

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

3 **Filing Date:** April 14, 2016

4 **NO. S-1-SC-34613**

5 **PHILLIP G. RAMIREZ, JR.,**

6 Plaintiff-Petitioner,

7 v.

8 **STATE OF NEW MEXICO CHILDREN, YOUTH**
9 **AND FAMILIES DEPARTMENT, DORIAN DODSON,**
10 **in her individual and official capacities, RON WEST, in his**
11 **individual and official capacities, BARBARA AUTEN,**
12 **in her individual and official capacities, ROGER GILLESPIE,**
13 **in his individual and official capacities, TED LOVATO, in his**
14 **individual and official capacities, TIM HOLESINGER, in his**
15 **individual and official capacities, DANIEL BERG, in his individual**
16 **and official capacities,**

17 Defendants-Respondents,

18 and

19 **NEW MEXICO ATTORNEY GENERAL'S OFFICE,**

20 Intervenor.

21 **ORIGINAL PROCEEDING ON CERTIORARI**

22 **Camille Martinez-Olguin, District Judge**

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1 **OPINION**

2 **NAKAMURA, Justice.**

3 {1} We are called to decide whether a New Mexico National Guard member may
4 assert a claim against the State as employer under the Uniformed Services
5 Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-
6 4335 (2012). Phillip Ramirez, a member of the New Mexico Army National Guard,
7 was employed by the New Mexico Children, Youth and Families Department
8 (CYFD). In July 2005, Ramirez was ordered to federal active duty and deployed to
9 Iraq. After Ramirez returned to work in New Mexico, CYFD terminated his
10 employment. Ramirez sued CYFD, asserting a USERRA claim. A jury found that
11 CYFD took adverse employment actions against Ramirez because of his military
12 service and awarded him monetary damages. The Court of Appeals reversed the
13 damages award, concluding that CYFD as an arm of the State was immune to
14 Ramirez’s USERRA claim. *Ramirez v. State ex rel. Children, Youth & Families*
15 *Dep’t*, 2014-NMCA-057, ¶¶ 1, 27, 326 P.3d 474, *cert. granted*, 2014-NMCERT-005.
16 We disagree. By enacting NMSA 1978, Section 20-4-7.1(B) (2004), the Legislature
17 specifically extended “[t]he rights, benefits and protections” of USERRA to members
18 of the New Mexico National Guard who are ordered to federal or state active duty for
19 a period of thirty or more consecutive days. In so doing, the Legislature consented to

1 suits brought against state employers who violate the protections guaranteed by
2 USERRA. Accordingly, we reverse and reinstate the district court’s judgment and
3 damages award.

4 **I. BACKGROUND**

5 **A. USERRA**

6 {2} Congress enacted USERRA to encourage noncareer military service, to
7 minimize disruptions in the lives and communities of those who serve in the
8 uniformed services, and “to prohibit discrimination against persons because of their
9 service in the uniformed services.” 38 U.S.C. § 4301(a)(1)-(3). Congress created
10 USERRA pursuant to its War Powers set forth in Article I, Section 8, Clause 11 of
11 the United States Constitution. *Bedrossian v. Nw. Mem’l Hosp.*, 409 F.3d 840, 843-44
12 & n.2 (7th Cir. 2005). In pertinent part, USERRA provides:

13 A person who is a member of, applies to be a member of, performs, has
14 performed, applies to perform, or has an obligation to perform service
15 in a uniformed service shall not be denied initial employment,
16 reemployment, retention in employment, promotion, or any benefit of
17 employment by an employer on the basis of that membership,
18 application for membership, performance of service, application for
19 service, or obligation.

20 38 U.S.C. § 4311(a). USERRA’s antidiscrimination rights apply to states as
21 employers. *See* 38 U.S.C. § 4303(4)(A)(iii) (defining the term “employer” to include

1 “a State”). To enforce these guarantees, USERRA creates a private right of action for
2 qualified service members to recover monetary damages against a state as an
3 employer. 38 U.S.C. § 4323(a)(3), (d)(1)(B)-(C).

4 {3} Congress originally conferred jurisdiction on the federal district courts to
5 adjudicate USERRA actions brought by private individuals against state employers.
6 Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No.
7 103-353, 108 Stat. 3149, 3165 (1994) (providing that “[i]n the case of an action
8 against a State as an employer, the appropriate district court is the court for any
9 district in which the State exercises any authority”) (current version at 38 U.S.C. §
10 4323(b)). In *Seminole Tribe of Florida v. Florida*, however, the Supreme Court
11 rejected Congress’s authority under the powers granted by Article I of the United
12 States Constitution to abrogate a state’s sovereign immunity and subject
13 nonconsenting states to suit in federal court. 517 U.S. 44, 72 (1996). Because
14 Congress enacted USERRA pursuant to its War Powers granted by Article I, Section
15 8, *Seminole Tribe* cast doubt on the federal courts’ jurisdiction to adjudicate
16 USERRA actions for monetary damages against states as employers. *See, e.g.,*
17 *Palmatier v. Mich. Dep’t of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997)
18 (dismissing a USERRA claim against the Michigan entities for lack of jurisdiction).

1 {4} In 1998, Congress amended USERRA’s jurisdictional provision concerning
2 claims against state employers to provide that “[i]n the case of an action against a
3 State (as an employer) by a person, the action may be brought in a State court of
4 competent jurisdiction in accordance with the laws of the State.” Veterans Programs
5 Enhancement Act of 1998, Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329
6 (1998) (codified as amended at 38 U.S.C. § 4323(b)(2)). With this amendment,
7 Congress sought to channel private USERRA claims against state employers to state
8 courts. *See* 38 U.S.C. § 4323(b)(2). Given this background, Ramirez asserted a
9 USERRA claim against CYFD in New Mexico district court.

10 **B. Ramirez’s USERRA claim**

11 {5} Ramirez joined the New Mexico National Guard on August 22, 1991. On
12 April 9, 1997, CYFD hired him as a surveillance officer. In November 2005, Ramirez
13 was deployed to Iraq where he led a platoon charged with providing security escort
14 to supply convoys. After his service in Iraq, Ramirez was transferred to Kuwait,
15 where on May 13, 2006, he was promoted to Sergeant First Class. Ramirez returned
16 to Gallup in November 2006.

17 {6} Ramirez resumed employment with CYFD on January 2, 2007 under the
18 supervision of Daniel Berg and Tim Holesinger. Within a few months of his return,

1 Ramirez's relationship with his supervisors deteriorated. Berg and Holesinger
2 allegedly harassed and reprimanded Ramirez for being insubordinate. On May 8,
3 2008, CYFD terminated his employment.

4 {7} On May 19, 2008, Ramirez filed a lawsuit in the Eleventh Judicial District
5 Court against CYFD, the former secretary of CYFD, Holesinger, Berg, and others at
6 CYFD who supervised Ramirez, alleging a USERRA claim for monetary relief and
7 other claims arising under federal and state law. CYFD moved to dismiss Ramirez's
8 USERRA claim on grounds that, as a state agency, it was immune to USERRA claims
9 brought by private individuals. The record indicates that the district court did not
10 specifically rule on that motion and commenced a jury trial on, inter alia, Ramirez's
11 USERRA claim. During trial, CYFD moved for a directed verdict with respect to the
12 USERRA claim. The district court denied that motion. The jury found that Ramirez's
13 military service was a motivating factor for the adverse employment actions taken by
14 CYFD and returned a verdict in his favor, awarding him \$36,000 in damages for lost
15 earnings. The district court entered the judgment and award in favor of Ramirez.

16 {8} CYFD appealed, and the Court of Appeals reversed. *Ramirez*, 2014-NMCA-
17 057, ¶ 1. In a divided opinion, the Court of Appeals held that CYFD, as a state
18 agency, was immune to Ramirez's USERRA claim. *See id.* The Court of Appeals

1 determined that the Legislature had not waived New Mexico’s sovereign immunity
2 with respect to Ramirez’s USERRA claim because the Legislature had not spoken
3 with “the requisite specificity required to determine . . . [an] inten[tion] to waive the
4 State’s constitutional sovereign immunity to private USERRA suits for damages.” *Id.*

5 ¶ 19. The Court of Appeals also held that CYFD was immune to Ramirez’s USERRA
6 claim because, in the absence of a state’s consent to suit, Congress lacks the power
7 to abrogate a state’s sovereign immunity when acting pursuant to its War Powers. *Id.*
8 ¶¶ 17-18.

9 {9} We granted Ramirez’s petition for a writ of certiorari to consider whether New
10 Mexico is immune to private USERRA suits for damages, exercising our appellate
11 jurisdiction provided by Article VI, Section 3 of the New Mexico Constitution and
12 NMSA 1978, Section 34-5-14(B) (1972). We also granted the New Mexico Office
13 of the Attorney General’s motion to intervene and allowed amicus curiae briefs from
14 the United States, the Reserve Officers Association of America, and the American
15 Civil Liberties Union of New Mexico.

16 **II. DISCUSSION**

17 **A. State sovereign immunity should be determined at the outset of litigation**

18 {10} The procedural history of Ramirez’s USERRA claim in the district court gives

1 us pause. In its motion to dismiss, CYFD argued that the USERRA claim should be
2 dismissed for lack of subject matter jurisdiction because CYFD was immune from
3 suit. CYFD requested a hearing on that motion, and the district court held a hearing
4 on February 9, 2010. At the hearing, the district court announced it would issue a
5 written ruling. The record, however, contains no indication that the district court ruled
6 on CYFD's motion, and CYFD maintains that the district court did not so rule.

7 {11} When the State moves to dismiss a plaintiff's claim by raising the affirmative
8 defense of sovereign immunity invoking the lack of subject matter jurisdiction, the
9 district court must rule on that motion before allowing the claim to proceed. *See*
10 *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 12, 120 N.M. 133, 899 P.2d 576
11 (“Subject matter jurisdiction is [a court’s] power to adjudicate the general questions
12 involved in the claim.”). This is a matter of both principle and practice. First,
13 sovereign immunity protects the State not only from liability but also from suit. *Fed.*
14 *Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). Courts may not
15 allow a plaintiff to impose on the State the expense of litigating a claim to which it
16 is immune. *See id.* at 765 (“[S]tate sovereign immunity serves the important function
17 of shielding state treasuries and thus preserving the [state’s] ability to govern.”
18 (internal quotation marks and citation omitted)). Second, if the State properly invokes

1 its sovereign immunity to a pending claim, “any [ruling] regarding that claim is
2 advisory to the extent that it addresses issues other than immunity.” *See Rusk State*
3 *Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). And “[w]e avoid rendering advisory
4 opinions.” *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M.
5 640, 954 P.2d 72. Third, as a matter of judicial administration, if the State raises the
6 defense of sovereign immunity to a claim, that issue should be decided well before
7 the claim goes to a jury—not after a jury has rendered a verdict. *See Gonzales*, 1995-
8 NMSC-036, ¶ 12.

9 {12} In this case, we conclude that the Legislature consented to private USERRA
10 actions for damages. Hence, the risks associated with not deciding a state sovereign
11 immunity defense at the outset did not materialize. Nevertheless, we reiterate that the
12 defense of state sovereign immunity should be adjudicated at the outset of litigation,
13 instead of permitting the issue to be decided after the expense of trial.

14 **B. USERRA and state sovereign immunity**

15 **1. Standard of review**

16 {13} We review de novo whether New Mexico is immune in its own courts to a
17 claim for damages arising under federal law. *See Manning v. Mining & Minerals Div.*
18 *of Energy, Minerals & Nat. Res. Dep’t*, 2006-NMSC-027, ¶ 9, 140 N.M. 528, 144

1 P.3d 87. Further, whether the Legislature waived New Mexico’s sovereign immunity
2 with respect to USERRA claims filed by private individuals in state court is an issue
3 of statutory interpretation that is also subject to de novo review. *Moongate Water Co.*
4 *v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405.

5 **2. State sovereign immunity and congressional legislation enacted under the**
6 **War Powers Clause**

7 {14} As framed by the parties, this case principally concerns whether the War
8 Powers Clause grants Congress the power to abrogate a state’s sovereign immunity
9 to suit in its own courts. To enforce the rights furnished to private individuals by
10 USERRA against state employers, Congress subjects the states to private actions for
11 money damages in their own courts. *See* 38 U.S.C. § 4323(b)(2). The parties dispute
12 whether this statutory provision is beyond Congress’s power to enact.

13 {15} This case concerns New Mexico’s sovereign immunity to federal causes of
14 action for monetary damages in its own courts—an immunity that derives from the
15 federal Constitution. *See Alden v. Maine*, 527 U.S. 706, 732-33 (1999) (“Although
16 the sovereign immunity of the States derives at least in part from the common-law
17 tradition, the structure and history of the Constitution make clear that the immunity
18 exists today by constitutional design.”); *Cockrell v. Bd. of Regents of N.M. State*

1 *Univ.*, 2002-NMSC-009, ¶¶ 4-8, 132 N.M. 156, 45 P.3d 876 (discussing *Alden* at
2 length). New Mexico’s immunity to suit for damages is a fundamental aspect of its
3 sovereignty and is held by virtue of its “admission into the Union upon an equal
4 footing with the other States.” *Alden*, 527 U.S. at 713.

5 {16} Because New Mexico’s sovereign immunity is grounded in the federal
6 Constitution, it exists only where the states’ sovereign immunity was not relinquished
7 either “by the plan of the Convention or certain constitutional Amendments.” *Id.*; *see*
8 *also* The Federalist No. 81 (Hamilton) (“It is inherent in the nature of sovereignty not
9 to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore,
10 there is a surrender of this immunity in the plan of the convention, it will remain with
11 the States”) (emphasis added). For example, “[i]n ratifying the Constitution, the
12 States consented to suits brought by other States or by the Federal Government.”
13 *Alden*, 527 U.S. at 754 (citing *Principality of Monaco v. State of Miss.*, 292 U.S. 313,
14 328-29 (1934) (collecting cases)).

15 {17} In *Alden*, the Supreme Court addressed the issue of state sovereignty at the
16 Constitutional Convention and specifically examined whether any provision of
17 Article I grants Congress the power to subject nonconsenting states to private suits
18 for damages in their own courts. *See* 527 U.S. at 730-31. The Supreme Court

1 determined that Congress only has such a power “if there is ‘compelling evidence’
2 that the States were required to surrender this power to Congress pursuant to the
3 constitutional design.” *Id.* at 730-31 (quoting *Blatchford v. Native Vill. of Noatak*,
4 501 U.S. 775, 781 (1991)). After analyzing the “history, practice, precedent, and the
5 structure of the Constitution,” the Supreme Court held that “the States retain
6 immunity from private suit in their own courts, an immunity beyond the congressional
7 power to abrogate by Article I legislation.” *Id.* at 754.

8 {18} In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the
9 Supreme Court retreated from the broad holdings of *Seminole Tribe* and *Alden* that
10 nothing in Article I empowers Congress to subject a state to suit by a private party for
11 monetary relief without its consent. *Katz* concluded after looking to the history of the
12 Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4, and bankruptcy legislation considered
13 and enacted in the wake of the Constitution’s ratification that the Bankruptcy Clause
14 enables Congress to abrogate state sovereign immunity in bankruptcy proceedings.
15 See 546 U.S. at 377 (“The ineluctable conclusion, then, is that States agreed in the
16 plan of the Convention not to assert any sovereign immunity defense they might have
17 had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”
18 (quoting U.S. Const. art I, § 8, cl. 4)). *Katz*, therefore, applied the framework

1 articulated in *Alden* to conclude that Congress’s power under the Bankruptcy Clause
2 includes a limited power to abrogate state sovereign immunity. *See id.* In so doing,
3 *Katz* opened the door to arguments that constitutional history and structure show that
4 Congress, by acting pursuant to other Article I powers, may subject the states to
5 private suits absent their consent.

6 {19} Encouraged by the Supreme Court’s holding in *Katz*, Ramirez, the New
7 Mexico Office of the Attorney General (as an intervenor), and the United States (as
8 an amicus curiae) argue that Congress’s War Powers include the power to subject
9 states to private suits for monetary relief without their consent. They maintain that
10 this putative power sounds in the plan of the Convention.

11 {20} We decline to decide whether, pursuant to the constitutional structure outlined
12 at the Convention and ratified thereafter, the states implicitly consented to Congress’s
13 authority under its War Powers to override their sovereign immunity. The resolution
14 of that constitutional question is unnecessary to the disposition of this case; therefore,
15 we do not address it. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (“It
16 is an enduring principle of constitutional jurisprudence that courts will avoid deciding
17 constitutional questions unless required to do so.” (internal quotation marks and
18 citation omitted)). Instead, we address whether the New Mexico Legislature waived

1 New Mexico’s sovereign immunity to private suits seeking monetary relief for a state
2 employer’s alleged violation of a right guaranteed by USERRA.

3 **3. Determining waiver of state sovereign immunity**

4 {21} New Mexico’s privilege to assert its sovereign immunity in its own courts
5 “does not confer upon the State a concomitant right to disregard the Constitution or
6 valid federal law.” *Alden*, 527 U.S. at 754-55. Sovereign immunity does not bar all
7 judicial review of state compliance with federal law in New Mexico courts. For
8 instance, a private individual may bring a federal cause of action seeking prospective,
9 injunctive relief against a state officer. *See Gill v. Pub. Emps. Ret. Bd. of Pub. Emps.*
10 *Ret. Ass’n of N.M.*, 2004-NMSC-016, ¶¶ 1, 28, 135 N.M. 472, 90 P.3d 491 (applying
11 the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to private suits against state
12 officials).

13 {22} Furthermore, the Legislature may consent to suits against the State. *See*
14 *Cockrell*, 2002-NMSC-009, ¶ 13 (“[I]t is within the sole province of the Legislature
15 to waive the State’s constitutional sovereign immunity.”). “The rigors of sovereign
16 immunity are thus ‘mitigated by a sense of justice which has continually expanded
17 by consent the suability of the sovereign.’” *Alden*, 527 U.S. at 755 (quoting *Great N.*
18 *Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). The Legislature may waive New

1 Mexico’s sovereign immunity with respect to causes of action that it creates. *See, e.g.*,
2 NMSA 1978, § 14-2-12 (1993) (providing for enforcement, including the award of
3 monetary damages, for a claim arising under the Inspection of Public Records Act);
4 NMSA 1978, § 28-1-13(D) (2005) (providing for the State’s monetary liability for
5 injury to a person under the Human Rights Act). The Legislature may also waive New
6 Mexico’s immunity to federal causes of action that Congress creates through the
7 exercise of its Article I powers. *See Cockrell*, 2002-NMSC-009, ¶ 13.

8 {23} This case turns on whether the Legislature waived the State’s immunity to suit
9 by enacting Section 20-4-7.1(B), which applies the rights created by USERRA to
10 qualifying members of the New Mexico National Guard. *Cockrell* guides the
11 resolution of this question. In *Cockrell*, this Court stated “that any waiver of the
12 State’s constitutional sovereign immunity must be clear and unambiguous.” 2002-
13 NMSC-009, ¶ 24. There, we specifically considered whether NMSA 1978, Section
14 37-1-23(A) (1976) waived the State’s sovereign immunity in actions for overtime
15 wages asserted under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§
16 201-219 (2012). *Cockrell*, 2002-NMSC-009, ¶¶ 16-24. Section 37-1-23(A) grants
17 immunity to governmental entities “from actions based on contract, except actions
18 based on a valid written contract.” This Court concluded that this statute did not

1 clearly and unambiguously indicate the Legislature’s intent to make state entities
2 amenable to suits asserting FLSA claims in state courts. *Cockrell*, 2002-NMSC-009,
3 ¶ 24. We accordingly held that “Section 37-1-23 does not waive the State’s
4 constitutional sovereign immunity.” *Cockrell*, 2002-NMSC-009, ¶ 22.

5 {24} We first look to the text of a statute to determine whether the Legislature’s
6 waiver of immunity is clear and unambiguous. For example, in *Cockrell* we first
7 addressed whether the text of Section 37-1-23(A) indicated an express waiver of
8 immunity. 2002-NMSC-009, ¶ 18. This Court determined that an FLSA claim, which
9 is purely statutory, is not “based on a valid written contract” within the meaning of
10 Section 37-1-23(A), even where there is a valid contract for employment
11 incorporating the protections of the FLSA. *Cockrell*, 2002-NMSC-009, ¶ 18.
12 Accordingly, this Court concluded that “Section 37-1-23 does not provide an express
13 waiver of immunity for . . . FLSA claim[s].” *Cockrell*, 2002-NMSC-009, ¶ 18.

14 {25} With respect to a textual indication of waiver, we clarify that the Legislature
15 is not required to employ certain magic words or a specific formulaic recital to
16 express its intention to consent to suit in state court. In *Luboyeski v. Hill*, for example,
17 this Court concluded that the State waived its immunity to private suits brought to
18 enforce the New Mexico Human Rights Act under its provision that ““the state shall

1 be liable the same as a private person.” 1994-NMSC-032, ¶ 14, 117 N.M. 380, 872
2 P.2d 353 (quoting Section 28-1-13(D) (1987)). Other jurisdictions have also declined
3 to adopt a magic-words test to discern a waiver of state sovereign immunity. *See, e.g.*,
4 *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003) (“[W]e do not
5 insist that the statute [waiving sovereign immunity] be a model of perfect clarity.”
6 (internal quotation marks and citation omitted)); *Klonis v. State, Dep’t of Revenue*,
7 766 So. 2d 1186, 1189 (Fla. Dist. Ct. App. 2000) (“Although a waiver of sovereign
8 immunity by a legislative enactment must be clear, specific, and unequivocal, no
9 particular magic words are required.”). Like these courts, we do not favor any
10 particular language by which the Legislature may render the State amenable to suit
11 in its own courts.

12 {26} This Court may also discern a clear and unambiguous waiver by examining the
13 purpose of a statute. The clear and unambiguous standard does not confine our
14 statutory analysis to the text alone. For example, in *Cockrell*, after considering
15 whether Section 37-1-23(A) expressly waived immunity, this Court addressed
16 whether the statute “implicitly evidence[d] a legislative intent to waive immunity
17 from FLSA claims.” 2002-NMSC-009, ¶ 19. *Cockrell* “recognized that the purpose
18 of the legislative enactment containing Section 37-1-23 was to reinstate the sovereign

1 immunity which had been abolished by *Hicks v. State*, subject to certain exceptions.”
2 *Cockrell*, 2002-NMSC-009, ¶ 22 (internal quotation marks and citation omitted). This
3 Court determined that the purpose of the limited waiver of immunity expressed in
4 Section 37-1-23(A) was to encourage parties who contract with state entities to do so
5 in writing in order to ensure clear terms and to verify that the “governmental entity
6 is authorized to enter into [the] contract.” *Cockrell*, 2002-NMSC-009, ¶ 22 (alteration
7 in original) (internal quotation marks and citation omitted). *Cockrell* concluded that
8 the purposes of Section 37-1-23(A) did not support making state entities amenable
9 to suit in state courts for alleged violations of the FLSA. *See Cockrell*, 2002-NMSC-
10 009, ¶¶ 21-22.

11 {27} We clarify that the method that this Court employs to determine whether the
12 Legislature waived New Mexico’s immunity to suit in its own courts is not the
13 method employed by the federal courts to discern a waiver of state sovereign
14 immunity to suit in federal court. While the federal courts may hesitate to look
15 beyond the statutory text to discern a state’s consent to suit in the federal courts, *see*,
16 *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 673 (1973), in *Cockrell*, this Court
17 appropriately examined both the text and the purpose of a statute to determine the
18 Legislature’s intent to consent to suit in its own court. 2002-NMSC-009, ¶¶ 21-22.

1 The federal courts’ determination of waivers of sovereign immunity to suit in federal
2 court is guided by federalism concerns that do not bear upon this Court’s
3 determination of the Legislature’s consent to suit in the courts of New Mexico. *See*
4 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984) (“A State’s
5 constitutional interest in immunity encompasses not merely *whether* it may be sued,
6 but *where* it may be sued. . . . [B]ecause of the problems of federalism inherent in
7 making one sovereign appear against its will in the courts of the other, a restriction
8 upon the exercise of the federal judicial power has long been considered to be
9 appropriate. . . .” (internal quotation marks and citation omitted)). Unlike the federal
10 courts, when this Court interprets a statute to determine the Legislature’s intent to
11 waive sovereign immunity, we are concerned with the State’s amenability to suit in
12 *its own* courts. Thus, as in *Cockrell*, this Court will examine both statutory text and
13 purpose to determine whether the Legislature clearly intended to waive the State’s
14 sovereign immunity to a federal cause of action in its own courts.

15 {28} We also make clear that any determination by this Court that the Legislature
16 consented to suit in its own courts does not also mean that the Legislature consented
17 to suit in the federal courts. *See Pennhurst*, 465 U.S. at 100 n.9 (noting that the
18 United States Supreme Court “consistently has held that a State’s waiver of sovereign

1 immunity in its own courts is not a waiver of the Eleventh Amendment immunity in
2 the federal courts”); *Great N. Life Ins.*, 322 U.S. at 54 (“[I]t is not consonant with our
3 dual system for the Federal courts . . . to read the consent to embrace Federal as well
4 as state courts.”).

5 **4. New Mexico waived sovereign immunity to USERRA claims**

6 {29} Ramirez contends that by enacting Section 20-4-7.1(B), the Legislature waived
7 state sovereign immunity to his USERRA action. We agree. Section 20-4-7.1(B)
8 provides as follows: “The rights, benefits and protections of the federal Uniformed
9 Services Employment and Reemployment Rights Act of 1994 shall apply to a member
10 of the national guard ordered to federal or state active duty for a period of thirty or
11 more consecutive days.” The Legislature enacted this provision in 2004, with
12 knowledge of *Alden*’s holding that “the powers delegated to Congress under Article
13 I . . . do not include the power to subject nonconsenting States to private suits for
14 damages in state courts.” *See Alden*, 527 U.S. at 712; 2004 N.M. Laws, ch. 37 § 1
15 (codified at § 20-4-7.1(B)). *See also Inc. Cty. of Los Alamos v. Johnson*, 1989-
16 NMSC-045, ¶ 4, 108 N.M. 633, 776 P.2d 1252 (presuming that the legislature is well
17 informed as to existing law).

18 {30} Under Section 20-4-7.1(B), the Legislature provided that members of the New

1 Mexico National Guard who are ordered to active duty for at least thirty consecutive
2 days will benefit from every applicable right that USERRA creates. Two of these
3 rights are pertinent here. First, USERRA guarantees members of a uniformed service
4 the right not to be denied “any benefit of employment by an employer on the basis”
5 of their membership in a uniformed service. 38 U.S.C. § 4311(a). Second, USERRA
6 creates a private right of action for damages against a state employer to remedy
7 violations of USERRA’s substantive antidiscrimination protections. *See* 38 U.S.C.
8 §§ 4323(a)(3), (d)(1)(B)-(C), 4311(a).

9 {31} Section 20-4-7.1(B) guarantees both the substantive antidiscrimination right
10 and the right of action against a state employer to members of the national guard
11 ordered to federal or state active duty for a period of thirty or more consecutive days.
12 Section 20-4-7.1(B) adopts the rights guaranteed by USERRA without limitation. The
13 statutory provision contains no suggestion that it only extends *some* of the rights
14 created by USERRA. *See* § 20-4-7.1(B). It does not suggest that the Legislature
15 intended to extend USERRA’s substantive antidiscrimination right to members of the
16 New Mexico National Guard but to withhold USERRA’s right to a remedy for
17 damages. *See id.* We therefore have no reason to construe the statute as not conferring
18 USERRA’s right of action against state employers to national guard members.

1 {32} Other relevant statutes counsel against such a construction, and we read
2 statutes in pari materia to ascertain legislative intent. *See State v. Davis*, 2003-NMSC-
3 022, ¶ 12, 134 N.M. 172, 74 P.3d 1064. The Legislature has made clear that “[t]he
4 intent of the New Mexico Military Code and all laws and regulations of the state
5 affecting the military forces is to reasonably conform to all laws and regulations of
6 the United States affecting the same subjects, except as otherwise expressly provided
7 with respect to military justice.” NMSA 1978, § 20-1-2 (1987). Furthermore, it has
8 long been the policy of New Mexico to provide a private right of action for damages
9 against the State as an employer for the failure to reemploy a qualifying service
10 member who returns to state employment from active duty. *See* NMSA 1978, Section
11 28-15-3 (1941, amended 1971) (creating a private right of action to enforce the
12 substantive rights created by NMSA 1978, Section 28-15-1 (1941)). To be sure,
13 Sections 28-15-1 and 28-15-3 would not provide Ramirez with a remedy because
14 those provisions guard against a state employer’s failure to reemploy a qualifying
15 service member and Ramirez was reemployed by CYFD. Ramirez complained of
16 separate adverse employment actions, including termination, taken by CYFD because
17 of his military service. Nevertheless, the Legislature’s creation of a private right of
18 action for qualifying service members to recover from the discrimination of not being

1 reemployed because of their uniformed service strongly supports that, by enacting
2 Section 20-4-7.1(B), the Legislature intended to create a right of action for qualifying
3 service members to recover from other forms of employment discrimination. Thus,
4 in light of both the Legislature's longstanding willingness to confer a private right of
5 action against state employers on service members who return from active duty and
6 suffer the employment discrimination of not being reemployed because of their
7 military service (as indicated by Section 28-15-3) and the Legislature's intent that
8 New Mexico law conform to federal law with respect to the military forces (as
9 expressed by Section 20-1-2), it is clear that Section 20-4-7.1(B) confers on members
10 of the New Mexico National Guard who are ordered to federal or state active duty for
11 a period of thirty or more consecutive days a private right of action for damages
12 against the State to remedy a violation of USERRA's substantive antidiscrimination
13 rights.

14 {33} Other courts, when confronted with the same issue, have interpreted statutes
15 similar to Section 20-4-7.1(B) and Section 20-1-2 to indicate a legislative intent to
16 waive immunity to private USERRA actions. *See Scocos v. State Dep't of Veteran*
17 *Affairs*, 819 N.W.2d 360, 366-67 (Wis. Ct. App. 2012) (holding that a statute
18 providing that the discharge from federal active duty of persons restored to state

1 employment is subject to all federal laws affecting any private employment was
2 sufficient to authorize the plaintiff's claims against the state under USERRA);
3 *Panarello v. State*, 2009 WL 3328484, at *4 (R.I. Super. Jan. 22, 2009) ("This Court
4 will not reach the constitutional question raised above because it is clear that the
5 [Wisconsin Legislature] waived the State's sovereign immunity by necessary
6 implication when it incorporated USERRA, without qualification, within its general
7 laws.").

8 {34} When the Legislature creates a right of action for damages against the State
9 it thereby makes the State liable to suit. *See Luboyeski*, 1994-NMSC-032, ¶ 14
10 (holding that the Human Rights Act's provisions permitting plaintiffs to obtain
11 damages and attorney's fees from the State waived the State's sovereign immunity
12 created by the Tort Claims Act). When enacting Section 20-4-7.1(B), the Legislature
13 furnished qualifying members of the New Mexico National Guard a right of action
14 against state employers for money damages if they are denied any benefit of
15 employment by a state employer on the basis of their membership in the national
16 guard or their service to this State and the United States. Therefore, we conclude that
17 the Legislature consented to private USERRA suits for damages against state
18 employers.

1 {35} Our analysis differs from the reasoning of the Court of Appeals. The Court of
2 Appeals first determined that the War Powers Clause does not grant Congress the
3 power to subject nonconsenting states to private suits for damages in their own
4 courts. *Ramirez*, 2014-NMCA-057, ¶¶ 17-18. The Court of Appeals then reasoned
5 that Sections 20-1-2 and 20-4-7.1(B), which serve to confer the rights created by
6 USERRA on qualifying members of the New Mexico National Guard, cannot have
7 extended USERRA’s jurisdictional provision that a private right of action may be
8 brought in a state court. Accordingly, the Court of Appeals concluded that neither
9 Section 20-1-2 nor Section 20-4-7.1(B) waived New Mexico’s sovereign immunity
10 to private USERRA actions seeking monetary damages. *Ramirez*, 2014-NMCA-057,
11 ¶ 25.

12 {36} Unlike the Court of Appeals, we do not decide whether the War Powers Clause
13 grants Congress the power to abrogate state sovereign immunity. Whether USERRA’s
14 jurisdictional provision that enforcement actions “may be brought in a State court”
15 is *ultra vires*, and, consequently, whether the Legislature could have validly extended
16 that jurisdictional provision, are issues inapposite to the proper resolution of this case.
17 38 U.S.C. § 4323(b)(2). New Mexico’s district courts are courts of general
18 jurisdiction. *Trujillo v. State*, 1968-NMSC-179, ¶ 3, 79 N.M. 618, 447 P.2d 279.

1 Their power to adjudicate claims is grounded in the New Mexico Constitution, not
2 in a federal statute. N.M. Const., art. VI, § 13.

3 {37} In the light of the text and purpose of Section 20-4-7.1(B), the Legislature
4 clearly conferred USERRA's antidiscrimination rights on qualifying members of the
5 New Mexico National Guard and extended USERRA's private right of action for
6 damages against state employers that violate those antidiscrimination rights. In so
7 doing, the Legislature waived New Mexico's immunity to suit.

8 **III. CONCLUSION**

9 {38} For the foregoing reasons, we reverse the decision of the Court of Appeals and
10 reinstate the district court's judgment and damage award.

11 {39} **IT IS SO ORDERED.**

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13

JUDITH K. NAKAMURA, Justice

14 **WE CONCUR:**

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16

CHARLES W. DANIELS, Chief Justice

1

2 **PETRA JIMENEZ MAES, Justice**

3

4 **EDWARD L. CHÁVEZ, Justice**

5

6 **BARBARA J. VIGIL, Justice**