Supreme Court. See *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (2001) (stating that Section 4323(b)(2) "arguably" includes deference to state laws dealing with waiver of immunity from suit). This dicta has since been endorsed by three other state courts. See *Smith* v. *Tennessee Nat'l Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), cert. denied, 133 S. Ct. 1471 (2013); *Anstadt* v. *Board of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868 (Ga. Ct. App.), cert. denied (Ga. Oct. 4, 2010); *Janowski* v. *Division of State Police*, 981 A.2d 1166 (Del. 2009).

the phrase in question is that it renders a litigant responsible for filing suit in the correct state court and for complying with all applicable rules and procedures. The text does not mention "waiver," "consent," or any other term that supports VSP's interpretation. "[I]f Congress had intended to authorize [suits only by consent], it could have said so in straightforward language." See *New Process Steel, L.P*. v. *NLRB*, 560 U.S. 674, 681 (2010).

Second, VSP's construction cannot be reconciled with the amendment's legislative history. See *Lewis* v. *City of Alexandria*, 756 S.E.2d 465, 473 (Va. 2014) ("When interpreting an ambiguous statute, courts may consult its legislative history."). The House Report's section-by-section analysis describes Section 4323(b) as "codify[ing] existing law that provides that state courts have jurisdiction to hear complaints brought by persons alleging that the State has violated USERRA." House Report 6. Nothing in the Report indicates that such jurisdiction arises only when a State consents.

Finally, VSP's strained interpretation of Section 4323(b)(2) would subvert Congress's intent in passing the amendment. As this Court has stated, "[t]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Commonwealth* v. *Amerson*, 706 S.E.2d

879, 882 (2011) (internal quotation marks and citation omitted). The legislative history shows that the purpose behind the 1998 amendment was to ensure that state-employed servicemembers could continue to enforce their USERRA rights after *Seminole Tribe*. The prevailing view at the time of the 1998 amendment was that the Eleventh Amendment simply did not apply in state court, see *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-205 (1991); *United States ex rel. Long* v. *SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 887 n.20 (D.C. Cir. 1999), cert. denied, 530 U.S. 1202 (2000), so interpreting the amendment to authorize suits only by consent would mean that it actually *narrowed* the options that servicemembers would have otherwise had. That result simply cannot be squared with Congress's intent.

For these reasons, the Court should reject VSP's interpretation of Section 4323(b)(2) and hold that the statute unequivocally subjects States to private suit irrespective of their consent. Cf. *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the * * * legislative history of the * * * amendment.").

III

CONGRESS HAD THE AUTHORITY, PURSUANT TO ITS WAR POWERS, TO SUBJECT STATES TO USERRA ACTIONS (ASSIGNMENT 1)

The Circuit Court erred in sustaining VSP's Amended Special Plea of Sovereign Immunity based on an unduly narrow interpretation of *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 377 (2006). The War Powers are a solid constitutional foundation for Congress to subject States to suit under USERRA. Indeed, they provide an even stronger basis for Congressional authority than the bankruptcy power at issue in *Katz*.

A. The Circuit Court's Decision Was Based On An Unduly Narrow Interpretation Of *Katz*

The Supreme Court held in *Katz* that the Bankruptcy Clause—which, like the War Powers clauses, is found in Article I of the Constitution—gives Congress the authority to subject States to private suit in certain types of bankruptcy actions. 546 U.S. at 359. The Court examined the intent behind the inclusion of the Bankruptcy Clause in the Constitution, the States' understanding in ratifying the Constitution, and early congressional efforts to exercise authority under the clause. *Id.* at 362-373. Based on this evidence, the Court concluded that States had ceded their authority in the area of bankruptcy to the national government and thereby gave up their immunity to certain private suits. *Id.* at 373, 377-378. In other words,

as to certain bankruptcy proceedings, "the States agreed in the plan of the Convention not to assert [sovereign] immunity." *Id.* at 373. Thus, the Court held:

> The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.

Id. at 379 (citation and footnote omitted).

The Circuit Court erroneously interpreted *Katz* as "a very limited exception arising and pertaining to the Article I Bankruptcy Clause involving in rem jurisdiction." (App. 59). To be sure, the Court in *Katz* discussed the *in rem* nature of bankruptcy proceedings, but it did so only because that feature of bankruptcy proceedings informed the requisite historical analysis. See, *e.g.*, 546 U.S. at 378 ("In ratifying the Bankruptcy Clause, 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."). Thus, it is simply incorrect to interpret *Katz* as having no effect outside the bankruptcy context.

Instead, *Katz* stands for two points that are central to the resolution of this case. First, *Katz* makes clear that the suggestion in *Seminole Tribe* v.

Florida, 517 U.S. 44 (1996), that Congress may never subject States to suit pursuant to an Article I power, was non-controlling dicta. *Katz*, 546 U.S. at 363. Second, as described below, *Katz* instructs that whether States may be subjected to suit depends on an historical analysis of the specific constitutional power under which Congress authorized the cause of action. *Id*. at 375-378.

B. The Historical Inquiry Required By *Katz* Shows That Congress's War Powers Encompass The Authority To Subject States To Private Suits In Their Own Courts

Several factors show that the States' surrender of all War Powers to Congress included a surrender of immunity to private suit. First, the Founding Fathers were focused not only on the need to make the federal government's War Powers exclusive, but also on preventing the powers from being inhibited in any way. Second, *The Federalist* essays set out a standard for ascertaining the narrow class of constitutional powers that include authority to subject States to suit—a standard that the War Powers clearly meet. Third, the U.S. Supreme Court has consistently interpreted the War Powers broadly and, to effectuate the Founders' intent, has avoided interpreting any other constitutional provision in a way that would limit those powers. And fourth, States never possessed war powers in the first place and therefore had no immunity to retain in that arena.

1. The Founding Fathers Sought To Ensure That Federal War Powers Authority Would Not Be Inhibited

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

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

The Founders highlighted the danger of limiting the Nation's ability to wage war. As Alexander Hamilton wrote in *The Federalist No. 23*, "[t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to

which the care of it is committed." *The Federalist No. 23*, at 147 (Jacob E. Cooke ed., 1982).[5] 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. Similarly, in *The Federalist No. 41*, James Madison stated: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it, must be effectually confided to the 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.

Madison and Hamilton were strong supporters of state sovereign immunity, but they appreciated the danger in allowing state sovereignty to interfere with Congress's execution of its War Powers. Allowing such interference, they observed, would place "constitutional shackles" on, and "oppose [a] constitutional barrier[]" to, Congress's exercise of its War Powers authority. See *The Federalist No. 23*, at 147 (Hamilton), and *The*

[5] All references to *The Federalist* are to the 1982 Jacob E. Cooke edition.

Federalist No. 41, at 270 (Madison). These observations provide compelling evidence that these powers were "understood to carry * * * the power to subordinate state sovereignty." See *Katz*, 546 U.S. at 377.

Denying state-employed servicemembers the ability to bring USERRA claims would allow state sovereign immunity to limit Congress's War Powers authority—the very result the Founding Fathers sought to prevent. Indeed, allowing States to force servicemembers to choose between their civilian jobs and military service would, if effected on a large scale, give States an effective veto over Congress's ability to wage war. Congress explicitly recognized this danger when it amended USERRA in the wake of *Seminole Tribe*, stating that judicial opinions allowing States to assert sovereign immunity to private USERRA claims "raise serious questions about the United States[']ability to provide for a strong national defense." House Report 5.

Katz relied on the Founders' recognition of the problem of overlapping jurisdiction in the area of bankruptcy and, consequently, of the need for uniformity in that area. 546 U.S. at 362-369. It was undoubtedly important, as the Court explained in *Katz*, to ensure that a person not be held responsible in one State for a debt that had already been discharged in another. *Id.* at 363. The *Katz* Court considered the founding

generation's concern about the problem of overlapping jurisdiction in the area of bankruptcy to be evidence of an acknowledgment, inherent in the plan of the Constitutional Convention, that state sovereign immunity must be subordinated to the need for uniformity. See *id*. at 372-373.

In the same vein, the Founders' recognition of the need to avoid any encumbrance on national authority in the area of war demonstrates their intent that Congress not be hampered in the exercise of its War Powers by States' sovereign immunity claims. As evidenced by Hamilton's and Madison's statements, the Founders sought to preclude any interference with the national government's ability to conduct war and to provide and maintain military forces. Indeed, the Framers' concern for federal exclusivity in the War Powers arena, and the need to prevent any interference with the War Powers, was far greater than the bankruptcy-related concerns at issue in *Katz*. As one scholar has recognized, while *The Federalist* essays are replete with discussions regarding the War Powers, "in the whole of *The Federalist Papers*, the Bankruptcy Clause is mentioned only once."[6]

[6] Maj. Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions*

(continued…)

2. The Standard Set Forth In *The Federalist* Indicates A Surrender Of State Sovereignty Under The War Powers

The Federalist essays set forth a framework for determining when state sovereignty is subordinated in the "plan of the Convention," and the War Powers fit squarely within this framework. In *The Federalist No. 81*, Alexander Hamilton penned an oft-quoted defense of state sovereign immunity, stating 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. He 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." *Ibid*. The U.S. Supreme Court has frequently cited this passage for the point that immunity to private suit is a fundamental aspect of state sovereignty. See, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 283-284 (2011); *Alden* v. *Maine*, 527 U.S. 706, 716-717 (1999).

Although *The Federalist No. 81* certainly establishes that Hamilton viewed immunity to individual suit as a fundamental aspect of the

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is a Valid Exercise of the Congressional War Powers, 195 Mil. L. Rev. 91, 111 (2008).

sovereignty retained by the States, it also makes clear that this immunity is not 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 explain in *The Federalist No. 81* what is necessary to effect such a surrender, but instead stated 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." *Ibid*.

The article of taxation Hamilton referenced is found in *The Federalist No. 32*. In it, Hamilton discussed three circumstances in which the Constitution's grant of authority to the national government effects a corresponding "alienation of State sovereignty":

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

The Federalist No. 32, at 200. 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 (Hamilton); see also *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 War Powers easily fit within *The Federalist No. 32*'s "three cases." First, the Constitution 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. And third, of course, it is difficult to conceive of anything that would be more "contradictory and repugnant" to national unity than the exercise of the War Powers by a patchwork of individual States. *The Federalist No. 32*, at 200. Thus, the War Powers effect an "alienation of State sovereignty" that

includes a surrender of state sovereign immunity "in the plan of the convention." *The Federalist Nos. 81*, *32*.

Application of this 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 set forth in *The Federalist* aligns with *Katz*'s instruction that whether a particular power enables Congress to subject States to private suit should be determined on a power-by-power basis. *The Federalist* framework sets legislation enacted under the War Powers apart from legislation enacted under, for example, the Commerce Clause, which was at issue in *Seminole Tribe* (Indian Commerce Clause) and *Alden* (Fair Labor Standards Act). States possess, and have always possessed, their own powers with respect to the intrastate regulation of commerce, and their authority has been exercised concurrently with the commerce powers of the federal government. This is not so with respect to the War Powers.

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

The U.S. Supreme Court's War Powers jurisprudence makes two points clear. First, Congress's War Powers authority is uniquely exclusive

and unfettered. Second, other constitutional provisions should not be interpreted to interfere with that authority.

The Court has consistently deferred to federal prerogatives, and has rejected attempts to interfere with or diminish federal authority, in the War Powers arena. For example, in *In re Tarble*, 80 U.S. 397 (1871), the U.S. Supreme Court rejected Wisconsin's attempt to retrieve—through a writ of habeas corpus—an individual who was in military custody for having deserted the Army. *Id.* at 411-412. Rejecting Wisconsin's authority to issue the writ, the U.S. Supreme Court described the federal War Powers as "plenary and exclusive." *Id.* at 408. The Court explained that "[n]o interference with the execution of th[e] power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency" of the military. *Ibid*.; cf. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 8-13 (1969) (concluding that it would be contrary to the Constitution to permit States to impose disadvantages upon individuals on the basis of membership in the military).

Since then, the Court has continued to emphasize that courts should "give Congress the highest deference in ordering military affairs." *Loving* v. *United States*, 517 U.S. 748, 768 (1996); accord *Weiss* v. *United States*,

510 U.S. 163, 177 (1994); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65, 70 (1981); see also *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U.S. 135, 149 (1919) ("The complete and undivided character of the war power of the United States is not disputable.").

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

> [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments.

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

When the U.S. Supreme Court revitalized the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833, 854-855 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), it did not overrule *Case* v. *Bowles*. Instead, it was careful to note that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." *National League of Cities*, 426 U.S. at 854 n.18. Courts have since ruled that legislation enacted under the War Powers is exempt from the typical Tenth Amendment analysis. See, *e.g.*, *United States* v. *Onslow Cnty. Bd. of Educ*., 728 F.2d 628, 640 (4th Cir. 1984) ("Even if a Tenth Amendment violation would exist had the Relief Act been enacted under Congress' commerce power, we believe that the doctrine of *National League of Cities* has no applicability where Congress has acted under the War Powers.").

Against this backdrop, it makes little sense to interpret the Eleventh Amendment as constraining Congress's War Powers authority.

4. The States Never Possessed War Powers

Finally, unlike most powers enumerated in Article I, neither the States, nor the colonies before them, ever possessed any war powers. In *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the

Court explained that war powers were never an attribute of state sovereignty:

> As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence.

Id. at 316. Thus, the Court reasoned:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. at 318. The Court made similar statements in *Penhallow* v. *Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-81 (1795). In discussing whether the Continental Congress had the authority to convene a tribunal with appellate jurisdiction over a state court of admiralty prior to the ratification of the Articles of Confederation, Justice Patterson declared that the supreme authority of exercising "the rights and powers of war and peace" was "lodged in, and exercised by, Congress; it was there, or no where; the states individually did not, and, with safety, could not exercise it." *Id*. at 80.

The U.S. Supreme Court made clear in *Seminole Tribe* that the Eleventh Amendment is intended to embody "the background principle of state sovereign immunity." 517 U.S. at 72. As the opinions in *Curtiss-Wright Export* and *Penhallow* make clear, that background principle did not apply to the War Powers. Whether the War Powers were transmitted directly from the Crown to the colonies collectively or from the Crown to the people and then to the Continental Congress, they never belonged to the States. Because the States never possessed any war powers, they cannot have expected to retain sovereign immunity in this area when they joined the Union. Indeed, *The Federalist No. 32* explained that States "retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." *The Federalist No. 32*, at 200 (Hamilton). For this reason, even apart from the Constitution's alienation of States' sovereignty in the war powers area, immunity to the exercise of Congress's authority under the War Powers cannot be part of "the background principle of state sovereign immunity." *Seminole Tribe*, 517 U.S. at 72.

5. The Cases Cited By VSP Misconstrue Congress's Authority To Subject States To Private Suit Under Its War Powers

VSP cites several cases for the proposition that Clark's USERRA action is barred by sovereign immunity. (Def.'s Mem. in Support of Am.

Special Plea of Sovereign Immunity 3-5). These cases are not persuasive. *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358 (Ala. 2001), was decided before the U.S. Supreme Court's decision in *Katz* made clear that *Seminole Tribe* does not serve as an outright bar on Congress's ability to subject States to suit pursuant to an Article I power. *Janowski* v. *Division of State Police*, 981 A.2d 1166 (Del. 2009), though decided after *Katz*, did not discuss *Katz* at all. *Smith* v. *Tennessee National Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), cert. denied, 133 S. Ct. 1471 (2013), not only ignored *Katz*, but failed to mention the War Powers clauses. In *Anstadt* v. *Board of Regents of University System of Georgia*, 693 S.E.2d 868, 870-871 (Ga. Ct. App.), cert. denied (Ga. Oct. 4, 2010), the plaintiff argued, for the first time on appeal, that USERRA abrogated state sovereign immunity pursuant to the War Powers. The Court of Appeals of Georgia held that the plaintiff had waived any argument based on *Katz* by failing to raise it below, while "not[ing]" without any meaningful analysis that the holding in *Katz* was "narrowly limited to bankruptcy cases." See *id.* at 871. None of these cases reflects the sort of legal analysis that would warrant deference from this Court.[7]

[7] The War Powers argument was also addressed in *Risner* v. *Ohio Department of Rehabilitation & Correction*, 577 F. Supp. 2d 953, 956 (N.D.

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The only case to have addressed this issue in any meaningful way is *Ramirez I*, 326 P.3d 474 (N.M. Ct. App. 2014), rev'd *sub nom. Ramirez II*, No. S-1-SC-34613, 2016 N.M. LEXIS 87 (N.M. Apr. 14, 2016).[8] In *Ramirez I*, the Court of Appeals of New Mexico recognized that the lesson of *Katz* is that the States' retention of sovereign immunity with respect to a particular piece of federal legislation depends on the history of the particular Constitutional power under which Congress acted. See *Ramirez I*, 326 P.3d at 481 ("It was therefore not the exclusive delegation of power to Congress itself that justified a limited subordination of state sovereignty, but rather an understanding among the states, *as evidenced by the history of bankruptcy jurisdiction*, that an exclusive delegation of this power to Congress inherently included a subordination of their sovereignty to

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Ohio 2008), a magistrate judge's recommendation that was adopted by a district court without objection. There, the court held that the *Katz* exception was "a narrow one" that was limited to the bankruptcy context. *Id.* at 963. But in that case, the plaintiff had not identified evidence that would support recognition of a similar exception in the War Powers context. *Ibid.* Here, in contrast, the United States has identified substantial evidence to that effect.

[8] During the oral argument below, the Circuit Court based its dismissal of Clark's case almost entirely on the Court of Appeals of New Mexico's opinion in *Ramirez I*. (App. 57-59).

accomplish its purposes.") (emphasis added); see also *ibid.* (the Supreme Court's retreat from *Seminole Tribe* in *Katz* was "justified by the *unique history of bankruptcy jurisdiction*") (emphasis added).

But then the *Ramirez I* court failed to undertake the necessary historical analysis, stating merely that it was "unlikely that the states, in ratifying the Constitution, would have considered that [the war] powers would be effectuated by a subordination of their sovereign immunity." 326 P.3d at 481. To support this statement, the court cited only *Velasquez* v. *Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998), vacated in part, 165 F.3d 593 (7th Cir. 1999), a pre-*Katz* decision that, like *Ramirez I* itself, overlooked the unique history of the War Powers, including the interplay of *The Federalist Nos. 81* and *32*.[9] Discussed above, this history should leave no

[9] The court in *Ramirez I* acknowledged the argument based on *The Federalist Nos. 81* and *32*, see *Ramirez I*, 326 P.3d at 479, but did not address it. Instead, it quoted *Seminole Tribe* for the proposition that state sovereign immunity "is not so ephemeral as to dissipate when the subject of the suit is an area * * * that is under the exclusive control of the Federal Government." *Ramirez I*, 326 P.3d at 480-481 (quoting *Seminole Tribe*, 517 U.S. at 72). But the *Ramirez I* court failed to appreciate that this language was substantially undermined by *Katz*, which specifically relied on "the Bankruptcy Clause's unique history, *combined with the singular nature of the bankruptcy courts' jurisdiction*," to conclude that the States had surrendered sovereign immunity in bankruptcy proceedings. *Katz*, 546 U.S. at 369 n.9 (emphasis added); *id.* at 376 n.13 ("the mandate to enact

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doubt that the Nation's Founders did not intend for States to retain immunity in an area where the Constitution "granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority." *The Federalist No. 32*, at 200 (Hamilton). If any such area exists, surely it is the War Powers.

Judge Bustamante dissented from the decision in *Ramirez I*, arguing that "[c]omparing the interests and history" of the Bankruptcy Clause with those of the War Powers clauses demonstrated that "the War Powers Clause presents the more compelling case" for subjecting States to suit. *Ramirez I*, 326 P.3d at 485. In particular, Judge Bustamante cited the fact that "the individual states did not possess war powers at the time of the Constitutional Convention" and therefore "had no sovereign interest to protect or cede when they approved the War Powers Clause." *Ibid.*

In any case, the Court of Appeals of New Mexico's decision was reversed by that State's Supreme Court, which specifically declined to

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'uniform' laws supports the historical evidence showing that the States agreed not to assert their sovereign immunity" in bankruptcy proceedings); see also *Ramirez I*, 326 P.3d at 484 (Bustamante, J., dissenting) ("*Katz* is relevant when it discusses the need for national uniformity with regard to bankruptcy laws. In doing so, *Katz* revived uniformity as a valid topic of consideration in Article I jurisprudence.").

address whether Congress may subject States to suit by private individuals under its War Powers. 2016 N.M. LEXIS 87, at *13. Instead, the State's highest court held that New Mexico had surrendered its sovereign immunity by enacting a state statute applying the protections of USERRA to the New Mexico National Guard. *Id.* at *20-26.

Here, however, the plaintiff does not argue that the State has voluntary surrendered its sovereign immunity.[10] Thus, the Eleventh Amendment issue is squarely before the Court. For the reasons discussed above, the United States urges the Court to find that Congress validly exercised its War Powers when it chose to subject States to private USERRA actions.

[10] Clark argued in the Circuit Court that Annotated Virginia Code Section 44-93, which sets out reemployment rights for former members of the armed services of the United States or the National Guard, represented a voluntary abrogation of sovereign immunity for USERRA actions. (App. 34). This argument is not one of the assignments of error on which this Court granted a Writ of Appeal.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2016, I caused an electronic copy of this amicus brief to be filed, via VACES, and ten paper copies to be sent by Federal Express to the Clerk of the Supreme Court of Virginia. In addition, I caused an electronic copy of this amicus brief to be served by electronic mail and one paper copy via Federal Express on the following:

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CERTIFICATE OF COMPLIANCE WITH RULES 5:6 AND 5:26

I hereby certify that this brief was prepared in compliance with Rules 5:6 and 5:26 because it has been prepared in 14-point Arial font and contains 8,403 words, excluding the parts of the brief exempted under Rule 5:26(b), according to the count of Microsoft Word.

/s/ Steven Gordon
STEVEN GORDON (VSB #66339)

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 10, 2015

The Honorable Joseph R. Biden, Jr.
President
United States Senate
Washington, DC 20510

Dear Mr. President:

Members of the armed forces make tremendous sacrifices in order to protect our Nation, and safeguarding the civil rights of these servicemembers and their families is therefore one of the highest priorities of the Department of Justice. We are pleased to transmit to Congress the enclosed legislative proposals, which would significantly strengthen the protections afforded to servicemembers and their families under existing civil rights laws.

This legislative package contains four titles. Title I would strengthen enforcement mechanisms under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Title II would bolster protection of housing and lending rights under the Servicemembers Civil Relief Act (SCRA). Title III would enhance enforcement authority and broaden coverage under the Military Lending Act (MLA). Title IV proposes changes to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to better ensure that servicemembers and overseas citizens have the opportunity to vote and have their votes counted. These proposals are summarized below.

Title I. Title I would strengthen the protection of employment rights for military servicemembers. USERRA entitles servicemembers to return to their civilian employment upon completion of their military service with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed by their civilian employer. The proposed changes clarify the statute's venue section in order to simplify the process of filing a claim by a servicemember and update the damages provisions to ensure that USERRA claimants are made whole through their USERRA claims. Because servicemembers are sometimes unable to bring claims themselves, these proposals would authorize the Department to investigate and bring suit to stop a pattern or practice of USERRA violations, in addition to its authority to challenge individual instances of USERRA violations under existing law. We also propose to improve USERRA enforcement by allowing the United States to serve as a named plaintiff in all suits filed by the Department, rather than in only those suits filed against State employers. Finally, to enhance the Department's enforcement of servicemembers' employment rights, these

proposals would provide for civil investigative demand authority to obtain documents necessary for the Department to conduct investigations under USERRA.

Title II. The SCRA suspends certain civil legal obligations of active duty servicemembers so that they can focus full attention on their military responsibilities without adverse consequences for themselves and their families. The relief authorized under the SCRA includes civil protections and the temporary suspension of judicial and administrative proceedings in areas such as mortgage interest rate payments and foreclosure, rental agreements, credit card and auto loans, and other civil proceedings. As explained in more detail in the attached section-by-section analysis, we propose to strengthen enforcement of the SCRA by, among other things, doubling the civil penalties currently available and authorizing the Attorney General to issue civil investigative demands to obtain documents in SCRA investigations.

Title III. The MLA caps interest rates on certain types of loans to active duty servicemembers at 36%. The statute originally did not designate any agency to enforce it. In 2012, enforcement authority was given to the Federal Trade Commission and the bank regulatory agencies, including the Consumer Financial Protection Bureau, over the lenders that each agency supervises. This proposal would give the Attorney General authority to bring pattern or practice enforcement actions under the MLA. Such authority would be beneficial for the following reasons: (1) as noted above, the Department currently enforces the SCRA, and there is overlap in the population protected and in the potential defendants; (2) providing the Department enforcement authority will ensure that one agency can bring enforcement actions against all actors, as the current designated agencies have limited enforcement jurisdiction; and (3) the Department should be in a position to enforce a statute aimed at preventing predatory lending, which ultimately hurts troop readiness and undermines national security.

Title IV. These proposals would strengthen enforcement of the voting rights of military personnel and American citizens living overseas. The Military and Overseas Voter Empowerment Act of 2009 amended UOCAVA to establish new voter registration and absentee ballot procedures that States must follow in all federal elections. As a result of the Department's enforcement actions during recent election cycles, thousands of military and overseas voters were afforded an opportunity to cast ballots that were counted despite the failure of some election officials to send out ballots on time. The Department has assessed the causes of these delays and developed proposals designed to remedy these problems.

In particular, we recommend the addition of pre-election reporting requirements on the status of ballot transmission to provide the Department with comprehensive and timely information regarding whether enforcement actions may be needed. We also propose to eliminate the hardship waiver provision (authorizing waiver of the 45-day ballot transmission deadline upon a showing of undue hardship) in favor of a uniform, nationwide standard that equally protects all military and overseas voters. To further strengthen the Act's protections and provide additional incentives for States to comply, we also propose an express mail requirement, and the establishment of civil penalties and a private right of action for an individual voter aggrieved by a violation of the Act.

The Department of Justice is committed to vigorous enforcement of the housing, lending, employment, and voting rights established by federal civil rights laws. We believe that the enclosed proposals would strengthen our ability to enforce these laws on behalf of servicemembers.

Thank you for the opportunity to present these proposals. The Office of Management and Budget has advised us that there is no objection to submission of this proposal from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

IDENTICAL LETTER SENT TO THE HONORABLE PAUL RYAN, SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Department of Justice

Servicemembers Legislative Package

114th Congress

Amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

SEC. ___. ENFORCEMENT OF RIGHTS UNDER CHAPTER 43 OF TITLE 38, UNITED STATES CODE, WITH RESPECT TO A STATE OR PRIVATE EMPLOYER.

(a) ACTION FOR RELIEF.—

(1) INITIATION OF ACTIONS.—Paragraph (1) of subsection (a) of section 4323 of title 38, United States Code, is amended by striking the third sentence and inserting the following new sentences: "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 commence an action for relief under this chapter. The person on whose behalf the complaint is referred may, upon timely application, intervene in such action and may obtain such appropriate relief as provided in subsections (d) and (e).".

(2) ATTORNEY GENERAL NOTICE TO SERVICEMEMBER OF DECISION.—Paragraph (2) of such subsection is amended to read as follows:

"(2)(A) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall transmit, in writing, to the person on whose behalf the complaint is submitted—

"(i) if the Attorney General has made a decision about whether the United States will commence an action for relief under paragraph (1) relating to the complaint of the person, notice of the decision; and

"(ii) if the Attorney General has not made such a decision, notice of when the Attorney General expects to make such a decision.

"(B) If the Attorney General notifies a person of when the Attorney General expects to make a decision under subparagraph (A)(ii), the Attorney General shall, not later than 30 days after the date on which the Attorney General makes such decision, notify, in writing, the person of such decision.".

(3) PATTERN OR PRACTICE CASES.—Such subsection is further amended—

(A) by redesignating paragraph (3) as paragraph (4); and

(B) by inserting after paragraph (2) (as amended by paragraph (2) of this subsection) the following new paragraph (3):

"(3) Whenever the Attorney General has reasonable cause to believe that a State (as an employer) or a private employer is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights or benefits secured by this chapter, the Attorney General may commence a action under this chapter.".

(4) ACTIONS BY PRIVATE PERSONS.—Subparagraph (C) of paragraph (4) of such subsection, as redesignated by paragraph (3)(A), is amended by striking "refused" and all that follows and inserting "notified by the Department of Justice that the Attorney General does not intend to bring a civil action.".

(b) SOVEREIGN IMMUNITY. —Paragraph (2) of subsection (b) of section 4323 of such title is amended to read as follows:

"(2)(A) In the case of an action against a State (as an employer), any instrumentality of a State, or any officer or employee of a State or instrumentality of a State acting in that officer or employee's official capacity, by any person, the action may be brought in the appropriate district court of the United States or in a State court of competent jurisdiction, and the State, instrumentality of the State, or officer or employee of the State or instrumentality acting in that

officer or employee's official capacity shall not be immune under the Eleventh Amendment of the Constitution, or under any other doctrine of sovereign immunity, from such action.

"(B)(i) No State, instrumentality of such State, or officer or employee of such State or instrumentality of such State, acting in that officer or employee's official capacity, that receives or uses Federal financial assistance for a program or activity shall be immune, under the Eleventh Amendment of the Constitution or under any other doctrine of sovereign immunity, from suit in Federal or State court by any person for any violation under this chapter related to such program or activity.

"(ii) In an action against a State brought pursuant to subsection (a), a court may award the remedies (including remedies both at law and in equity) that are available under subsections (d) and (e).".

(c) VENUE FOR CASES AGAINST PRIVATE EMPLOYERS.—Subsection (c)(2) of such section is amended by striking "United States district court for any district in which the private employer of the person maintains a place of business." and inserting "United States district court for—

"(A) any district in which the employer maintains a place of business;

"(B) any district in which a substantial part of the events or omissions giving rise to the claim occurred; or

"(C) if there is no district in which an action may otherwise be brought as provided in subparagraph(A) or (B), any district in which the employer is subject to the court's personal jurisdiction with respect to such action.".

(d) COMPENSATORY AND PUNITIVE DAMAGES.—Subsection (d)(1) and d(2) of such section is amended by striking subparagraph (d)(1)(C) and d(2) and inserting the following new subparagraphs:

"(C) The court may require the employer to pay the person compensatory damages suffered by reason of such employer's failure to comply with the provisions of this chapter.

"(D) The court may require the employer (other than a government, government agency, or political subdivision) to pay the person punitive damages if the court determines that the employer failed to comply with the provisions of this chapter with reckless indifference to the federally protected rights of the person.

"(E) The sum of the amount of compensatory damages awarded under subparagraph C of this section and the amount of punitive damages awarded under subparagraph D of this section, may not exceed, for each person the following:

"(i) In the case of an employer who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.

"(ii) In the case of an employer who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000.

"(iii) In the case of an employer who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000.

"(iv) In the case of an employer who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.".

(d)(1) CONFORMING AMENDMENTS.—Subsection (2) of such section is amended to read as follows:

"(2)(A) Any compensation awarded under subparagraph (B) or (C) or (D) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

"(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) or (D) 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."

(e) STANDING. —Subsection (f) of such section is amended—

(1) by inserting "by the United States or" after "may be initiated only"; and

(2) by striking "or by the United States under subsection (a)(1)".

(f) ATTORNEY FEES AND OTHER LITIGATION EXPENSES.—Subsection (h)(2) of such section is amended striking "subsection (a)(2)" and inserting "subsection (a)(1) or subsection (a)(4)".

(g) PENSION CONTRIBUTION CALCULATIONS.—Subsection (b) of section 4318 of such title is amended—

(1) in paragraph (3)(B), by striking "on the basis of" and all the follows and inserting "on the basis specified in paragraph (4).''; and

(2) by adding at the end the following new paragraph:

"(4) The basis for a computation under paragraph (3) to which subparagraph (B) of that paragraph applies is as follows:

"(A) If the period of service described in subsection (a)(2)(B) is one year or less, the computation shall be made on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period or, if shorter, the period of employment immediately preceding such period.

"(B) If the period of such service is more than one year, the computation shall be made on the basis of the average rate of compensation during such period of service of employees of that employer who are similarly situated to the servicemember in terms of having similar seniority, status, and pay.".

(h) DISABILITY DISCOVERED AFTER EMPLOYEE RESUMES EMPLOYMENT.—Subsection (a)(3) of section 4313 of such title is amended by inserting "including a disability that is brought to the employer's attention within five years after the person resumes employment," after "during, such service,".

(i) BURDEN OF IDENTIFYING PROPER REEMPLOYMENT POSITIONS.—Section 4313 of such title is amended by adding at the end the following new subsection:

"(c) For purposes of this section, the employer shall have the burden of identifying the appropriate reemployment positions.".

(j) CIVIL INVESTIGATIVE DEMANDS.—Section 4323 of such is amended by adding at the end the following new subsection:

"(j) ISSUANCE AND SERVICE OF CIVIL INVESTIGATIVE DEMANDS BY ATTORNEY GENERAL.—(1) Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material relevant to an investigation under this chapter, the Attorney General may, before commencing a civil action under subsection (a),

issue in writing and cause to be served upon such person, a civil investigative demand requiring—

"(A) the production of such documentary material for inspection and copying;

"(B) that the custodian of such documentary material answer in writing written questions with respect to such documentary material; or

"(C) the production of any combination of such documentary material or answers.

"(2) The provisions governing the authority to issue, use, and enforce civil investigative demands under section 3733 of title 31 (known as the 'False Claims Act') shall govern the authority to issue, use, and enforce civil investigative demands under paragraph (1), except that for purposes of that paragraph—

"(A) a reference in that section to false claims law investigators or investigations shall be applied as referring to investigators or investigations under this chapter;

"(B) a reference to interrogatories shall be applied as referring to written questions, and answers to such need not be under oath;

"(C) the statutory definitions for purposes of that section relating to 'false claims law' shall not apply; and

"(D) provisions of that section relating to qui tam relators shall not apply.".

Section-by-Section Analysis

This proposal would amend chapter 43 of title 38, United States Code, to improve the enforcement of reemployment rights under that chapter with respect to a State or private employer. That chapter is popularly known as the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Subsection (a) strengthens enforcement of USERRA rights by allowing the United States to serve as a plaintiff in all suits filed by the Attorney General, as opposed to only suits filed against State employers. The amendment preserves the right of the aggrieved persons to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit. This section also strengthens enforcement by granting independent authority to the Attorney General to investigate and file suit to challenge a pattern or practice in violation of USERRA. The pattern or practice language is modeled after Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-6(a)).

Subsection (b) explicitly abrogates sovereign immunity so that servicemembers can bring an action against a State employer in State court or Federal district court.

Subsection (c) amends USERRA's venue provision to allow servicemembers to file actions against private employers in district courts with jurisdictional requirements that are similar to the general venue statute, 28 U.S.C. 1391(b).

Subsection (d) adds compensatory and punitive damages provisions that are similar to the damages provisions in title VII of the Civil Rights Act of 1964.

Subsection (e) authorizes either the United States or the aggrieved individual to serve as a plaintiff in all USERRA suits.

Subsection (f) makes conforming amendments to the amendments made by subsection (a).

Subsection (g) would revise the pension contribution calculations for servicemembers in service over one year so that the servicemember's pension contribution is comparable to a similarly situated employee.

Subsection (h) modifies USERRA to include disabilities discovered within five years after a servicemember resumes work for purposes of reemployment determinations.

Subsection (i) clarifies that the employer has the burden of identifying proper reemployment positions.

Subsection (j) grants authority to the Attorney General to issue civil investigative demands in its USERRA investigations. The authority is similar to that provided under the False Claims Act (31 U.S.C. 3733), except that it does not include the authority to compel oral testimony or sworn answers to interrogatories.

Amendments to the Servicemembers Civil Relief Act (SCRA)

SEC. 100. STATUTORY REFERENCES.

Any reference in this title to the "SCRA" shall be treated as a reference to the Servicemembers Civil Relief Act (50 U.S.C. App. 501 et seq.).

SEC. 101. CLARIFICATION OF AFFIDAVIT REQUIREMENT.

Paragraph (1) of section 201(b) of the SCRA (50 U.S.C. App. 521(b)) is amended to read as follows:

"(1) PLAINTIFF TO FILE AFFIDAVIT.—

"(A) In any action or proceeding covered by this section, the plaintiff, before seeking a default judgment, shall file with the court an affidavit—

"(i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

"(ii) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

"(B) Before filing an affidavit under subparagraph (A), the plaintiff shall conduct a diligent and reasonable investigation to determine whether or not the defendant is in military service, including a search of available Department of Defense records and any other information available to the plaintiff. The affidavit shall set forth all steps taken to determine the defendant's military status and shall have attached the records on which the plaintiff relied in preparing the affidavit. Attached records shall include at least a copy of the certificate produced by the Department of Defense Manpower Data Center.".

SEC. 101a. OBLIGATIONS OF ATTORNEY APPOINTED TO REPRESENT DEFENDANT IN MILITARY SERVICE.

Paragraph (2) of Section 201(b) of the SCRA (50 U.S.C. App. 521(b)) is amended to read as follows:

"(2) APPOINTMENT OF ATTORNEY TO REPRESENT DEFENDANT IN MILITARY SERVICE.—

"(A) If in an action covered by this section it appears that the defendant is in military service, the court shall not enter a judgment until after the court appoints an attorney to represent the defendant.

"(B) The court appointed attorney shall act only in the best interests of the defendant. The court appointed attorney, when appropriate to represent the best interests of the defendant, shall request a stay of proceedings under this Act.

"(C) The court appointed attorney shall use due diligence to locate and contact the defendant. The plaintiff must provide to the court appointed attorney all contact information it has for the defendant. A court appointed attorney unable to make contact with the defendant shall report to the court on all of the attorney's efforts to make contact.

"(D) Upon making contact with the defendant, the court appointed attorney shall advise the defendant of the nature of the lawsuit and the defendant's rights provided by the Act, including rights to obtain a stay and to request the court to adjust an obligation. Regardless of whether contact is made, the court appointed attorney shall assert such rights on behalf of defendant, provided that

there is an adequate basis in law and fact, unless the defendant provides informed consent to not assert such rights.

"(E) The court shall require the court appointed attorney to perform duties faithfully and, upon failure to do so, shall discharge the attorney and appoint another.

"(F) If an attorney appointed under this section to represent a defendant in military service cannot locate the defendant, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember."

Paragraph (1) of Section 201(g) of the SCRA (50 U.S.C. App. 521(g)) is amended to read as follows:

"(g) VACATION OR SETTING ASIDE OF DEFAULT JUDGMENTS.—

"(1) Authority for court to vacate or set aside judgment

If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that—

"(A) (i) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(ii) the servicemember has a meritorious or legal defense to the action or some part of it; or

"(B) an attorney appointed to represent the servicemember failed to adequately represent the best interests of the defendant.

SEC. 102. RESIDENCY OF DEPENDENTS OF MILITARY PERSONNEL.

(a) EXTENSION OF SPOUSE COVERAGE TO ALL DEPENDENTS.—Subsection (b) of section 705 of the SCRA (50 U.S.C. App. 595) is amended—

(1) by striking "SPOUSES" in the subsection heading and inserting "DEPENDENTS"; and

(2) by striking "spouse" and inserting "dependent".

(b) TECHNICAL AMENDMENTS FOR STATUTORY CONSISTENCY.—Such section is further amended by striking "or naval" in subsections (a) and (b).

(c) CLERICAL AMENDMENTS.—

(1) SECTION HEADING.—The heading of such section is amended to read as follows:

"SEC. 705. GUARANTEE OF RESIDENCY FOR MILITARY PERSONNEL AND DEPENDENTS OF MILITARY PERSONNEL."

(2) TABLE OF CONTENTS.—The item relating to that section in the table of contents in section 1(b) of the SCRA is amended to read as follows:

"705. Guarantee of residency for military personnel and dependents of military personnel.".

SEC. 103. INCREASE IN CIVIL PENALTIES.

Subsection (b)(3) of section 801 of the SCRA (50 U.S.C. App. 597) is amended—

(1) in subparagraph (A), by striking "$55,000" and inserting "$110,000"; and

(2) in subparagraph (B), by striking "$110,000" and inserting "$220,000".

SEC. 104. ENFORCEMENT BY THE ATTORNEY GENERAL.

Section 801 of the SCRA (50 U.S.C. App. 597) is amended by adding at the end the following new subsections:

"(d) ISSUANCE AND SERVICE OF CIVIL INVESTIGATIVE DEMANDS.—Whenever the Attorney General, or a designee, has reason to believe that any person may be in possession, custody, or control of any documentary material relevant to an investigation under this Act, the Attorney General, or a designee, may, before commencing a civil action under subsection (a), issue in writing and cause to be served upon such person, a civil investigative demand requiring—

"(1) the production of such documentary material for inspection and copying;

"(2) that the custodian of such documentary material answer in writing written questions with respect to such documentary material; or

"(3) the production of any combination of such documentary material or answers.

"(e) RELATION TO FALSE CLAIMS ACT.—The statutory provisions governing the authority to issue, use, and enforce civil investigative demands under section 3733 of title 31, United States Code (popularly known as the 'False Claims Act'), shall govern the authority to issue, use, and enforce civil investigative demands under this section, except that for purposes of this section —

"(1) references in that section to false claims law investigators or investigations shall be read as references to investigators or investigations;

"(2) references in that section to interrogatories shall be read as references to written questions, and answers to such need not be under oath;

"(3) the statutory definitions relating to 'false claims law' shall not apply; and

"(4) provisions relating to qui tam relators shall not apply.

"(f) APPLICATION.—This section applies to any violation of this Act occurring on, before, or after October 13, 2010.".

SEC. 105. APPLICATION OF PRIVATE RIGHT OF ACTION.

Section 802 of the SCRA (50 U.S.C. App. 597a) is amended by adding at the end the following new subsection:

"(c) APPLICATION.—This section applies to any violation of this Act occurring on, before, or after October 13, 2010.".

SEC. 106. DEFINITION OF MILITARY ORDERS AND CONTINENTAL UNITED STATES.

(a) DEFINITIONS FOR ENTIRE ACT.—Section 101 of the SCRA (50 U.S.C. App. 511) is amended by adding at the end the following new paragraphs:

"(10) MILITARY ORDERS.—The term 'military orders', with respect to a servicemember, means official military orders, or any notification, certification, or verification from the Secretary or the servicemember's commanding officer, with respect to the servicemember's current or future military duty status.

"(11) CONUS.—The term 'continental United States' means the 48 contiguous States and the District of Columbia.".

(b) CONFORMING AMENDMENTS.—Such Act is further amended—

(1) in section 305 (50 U.S.C. App. 535), by striking subsection (i); and

(2) in section 207 (50 U.S.C. App. 527(b)(2)) by striking "calling a servicemember to military service".

SEC. 107. ORAL NOTICE SUFFICIENT TO INVOKE INTEREST RATE CAP.

Paragraphs (1) and (2) of section 207(b) of the SCRA (50 U.S.C. App. 527(b)) are amended to read as follows:

"(1) NOTICE TO CREDITOR.—In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor oral or written notice of military service and any further extension of military service, not later than 180 days after the date of the servicemember's termination or release from military service. The creditor shall retain a record of the servicemember's oral or written notification.

"(2) LIMITATION EFFECTIVE AS OF DATE OF ORDER TO ACTIVE DUTY.—Upon receipt of oral or written notice of military service, the creditor shall conduct a search of Department of Defense records available through the Department of Defense Manpower Data Center, and if military service is confirmed by such search shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service. If the search of Department of Defense records does not confirm military service, the creditor shall notify the servicemember and may require the servicemember to provide a copy of the servicemember's military orders prior to treating the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.".

SEC. 108. NON-DISCRIMINATION PROVISION.

(a) PROHIBITION ON DISCRIMINATION AGAINST SERVICEMEMBERS.—Section 108 of the SCRA (50 U.S.C. App. 518) is amended—

(1) by striking ''Application by a servicemember for, or receipt by a servicemember of, a stay, postponement, or suspension'' and inserting ''(a) APPLICATION OR RECEIPT.—Application by a servicemember for rights or protections''; and

(2) by adding at the end the following new subsection:

''(b) ELIGIBILITY.—

''(1) IN GENERAL.—In addition to the rights and protections under subsection (a), an individual who is eligible, or may become eligible by virtue of current membership in the reserves or a commitment to perform future military service, for rights or protections under any provision of this Act may not be denied services, including access to housing, or refused credit or be subject to any other action described under paragraphs (1) through (6) of subsection (a) by reason of such eligibility.

''(2) CONSTRUCTION.—Nothing in this subsection shall be construed to prohibit a lender or service provider from considering all relevant factors, other than the potential eligibility of an individual for rights or protections under a provision of this Act, in making a determination as to whether it is appropriate to provide services or extend credit.''.

(b) CLERICAL AMENDMENTS.—

(1) SECTION HEADING.—The heading of such section is amended to read as follows:

"SEC. 108. PROHIBITION ON DISCRIMINATION AGAINST SERVICEMEMBERS."

(2) TABLE OF CONTENTS.—The item relating to that section in the table of contents in section 1(b) of the SCRA is amended to read as follows:

"108. Prohibition on discrimination against servicemembers.".

SEC. 109. EXTENSION OF PROTECTION AGAINST REPOSSESSION FOR INSTALLMENT SALES CONTRACTS.

Subsection (a)(1) of section 302 of the SCRA (50 U.S.C. App. 532) is amended by striking "during that person's military service" and inserting "during and for one year after that person's military service".

SEC. 110. HARMONIZATION OF SECTIONS.

Section 303 of the SCRA (50 U.S.C. App. 533) is amended—

(1) in subsection (b), by striking "filed" and inserting "pending"; and

(2) in subsection (c)(1), by striking "with a return made and approved by the court".

SEC. 111. EXPANSION OF PROTECTION FOR TERMINATION OF RESIDENTIAL AND MOTOR VEHCICLE LEASES.

(a) TERMINATION OF LEASES.—Subsection (a) of section 305 of the SCRA (50 U.S.C. App. 535) is amended—

(1) in paragraph (1)—

(A) in subparagraph (A), by striking ''or'' at the end;

(B) in subparagraph (B), by striking the period at the end and inserting ''; or"; and

(C) by adding at the end the following new subparagraph:

''(C) in the case of a lease described in subsection (b)(1) and subparagraph (C) of such subsection, the date the lessee is assigned to or otherwise relocates to quarters or a housing facility as described in such subparagraph.''; and

(2) in paragraph (2), by striking "a dependent of the lessee" and inserting "a co-lessee".

(b) COVERED LEASES.—Subsection (b)(1) of such section is amended—

(1) in subparagraph (A), by striking "or'' at the end;

(2) in subparagraph (B)—

(A) by inserting "(as defined in the Joint Federal Travel Regulations, Chapter 5, paragraph U5000B)" after "permanent change of station"; and

(B) by striking the period at the end and inserting ''; or''; and

(3) by adding at the end the following new subparagraph:

''(C) the lease is executed by or on behalf of a person who thereafter and during the term of the lease is assigned to or otherwise relocates to quarters of the United States or a housing facility under the jurisdiction of a uniformed service (as defined in section 101 of title 37, United States Code), including housing provided under the Military Housing Privatization Initiative.''.

(c) MANNER OF TERMINATION.—Subsection (c)(1) of such section is amended—

(1) in subparagraph (A)—

(A) by inserting ''in the case of a lease described in subsection (b)(1) and subparagraph (A) or (B) of such subsection,'' before ''by delivery''; and

(B) by striking ''and'' at the end;

(2) by redesignating subparagraph (B) as subparagraph (C); and

(3) by inserting after subparagraph (A) the following new subparagraph (B):

''(B) in the case of a lease described in subsection (b)(1) and subparagraph (C) of such subsection, by delivery by the lessee of written notice of such termination, and a

letter from the servicemember's commanding officer indicating that the servicemember has been assigned to or is otherwise relocating to quarters of the United States or a housing facility under the jurisdiction of a uniformed service (as defined in section 101 of title 37, United States Code), to the lessor (or the lessor's grantee), or to the lessor's agent (or the agent's grantee); and''.

(d) WAIVER IMPERMISSIBLE—Such section is amended by inserting the following new subsection—

"(i) Waiver not permitted. The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances."

SEC. 112. MILITARY FAMILY PROFESSIONAL LICENSE PORTABILITY.

(a) PORTABILITY.—The SCRA (50 U.S.C. App. 501 et seq.) is amended by inserting after section 595 the following new section:

"SEC. 595A. PORTABILITY OF PROFESSIONAL LICENSES AND CERTIFICATIONS FOR SERVICEMEMBERS AND THEIR SPOUSES."

"Any professional license or commercial license provided to a servicemember or the spouse of a servicemember shall be fully recognized and honored in any jurisdiction of the United States in which that servicemember or spouse of a servicemember resides due to the military orders of the servicemember for the duration of the orders, if the servicemember or the servicemember's spouse—

"(1) provides a copy of the military orders calling the servicemember to duty in that jurisdiction to the licensing entity in that jurisdiction;

"(2) remains in good standing with the licensing entity of the original jurisdiction; and

"(3) agrees to be subject to the authority of the licensing entity in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.".

(b) TABLE OF CONTENTS.—The table of contents in section 1(b) of the SCRA is amended by inserting after the item relating to section 595 the following new item:

"595A. Portability of professional licenses and certifications for servicemembers and their spouses.".

SEC. 113. FEDERAL CLAIMS UNDER SCRA EXEMPT FROM FEDERAL ARBITRATION ACT.

Section 102 of the SCRA (50 U.S.C. App. 512) is amended by adding at the end the following new subsection:

"(d) ELECTION OF ARBITRATION.—

"(1) CONSENT REQUIRED.—Notwithstanding any other provision of law, whenever a contract with a servicemember provides for the use of arbitration to resolve a controversy pursuant to this Act and arising out of or relating to such contract, arbitration may be used to settle such controversy only if, after such controversy arises, all parties to such controversy consent in writing to use arbitration to settle such controversy.

"(2) EXPLANATION REQUIRED.—Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute pursuant to paragraph (1), the arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award.

"(3) APPLICABILITY.—This subsection shall apply to any controversy pursuant to this Act occurring on, before, or after the date of the enactment of this subsection.".

Section-by-Section Analysis

SEC. 101. CLARIFICATION OF AFFIDAVIT REQUIREMENT.

This section clarifies that the plaintiff in a default judgment action has an affirmative obligation to determine the defendant's military status and that the plaintiff must take steps accordingly, including but not limited to reviewing and attaching available Department of Defense records.

SEC. 101a. OBLIGATIONS OF ATTORNEY APPOINTED TO REPRESENT DEFENDANT IN MILITARY SERVICE.

This section clarifies basic obligations for attorneys appointed by a court to represent defendants in military service. It imposes an affirmative obligation on each such attorney to use due diligence to locate and contact the defendant, and to act in that defendant's best interests. It also provides a remedy for defendants in military service who have been harmed by a court appointed attorney's failure to meet these affirmative obligations.

SEC. 102. RESIDENCY OF DEPENDENTS OF MILITARY PERSONNEL.

This section clarifies that a dependent family member of a servicemember does not have to accompany that servicemember who is absent from a State in compliance with military or naval orders in order for the dependent family member to retain a residence or domicile in that State. Often if a servicemember is called to Iraq or Afghanistan or deploys on ship for 6-12 months a dependent family member will return to a parent or other extended family's home during that time for the support network, particularly when there are small children, rather than remaining in a place with no family support. This clarification will allow the dependent family member the same residency rights as a servicemember even if the dependent family member is unable to accompany the servicemember to the duty station and due to the change in duty station needs to also move to a different place during that deployment.

SEC. 103. INCREASE IN CIVIL PENALTIES.

This section doubles the amount of civil penalties currently authorized.

SEC. 104. ENFORCEMENT BY THE ATTORNEY GENERAL.

This section grants authority to the Attorney General to issue civil investigative demands in investigations under the SCRA. The authority is similar to that provided under the False Claims Act, 31 U.S.C. 3733, except that it does not include the authority to compel oral testimony or sworn answers to interrogatories. This section also clarifies that the Attorney General's authority to enforce the Act applies to violations of the Act that occurred before enactment of the Veterans' Benefits Act of 2010, Public Law 11-275 (Oct. 13, 2010), which made such authority explicit.

SEC. 105. APPLICATION OF PRIVATE RIGHT OF ACTION.

This section clarifies that a private right of action may be filed by any person aggrieved by a violation of the SCRA that occurred before enactment of the Veterans' Benefits Act of 2010, Public Law 11-275 (Oct. 13, 2010), which made such right explicit.

SEC. 106. DEFINITION OF MILITARY ORDERS AND CONTINENTAL UNITED STATES.

This section would add definitions for "military orders" and "continental United States." The amended definition of "military orders" will allow for use of a commanding officer letter in place of orders, similar to the language proposed in S. 3322 in the 112th Congress, so that this provision would apply to the whole SCRA, and not just to lease terminations.

SEC. 107. ORAL NOTICE SUFFICIENT TO INVOKE INTEREST RATE CAP.

This section allows servicemembers to give oral or written notice when they wish to invoke the interest rate cap, instead of just written notice, and requires the creditor to retain a record of the servicemember's oral or written notification. It also allows them to invoke the interest rate cap without sending in a copy of their military orders. Upon receipt of notice, the creditor must conduct a search of Department of Defense records available through the Defense Manpower Data Center (DMDC). If those records confirm military service, the creditor shall grant the interest rate benefit, effective as of the date on which the servicemember was called to military service. If the records do not confirm military service, the creditor may require the servicemember to provide a copy of his or her military orders.

SEC. 108. NON-DISCRIMINATION PROVISION.

This section provides for a nondiscrimination provision that is modeled after a similar provision in S. 3322 in the 112th Congress.

SEC. 109. EXTENSION OF PROTECTION AGAINST REPOSSESSION FOR INSTALLMENT SALES CONTRACTS.

This section provides harmonization of the tail coverage periods for installment sales contracts in section 532 to match mortgages in section 533.

SEC. 110. HARMONIZATION OF SECTIONS.

This section changes "filed" to "pending" in section 533(b), so that servicemembers get stays of proceedings or adjustments of the obligation even if the action was filed before they entered service, or during a break in service. This section also removes "with a return made and approved by the court" to harmonize it with other provisions.

SEC. 111. EXPANSION OF PROTECTION FOR TERMINATION OF RESIDENTIAL AND MOTOR VEHICLE LEASES.

This section extends lease termination protection to individuals ordered to move onto a military base. The language is similar to section 103 of the mark up for S. 3322 in the 112th Congress. In addition, this section provides that the rights with respect to termination of

residential and motor vehicle leases conferred in section 535 may not be waived under any circumstances.

SEC. 112. MILITARY FAMILY PROFESSIONAL LICENSE PORTABILITY.

This section creates a requirement that states in which a military spouse resides due to the servicemembers' orders recognize the spouse's professional licenses that have been awarded by other states. The Administration has called upon all 50 states to pass this type of legislation by 2014 (approximately 25 states currently have laws on this).

SEC. 113. FEDERAL CLAIMS UNDER SCRA EXEMPT FROM FEDERAL ARBITRATION ACT.

This section makes arbitration clauses unenforceable unless all parties consent to arbitration after a dispute arises. The language is similar to another statutory exception to the Federal Arbitration Act (15 U.S.C. 1226(a)(2)).

Amendments to the Military Lending Act (MLA)

SEC. ____. ENHANCED ROLE FOR DEPARTMENT OF JUSTICE UNDER MILITARY LENDING ACT.

(a) ENFORCEMENT BY THE ATTORNEY GENERAL.—Subsection (f) of section 987 of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(7) ENFORCEMENT BY THE ATTORNEY GENERAL.—

"(A) IN GENERAL.—The Attorney General may commence a civil action in any appropriate district court of the United States against any person who—

"(i) engages in a pattern or practice of violating this section; or

"(ii) engages in a violation of this section that raises an issue of general public importance.

"(B) RELIEF.—In a civil action commenced under subparagraph (A), the court—

"(i) may grant any appropriate equitable or declaratory relief with respect to the violation of this section;

"(ii) may award all other appropriate relief, including monetary damages, to any person aggrieved by the violation; and

"(iii) may, to vindicate the public interest, assess a civil penalty—

"(I) in an amount not exceeding $110,000 for a first violation; and

"(II) in an amount not exceeding $220,000 for any subsequent violation.

"(C) INTERVENTION.—Upon timely application, a person aggrieved by a violation of this section with respect to which the civil action is commenced may intervene in such action, and may obtain such appropriate relief as the person could obtain in a civil action under paragraph (5) with respect to that violation, along with costs and a reasonable attorney fee.

"(D) ISSUANCE AND SERVICE OF CIVIL INVESTIGATIVE DEMANDS.—Whenever the Attorney General, or a designee, has reason to believe that any person may be in possession, custody, or control of any documentary material relevant to an investigation under this section, the Attorney General, or a designee, may, before commencing a civil action under subparagraph (A), issue in writing and cause to be served upon such person, a civil investigative demand requiring—

"(i) the production of such documentary material for inspection and copying;

"(ii) that the custodian of such documentary material answer in writing written questions with respect to such documentary material; or

"(iii) the production of any combination of such documentary material or answers.

"(E) RELATIONSHIP TO FALSE CLAIMS ACT.—The statutory provisions governing the authority to issue, use, and enforce civil investigative demands under section 3733 of title 31 (known as the 'False Claims Act') shall govern the authority to issue, use, and enforce civil investigative demands under subparagraph (D), except that—

"(i) any reference in that section to false claims law investigators or investigations shall be applied for purposes of subparagraph (D) as referring to investigators or investigations under this section;

"(ii) any reference in that section to interrogatories shall be applied for purposes of subparagraph (D) as referring to written questions and answers to such need not be under oath;

"(iii) the statutory definitions for purposes of that section relating to 'false claims law' shall not apply; and

"(iv) provisions of that section relating to qui tam relators shall not apply.".

(b) CONSULTATION WITH DEPARTMENT OF JUSTICE.—Subsection (h)(3) of such section is amended by adding at the end the following new subparagraph:

''(H) The Department of Justice."

Section-by-Section Analysis

Subsection (a)—ENFORCEMENT BY THE ATTORNEY GENERAL

Subsection (a) of this proposal would amend subsection (f) of 10 U.S.C. 987, the so-called Military Lending Act (MLA) to include Attorney General enforcement authority for the MLA, with civil penalties and civil investigative demand authority.

Subsection (b)—CONSULTATION WITH THE DEPARTMENT OF JUSTICE ON MILITARY LENDING ACT PROVISIONS.

Subsection (b) of the proposal would add the Department of Justice to the list of agencies (the banking regulators, FTC, and Treasury) with which the Defense Department must consult on a regular basis about the MLA's regulations.

Amendments to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

SEC. 1401. PRE-ELECTION REPORTING REQUIREMENTS ON AVAILABILITY AND TRANSMISSION OF ABSENTEE BALLOTS.

(a) IN GENERAL.—Subsection (c) of section 102 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20302) is amended—

(1) by designating the text of that subsection as paragraph (3) and indenting that paragraph, as so designated, two ems from the left margin; and

(2) by inserting before paragraph (3), as so designated, the following new paragraphs:

"(1) PRE-ELECTION REPORT ON ABSENTEE BALLOT AVAILABILITY.—Not later than 55 days before any election for Federal office held in a State, such State shall submit a report to the Attorney General and the Presidential Designee, and make that report publicly available that same day, certifying that absentee ballots are available for transmission to absentee voters, or that it is aware of no circumstances that will prevent absentee ballots from being available for transmission by 46 days before the election. The report shall be in a form prescribed by the Attorney General and shall require the State to certify specific information about ballot availability from each unit of local government which will administer the election.

"(2) PRE-ELECTION REPORT ON ABSENTEE BALLOTS TRANSMITTED.—Not later than 43 days before any election for Federal office held in a State, such State shall submit a report to the Attorney General and the Presidential Designee, and make that report publicly available that same day, certifying whether all absentee

ballots validly requested by absent uniformed services voters and overseas voters whose requests were received by the 46th day before the election have been transmitted to such voters by such date. The report shall be in a form prescribed by the Attorney General and shall require the State to certify specific information about ballot transmission, including the total numbers of ballot requests received and ballots transmitted, from each unit of local government which will administer the election.".

(b) CONFORMING AMENDMENTS.—

(1) SUBSECTION HEADING.—The heading for such subsection is amended to read as follows: "REPORTS ON ABSENTEE BALLOTS.—".

(2) PARAGRAPH HEADING.—Paragraph (3) of such subsection, as designated by subsection (a)(1), is amended by inserting "POST-ELECTION REPORT ON NUMBER OF ABSENTEE BALLOTS TRANSMITTED AND RECEIVED.—" before "Not later than 90 days".

SEC. 1402. TRANSMISSION REQUIREMENTS; REPEAL OF WAIVER PROVISION.

(a) IN GENERAL.—Subsection (a)(8) of section 102 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20302) is amended by striking "voter—" and all that follows in that subsection and inserting "voter by the date and in the manner determined under subsection (g);".

(b) BALLOT TRANSMISSION REQUIREMENTS AND REPEAL OF WAIVER PROVISION.—Subsection (g) of such section is amended to read as follows:

"(g) BALLOT TRANSMISSION REQUIREMENTS.—

"(1) REQUESTS RECEIVED AT LEAST 46 DAYS BEFORE AN ELECTION FOR FEDERAL OFFICE.—For purposes of subsection (a)(8), in a case in which a valid request for an absentee ballot is received at least 46 days before an election for Federal office, the following rules shall apply:

"(A) TIME FOR TRANSMITTAL OF ABSENTEE BALLOT.—The State shall transmit the absentee ballot not later than 46 days before the election.

"(B) SPECIAL RULES IN CASE OF FAILURE TO TRANSMIT ON TIME.—

"(i) GENERAL RULE.—If the State fails to transmit any absentee ballot by the 46th day before the election as required by subparagraph (A) and the absent uniformed services voter or overseas voter did not request electronic ballot transmission pursuant to subsection (f), the State shall transmit such ballot by express delivery.

"(ii) EXTENDED FAILURE.—If the State fails to transmit any absentee ballot by the 41st day before the election, in addition to transmitting the ballot as provided in clause (i), the State shall—

"(I) in the case of absentee ballots requested by absent uniformed services voters with respect to regularly scheduled general elections, notify such voters of the procedures established under section 103A for the collection and delivery of marked absentee ballots; and

"(II) in any other case, provide, at the State's expense, for the return of such ballot by express delivery.

"(iii) ENFORCEMENT.—A State's compliance with this subparagraph does not bar the Attorney General from seeking additional remedies necessary to effectuate the purposes of this Act.

"(2) REQUESTS RECEIVED AFTER 46TH DAY BEFORE AN ELECTION FOR FEDERAL OFFICE.—For purposes of subsection (a)(8), in a case in which a valid request for an absentee ballot is received less than 46 days before an election for Federal office, the State shall transmit the absentee ballot within one business day of receipt of the request.".

SEC. 1403. CLARIFICATION OF STATE RESPONSIBILITY, CIVIL PENALTIES, AND PRIVATE RIGHT OF ACTION.

(a) ENFORCEMENT.—Section 105 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20307) is amended to read as follows:

"SEC. 105. ENFORCEMENT.

"(a) IN GENERAL.—The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title. In any such action, the only necessary party defendant is the State. It shall not be a defense to such action that local election officials are not also named as defendants.

"(b) CIVIL PENALTY.—In a civil action brought under subsection (a), if the court finds that the State violated any provision of this title, it may, to vindicate the public interest, assess a civil penalty against the State—

"(1) in an amount not exceeding $110,000, for a first violation.

"(2) in an amount not exceeding $220,000, for any subsequent violation.

"(c) ANNUAL REPORT TO CONGRESS.—Not later than December 31 of each year, the Attorney General shall submit to Congress a report on any civil action brought under subsection (a) during that year.

"(d) PRIVATE RIGHT OF ACTION.—A person who is aggrieved by a State's violation of this Act may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this Act.

"(e) ATTORNEY'S FEES.—In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney's fees, including litigation expenses, and costs.".

(b) REPEAL OF CLARIFICATION REGARDING DELEGATION OF STATE RESPONSIBILITY.—Section 576 of the Military and Overseas Voter Empowerment Act (52 U.S.C. 20302 note) is repealed.

SEC. 1404. TECHNICAL CLARIFICATIONS TO CONFORM TO 2009 MOVE ACT AMENDMENTS RELATED TO THE FEDERAL WRITE-IN ABSENTEE BALLOT.

(a) STATE RESPONSIBILITIES.—Section 102(a)(3) of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20302(a)(3)) is amended by striking "general".

(b) WRITE-IN ABSENTEE BALLOTS.—Section 103 of such Act (52 U.S.C. 20303) is amended—

(1) by striking "**GENERAL**" in the title of the section; and

(2) by striking "general" in subsection (b)(2)(B).

SEC. 1405. TREATMENT OF BALLOT REQUESTS.

(a) IN GENERAL.—Section 104 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20306) is amended—

(1) by striking "A State may not" and inserting "(a) PROHIBITION OF REFUSAL OF APPLICATIONS ON GROUNDS OF EARLY SUBMISSION—A State may not";

(2) by inserting "or overseas voter" after "an absent uniformed services voter";

(3) by striking "members of the" before "uniformed services";

(4) by inserting "voters or overseas voters" before the period; and

(5) by adding at the end the following new subsection:

"(b) APPLICATION TREATED AS VALID FOR SUBSEQUENT ELECTIONS.—

"(1) IN GENERAL.— If a State accepts and processes a request for an absentee ballot by an absent uniformed services voter or overseas voter and the voter requests that the application be considered an application for an absentee ballot for each subsequent election for Federal office held in the State through the next regularly scheduled general election for Federal office (including any runoff elections which may occur as a result of the outcome of such general election), and any special elections for Federal office held in the State through the calendar year following such general election, the State shall provide an absentee ballot to the voter for each such subsequent election.

"(2) EXCEPTION FOR VOTERS CHANGING REGISTRATION.— Paragraph (1) shall not apply with respect to a voter registered to vote in a State for any election

held after the voter notifies the State that the voter no longer wishes to be registered to vote in the State or after the State determines that the voter has registered to vote in another State.".

(b) CONFORMING AMENDMENT.—- The heading of such section is amended to read as follows:

"SEC. 104. "TREATMENT OF BALLOT REQUESTS.".

SEC. 1406. INCLUSION OF NORTHERN MARIANA ISLANDS IN THE DEFINITION OF "STATE" FOR PURPOSES OF THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT.

Paragraphs (6) and (8) of section 107 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20310) are each amended by striking "and American Samoa" and inserting "American Samoa, and the Commonwealth of the Northern Mariana Islands".

SEC. 1407. REQUIREMENT FOR PRESIDENTIAL DESIGNEE TO REVISE THE FEDERAL POST CARD APPLICATION TO ALLOW VOTERS TO DESIGNATE BALLOT REQUESTS.

(a) REQUIREMENT.—The Presidential designee shall ensure that the official post card form (prescribed under section 101(b)(2) of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301(b)(2))) enables a voter using the form to—

(1) request an absentee ballot for each election for Federal office held in a State through the next regularly scheduled general election for Federal office (including any runoff elections which may occur as a result of the outcome of

such general election) and any special elections for Federal office held in the State through the calendar year following such general election; or

(2) request an absentee ballot for a specific election or elections for Federal office held in a State during the period described in paragraph (1).

(b) DEFINITION.—In this section, the term "Presidential designee" means the individual designated under section 101(a) of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20301(a)).

SEC. 1408. REQUIREMENT OF PLURALITY VOTE FOR VIRGIN ISLANDS AND GUAM FEDERAL ELECTIONS.

Section 2(a) of the Act entitled "An Act to provide that the unincorporated territories of Guam and the Virgin Islands shall each be represented in Congress by a Delegate to the House of Representatives" approved April 10, 1972 (48 U.S.C. 1712(a)), is amended—

(1) by striking "majority" in the second and third sentences and inserting "plurality"; and

(2) by striking the fourth sentence.

SEC. 1409. EXTENSION OF REPORTING DEADLINE FOR THE ANNUAL REPORT ON THE ASSESSMENT OF THE EFFECTIVENESS OF ACTIVITIES OF THE FEDERAL VOTING ASSISTANCE PROGRAM.

(a) ELIMINATION OF REPORTS FOR NON-ELECTION YEARS.—Section 105A(b) of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 1973ff-4a(b)) is amended—

(1) by striking "March 31 of each year" and inserting "September 30 of each odd-numbered year"; and

(2) by striking "the following information" and inserting "the following information with respect to the Federal elections held during the preceding calendar year".

(b) CONFORMING AMENDMENTS.—Such section is further amended—

(1) by striking "ANNUAL REPORT" in the subsection heading and inserting "BIENNIAL REPORT"; and

(2) by striking "In the case of" in paragraph (3) and all that follows through "a description" and inserting "A description".

SEC. 1410. TREATMENT OF POST CARD FORM REGISTRATIONS.

Section 102 of the Uniformed and Overseas Citizens Absentee Voting Act (52 U.S.C. 20302) is amended by adding at the end the following new subsection:

"(j) Treatment of Post Card Registrations.—A State shall not remove any absent uniformed services voter or overseas voter who has registered to vote using the official post card form (prescribed under section 101) from the official list of registered voters, except in accordance with subparagraph (A), (B), or (C) of section 8(a)(3) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–6(a))."

Section-by-Section Analysis

SEC. 1401. PRE-ELECTION REPORTING REQUIREMENTS ON AVAILABILITY AND TRANSMISSION OF ABSENTEE BALLOTS.

This section is substantially the same as the Department of Justice 2011 proposal as coordinated with the Department of Defense, and amends Section 102 of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to require that States submit two pre-election reports to the Departments of Justice and Defense on the status of ballot transmission to military and overseas voters. It requires that States submit the first report 55 days before the election and identify any jurisdictions that may not be able to send ballots by the 46th day before the election. It requires that States submit the second report 43 days before the election and certify whether each of its jurisdictions transmitted its ballots by the 46th day. These two pre-election reports would provide the Department with information necessary to assess, at the most critical and timely stages, whether enforcement actions are needed, and alleviate the need to rely on voluntary reporting by the States.

SEC. 1402. TRANSMISSION REQUIREMENTS; REPEAL OF WAIVER PROVISION.

Except as noted below, the substance of this section is substantially the same as section 202 of the Department of Justice 2011 proposal as coordinated with the Department of Defense. In addition, it includes Section 204 of the 2011 proposal, repeal of the waiver provision.

This provision, which changes the 45-day deadline under the MOVE Act to a 46-day deadline, addresses the substance of Section 205 of the Department of Justice's 2011 proposal. The 2011 proposal offered a "Saturday Mailing Date Rule," while maintaining the 45-day deadline. Initially, Senate staff proposed the 46-day rule as a cleaner way of accomplishing the same goal of clarifying the general ballot deadline. We propose incorporating the 46-day deadline in our proposals. Conforming changes to the 46 day deadline are made throughout this proposal.

This section amends Section 102 of UOCAVA to require States that have failed to mail absentee ballots by the 46-day deadline to voters who request ballots by the 46th day to send them by express delivery, and to require States that have failed to mail absentee ballots by the 41st day to enable such voters to return their ballots by express delivery. These requirements would increase the likelihood that ballots arrive in time for the voters to receive, mark, and return the ballots by Election Day, and would create a strong financial incentive for strict State compliance with the 46-day rule. The 2011 proposal triggered the requirement to provide for the express return of ballots at the State's expense after the 40th day, *i.e.*, when a ballot was sent late by 5 days or more. The 41st day reference here (in Section 102(g)(1)(B)(ii)) conforms to the new 46 day transmission standard, and provides the same 5 day trigger we envisioned in our 2011 proposal.

This section also repeals UOCAVA's hardship waiver provision, Section 102(g), which currently waives the 45-day deadline for States that cannot comply with the deadline due to an undue hardship created by (1) the date of the State's primary election; (2) a delay in generating

ballots due to a legal contest; or (3) a prohibition in the State's Constitution. The Department's experience with the waiver provision during the 2010 Federal general election cycle shows that its marginal benefits are outweighed by its downsides, including the significant enforcement and administrative resources expended on its implementation. All 11 States that applied for a waiver did so based on the date of their primary elections, and a majority of them were denied a waiver, which required them to take additional, immediate steps to come into compliance at a time when the Federal general election date was fast approaching. Repealing the waiver provision would strengthen the protections of the Act by ensuring that the 46-day deadline is the standard that all States should meet, even if it requires changing the date of their primary elections. A uniform, nationwide standard ensures that all military and overseas voters are afforded its benefits equally.

Section 102(g)(2) is amended because the MOVE Act language (currently in Section 102(a)(8)(b) of UOCAVA) affords no specific requirement to ensure ballots requested between 45 and 30 days of the election (or a later date where states accepted ballot requests closer to the election) are promptly transmitted to voters. Some states have a law or practice of sending ballots promptly; others do not. There remains confusion as to what this provision mandates, if anything. This amendment would ensure that that ballot requests are promptly transmitted by directing that ballots be sent within one business day of receipt.

SEC. 1403. CLARIFICATION OF STATE RESPONSIBILITY, CIVIL PENALTIES, AND PRIVATE RIGHT OF ACTION.

This section is substantially the same as the Department of Justice 2011 proposal as coordinated with the Department of Defense. This section amends Section 105 of UOCAVA to clarify that States bear the ultimate responsibility for ensuring timely transmission of absentee ballots; to provide for civil penalties for violations of the Act in appropriate circumstances; and to provide for an express private right of action. The clarifying language in this amendment would preclude State officials from successfully arguing, contrary to Congress's intent and the Act's legislative history, that they lack sufficient authority to be held responsible for localities' failures to timely send overseas ballots. This section also repeals 52 U.S.C. 20302 note, which addresses the delegation of administrative control of absentee voting, to avoid confusion regarding State responsibility for compliance with the Act. The inclusion of civil penalties and an express private right of action strengthens the Act's protections by providing additional incentives for State compliance.

SEC. 1404. TECHNICAL CLARIFICATIONS TO CONFORM TO 2009 MOVE ACT AMENDMENTS RELATED TO THE FEDERAL WRITE-IN ABSENTEE BALLOT

Section 581 of the MOVE Act extended UOCAVA voters' eligibility to use a Federal Write-In Absentee Ballot (FWAB) to all elections for Federal office, effective December 31, 2010. Prior to that time, FWABs could only be cast in federal general elections. Section 581 effects a number of conforming amendments, but fails to revise these two other FWAB references in the Act.

SEC. 1405. TREATMENT OF BALLOT REQUESTS.

This section amends Section 104 of UOCAVA and is based in part on Section 206 of the Department of Justice's 2011 proposal as coordinated with the Department of Defense. As in the 2011 proposal, this section amends Section 104 of UOCAVA to add overseas civilian voters to a provision that currently requires States to accept or process absentee ballot requests from military voters received in the same calendar year as the Federal election. The inclusion of overseas civilian voters in this provision is consistent with other provisions of the Act.

This proposal also restores, in part, language the 2009 MOVE Act deleted related to treating a ballot application as valid for subsequent elections. Rather than allowing a voter to use the application to request ballots through two general election cycles as the pre-MOVE Act law did, this proposal would provide that applications are valid for one general election cycle, which includes any runoff elections that are held after that general election, a provision contained in Senator Brown's bill (S. 3322). We propose one addition to extend the period to cover any special Federal elections that occur between the general election and the end of the following year. It also provides that all absent uniformed services voters and overseas voters have the option of applying for ballots for all Federal elections held during the period prescribed by this section.

SEC. 1406. INCLUSION OF NORTHERN MARIANA ISLANDS IN THE DEFINITION OF "STATE" FOR PURPOSES OF THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT.

This section is substantially the same as Section 207 of the Department of Justice 2011 proposal coordinated with the Department of Defense. This section amends UOCAVA to make its requirements applicable to the Commonwealth of the Northern Mariana Islands, which, as of 2008, has a nonvoting Delegate to the House of Representatives.

SEC. 1407. REQUIREMENT FOR PRESIDENTIAL DESIGNEE TO REVISE THE FEDERAL POST CARD APPLICATION (FPCA) TO ALLOW VOTERS TO DESIGNATE BALLOT REQUESTS.

The provision for FVAP to revise the FPCA was included in the Department of Justice 2011 proposal as coordinated with the Department of Defense. We revised the language to conform to the change referenced in Section 1705, and contained in Senator Brown's bill (S. 3322), which would allow voters to request ballots through the next general election and included the additional option we propose to extend it to special Federal elections that may be held after the general election through the following calendar year.

SEC. 1408. REQUIREMENT OF PLURALITY VOTE FOR VIRGIN ISLANDS AND GUAM FEDERAL ELECTIONS.

The MOVE Act required that absentee ballots be transmitted 45 days in advance of an election for Federal office. The Department of Justice has interpreted this requirement to apply to all Federal elections, including runoff elections, and the United States Court of Appeals for the

Eleventh Circuit recently affirmed that interpretation. See *U.S. v. State of Alabama*, No. 14-11298 (11th Cir. Feb. 12, 2015), *reh'g denied* April 21, 2015.

In response to the MOVE Act's 45-day deadline, some States changed their State laws to allow sufficient time in their election calendars to transmit runoff ballots if a primary election triggers a runoff. The Virgin Islands and Guam are not able to make a similar change to their runoff election calendars because 48 U.S.C. 1712 requires that runoff elections be held within 14 days after a Federal general election, if no candidate receives a majority of the votes cast at the general election. This proposal provides that the Delegates for the Virgin Islands and Guam be elected by plurality vote. It is consistent with the general rule for the election of Delegates to the other territories and the District of Columbia.

SEC. 1409. EXTENSION OF REPORTING DEADLINE FOR THE ANNUAL REPORT ON THE ASSESSMENT OF THE EFFECTIVENESS OF ACTIVITIES OF THE FEDERAL VOTING ASSISTANCE PROGRAM.

Section 1409 would change the deadline to submit the annual report on the effectiveness of activities of the Federal Voting Assistance Program (FVAP) from March 31 of every year to September 30 of odd-numbered years. It also would clarify that the information submitted in the report should cover the previous calendar year – the year in which the regularly scheduled elections for Federal office occurred. Therefore, the Department of Defense seeks these changes to ensure that the report provides the best quality information about FVAP's program, voter registration and participation in the election and enhance the validity of post-election survey results.

The Department of Defense strongly believes that developing and publishing this report for odd-numbered calendar years in which few Federal elections occur does not provide sufficient information to warrant the time, effort and expense expended in preparing the report. Few elections for Federal office occur in odd-numbered years. In 2009 there were a total of only four elections for Federal office. Again in 2011, only four elections occurred. In 2013 there were eight elections for federal office; there were three in 2015.

Evaluation and analysis of FVAP activities for special primary or general elections requires the Department of Defense to obtain the election data from the local jurisdiction involved and, in many cases, the specific data required to make accurate analysis is not available or is not available in a timely manner. The Department of Defense has concluded that analysis of odd-numbered year elections could lead to poor policy decisions based upon incomplete data and/or conclusions which may not be valid in even-numbered election years, which have greater public participation and FVAP activity.

In addition, the Department of Defense has determined that the post-election survey results for even-numbered year reports and quadrennial analysis cannot be collected, processed, analyzed and reported by the current March 31 deadline. General elections for Federal office are held in November (potentially with some States conducting run-off elections for Federal office in December). The FVAP's survey instruments will be fielded in January and the Department believes they need to be open for at least three months to garner sufficient participation to make

them statistically valid. Further, for the Department to compare the voting behavior rates of active duty military members with those of the citizen voting age population, it must compare data released by other federal agencies. However, the data are historically not available until the summer months following a general election. Thus, the March 31 deadline provides little time after the elections to collect, synthesize and thoughtfully analyze post-election survey data to base program evaluations and policy decisions. Accordingly, the Department of Defense recommends that the reporting deadline be extended from March 31 to September 30, and that the report only be submitted in odd-numbered years.

SEC. 1410. TREATMENT OF POST CARD FORM REGISTRATIONS.

This provision addresses the concern that some jurisdictions may be treating voters who register to vote by the federal post card application prescribed by UOCAVA as "temporary" registrants whose voter registration expires when the voters' absentee ballot request expires (under current law that request expires after just one year). This new provision would clarify that UOCAVA registrants will not have their voter registrations cancelled except as allowed under the National Voter Registration Act of 1993 (i.e., at the request of the registrant; as provided by State law, by reason of criminal conviction or mental incapacity; or in accordance with the procedures and notice requirements of a general removal program governed by the NVRA). This is a new section to address an issue that arose during the Department's technical assistance process in connection with the SENTRI Act. Section 104 of the SENTRI Act (S. 1728) would add a provision with nearly identical language.