

## NOTE

### THE ELEVENTH AMENDMENT: “A WORK IN PROGRESS”

Imagine you have been working for the same company for almost forty years. You dedicated your life to this company. You are sixty years old. You do not plan on retiring for at least another five or six years. Then, one day, your boss comes in and tells you, “We are no longer in need of your services, it is a good time for you to retire, or we can fire you.” What choice do you have? You choose early retirement.

A few weeks later you are talking with your former coworkers. You are told that your boss hired someone younger to replace you. You just discovered you are a victim of age discrimination. To make matters worse, you work for the state and learn that the federal Age Discrimination in Employment Act (ADEA)<sup>1</sup> does not protect you.<sup>2</sup>

Now, imagine that you are wheelchair-bound. You apply for a job at a state agency. The office building is not wheelchair-accessible. Although you meet the necessary job requirements, you are denied employment. The job is given to a less qualified individual who is not dependent on a wheelchair because the state refuses to renovate the office building. You decide to take action and file a complaint against your employer, the State, for violations of the Americans with Disabilities Act (ADA).<sup>3</sup> You file your action in state court seeking relief under this Act. The State removes the action to federal court based on federal question jurisdiction. Now, your case is in federal court and you think, “Perfect! I will be able to enforce my federal rights in federal court.” Both parties proceed with discovery, depositions, summary

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1. 29 U.S.C. §§ 621-634 (2001).

2. *See, e.g., Arkansas v. Goss*, 42 S.W.3d 440 (Ark. 2001). The plaintiff alleged that he was denied employment on the basis of his age; the job was given to a younger person. *Id.* at 441. He initiated his claim in state court and subsequently his claim was removed by the State to federal court. *Id.* The Court of Appeals for the Eighth Circuit dismissed the action on Eleventh Amendment immunity grounds and remanded the case to state court. *Id.*

3. 42 U.S.C. §§ 12101-12213 (2001).

judgment motions, and pretrial conferences all in preparation for trial. But wait—you are in for a surprise!

You arrive at the courthouse on the day of trial expecting to give your opening statement, but the State says, “Not just yet. We have one more motion.” The State confronts you with a motion to dismiss for lack of subject matter jurisdiction. You are shocked. Afterall, it was the State that voluntarily removed the action and now it claims Eleventh Amendment immunity from the suit in federal court. How is this possible?

Imagine an even worse scenario. You proceed with the trial in federal court after voluntary removal by the State. A verdict is rendered in your favor and the State’s response is, “It is too early to start your celebration. We have a surprise waiting for you!” The State has a new theory on appeal: it claims that as a sovereign entity, it is immune from the suit in federal court. Moreover, the State claims that its sovereign immunity operates as a jurisdictional bar similar to subject matter jurisdiction, which can be raised at anytime. The State wins the appeal and your claim is dismissed.

Usually, when an action has been removed to federal court and subsequently dismissed for lack of jurisdiction, the federal court remands the action to the state court from which it was removed. However, this is not always the case. You are fortunate though; your case is one of the few that is successfully remanded. But you learn that even if you win the action in state court, you cannot receive the monetary relief guaranteed to employees under federal employment laws. Why? Because the court feels that requiring a state to pay monetary damages for its federal employment law violations would place an “unfair burden” on the state treasury. You think, “What about me? I have the burden of litigating the same claim twice.”

Why should state employees be denied their rights under these employment protection statutes? Had you worked or applied to a federal, private, or local employer, that employer may be required to accommodate you or be held accountable under federal employment laws. However, because you applied for a job with a state agency, you are not guaranteed the full protection of these laws.

This Note discusses problems and suggests solutions related to the unfair treatment of state employees in court as they attempt to enforce their federal employment rights. Under these proposed solutions, state employees will be guaranteed treatment equal to that of federal, private, or local employees.

## I. INTRODUCTION

Recent Supreme Court decisions<sup>4</sup> restrict the rights available to state employees under federal employment laws.<sup>5</sup> First, state employees may not be able to assert these rights in federal court. Second, when state employees bring suit in state court, the remedies available to them are limited. No such limitations affect the rights of federal, private, or local employees.

A state employee who files suit in state court against her employer, claiming violations of the ADA,<sup>6</sup> the ADEA,<sup>7</sup> or the Fair Labor Standards Act (FLSA)<sup>8</sup> expects to have the claim adjudicated in state court, where the action was properly filed. After receiving the claim, the defendant, the State, may choose to remove the action to federal district

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4. See generally *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of the ADA is not a valid abrogation of Eleventh Amendment sovereign immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the ADEA does not validly abrogate sovereign immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the Fair Labor Standards Act is not a valid abrogation of a state's sovereign immunity).

5. See, e.g., 29 U.S.C. §§ 201-219 (2001); 29 U.S.C. §§ 621-634; 42 U.S.C. §§ 12101-12213.

6. 42 U.S.C. §§ 12101-12213. The purpose of the Act is:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.* at § 12101(b).

7. 29 U.S.C. §§ 621-634. The purpose of the Act is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” *Id.* § 621(b). The legislative history of the ADEA confirms that “Congress’ purpose in extending coverage to state and local governments was to prohibit discriminatory conduct and insure equal treatment to older citizens.” 29 U.S.C.S. § 621 notes (Purpose) (LEXIS 2001).

8. 29 U.S.C. §§ 201-219. According to Congress, the purpose of the Act is to exclude from interstate commerce goods produced for commerce and to prevent their production for interstate commerce under conditions detrimental to maintenance of minimum standards of living necessary for health and general well-being and to prevent use of interstate commerce as means of competition in distribution of goods so produced and as means of spreading and perpetuating such substandard labor conditions among workers of several states.

29 U.S.C.S. § 202 notes (Purpose, generally) (LEXIS 2001).

court under the federal removal statute.<sup>9</sup> The removal statute provides that

any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.<sup>10</sup>

Once the case is removed to federal district court, the State has two options: (1) go to trial on the merits, or (2) claim immunity under the Eleventh Amendment.<sup>11</sup> If the State proceeds to trial on the merits and wins, the judgment is final. However, if the state loses at trial, it may retain the ability to assert its Eleventh Amendment immunity on appeal, which may result in dismissal of the action. In this instance, courts do not consider the actual merits of the claim, but will dismiss the case on procedural grounds. However, if the employee receives an adverse judgment at trial, the judgment stands.<sup>12</sup>

Currently, the employee does not enjoy the same procedural advantages as the state—another chance at victory. In *Dunn v. Baltimore County Board of Education*,<sup>13</sup> the plaintiff filed suit in state court against his employer, the State, alleging discrimination under state law and the ADEA.<sup>14</sup> In response, the State, using the ADEA claims as the basis for removal, removed the action to federal court.<sup>15</sup> Once in federal court, the State claimed Eleventh Amendment immunity based on the Supreme Court's decision in *Kimel v. Florida Board of Regents*,<sup>16</sup> and moved for dismissal of the federal and state law claims.<sup>17</sup> Subsequently, the district

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9. 28 U.S.C. § 1441 (2001).

10. 28 U.S.C. § 1441(a). A claim filed under the federal employment statutes can be removed to federal district court under federal question jurisdiction. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2001).

11. See U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

12. When a decision has been made on the merits, res judicata prevents relitigation of the same claim or issue. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981). Specifically, the doctrine of claim preclusion applies.

13. 83 F. Supp. 2d 611 (D. Md. 2000).

14. *Id.* at 612.

15. *Id.*

16. 528 U.S. 62 (2000).

17. *Dunn*, 83 F. Supp. 2d at 612.

court dismissed the ADEA claims, holding that the State enjoys sovereign immunity from suit in federal court, and remanded the remaining state law claims to state court pursuant to 28 U.S.C. § 1447(c).<sup>18</sup> The court held:

[T]his Court’s original and removal jurisdiction both stemmed from a claim barred by the Eleventh Amendment. There is persuasive authority that a claim barred by the Eleventh Amendment is one over which the federal court has no jurisdiction, and that state-law based claims supplemental thereto must be remanded, rather than dismissed, after an Eleventh Amendment dismissal of the only “federal” claim in suit.<sup>19</sup>

By removing the action to federal court, the State obtained dismissal of an otherwise legitimate federal claim, which would not have been accomplished by maintaining the action in state court.

As a result of the Supreme Court’s decisions in *Alden v. Maine*,<sup>20</sup> *Kimel*, and *Board of Trustees of the University of Alabama v. Garrett*,<sup>21</sup> a state now has the opportunity to remove claims to federal court to gain a procedural advantage over its employees. States can use the sovereign immunity defense as a tool to quash discrimination claims by employees.

In addition, the restrictions the courts placed on Congress have limited Congress’s ability to abrogate the Eleventh Amendment, and have directly impacted a litigant’s ability to recover damages for violations of federal laws.<sup>22</sup> Although a litigant may sue the state for injunctive relief in federal court, she must then bring a separate lawsuit in state court to recover monetary damages.<sup>23</sup> This prolonged process only increases the cost and time of litigation.<sup>24</sup> This is not the only obstacle that a litigant in this situation may encounter. Other issues may come into consideration, such as claim preclusion and the statute of limitations, which may bar relitigation in state court.

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18. *Id.* A federal district court may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3) (2001).

19. *Dunn*, 83 F. Supp. 2d at 612.

20. 527 U.S. 706 (1999).

21. 531 U.S. 356 (2001).

22. Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 633 (2000).

23. *Id.*

24. *Id.*

## II. STATE SOVEREIGN IMMUNITY

*"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."*<sup>25</sup>

### A. The Eleventh Amendment

The Eleventh Amendment provides that a state is immune from suit in federal court.<sup>26</sup> Pursuant to a strict textual interpretation of the Eleventh Amendment, it applies to suits against a State by citizens of another state. Furthermore, in *Hans v. Louisiana*,<sup>27</sup> the Supreme Court expanded a state's sovereignty to include immunity from suits initiated by its own citizens.<sup>28</sup> Currently, the Eleventh Amendment is interpreted as preventing non-consenting states from being subject to suit in federal court by any party except the federal government or a federal agency.<sup>29</sup> Courts have held that sovereign immunity is an implicit limitation on the judicial power of federal courts.<sup>30</sup>

The protections afforded by Eleventh Amendment immunity are also extended to state officials and state agencies.<sup>31</sup> The Supreme Court

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25. U.S. CONST. amend. XI.

26. *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983). "The Eleventh Amendment stands as a palladium of sovereign immunity. It bars federal court lawsuits by private parties . . . unless the state has consented to suit or unless the protective cloak of the amendment has been doffed by waiver or stripped away by congressional fiat." *Id.*

27. 134 U.S. 1 (1890).

28. *Id.* at 11; see also Leon Friedman, *Supreme Court Federalism Decisions*, 16 *TOURO L. REV.* 243 (2000). Friedman points out that "[t]he Eleventh Amendment says two things, both of which the Supreme Court has totally disregarded since the beginning. It says the judicial power of the United States shall not extend to a suit between a state and a citizen of another state." *Id.* at 251. The Eleventh Amendment implies that the judicial power of the United States should not be extended to a suit brought by a citizen against his or her state in a state court. *Id.* at 251-52. "Therefore, on two grounds the Eleventh Amendment should not be a problem." *Id.* at 251.

29. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999).

30. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000); see also *Reese v. Michigan*, No. 99-1173, 2000 U.S. App. LEXIS 27404, at \*11 (6th Cir. Oct. 24, 2000) (holding that "[a]lthough the Amendment on its face prohibits only suits brought against a state by 'Citizens of another State,' the Supreme Court has long construed the Amendment to protect states from suits filed by their own citizens in federal court on the basis of federal question jurisdiction").

31. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (holding that the Eleventh Amendment may still apply if a state is not a named party); see also *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999) (stating that "[o]nly a state or 'arms' of a state may assert the Eleventh Amendment as a defense to suit in federal court").

held that “[t]he Eleventh Amendment bars suits not only against the state itself, but also against a subdivision of the state if the state remains ‘the real party in interest.’”<sup>32</sup> A state agency is deemed to be the real party in interest when “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.”<sup>33</sup> In these actions, because the state is responsible for damages, the action is considered a suit against the state. However, a claim seeking injunctive or declaratory relief can be maintained against a state official or agency,<sup>34</sup> since these types of actions are not brought against the state itself.<sup>35</sup>

### B. Waiver of Eleventh Amendment Immunity

The Supreme Court has been using the Eleventh Amendment to justify restricting an individual’s ability to sue a state in federal court for federal rights violations and to obtain federal remedies.<sup>36</sup> However, there

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32. *Coll. Sav. Bank v. Fla. Prepaid Post-Secondary Educ. Expense Bd.*, 948 F. Supp. 400, 409 (D.N.J. 1996) (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)); *see also Sutton*, 173 F.3d at 1232 (holding that there are four factors used to determine whether a particular political subdivision is an arm of the state: “(1) the characterization of the governmental unit under state law; (2) the guidance and control exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the governmental unit’s ability to issue bonds and levy taxes on its own behalf”).

33. *Coll. Sav. Bank*, 948 F. Supp. at 409 (quotation marks omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)).

34. *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3rd Cir. 1997); *see also* Gordon L. Hamrick IV, Comment, *Roving Federalism: Waiver Doctrine After College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 49 EMORY L.J. 859, 865-66 (2000). The author notes that under the *Ex parte Young* fiction, a private party still can obtain prospective injunctive relief in an action brought against a state official, the Eleventh Amendment notwithstanding. An action for money damages against a state officer in his or her individual capacity for constitutional or statutory violations under Section 1983 also is allowed if relief is sought from the officer personally, not the state treasury. Private actions against lesser governmental entities such as counties are exempt from immunity as well. Finally, a state may waive its Eleventh Amendment protection and consent to suit in federal court.

*Id.* (footnotes omitted).

35. *Watkins v. Cal. Dep’t of Corr.*, 100 F. Supp. 2d 1227, 1232 (C.D. Cal. 2000); *see also Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000) (noting that “the basic rationale . . . is to allow parties to enforce their federal rights in state or federal court by suing government officials for prospective relief, because the state itself cannot be sued without its consent”).

36. Braveman, *supra* note 22, at 612. “During the past two decades, the Supreme Court has articulated federalism concerns to restrict a person’s ability to sue a state in federal court for federal rights violations.” *Id.* According to the author:

are avenues through which an employee may avoid the restrictions the Eleventh Amendment places on the jurisdiction of the federal court.<sup>37</sup>

First, the Eleventh Amendment restriction does not apply when the state waives its sovereign immunity and consents to the suit in federal court.<sup>38</sup> According to the Supreme Court, sovereign immunity is a privilege that belongs to a state, and therefore a state has the power to voluntarily waive its immunity and consent to suit in federal court.<sup>39</sup> “The Supreme Court has held that states may consent to suit; sovereign immunity is not an absolute bar to suit, but an immunity from suit without consent.”<sup>40</sup> The federal courts established a “stringent” test to determine whether the state waived its immunity.<sup>41</sup> A state waives its immunity if:

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In an attempt to strike a balance between state and federal power, the Court sided with the states. Relying in some instances on general federalism concerns and in others on the Eleventh Amendment, the Court effectively closed the federal courthouse doors to many lawsuits alleging state violations of the Constitution or federal statutes.

*Id.* (footnotes omitted).

37. *Id.* at 631.

38. *Id.*

39. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (finding that a state waives its immunity when it consents to suit in federal court); *see also Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 473 (1987) (noting that “[i]f a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment”); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (explaining that “[t]he immunity from suit belong[s] to a State . . . [and] is a personal privilege which it may waive at pleasure”); *Beers v. Arkansas*, 61 U.S. 527, 529 (1857) (finding that a state “may, if it thinks proper, waive this privilege, and permit itself to be made a defendant”); *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1234 (10th Cir. 1999) (holding that “[w]hether immunity is a constitutional or common law bar, the Court has held that the bar may be waived by consent to suit”).

40. Jonathan R. Siegel, *Congress’s Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 50 (1999); *see also Watkins*, 100 F. Supp. 2d at 1230. There are two instances in which a state can waive its sovereign immunity:

First, the state may make a clear and unequivocal declaration that it intends to submit to the jurisdiction of a federal court . . . . Second, the state may “voluntarily invoke the jurisdiction” of the federal court . . . by defending an action in federal court and “voluntarily submitting its rights to judicial determination” by the federal tribunal.

*Watkins*, 100 F. Supp. 2d at 1230.

41. *See Braveman*, *supra* note 22, at 631. The author notes that

[a] general consent to sue and to be sued is insufficient to constitute a waiver. Moreover, a state’s consent to suit in its own courts, or in any court of competent jurisdiction, is not deemed to be a waiver of Eleventh Amendment immunity in federal court. Finally, a waiver will not be implied from a state’s voluntary participation in federally regulated conduct. Such an implied waiver will not be found even when the state engages in commercial ventures unassociated with the customary sovereign activities.

*Id.* (footnotes omitted).

(1) the state expressly consents to federal jurisdiction in the context of the litigation; (2) a state statute or constitutional provision expressly provides for suit in a federal court; or (3) Congress clearly intends to condition the state’s participation in a program or activity on the State’s waiver of its immunity.<sup>42</sup>

Second, Congress may subject a state to suit in federal court by abrogating its Eleventh Amendment immunity.<sup>43</sup> However, the Supreme Court narrowly construes the power of Congress to do so.<sup>44</sup> Congress must be unmistakably clear in its intent to abrogate.<sup>45</sup> Even if Congress’s intent is clear, it may not be enough.<sup>46</sup>

Congress no longer has the ability to abrogate the Eleventh Amendment using the constructive waiver doctrine.<sup>47</sup> Under this doctrine, Congress had the ability to condition state participation in federally regulated commercial fields on a state’s waiver of its sovereign immunity.<sup>48</sup> In striking down the constructive waiver doctrine, the Supreme Court reasoned that “[t]he constitutional role of the States sets them apart from other employers and defendants.”<sup>49</sup> The Court reiterated that constructive waiver is inconsistent with the premise of voluntary and unequivocal waiver.<sup>50</sup>

The practical effect of the Supreme Court’s ruling in *College Savings Bank*, and its subsequent holding in *Seminole Tribe of Florida v.*

42. *Charley’s Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 873 (9th Cir. 1987) (citations omitted); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (ruling that the consent to suit must be “unequivocally expressed”); *Smith v. Reeves*, 178 U.S. 436, 445 (1900) (holding that if a state consents to suit in its own court, it has not consented to suit in federal court).

43. *Braveman*, *supra* note 22, at 632.

44. *Id.*

45. *Id.* “A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

46. “The Court has found a way to protect the states from federal court jurisdiction, even when congressional intent to lift the Eleventh Amendment immunity has been unmistakably clear.” *Braveman*, *supra* note 22, at 632.

47. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

48. *Hamrick*, *supra* note 34, at 859-60 (noting that “if Congress deemed it necessary to establish private enforcement proceedings under a particular federal law, states and commercial entities competing in the marketplace would be treated symmetrically under that enforcement regime”).

49. *Coll. Sav. Bank*, 527 U.S. at 685-86 (quoting *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987)).

50. *Id.* at 680.

*Florida*,<sup>51</sup> limits Congress's spending power over the states. Presently, Congress can only abrogate a state's Eleventh Amendment immunity using its powers under Section 5 of the Fourteenth Amendment.<sup>52</sup> Additionally, under *Seminole*, Congress's intent to abrogate must be "unequivocally expresse[d]"<sup>53</sup> and Congress's actions must be "pursuant to a valid exercise of power."<sup>54</sup>

In *City of Boerne v. Flores*,<sup>55</sup> the Supreme Court placed further restrictions on Congress's abrogation power. The Court held that Congressional authority under the Fourteenth Amendment is not unlimited.<sup>56</sup> In *Boerne*, the Court found that the Religious Freedom Restoration Act of 1993<sup>57</sup> was beyond Congress's power to enact such a law under the Fourteenth Amendment Enforcement Clause.<sup>58</sup> According to the Court, Congress's legislative power was only "remedial."<sup>59</sup> When exercising its legislative powers, Congress "must do so to remedy an already existing constitutional violation. . . . Accordingly, Congressional power under Section 5 is limited to preparing, creating, or establishing a proportionate remedy to a Constitutional violation already found by the Supreme Court."<sup>60</sup> A law is found to be an appropriate use of Congressional power under the Fourteenth Amendment "(1) if it may be regarded as an enactment to enforce the Equal Protection Clause, (2) if it is plainly adapted to that end, and (3) if it is not prohibited by but is consistent with the letter and spirit of the constitution [sic]."<sup>61</sup>

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51. 517 U.S. 44 (1996).

52. *Id.* at 59 (holding that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment"); see also U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

53. 517 U.S. at 55 (citation omitted); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (ruling that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment").

54. 517 U.S. at 55 (citation omitted).

55. 521 U.S. 507 (1997).

56. *Id.* at 518.

57. 42 U.S.C. §§ 2000bb-2000bb-4 (2001).

58. *Boerne*, 521 U.S. at 536.

59. *Id.* at 519.

60. Friedman, *supra* note 28, at 248, 248-49 (footnote omitted) (noting that "Congress cannot declare what the Constitution means and afford a remedy for violations" and "since the Fourteenth Amendment speaks to the states, and Section 5 of the Fourteenth Amendment, the Enabling Act, is the vehicle by which Congress passes these laws, what *Boerne* really says to Congress is you have to be very careful when you exercise that power" (footnote omitted)).

61. *Mills v. Maine*, 118 F.3d 37, 45 (1st Cir. 1997) (quotation marks omitted).

### C. *Ex parte Young*

The sovereign immunity of a state has been limited by the *Ex parte Young* doctrine. In *Ex parte Young*,<sup>62</sup> the Supreme Court permitted suits seeking injunctive relief against state officials acting in their official capacities in federal court.<sup>63</sup> Courts have expanded this doctrine to include suits against state officials for prospective and declaratory relief.<sup>64</sup> For the *Ex parte Young* doctrine to apply, the lawsuit must name the state official and not the state agency or the state itself as a defendant.<sup>65</sup> The purpose of the *Ex parte Young* doctrine is to prevent state officials from using Eleventh Amendment immunity to avoid compliance with federal laws.<sup>66</sup> This doctrine is not without limitations. If a court determines that a state is the real party in interest, the suit is barred by the Eleventh Amendment “regardless of the relief sought.”<sup>67</sup> In determining the real party in interest, a court will look at the nature of the relief sought:

Lawsuits seeking retroactive relief, usually in the form of monetary damages and declaratory judgment for past conduct, against a state official are generally construed as suits against the State because a judgment for damages against an official would necessarily require payment from the government. However, it is clear that “a state official in is his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official capacity actions for prospective relief are not treated as actions against the State.’”<sup>68</sup>

Therefore, a state official can be sued in his official capacity for prospective relief, such as injunctions and declaratory judgments.<sup>69</sup> In such instances, the Eleventh Amendment is not at issue.

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62. 209 U.S. 123 (1908).

63. *Id.* at 159.

64. *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997).

65. *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 483 (D.N.J. 2001).

66. *See id.*; *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) (holding there is no Eleventh Amendment bar to claims seeking prospective relief that would “prevent a continuing violation of federal law”).

67. *Doe*, 148 F. Supp. 2d at 483.

68. *Id.* at 483-84 (citations omitted).

69. *See id.* at 484. There are limitations on the availability of declaratory relief. A plaintiff can not get a declaratory judgment stating that the state official’s prior conduct violated a federal law. *See id.*

### III. LIMITATION ON STATE EMPLOYEES' RIGHTS

The Supreme Court, beginning with its decision in *Seminole Tribe of Florida v. Florida*,<sup>70</sup> and its subsequent decisions in *Alden v. Maine*,<sup>71</sup> *Kimel v. Florida Board of Regents*,<sup>72</sup> and *Board of Trustees of the University of Alabama v. Garrett*,<sup>73</sup> restricted Congress's power using the underlying principle of federalism. "Congress treat[s] the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."<sup>74</sup> The Supreme Court applied principles of federalism to restrict the power of Congress to subject states to federal labor and employment statutes. The practical effect of *Seminole*, *Alden*, *Kimel*, and *Garrett* was to

limit the enforceability of federal law against the states. In federal court, the states are protected by Eleventh Amendment immunity, which Congress cannot lift using its Article I powers. In their own courts, states can now assert the constitutionally based sovereign immunity doctrine. Of course . . . the supremacy of federal law might be achieved by the good faith of the states in honoring federal requirements.<sup>75</sup>

The principle of federalism was emphasized in *Seminole*, and later in *Alden*, where the Supreme Court held that it was unfair to subject states to private suits based on federal law claims.<sup>76</sup> In *Alden*, a group of employees filed suit against the State of Maine, their employer, alleging violations of the FLSA, and subsequently the state court dismissed the complaint on the basis of sovereign immunity.<sup>77</sup> The issue before the United States Supreme Court was whether Congress had "the power, under Article I, to subject nonconsenting States to private suits in their own courts."<sup>78</sup> The *Alden* Court was concerned that subjecting states to

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70. 517 U.S. 44 (1996).

71. 527 U.S. 706 (1999).

72. 528 U.S. 62 (2000).

73. 531 U.S. 356 (2001).

74. *Alden*, 527 U.S. at 748.

75. Braveman, *supra* note 22, at 647 (footnotes omitted). The author also observes that [a]fter *Alden*, there is no real cost to the state for ignoring federal law. Absent the threat of damages, the state has little, if any, incentive to align its policies with federal requirements. State officials can ignore federal requirements, confident that if they are sued and lose they simply will be directed to comply in the future.

*Id.* at 648 (footnotes omitted).

76. See generally *Alden*, 527 U.S. at 749, 750.

77. *Id.* at 712.

78. *Id.* at 730.

suits for damages would give “Congress a power and a leverage over the States that is not contemplated by our constitutional design.”<sup>79</sup> The Court held that Article I of the Constitution does not grant power to Congress to subject nonconsenting states to suits for damages.<sup>80</sup> According to the Court, states are sovereign entities immune from suits to which they have not consented.<sup>81</sup>

However, the Supreme Court pointed out that a state’s sovereign immunity is not absolute.<sup>82</sup> First, immunity under the Eleventh Amendment is valid only in the absence of a state’s consent.<sup>83</sup> Once a state consents, it waives its sovereign immunity, which can arise from a state’s own initiative, from a constitutional amendment, or from legislation pursuant to Congress’s power under the Fourteenth Amendment.<sup>84</sup> Second, the Court reasoned that protection of sovereign immunity did not extend to lesser state entities, such as municipal corporations or other state agencies that are not considered arms of the state.<sup>85</sup> Third, in actions seeking injunctive or declaratory relief, states cannot claim sovereign immunity.<sup>86</sup> Fourth, suits for monetary damages for violations of federal laws could be brought against state officials in their personal capacity.<sup>87</sup>

In *Alden*, the Supreme Court did not consider the effect of its ruling on an individual’s rights to redress wrongs committed by a state in violation of federal laws.<sup>88</sup> The Court left state employees with rights, but no remedies. The Court disregarded the fact that although states are sovereign entities, there is a “fundamental concept that the ‘will’ of state citizens should be viewed to include federal law.”<sup>89</sup> Thus, this ruling denies state employees the full protection of federal employment laws.

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79. *Id.* at 750.

80. *Id.* 712.

81. *Alden*, 527 U.S. at 754.

82. *Id.* at 755.

83. *Id.*

84. *Id.* at 755-56.

85. *Id.* at 756.

86. *Alden*, 527 U.S. at 757.

87. *Id.* Suits of this nature do not violate sovereign immunity since “a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.” *Id.*

88. *See id.* at 809 (Souter, J., dissenting).

89. Braveman, *supra* note 22, at 646. Braveman notes that Justice Kennedy, author of the majority opinion, and Chief Justice Rehnquist, “two of the Court’s strongest champions of states’ rights, previously recognized this basic proposition.” *Id.*

In *Kimel*, the Supreme Court held that the ADEA does not abrogate a state's Eleventh Amendment immunity.<sup>90</sup> Although the Court found that Congress clearly intended to abrogate state immunity, Congress acted in the absence of a valid exercise of power because age is not a protected class under the Fourteenth Amendment.<sup>91</sup> As a result of this decision, a state employee cannot sue her employer in federal court for violations of the ADEA.

Congress's ability to subject a nonconsenting state to suit in federal court was further restricted by the Supreme Court's holding in *Garrett*. The Court held that suits in federal court by state employees to recover money damages by reason of the state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment.<sup>92</sup> Disparate treatment by a state of individuals with disabilities does not necessarily amount to a constitutional violation provided that the state has a rational basis for such a policy.<sup>93</sup> The Court reasoned that enforcement of monetary damages against a state for violations of the ADA would place an extra burden on the state and its scarce resources.<sup>94</sup> The Supreme Court concluded that Congress did not validly abrogate the states' sovereign immunity from suits by private individuals for monetary damages under the ADA because in order to do so "there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."<sup>95</sup>

Contrary to the majority's conclusion, the dissent pointed to an extensive legislative record documenting society-wide discrimination against persons with disabilities,<sup>96</sup> such as "instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, . . . or to obtain a public education, which is often a

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90. 528 U.S. 62, 91 (2000).

91. *See id.* at 75-76, 91.

92. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

93. *Id.* at 370.

94. *Id.* at 372.

"For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to 'make existing facilities used by employees readily accessible to and usable by individuals with disabilities.'"

*Id.* (quoting 42 U.S.C. §§ 12112(5)(B), 12111(9) (2001)).

95. *Id.* at 374.

96. *See Garrett*, 531 U.S. at 377. Congress created a special task force to aid in the gathering of data on employment discrimination against the disabled. *Id.* The task force held hearings in every state which were attended by more than 30,000 people. *Id.*

prerequisite to obtaining employment.”<sup>97</sup> Additional data analyzed by Congress, such as the census and other national polls, led Congress to the conclusion that “‘people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.’”<sup>98</sup>

The ADA, an important civil rights law, was a product of a bipartisan legislative process.<sup>99</sup> It is argued that the Court’s decision in *Garrett* substantially curbed Congress’s power under Section 5 of the Fourteenth Amendment.<sup>100</sup> The *Garrett* decision creates an assumption that the courts “will give Congress less flexibility when it comes to discrimination on the basis of age, disability or other categories ‘where the background norms are not so easily agreed on.’”<sup>101</sup>

Therefore, the implications of the Supreme Court’s recent decisions in *Seminole*,<sup>102</sup> and its subsequent holdings in *Alden*,<sup>103</sup> *Kimel*,<sup>104</sup> and *Garrett*,<sup>105</sup> deprive a state employee of the same rights guaranteed to federal, private, or local employee. As a result of these rulings, a state employee is barred from bringing a suit in federal court against her employer, the state.

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97. *Id.* at 379.

98. *Id.* at 378 (quoting 42 U.S.C. § 12101(a)(6)). “Congress spent years compiling a record of the extent of discrimination against people with disabilities, both in society at large and specifically as the result of government policies that created and perpetuated patterns of segregation, exclusion and lack of access to public services.” Linda Greenhouse, *The High Court’s Target: Congress*, N.Y. TIMES, Feb. 25, 2001, § 4, at 3.

99. Greenhouse, *supra* note 98, at 3 (finding that “the Americans With Disabilities Act, the most important civil rights law of the last quarter-century, was the highly visible product of a bipartisan legislative process, so much so that some people assumed the law might stand as a firewall against the court’s further expansion of state immunity”).

100. *Id.*

101. *Id.* (quoting Marci Hamilton).

102. 517 U.S. 44 (1996) (holding that Congress cannot use its Commerce Clause powers to abrogate a state’s Eleventh Amendment immunity).

103. 527 U.S. 706 (1999) (holding that the FLSA was passed pursuant to Congress’s Commerce Clause powers and, therefore, is not a valid abrogation of Eleventh Amendment immunity).

104. 528 U.S. 62 (2000) (holding that the ADEA is not a valid abrogation of a state’s Eleventh Amendment immunity).

105. 531 U.S. 356 (2001) (holding that the ADA is not a valid abrogation of a state’s Eleventh Amendment immunity).

#### IV. ELEVENTH AMENDMENT SOVEREIGN IMMUNITY IN THE FEDERAL COURTS

In *Wisconsin Department of Corrections v. Schacht*,<sup>106</sup> the Supreme Court held that the dismissal of one federal law claim based on immunity does not preclude a federal court from adjudicating any remaining federal and state law claims.<sup>107</sup> Schacht filed suit against a state agency in state court raising federal and state claims.<sup>108</sup> The State removed the case to federal court, and in its answer raised the defense of Eleventh Amendment immunity.<sup>109</sup> The issue before the Court involved the resolution of state law claims following the dismissal of the federal claim upon which subject matter jurisdiction was based.<sup>110</sup>

Justice Kennedy's concurring opinion raised the issue of whether a state "by giving its express consent to removal of the case from state court, . . . waived its Eleventh Amendment immunity."<sup>111</sup> Justice Kennedy asserted that a state must be responsible for its own acts.<sup>112</sup> Therefore, a state's affirmative act of removal should preclude it from claiming Eleventh Amendment immunity.<sup>113</sup> If a state is allowed to remove a properly filed state court claim to federal court it would permit

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106. 524 U.S. 381 (1998).

107. *Id.* at 392-93; *see also* 28 U.S.C. § 1367(a) (2001).

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

108. *Schacht*, 524 U.S. at 383.

109. *Id.* at 384. The federal removal statute allows a defendant to remove any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2001).

110. *Schacht*, 524 U.S. at 383; *see also* 28 U.S.C. § 1441(b) (2001).

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b).

111. *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring).

112. *Id.* at 393.

113. *Id.*

the belated assertion of the Eleventh Amendment bar, . . . [and would] allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.<sup>114</sup>

According to Justice Kennedy, waiver of immunity is treated as a “hybrid” of personal jurisdiction and subject matter jurisdiction.<sup>115</sup> Removal is akin to personal jurisdiction requirements because “it can be waived and courts need not raise the issue sua sponte.”<sup>116</sup> However, some courts treat Eleventh Amendment immunity similarly to subject matter jurisdiction, allowing it to be raised at anytime during the proceedings.<sup>117</sup> Justice Kennedy suggests that courts should require the state to raise the Eleventh Amendment immunity defense at the “outset of the proceedings”<sup>118</sup> or lose the ability to raise it as a defense.<sup>119</sup> Justice Kennedy’s reasoning was based on prior Supreme Court decisions holding that a state voluntarily waives its Eleventh Amendment immunity when the state intervenes in a federal action or files an action in federal court.<sup>120</sup> Justice Kennedy noted:

Since a State which is made a defendant to a state-court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the State makes in federal court may well be regarded as voluntary . . . .<sup>121</sup>

Currently, there is no uniform treatment of removal and waiver by the circuit courts. The Seventh and the Tenth Circuits treat removal as an unequivocal and express waiver of a state’s sovereign immunity.<sup>122</sup> The Second, Sixth, and Eleventh Circuits view Eleventh Amendment immunity as a jurisdictional issue similar to subject matter jurisdiction.<sup>123</sup> When immunity is treated as subject matter jurisdiction, a defendant

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114. *Id.* at 394.

115. *Id.*

116. *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

117. *See id.*

118. *Id.* at 395.

119. *Id.*

120. *Id.*

121. *Schacht*, 524 U.S. at 395-96 (Kennedy, J., concurring).

122. *See infra* notes 126-27 and accompanying text.

123. *See infra* notes 128-35 and accompanying text.

may raise the issue at anytime in the proceedings,<sup>124</sup> even on appeal. The First, Eighth, and Ninth Circuits look beyond removal itself and inquire into the conduct of the defendant to determine if immunity was waived.<sup>125</sup>

Justice Kennedy is not alone in advocating the treatment of removal as an express and unequivocal waiver of immunity. His proposition is supported by at least two circuit courts. The Seventh Circuit found that a state waives its immunity when it voluntarily enters the federal court system, thus barring itself from raising the defense of immunity.<sup>126</sup> The Tenth Circuit agrees with Justice Kennedy that “an unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum.”<sup>127</sup> Therefore, within these circuits, removal alone is sufficient to constitute an unequivocal waiver of immunity.

The Second, Sixth, and Eleventh Circuits have held that a state must expressly consent to treat its removal as a waiver of immunity; therefore, failure to raise the defense at the outset of the case does not bar the later assertion of immunity.<sup>128</sup> The Second Circuit, in *Richardson v. New York State Department of Corrections*,<sup>129</sup> held that the failure of the state to raise an immunity defense in its answer did not amount to a waiver.<sup>130</sup> The court stated that “Eleventh Amendment immunity may differ from other jurisdictional bars, [but] the law remains clear that it is jurisdictional enough that it need not be raised in the trial court.”<sup>131</sup> In the Sixth Circuit, a party’s failure to raise Eleventh Amendment immunity at the outset is not considered a waiver.<sup>132</sup> Furthermore, because immunity

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124. See *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

125. See *infra* notes 136-70 and accompanying text.

126. Dekalb County Div. of Family & Children Servs. (*In re Platter*), 140 F.3d 676, 680 (7th Cir. 1998). The court held that “[t]he Eleventh Amendment does not prevent a state from entering a federal forum voluntarily to pursue its own interest. However, if a state embarks down this route, it cannot run back to seek Eleventh Amendment protection when it does not like the result.” *Id.* (citation omitted).

127. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1234 (10th Cir. 1999); see also *McLaughlin v. Bd. of Trs. of State Colls. of Colo.*, 215 F.3d 1168, 1170 (10th Cir. 2000) (finding that intentional invocation of federal jurisdiction acted as a waiver of Eleventh Amendment immunity).

128. E.g., *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3314 (2001); *Reese v. Michigan*, No. 99-1173, 2000 U.S. App. LEXIS 27404, at \*1 (6th Cir. Oct. 24, 2000), *cert. denied*, 121 S. Ct. 1231 (2001); *Richardson v. N.Y. State Dep’t of Corr.*, 180 F.3d 426 (2d Cir. 1999).

129. 180 F.3d at 426.

130. *Id.* at 449.

131. *Id.*

132. *Reese*, 2000 U.S. App. LEXIS 27404, at \*6-\*7.

is a limitation on the power of a court, a court may raise the issue sua sponte.<sup>133</sup> In *Lapides v. Board of Regents of the University System of Georgia*,<sup>134</sup> the Eleventh Circuit held that a state’s voluntary removal of an action to federal court is not a waiver of its immunity.<sup>135</sup>

Decisions within the First Circuit hold that removal alone does not constitute a waiver of immunity; there must be additional conduct by the state.<sup>136</sup> In *Candela Corp. v. Regents of the University of California*,<sup>137</sup> the district court held that when a state voluntarily removes the case to federal court, answers the complaint and opposes a motion to remand, the state has “clearly and unequivocally” waived its immunity.<sup>138</sup> The First Circuit does not view the Eleventh Amendment as akin to subject matter jurisdiction because immunity can be waived; subject matter jurisdiction can never be waived.<sup>139</sup>

The Eighth Circuit inquires into the conduct of a state to determine whether immunity was waived.<sup>140</sup> Active litigation on the merits by a state is found to be a waiver of immunity.<sup>141</sup> The Eighth Circuit has held

133. *Id.* at \*7.

134. 251 F.3d 1372 (11th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3314 (2001).

135. *Id.* at 1378.

136. *E.g.*, *Paul N. Howard Co. v. P.R. Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984) (holding that when a state appears in federal court, defends on the merits, and files counterclaims, the state voluntarily waives its immunity); *Newfield House, Inc. v. Mass. Dep’t of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981) (discussing that removal to federal court is a waiver of immunity and the defendants untimely invocation of the Eleventh Amendment defense is “a virtual fraud on the federal court and opposing litigants”); *Inacom Corp. v. Massachusetts*, 2 F. Supp. 2d 150, 152 (D. Mass. 1998) (“The Eleventh Amendment bars civil actions for money damages against a state, its subdivisions, or its officials, except where a state has acted to reduce or eliminate its sovereign immunity.”); *see also Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459 (1945) (holding that the state’s constitution required that waiver of immunity must be done by the passage of a law by the state legislature). *But see Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 8-9 (1st Cir. 2000) (holding that if the defendant fails to raise an Eleventh Amendment defense, a court has discretion to raise the issue sua sponte; and should a state decide to raise the issue de novo on appeal, it must do so in a timely manner).

137. 976 F. Supp. 90 (D. Mass. 1997).

138. *Id.* at 92-93; *see also Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) (stating that the court will look to a state’s conduct to determine if it waived its immunity).

139. *Parella v. Ret. Bd. of the R.I. Employees’ Ret. Sys.*, 173 F.3d 46, 55 (1st Cir. 1999). The court held that:

Eleventh Amendment immunity can be waived. Furthermore, while courts have the discretion to raise Eleventh Amendment questions sua sponte, Article III does not obligate them to do so. These two aspects of Eleventh Amendment doctrine suggest that the Eleventh Amendment is just as much a grant of immunity (i.e., a type of defense) as it is a limitation on courts’ jurisdiction.

*Id.* (citations omitted).

140. *See, e.g., SDDS, Inc. v. South Dakota (In re SDDS, Inc.)*, 225 F.3d 970, 972-73 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1733 (2001).

141. *See id.*

that “[a] state may . . . waive its Eleventh Amendment immunity through its conduct.”<sup>142</sup>

A Ninth Circuit federal district court, in *California Mother Infant Program v. California Department of Corrections*,<sup>143</sup> noted that “[t]he agency took the affirmative act of removing this case to federal court and it then opposed plaintiff’s attempt to remand the case to state court. Where there was no need to take these actions, . . . the agency expressly waived its Eleventh Amendment immunity.”<sup>144</sup> The court treated the agency’s actions following removal as if the agency waived its immunity by intentionally invoking federal jurisdiction.<sup>145</sup> The court justified its decision by noting that the agency faced no prejudice by remaining in state court.<sup>146</sup>

In *Spingola v. Regents of the University of California*<sup>147</sup> and *Watkins v. California Department of Corrections*,<sup>148</sup> the courts stated that removal alone is not the determinative factor of whether the state waived its immunity.<sup>149</sup> In both cases, the plaintiffs filed suit in state court arguing both state and federal law claims.<sup>150</sup> The defendants removed the actions to federal court and claimed immunity under the Eleventh Amendment.<sup>151</sup> Both plaintiffs argued that the defendants waived their immunity by removing the cases to federal court.<sup>152</sup> The *Spingola* court found that the State did not waive its immunity from suit through removal because the State raised immunity as a defense before litigating on the merits.<sup>153</sup>

The *Spingola* court, in reaffirming the holding in *Watkins*, held that in order to determine if a state waived its immunity, one should not look at removal, but should consider whether or not the defendant actively litigated on the merits.<sup>154</sup> In *Watkins*, the court held that

removing a case to a federal forum does not automatically waive a state’s Eleventh Amendment immunity with respect to all of the claims

142. *Id.* at 973 (quoting *Hankins v. Finnel*, 964 F.2d 853, 856 (8th Cir. 1992)).

143. 41 F. Supp. 2d 1123 (S.D. Cal. 1999).

144. *Id.* at 1129.

145. *Id.*

146. *Id.*

147. No. C 99-1076, 2000 U.S. Dist. LEXIS 17378, at \*1 (N.D. Cal. Nov. 21, 2000).

148. 100 F. Supp. 2d 1227 (C.D. Cal. 2000).

149. *Spingola*, 2000 U.S. Dist. LEXIS 17378, at \*20; *Watkins*, 100 F. Supp. 2d at 1231.

150. *Spingola*, 2000 U.S. Dist. LEXIS 17378, at \*6; *Watkins*, 100 F. Supp. 2d at 1228.

151. *Spingola*, 2000 U.S. Dist. LEXIS 17378, at \*7; *Watkins*, 100 F. Supp. 2d at 1228.

152. *Spingola*, 2000 U.S. Dist. LEXIS 17378, at \*12; *Watkins*, 100 F. Supp. 2d at 1230.

153. *Spingola*, 2000 U.S. Dist. LEXIS 17378, at \*16.

154. *Id.* at \*18.

in the case. Where the state has removed a case to federal court in order to ensure that the federal claims in the case are adjudicated by a federal tribunal, but has all the while made clear its intention to assert sovereign immunity as to the other, state-law claims, the state has not unequivocally indicated its consent to have the state-law claims adjudicated in a federal forum.<sup>155</sup>

The court stated that it would find an implied waiver of immunity “proper” only when the state was “guilty of . . . abusive tactical maneuvering . . . with respect to the state law claims.”<sup>156</sup> Therefore, this Ninth Circuit federal district court analyzed removal and waiver on a case-by-case basis.

However, in dicta, the *Watkins* court reasoned that the state would not be allowed to claim immunity after a judgment has been entered. The court stated that

[t]he reason for construing a state’s decision actively to litigate its case as an implied waiver of immunity is clear. If a state were allowed first to litigate the merits of its case but then to assert immunity after becoming dissatisfied with the proceedings, the state could make unfair offensive use of its Eleventh Amendment shield. Such conduct would “undermine the integrity of the judicial system.” When a state seeks to abuse its Eleventh Amendment immunity merely to obtain an improper tactical advantage, the federal courts may prevent that abuse by construing the state’s earlier invocation of federal jurisdiction as an implied waiver of the state’s Eleventh Amendment rights.<sup>157</sup>

In the Ninth Circuit decision, *Hill v. Blind Industries and Services of Maryland*,<sup>158</sup> the plaintiff filed a federal law claim in federal court against the defendant, an arm of the state.<sup>159</sup> Prior to trial, the defendant filed an answer, a motion to dismiss, participated in discovery, attended pretrial conferences, prepared witness lists, and proposed jury instructions.<sup>160</sup> On the day of trial, the defendant asserted, for the first time, an Eleventh Amendment immunity defense.<sup>161</sup> The plaintiff argued that by participating in extensive pretrial motions and activities, the defendant waived its Eleventh Amendment immunity.<sup>162</sup> The district

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155. *Watkins*, 100 F. Supp. 2d at 1231.

156. *Id.*

157. *Id.* (citation omitted).

158. No. 97-55382, 1999 U.S. App. LEXIS 35237, \*1 (9th Cir. June 4, 1999).

159. *Id.* at \*2.

160. *Id.* at \*2-\*3.

161. *Id.* at \*3.

162. *Id.*

court allowed the trial to continue and a verdict was reached for the plaintiff.<sup>163</sup> The Ninth Circuit Court of Appeals found that by waiting until trial to claim immunity and engaging in pretrial litigation, the State waived its immunity.<sup>164</sup> The court stated that there was “no valid reason why a party should belatedly be permitted to assert Eleventh Amendment immunity.”<sup>165</sup> By claiming immunity on the day of trial,

[the defendant] had the best of both worlds. If [the defendant] prevailed at trial, it could withdraw its motion and let the jury verdict stand. If [the defendant] lost at trial, it could ask to have the verdict set aside on the ground that the action was barred by the Eleventh Amendment.<sup>166</sup>

This tactic is an example of what Justice Kennedy discussed in his concurring opinion in *Schacht*. If active participation in the litigation is not seen as a waiver, the defendant is receiving a procedural advantage.<sup>167</sup> If a court is to allow the defendant to wait until the last possible minute to raise an Eleventh Amendment defense, this would

undermine[] the integrity of the judicial system. It also wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants. In addition, when an Eleventh Amendment defense is first raised late in the case, the record may be inadequate to permit informed appellate review, and the plaintiff may have difficulty obtaining evidence necessary to oppose the motion.<sup>168</sup>

The purpose behind the federal rules of procedure is to prevent such abuses of judicial resources and to prevent one party from gaining an

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163. *Hill*, 1999 U.S. App. LEXIS 35237, at \*3.

164. *Id.*; see also *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (holding that a state may waive its immunity by accepting federal funds).

165. *Hill*, 1999 U.S. App. LEXIS 35237, at \*8.

166. *Id.* at \*4.

167. *Id.* at \*8-\*9.

If a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant. We find persuasive Justice Kennedy's thoughtful concurrence in *Wisconsin Dep't of Corrections v. Schacht*, which proposes a similar rule. To permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result, would “work a virtual fraud on the federal court and opposing litigants.”

*Id.* (citations omitted).

168. *Id.* at \*4.

improper advantage over the party.<sup>169</sup> The *Hill* court had a simple solution—if a state does not wish to be in a federal forum, then it “can quickly make its objections known and obtain a ruling on that defense.”<sup>170</sup>

## V. SOLUTIONS TO GUARANTEE STATE EMPLOYEES’ RIGHTS

### A. *The Civil Procedure Fix*

To resolve the inconsistencies among the federal circuit courts, there needs to be a change in the treatment of the Eleventh Amendment immunity following removal to these courts. To protect the federal rights of state employees and provide them remedies equal to those available to federal, private, or local employees, voluntary removal by states to federal court must be interpreted as an unequivocal and express waiver of a state’s sovereign immunity. Furthermore, immunity should be treated as personal jurisdiction; if a party does not raise it in the initial federal court proceeding, it is waived.

Changing the treatment of the Eleventh Amendment immunity would effectively eliminate the unfair advantage given to states when they remove claims to federal court.<sup>171</sup> Currently, states are given a second bite at the apple. Even if a state voluntarily removes a claim to federal court, some circuits do not consider the removal a waiver of immunity.<sup>172</sup> In these circuits, a state can litigate on the merits and await final judgment before claiming immunity.<sup>173</sup> Another obstacle imposed on the plaintiff is the statute of limitations, which may prevent the relitigation of the suit in state court.<sup>174</sup> Furthermore, the plaintiff is faced with the burden of additional litigation expenses. Finally, the plaintiff faces a delay in receiving any possible remedies.

Assuming a plaintiff can overcome these obstacles, the damages available in state court are limited. For example, damages available in state court for violations of federal employment laws are limited to only

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169. See *Hill*, 1999 U.S. App. LEXIS 35237, at \*5. For example, “[d]efeats in personal jurisdiction, venue, or service of process are waived unless asserted in a party’s initial pleading. Removal and remand are likewise governed by strict time limits.” *Id.* (citation omitted).

170. *Id.* at \*14.

171. See *supra* notes 9-19 and accompanying text.

172. See *supra* notes 128-35 and accompanying text.

173. *Id.*

174. See generally *Regents of the Univ. of Minn. v. Raygor*, 620 N.W.2d 680 (Minn. 2001), cert. granted, 121 S. Ct. 2214 (2001).

injunctive and declaratory relief.<sup>175</sup> Despite the courts' confidence that injunctive relief is a "sufficient mechanism for policing state deviations from federal constitutional and statutory norms,"<sup>176</sup> the enforcement of injunctive relief is difficult to obtain. Litigants may have problems identifying the officials responsible for misconduct; and, thus, would be unable to determine to whom an injunctive order should be directed.<sup>177</sup> Assuming that such a person is identified, "restrictive standing limitations on who can seek an injunction may preclude [the litigant] from seeking state compliance in the first place."<sup>178</sup> Even if a litigant is successful and gets the complaint into court, by the time the lawsuit is over, injunctive relief may have little effect or benefit, especially if the plaintiff "experienced only a single, isolated incident of state misconduct."<sup>179</sup> Moreover, it can be argued that injunctive relief provides an inadequate incentive for private citizens to bear the cost and burden of litigation.<sup>180</sup> "Citizens may be wary of incurring litigation costs, both financial and psychological, without the possibility of a substantial monetary pay off."<sup>181</sup>

As previously discussed, the Supreme Court reasoned that subjecting states to monetary damages would place an unfair burden on their finances.<sup>182</sup> However, the Court disregarded the fact that without the risk of being held financially responsible for violations of federal employment statutes, there is an extremely low probability that states will make any substantial efforts to monitor and enforce federal employment anti-discrimination laws.

Absent monetary sanctions, states will not be likely to be pressured by citizens to change their practices. However, should a substantial damage remedy be levied against the state, the threat of increased taxes or budgetary constraints in other programs might spark citizen ire, thus increasing the chances that states would make concerted efforts to avoid such controversy or embarrassment. Hence, because prospective

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175. See *supra* notes 62-69 and accompanying text.

176. Hamrick, *supra* note 34, at 911.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 912-13.

181. Hamrick, *supra* note 34, at 913. The author explains that litigants asserting their rights under federal employment statutes "may perceive the costs of being deposed, producing documents, answering interrogatories or testifying at trial as considerably outweighing the benefits of mere injunctive relief." *Id.*

182. See *supra* note 94 and accompanying text.

relief is too weak of an incentive for state compliance, damage remedies may be the only viable deterrent of state dereliction.<sup>183</sup>

Courts contend that the Eleventh Amendment does not interfere with a litigant’s ability to sue state officials for violations of federal laws in state courts.<sup>184</sup> However, many restrictions reduce the possibility of a litigant recovering monetary judgments from state officials.<sup>185</sup> For example, in actions for monetary damages, certain state officials may raise a personal immunity defense.<sup>186</sup> Other state officials, such as judges, are also entitled to immunity from suits seeking declaratory and injunctive relief.<sup>187</sup>

Another argument against the need to expand federal employment statutes to state employees is that state employees receive adequate and fair protection under state employment discrimination statutes, and therefore do not suffer substantial harm by being excluded from federal discrimination laws.<sup>188</sup> For example, in *Kimel*, the majority stated that “[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”<sup>189</sup>

Where an employee files a disability discrimination claim under the ADA, the remedies available to that employee include injunctive relief, reinstatement, reasonable accommodation, back pay, attorney’s fees, compensatory damages, and punitive damages.<sup>190</sup> Under many state laws, state employees are expressly excluded from recovering punitive damages from state employers.<sup>191</sup> As a result, state employees are not receiving adequate remedies under state laws, as compared to what they would receive under federal employment laws. These employees are in need of federal protection.

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183. Hamrick, *supra* note 34, at 912.

184. Braveman, *supra* note 22, at 636.

185. *Id.* at 649.

186. *Id.*

187. *Id.* “[A]ctions seeking damages against public officials can be heard by juries, which may be reluctant to impose personal liability on individuals attempting to perform their public duties.” *Id.*

188. See *Kimel*, 528 U.S. at 91.

189. *Id.*

190. 29 U.S.C. §§ 621-634 (2001).

191. *E.g.*, FLA. STAT. ch. 760.11(5) (2001) (limiting punitive damages to \$100,000); KAN. STAT. ANN. § 44-1005(k) (2000) (limiting punitive damages to \$2000); TEX. LAB. CODE § 21.2585(b) (2000) (stating that “[a] complainant may recover punitive damages against a respondent, other than a respondent that is a governmental entity”); see also *State v. Goss*, 42 S.W.3d 440, 442, 443 (Ark. 2001) (holding that a state employee in state court suing for age discrimination is not entitled to monetary damages).

By placing numerous limitations on the enforcement of federal employment laws, the courts overlook concerns that the states “will fail to police themselves or to offer adequate redress for their own wrongdoing.”<sup>192</sup> There is more than enough evidence indicating that states, in comparison to the federal government, are less responsive to the rights of minorities.<sup>193</sup> In *Kimel*, the Supreme Court opined that entities such as the federal government are not precluded by Eleventh Amendment jurisprudence from bringing actions against the states for violation of federal employment laws.<sup>194</sup> However, Congress emphasized that there is a crucial need for private enforcement, even when the federal government is capable of bringing the suit.<sup>195</sup>

Congress passed the ADA, the ADEA, and the FLSA to protect employees regardless of where they are employed. These acts provide remedies, including recovery of monetary damages that should be obtainable by any employee harmed. However, by not construing removal as a waiver of states’ sovereign immunity under the Eleventh Amendment, courts deny state employees the rights and remedies granted to them by Congress.

Another justification for treating removal as a waiver of sovereign immunity is that a state should be held accountable for its voluntary decision to remove a case to federal court. Once a state voluntarily removes a case, the state becomes a party in federal court. The state should be bound by its choice and should not escape the result by subsequently claiming the benefits of Eleventh Amendment immunity.<sup>196</sup> As Justice Kennedy reasoned, “[i]t would seem simple enough to rule that once a State consents to removal, it may not turn around and say the Eleventh Amendment bars the jurisdiction of the federal court.”<sup>197</sup>

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192. Hamrick, *supra* note 34, at 904. The author explains that the court “insinuates that because there is no reason to assume that states will act other than in ‘good faith,’ the need for broad private enforcement of federal law against states is weakened concomitantly.” *Id.*

193. *See id.* at 905. The author explains that states tend to privilege industry and business interests, while Congress has been more susceptible to interest group pressures from those concerned with such issues as environmental conservation and urban planning. States may have a tradition of respecting the rights of certain individuals under federal law, but this has not precluded them from responding indifferently at times towards other interest groups protected by federal legislation. An analysis of state action by the Court should at least be sensitive to these concerns.

*Id.* at 904-05 (footnotes omitted).

194. *Kimel*, 528 U.S. at 96.

195. Hamrick, *supra* note 34, at 910.

196. *Hill v. Blind Indus. & Servs. of Md.*, No. 97-55382, 1999 U.S. App. LEXIS 35237, at \*18 (9th Cir. June 4, 1999).

197. *Wisconsin Dep’t of Corr. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring).

According to Justice Kennedy, removing a case to federal court is similar to a state’s voluntary intervention into an already existing federal action.<sup>198</sup>

Viewing Eleventh Amendment immunity as personal jurisdiction would not be a reach for the courts. Originally, the Eleventh Amendment was thought of as a “personal privilege, which [a state] may waive at [its] pleasure.”<sup>199</sup> Furthermore, there is clear indication from the courts that the Eleventh Amendment is not akin to subject matter jurisdiction. In *Edelman v. Jordan*,<sup>200</sup> the court viewed the Eleventh Amendment as depriving the federal courts of subject matter jurisdiction.<sup>201</sup> However, in *Schacht*, the Court returned to its original view of the Eleventh Amendment as a personal privilege that may be waived by a state.<sup>202</sup>

### B. The Proposed Amendment of the ADEA

“Age discrimination continues to damage our society, reducing both the incomes and the self-confidence of millions of Americans.”<sup>203</sup> According to surveys, millions of Americans are forced into early retirement.<sup>204</sup> Surprisingly, age discrimination continues because of the assumption that it is proper for older workers to make room for those who are younger.<sup>205</sup>

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198. *Id.* at 395 (holding that when the state voluntarily intervenes in an action in federal court, it is barred from claiming Eleventh Amendment immunity) (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)); *see also* *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (holding that the state waived its sovereign immunity when it voluntarily appeared in bankruptcy court to file a complaint).

199. *Barnard*, 108 U.S. at 447.

200. 415 U.S. 651 (1974).

201. *See id.* at 678.

202. *Schacht*, 524 U.S. at 389. The Supreme Court held that [t]he Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

*Id.*

203. ADMINISTRATION ON AGING, AGE DISCRIMINATION: A PERVERSIVE AND DAMAGING INFLUENCE, at <http://www.aoa.dhhs.gov/factsheets/ageism.html> (last visited Nov. 20, 2001).

204. *Id.* According to a 1989 survey, one million workers age fifty to sixty-four believed that they would be forced into early retirement. *Id.* A 1992 survey showed that 5.4 million older Americans were unemployed because they were unable to find suitable employment. *Id.*

205. *Id.* The report notes that “for a variety of reasons, older workers *have* been leaving the labor force. The percentage of men 55 to 64 in the work force declined from 87 percent in 1950 to 67 percent in 1996, and for men 65 and older, from 46 percent to 16 percent.” *Id.*

Congress, in response to the Supreme Court rulings in *Kimel* and *Board of Trustees of the University of Alabama v. Garrett*,<sup>206</sup> proposed to amend the ADEA.<sup>207</sup> This bipartisan proposal would allow a state employee to sue her employer, the state, in federal court for violation of federal employment laws.<sup>208</sup> The purpose of this bill is

(1) to provide to State employees in programs or activities that receive or use Federal financial assistance the same rights and remedies for practices violating the Age Discrimination in Employment Act of 1967 as are available to other employees under that Act, and that were available to State employees prior to the Supreme Court's decision in *Kimel v. Florida Board of Regents* . . . ;

(2) to provide that the receipt or use of Federal financial assistance for a program or activity constitutes a State waiver of sovereign immunity from suits by employees within that program or activity for violations of the Age Discrimination in Employment Act of 1967; and

(3) to affirm that suits for injunctive relief are available against State officials in their official capacities for violations of the Age Discrimination in Employment Act of 1967.<sup>209</sup>

To ensure that state employees have a remedy guaranteed by the ADEA, the bill conditions the receipt of federal funds upon a state's waiver of its Eleventh Amendment immunity.<sup>210</sup> Moreover, the bill proposes to amend the ADEA so that a state's receipt and acceptance of federal funds constitutes a waiver of its immunity.<sup>211</sup> The proposed legislation would amend the ADEA to allow a state official to be sued in

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206. 531 U.S. 356 (2001).

207. S. 928, 107th Cong. (2001), available at <http://thomas.loc.gov>.

208. *Id.*

209. *Id.* at § 3.

210. *Id.* at § 3(2).

211. *Id.* at § 4. Therefore, anyone employed by a state agency that receives federal financial assistance may sue his or her employer, the state, in federal court for violations of the ADEA. However, if the state agency chooses not to waive its immunity, that state agency will lose federal funding. For example, New York receives approximately \$26.2 billion a year in federal funding, which it allocates to various state agencies. E-mail from Frank Mauro, Executive Director, Fiscal Policy Institute, to Bonnie A. Tucker (Nov. 7, 2001, 11:34:46 EST) (on file with the Hofstra Labor & Employment Law Journal) (interpreting the Financial Plan Overview, which summarizes the Governor's Executive Budget for 2001-02).

his official capacity for injunctive relief.<sup>212</sup> Therefore, if a state decides not to waive its Eleventh Amendment immunity, it loses its right to receive federal funding.<sup>213</sup>

The Supreme Court, in *South Dakota v. Dole*,<sup>214</sup> addressed the issue of conditioning federal funding upon a state’s waiver of its sovereign immunity.<sup>215</sup> The Court reasoned that indirect persuasion, such as conditioning of federal funds, falls within constitutional boundaries.<sup>216</sup> The Supreme Court held that Congress has the authority and power to condition the receipt of federal funding if four conditions are met: (1) “the exercise of the spending power must be in pursuit of the ‘general welfare,’”<sup>217</sup> (2) Congress must condition the receipt of federal funding “unambiguously, . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation,”<sup>218</sup> (3) “that conditions on federal grants [must relate] ‘to the federal interest in particular national projects or programs,’”<sup>219</sup> and (4) there must be no other constitutional provisions independently barring the conditional grant of federal funds.<sup>220</sup>

In *Dole*, Congress conditioned the receipt of federal highway funds on the states raising the drinking age to twenty-one.<sup>221</sup> South Dakota challenged the law, arguing that it exceeded Congress’s spending power.<sup>222</sup> The Supreme Court held that it was a valid use of Congress’s spending power to persuade a state to voluntarily raise its drinking age.<sup>223</sup> The Court found that Congress’s spending power “is not limited by the direct grants of legislative power found in the Constitution.”<sup>224</sup> In

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212. S. 928 § 4.

213. *Id.* at § 2.

214. 483 U.S. 203 (1987).

215. *See generally id.*

216. *Id.* at 207.

217. *Id.*

218. 483 U.S. at 207 (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, n.13 (1981)); *see also* *MCI Telecomms. Corp. v. Ill. Commerce Comm’n*, 183 F.3d 558, 565 (7th Cir. 1999) (holding that “Congress may condition a state’s receipt of federal funds or participation in a federal program on the state’s waiver of its immunity under the Eleventh Amendment, as long as Congress expresses its intent to do so using unmistakably clear language”).

219. *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

220. *Id.* at 208.

221. *Id.* at 205.

222. *Id.*

223. *Id.* at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

224. *Dole*, 483 U.S. at 207 (quoting *United States v. Butler*, 297 U.S. 1, 66 (1936)); *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *see also* Hamrick, *supra* note 34, at 888.

*Seminole* therefore can be read as providing for the possibility of waiver under the Spending Clause when made explicit. Taken as a whole and viewed against the backdrop

essence, “Congress may attach conditions on the receipt of federal funds . . . ‘upon compliance by the recipient with federal statutory and administrative directives.’”<sup>225</sup> When Congress conditions federal funding on a state’s waiver of its Eleventh Amendment immunity, “it operates ‘much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.’”<sup>226</sup> This contractual relationship exists only when a state voluntarily and knowingly accepts the terms of the contract, thereby giving the state a choice to either waive its immunity and receive funds, or reject the funds and preserve its immunity.<sup>227</sup>

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>228</sup> the Court narrowed the *Dole* doctrine. The *Dole* doctrine is applicable when the following conditions are met: “First, Congress must provide unambiguously that the State will be subject to suit if it engages in certain specified conduct governed by federal regulation. Second, the State must voluntarily elect to engage in the federally regulated conduct that subjects it to suit.”<sup>229</sup> Based on the Supreme Court’s holding in *Dole* and its progeny, Congress has authority, under its spending power, to condition the receipt of federal funding on a state’s waiver of its Eleventh Amendment immunity.

The proposed Senate bill meets the first requirement under the *Dole* test.<sup>230</sup> The conditioning of funds will ensure state employees their rights under the ADEA and other similar employment acts. “In the absence of the deterrent effect that such remedies provide, there is a greater likelihood that entities carrying out programs and activities receiving

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of *Dole*, pre-*College Savings* Eleventh Amendment cases suggest that a state can waive its immunity by participating in a federal spending program that explicitly conditions receipt of funds on such a waiver.

Hamrick, *supra* note 34, at 888.

225. *Dole*, 483 U.S. at 206.

226. *Litman v. George Mason Univ.*, 186 F.3d 544, 551 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The *Litman* court stated that

in exercising its spending power, the federal government “condition[s] an offer of federal funding on the promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” . . . And it also conditions these funds on the recipient state’s consent to be sued in federal court for an alleged breach of the promise not to discriminate.

*Id.* at 551-52 (alteration in original) (citations omitted).

227. *Id.* at 552.

228. 527 U.S. 666 (1999).

229. *Id.* at 679. The Court held that Congress cannot use its spending power to force a state’s compliance by withholding funds from instrumental and necessary state functions. *See id.* at 679-80.

230. *See supra* text accompanying note 222.

Federal financial assistance will use that assistance to violate that Act, or that the assistance will otherwise subsidize or facilitate violations of that Act.”<sup>231</sup> Congress’s use of the *Dole* doctrine will provide consistency in the law and eliminate a state’s procedural advantage over an employee in federal court. The purpose of the ADEA was to end age discrimination; as President Nixon noted

“[age discrimination] can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person’s unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [sic] the contribution they could make if they were working.”<sup>232</sup>

The second requirement of the *Dole* test<sup>233</sup> is met because Congress clearly states that failure to comply with the proposed bill to amend the ADEA will result in denial of federal funding. Congress’s proposed legislation meets the third *Dole* requirement<sup>234</sup> because the ADEA ensures that older Americans will not be terminated solely on the basis of their age,<sup>235</sup> thus lowering the number of older employees that may be dependent on scarce governmental resources. The national interest is also served by promoting the use of our best available labor resources. Because the proposed legislation has no constitutional bar, the fourth requirement of the *Dole* test<sup>236</sup> is met.

## VI. CONCLUSION

Substantial changes to current federal labor and employment laws are necessary to protect a state employee asserting her federal employment rights. In the interest of justice, a state must forfeit its immunity to ensure that the state employee receives protection equal to that afforded to a federal, private, or local employee. To nullify the

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231. S. 928, 107th Cong. § 2(4) (2001), available at <http://thomas.loc.gov>.

232. HOUSE GEN. SUBCOMM. ON LABOR, H. REP. NO. 93-913 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2849 (citation omitted).

233. See *supra* text accompanying note 223.

234. See *supra* text accompanying note 224.

235. *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 699 (1st Cir. 1983) (holding that “legislative history . . . makes it plain that Congress’ purpose in extending ADEA coverage was to shield public employees from the invidious effects of age-based discrimination”).

236. See *supra* text accompanying note 225.

procedural advantage enjoyed by states under the Eleventh Amendment, courts must treat removal to federal court as a waiver of immunity. Under this approach, a state would be required to raise an Eleventh Amendment immunity defense at its first appearance in federal court; that is, before the state argues the case on the merits. Therefore, removal would be an express and unequivocal waiver of sovereign immunity.

The proposed Congressional amendment of the ADEA and other labor and employment laws would enable a state employee to assert her rights under these laws. In amending these statutes to condition the receipt of federal funding on a state's waiver of its sovereign immunity, a state employee would receive adequate compensation should the state violate her federal employment rights. Such action is necessary to protect the rights of workers in all employment settings from discrimination on the basis of age and disability.

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