

No. 12-50049

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HILDA L. SOLIS, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

STATE OF TEXAS,
TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES,
CHILD PROTECTION SERVICES DIVISION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

The district court had jurisdiction over the Secretary of Labor's ("Secretary") case against the State of Texas, Texas Department of Family and Protective Services, Child Protection Services Division ("State of Texas") under section 17 of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. 217. Subject matter jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review the district court's final decision as to sovereign immunity pursuant to the collateral order doctrine. *See Puerto Rico*

Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (collateral order doctrine allows immediate appellate review of order denying claim of Eleventh Amendment immunity); *EEOC v. Bd. of Sup'rs for Univ. of Louisiana Sys.*, 559 F.3d 270, 271 (5th Cir. 2009) (same).

STATEMENT REGARDING ORAL ARGUMENT

The Secretary does not believe that oral argument is necessary in this action arising under the FLSA because the question whether sovereign immunity bars claims against a state by the Federal Government to enforce federal law is well-settled under Supreme Court and Fifth Circuit precedent and may be resolved on the basis of the briefs filed with this Court.

STATEMENT OF THE ISSUE

Whether this action brought by the Secretary against the State of Texas, under sections 16 and 17 of the FLSA, 29 U.S.C. 216(c), 217, seeking back wages due state employees and an injunction against future violations of the FLSA, is barred by sovereign immunity.

STATEMENT OF THE CASE

A. Nature of the Case and the Course of Proceedings

The Secretary filed a complaint under the FLSA on June 8, 2011 against the State of Texas. See Compl. (Doc. 1), *Solis v.*

State of Texas, No. 1:11-cv-469 (W.D. Tex. June 8, 2011).¹ The complaint alleges that the State of Texas is violating the FLSA by failing to pay overtime compensation for all hours worked over 40 in a workweek and by failing to keep adequate records of all hours worked on a daily and weekly basis. See Compl., at 2-3. The Secretary is seeking back wages owed, liquidated damages, pre-judgment interest, and a permanent injunction, restraining and enjoining the State of Texas from violating the overtime and recordkeeping requirements of the Act and from withholding payment of overtime compensation found due employees. See Compl., at 3-4.

The State of Texas filed a motion to dismiss on October 24, 2011, alleging that sovereign immunity bars the Secretary's suit because she is merely a nominal party acting on behalf of state employees. See Tab. D. Despite recognizing that this Court has twice rejected the nominal-party argument in the context of a federal agency bringing suit on behalf of state employees in order to enforce federal law, the State of Texas maintained that this is a "doctrinal misstep" created by this Court and that sovereign immunity should protect it from suit. See Tab. D, at

¹ References to the documents in the Record Excerpts submitted by the State of Texas on April 4, 2012 are indicated by the corresponding Tab. followed by the page number of the document. For documents not located in the Record Excerpts, the Secretary cites to the court filings submitted to the district court or this Court.

7-8. On November 21, 2011, the State of Texas also filed a motion to stay scheduling conference and discovery pending resolution by the district court of the sovereign immunity defense. See Mot. To Stay Scheduling Conf. and Discovery (Doc. 11), *Solis v. State of Texas*, No. 1:11-cv-469 (W.D. Tex. Nov. 21, 2011).

The Secretary filed her response to the State of Texas' motion to dismiss on November 7, 2011. See Tab. E. In her response, the Secretary noted that both the Supreme Court in *Emps. of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 285 (1973), and the Fourth Circuit in *Chao v. Va. Dep't of Transp.*, 291 F.3d 276, 280-82 (4th Cir. 2002), have acknowledged that the Secretary can sue a state to enforce the FLSA on behalf of state workers. *Id.* at 2-3. The Secretary also explained why the nominal-party doctrine discussed in *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), is not applicable to the facts of this case. *Id.* at 5-6. Specifically, the Secretary argued that she enforces the FLSA through injunction, not by presenting individual bills of each violation to be paid by an offending employer, and that employees are not consulted prior to filing a suit and do not pay the costs of any suit. *Id.* The Secretary also filed a response to the State of Texas' request for a stay of the scheduling conference and discovery. See Resp. To Mot. To Stay

Scheduling Conf. and Discovery (Doc. 12), *Solis v. State of Texas*, No. 1:11-cv-469 (W.D. Tex. Dec. 2, 2011).

On January 17, 2012, the district court denied the motion to dismiss as well as the motion to stay the scheduling conference and discovery. See Tab. C. The State of Texas filed a notice of appeal with this Court on January 17, 2012. See Tab. B.²

B. The District Court's Decision

In denying the State of Texas' motion to dismiss as well as the motion to stay the scheduling conference and discovery, the district court concluded that "it is well-established that the State's sovereign immunity does not extend to suits brought by the federal government, to enforce federal law." Tab. C, at 5 (citing *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001)). The district court noted that it is standard operating procedure for Texas "to engage in procedural litigation in lieu of joining

² On February 15, 2012, the State of Texas filed a Motion to Stay District Court Proceedings with this Court. See Texas's Mot. to Stay Dist. Court Proceedings, *Solis v. Texas*, No. 12-50049 (5th Cir. Feb. 15, 2012). The Secretary filed her response on February 24, 2012. See Secretary of Labor's Resp. to the State of Texas' Mot. to Stay Dist. Court Proceedings, *Solis v. Texas*, No. 12-50049 (5th Cir. Feb. 24, 2012). On March 2, 2012, the State of Texas filed their reply. See Texas's Reply to the United States' Resp. to the Mot. to Stay District Court Proceedings, *Solis v. Texas*, No. 12-50049 (5th Cir. Mar. 2, 2012). This Court denied the State of Texas' motion for stay of the district court proceedings pending the appeal. See Order, *Solis v. Texas*, No. 12-50049 (5th Cir. Apr. 18, 2012).

with the merits of a case" and that the State of Texas "is attempting its standard opening gambit, and claims sovereign immunity as the reason dismissal is merited under Rule 12." *Id.* at 2, 5. Furthermore, the district court recognized that the Supreme Court has confirmed that the Secretary can sue on behalf of state employees to enforce the FLSA, relying on *Alden v. Maine*, 527 U.S. 706, 755 (1999), and *Emps. of Dep't of Pub. Health & Welfare*, 411 U.S. at 285-86. See Tab. C, at 7. The district court stated that the Supreme Court in *Emps. of Dept of Pub. Health & Welfare* has "specifically confirmed that the federal government can sue on behalf of state employees to enforce the FLSA." *Id.* at 7.

The district court also recognized that this Court has squarely rejected the nominal-party argument in suits brought by the federal government against a state to enforce federal law. *Id.* at 5; see *EEOC v. Bd. of Sup'rs for Univ. of Louisiana Sys.*, 559 F.3d at 272-74; *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 498-99 (5th Cir. 2003). The district court concluded that "the Secretary is not merely a nominal party to this suit, and therefore, Texas's sovereign immunity is not present, even if [Texas] is correct that the nominal-party doctrine has any application as to the federal government (which is doubtful)." Tab. C, at 6. In support of this conclusion, the district court recognized that because the Secretary is

authorized to protect employees from FLSA violations, she has a "real and direct interest" in bringing this case. *Id.* at 7. The district court noted that if the State of Texas' position were to prevail, "States could flout the FLSA (and no doubt many other federal laws) with impunity." *Id.* at 7-8. As a result, the district court stated that "the inescapable conclusion is the State of Texas is presumed by our Constitutional system to have consented to this type of suit, and therefore its sovereign immunity is waived." *Id.* at 8.

SUMMARY OF THE ARGUMENT

Relying upon well-settled, binding precedent from the Supreme Court and this Court, the district court correctly held that the State of Texas is not immune from suits brought by the Secretary under the FLSA. In *Alden* and *Emps. of Dep't of Pub. Health and Welfare*, the Supreme Court reaffirmed that sovereign immunity does not preclude suits brought by the United States against the states, and specifically recognized the Secretary's right to bring FLSA claims against a state on behalf of state employees even when the Secretary seeks monetary damages. Further, the Supreme Court considered the difference between suits brought by private individuals and those brought by the Secretary under the FLSA, concluding that precedent and the history and structure of the Constitution make clear that, under the plan of the Convention, the States consented to suits

brought by the United States but not to suits by private individuals. Similarly, this Court in *Marshall v. A & M Consol. Indep. Sch. Dist.*, 605 F.2d 186, 188 (5th Cir. 1979), held that the Eleventh Amendment does not bar suits brought by the Secretary against a state on behalf of state employees, recognizing that a suit by the Secretary can be in the public interest even if the money sued for passes to private individuals. Thus, any arguments by the State of Texas to the contrary would require this Court to ignore decades of Supreme Court case law as well as its own precedent.

The State of Texas argues that the Secretary's action should nonetheless be barred under the nominal-party doctrine because she seeks monetary relief on behalf of private individuals. First, the nominal-party doctrine is not available as a bar against claims pursued by the Federal Government. This Court specifically rejected the application of the nominal-party argument to suits brought by a federal agency to enforce federal law even when that agency seeks monetary relief on behalf of private individuals. See *Bd. of Sup'rs for Univ. of Louisiana Sys.*, 559 F.3d at 272. As the Fourth Circuit in *Va. Dep't of Transp.* recognized, the Federal Government's superior position in the constitutional structure suggests that the limits of the states' consent to suit by other states do not coincide with the limits of the states' consent to suit by the United States.

Moreover, this Court has repeatedly recognized that the Federal Government always has a real and substantial federal interest in ensuring the states' compliance with federal law, and that pursuing a suit for the benefit of the public generally and for the individual specifically does not make the United States a nominal party, entitling the state to sovereign immunity. In this case, the Secretary brought suit against the State of Texas to enforce the overtime and recordkeeping requirements of the FLSA and ensure compliance with the Act. The Secretary seeks not only monetary damages but also a permanent injunction against future violations and the withholding of wages due under the FLSA. This Court has recognized that obtaining back wages increases the effectiveness of the enforcement of the Act and deprives a violator of any gains accruing to him through his violation. Thus, the Secretary has a real and direct interest in bringing this case and, therefore, her claim is not barred by the State of Texas' sovereign immunity.

ARGUMENT

THE SECRETARY'S ACTION AGAINST THE STATE OF TEXAS FOR VIOLATIONS OF THE OVERTIME AND RECORDKEEPING REQUIREMENTS OF THE FLSA IS NOT BARRED BY SOVEREIGN IMMUNITY BECAUSE SUPREME COURT AND FIFTH CIRCUIT PRECEDENT ESTABLISH THAT THE FEDERAL GOVERNMENT MAY BRING AN ACTION TO ENFORCE FEDERAL LAW AGAINST THE STATES

A. The State of Texas Consented to Suits Brought By the Federal Government When It Ratified the Constitution.

1. Both the Supreme Court and this Court have been abundantly clear that "sovereign immunity under the Eleventh Amendment³ operates only to protect States from private lawsuits—not from lawsuits by the federal government." *Bd. of Sup'rs for Univ. of Louisiana Sys.*, 559 F.3d at 272; *see Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought . . . by the Federal Government."); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) ("The Federal Government can bring suit in federal court against a State"); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in this [Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."); *see also Miss. Dep't of Pub. Safety*, 321 F.3d at 498-99 ("States

³ The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI.

retain no sovereign immunity as against the Federal Government.") (internal quotation marks omitted); *Marshall*, 605 F.2d at 188 ("The Eleventh Amendment does not apply to suits brought by the United States."); *cf. Idaho*, 533 U.S. at 271 n.4 ("Because this action was brought by the United States, it does not implicate the Eleventh Amendment").

In support of this understanding, the Supreme Court recognized that inherent within the constitutional plan is the understanding that the states surrendered their immunity from suit by the Federal Government when they ratified the Constitution. *See, e.g., Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (holding that the states did not surrender their sovereign immunity when the suit is brought by a foreign State); *United States v. Texas*, 143 U.S. 621, 644-45 (1892) (holding that the Supreme Court has original jurisdiction over a suit brought by the United States against Texas to determine questions of boundaries). The Supreme Court concluded that without such an understanding, "the permanence of the Union might be endangered." *Principality of Monaco*, 292 U.S. at 329 (quoting *Texas*, 143 U.S. at 645). "Accordingly, 'States retain no sovereign immunity as against the Federal Government.'" *Miss. Dep't of Pub. Safety*, 321 F.3d at 498 (quoting *West Virginia v. United States*, 479 U.S. 305, 312 n.4 (1987)). Thus, contrary to the State of Texas' argument that it

did not give consent to be subjected to FLSA suits brought by the Secretary to pursue claims on behalf of state employees, see State of Texas' Brief, at 9, Supreme Court and Fifth Circuit precedent make clear that states, such as Texas, surrendered their immunity from suit by the Federal Government when they ratified the Constitution and joined the Union.

2. The cases cited by the State of Texas, see State of Texas' Brief, at 20, address whether Congress may abrogate the states' Eleventh Amendment immunity by subjecting the states to suits brought by private individuals, and thus are not in any way inconsistent with the historical analysis set out above. See, e.g., *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (concluding that Title I of the American with Disabilities Act of 1990 ("ADA") did not abrogate state's Eleventh Amendment immunity from private suits); *Dellmuth v. Muth*, 491 U.S. 223 (1989) (concluding that the Education of the Handicapped Act did not abrogate state's Eleventh Amendment immunity from private suit). When analyzing this issue, the Supreme Court has recognized that "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and act[s] pursuant to a valid grant of constitutional authority." *Id.* at 363 (internal quotation marks omitted). The Court, however, did not apply this analysis to the question whether Congress can subject the states to suits

brought by the Federal Government under the Eleventh Amendment. In fact, the Supreme Court in *Bd. of Trs. of Univ. of Alabama* rejected such a conclusion when it decided that actions under Title I of the ADA could be brought by the United States on behalf of private individuals (despite the fact that it held that the Eleventh Amendment barred private suits).

Specifically, the Court stated:

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the *United States in actions for money damages*, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

531 U.S. at 374 n.9 (emphasis added). Moreover, the Supreme Court, in analyzing whether the state transit authority was immune under the Tenth Amendment from the minimum wage and overtime requirements of the FLSA, concluded in *Garcia v. San Antonio Metro. Transit Authority*, that "Congress' action in affording [state] employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause." 556 U.S. 528, 555-56 (1985). Thus, the State of Texas' reliance on the cases it cites, see State of Texas' Brief, at 20, is wholly misplaced in regard to the question at hand.

B. Supreme Court Precedent Specifically Establishes that the Secretary May Bring an FLSA Action for Monetary Damages Against the States on Behalf of State Employees.

1. The Supreme Court has recognized that the Secretary may seek a permanent injunction and back wages for violations of the minimum wage and overtime requirements of the FLSA on behalf of state employees. In *Emps. of Dep't of Pub. Health & Welfare*, 411 U.S. at 285, the Supreme Court held that sovereign immunity barred state employees' FLSA claims in federal court, but recognized the Secretary's right to bring FLSA claims on behalf of state employees. The Court concluded that because the Secretary could bring a suit on behalf of state employees under the FLSA (despite the fact that sovereign immunity prevented those state employees from bringing their own claims in federal court), the extension of coverage of state employees under the FLSA would not be rendered meaningless. *Id.* at 285. The Supreme Court further concluded:

Section 16(c) gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. Once the Secretary acts under s 16(c), the right of any employee or employees to sue under s 16(b) terminates. Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees. Sections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. *For suits by the United*

States against a State are not barred by the Constitution. . . . The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.

Id. at 285-86 (emphasis added).⁴

Similarly, the Supreme Court in *Alden* recognized that suits brought by the United States, through the Secretary, are permissible. The Court stated:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Alden, 527 U.S. 759-60.⁵ Thus, the Supreme Court clearly distinguished between suits brought by the United States and those brought by private individuals, concluding that “[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a

⁴ The Court in *Alden* concluded that its decision in *Emps. of Dep’t of Pub. Health & Welfare* “recognized that the FLSA was binding upon Missouri but nevertheless upheld the State’s immunity to a private suit to recover under that Act.” 527 U.S. 732.

⁵ The Court noted that there are “certain limits . . . implicit in the constitutional principle of state sovereign immunity.” *Id.* One of the limits specifically identified by the Court was the States’ consent, in ratifying the Constitution, to suit by the federal government under the plan of the Constitutional Convention. *Id.* at 755-56.

State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Id.* at 756.

Moreover, while the Court in *Alden* held that sovereign immunity precludes private suits in state court against a non-consenting state under the FLSA, it was careful to reconcile its holding with the Supremacy Clause,⁶ stating that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." 527 U.S. at 754-55. The Court further concluded that the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 755.

If the Supreme Court had doubts about the Secretary's ability to bring claims on behalf of state employees under sections 16(c) and 17 of the FLSA, it would have raised them when it was analyzing the states' sovereign immunity in *Alden* and *Emps. of Dep't of Pub. Health and Welfare*. Instead, it specifically noted, as it has in other cases under similar Acts, see *Bd. of Trs. of Univ. of Alabama*, 531 U.S. at 374 n.9, that

⁶ The Supremacy Clause provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI.

state employees were not without recourse under the FLSA because the Secretary could bring an action on their behalf. Thus, accepting the argument that sovereign immunity bars this suit brought by the Secretary under the FLSA would require this Court to disregard decades of Supreme Court precedent.

2. Texas argues that the Supreme Court's conclusions that the Secretary may bring claims to enforce the FLSA are mere dicta and are based upon a "careless view" of the states' consent to suit under the constitutional plan. See *State of Texas' Brief*, at 12, 22-34. The Supreme Court's analysis in these cases, however, does not support such a proposition. As the Supreme Court stated in *Seminole Tribe*, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we [and lower courts] are bound." 517 U.S. at 67; see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). In *Alden* and *Emps. of Dep't of Pub. Health and Welfare*, the Court specifically considered the difference between suits brought by private individuals and those brought by the Secretary under the FLSA, concluding that precedent and the history and structure of the Constitution make

clear that, under the plan of the Convention, the States consented to suits brought by the United States but not to suits by private individuals. In addition, the Court recognized in both cases that sovereign immunity does not confer upon a state the right to disregard federal law. Those portions of the opinion are necessary to understanding the Court's holdings that state employees are barred from bringing FLSA claims but are not without recourse and, thus, are portions of the opinions that the Supreme Court and lower courts are bound to follow. As the district court in the present case stated, "Indeed, the Supreme Court has held that whether the United States government decides to bring an FLSA suit on behalf of state employees is dispositive of whether that state's sovereign immunity is waived." Tab. C, at 6. Moreover, the Court's understanding of sovereign immunity articulated in these decisions is fully consistent with its position in countless other cases on sovereign immunity.

C. The Nominal-Party Doctrine Is Not Applicable to Claims Brought By the Secretary on Behalf of State Employees for Monetary Damages and Thus Does Not Bar Those Claims.

1. The State of Texas nevertheless argues that sovereign immunity bars FLSA claims by the Secretary under the nominal-party doctrine discussed in *New Hampshire v. Louisiana*, 108 U.S. at 88-89. A review of the facts of the case and the Supreme Court's analysis makes clear that the nominal-party doctrine is

simply not applicable to cases brought by the Federal Government to enforce federal law. In *New Hampshire*, a number of New Hampshire and New York citizens owned Louisiana bonds where Louisiana had defaulted. Because sovereign immunity barred Louisiana from being sued by the private citizens, New York and New Hampshire passed statutes authorizing citizens to assign their claims to the state for prosecution, provided that the citizens paid all expenses of the litigation. *Id.* at 77, 79. New York and New Hampshire then attempted to sue Louisiana as "representatives" of their citizens. *Id.* at 86. Under these facts, the Supreme Court held that sovereign immunity under the Eleventh Amendment barred claims where a sister state is merely a nominal party and the claim is in legal effect commenced and prosecuted solely by an individual citizen. *Id.* at 91. In support of its holding, the Court stated "[New York] as well as New Hampshire is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the state, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them." *Id.* at 89. The Court's holding was also based on the fact that the bond owners paid all expenses and the states did not incur any expenses. *Id.*

The Court's decision was necessarily informed by the recent passage of the Eleventh Amendment, which restored the original

intention of the Constitution to protect states from suit commenced by private citizens. The Court concluded that "one state cannot create a controversy with another state . . . by assuming the prosecution of debts owing by the other state to its citizens." 108 U.S. at 91.

The Supreme Court's adoption of the nominal-party doctrine cannot be used to bar claims by the Secretary to enforce the overtime and recordkeeping requirements of the FLSA against the states. Nowhere in the *New Hampshire* decision does the Court indicate that the nominal-party doctrine would be applicable to suits brought, litigated, and controlled by the Federal Government. The State of Texas has not presented, nor can it present, any cases where the Supreme Court has applied the nominal-party argument to bar a suit by the Federal Government to enforce federal law.⁷

⁷ Any reliance on *United States v. Minnesota*, 270 U.S. 181 (1926), is misplaced. In that case, the United States brought suit on behalf of the Chippewa Indians against Minnesota for cancellation of land patents and to recover the value of the lands sold. The Supreme Court stated that if the United States is only a nominal party, a mere conduit through which the Chippewas are asserting their private rights, then the suit would not be within the Court's original jurisdiction. *Id.* at 193. However, the Court held that the United States had a duty to protect the Chippewas' interests as a result of its guardianship and protection obligations over the Indians, and thus, it had a "real and direct interest" to remove any unlawful obstacles to the fulfillment of its obligations. *Id.* at 194. Thus, in that case, the Supreme Court recognized that when the United States has a real and direct interest in a matter, it will not be barred from bringing claims against the states.

2. The Fourth Circuit specifically rejected the application of the nominal-party doctrine in the context of an FLSA case brought by the Secretary for injunctive relief and back wages owed to state employees. *Va. Dep't of Transp.*, 291 F.3d at 280-82. The Fourth Circuit concluded that the Secretary's suit "has the political control found lacking in *New Hampshire*. The case is being litigated by the lawyers within, and is under the full control of, the Executive Branch." *Id.* at 281. Relying on the reasoning in *Alden*, the court further concluded that "[t]here can be no doubt that the Secretary, having invoked her authority under the FLSA, has taken 'political responsibility' for this suit; it is precisely the sort of suit that has always been thought to fall within the Federal Government's exemption from state sovereign immunity." *Id.* at 282. The Fourth Circuit recognized that the Secretary's FLSA suit against Virginia serves an interest not found in the state suits brought in *New Hampshire* - namely, the Federal

As the district court in the present case explained, "[s]ubsequent cases have failed to expand upon the dicta in *United States v. Minnesota*, and as [the State of Texas] concedes, the Fifth Circuit has twice squarely rejected attempts to apply the nominal-party doctrine to suits brought by the federal government against a State, to enforce federal law." Tab. C, at 5. Moreover, the Fifth Circuit has specifically rejected any possible reliance on *United States v. Minnesota* and some of the other cases cited by the State of Texas, stating that "none of these cases supports the proposition that the doctrine of sovereign immunity protects a state entity from suit in federal court by the federal government to enforce federal law." *Miss. Dep't of Pub. Safety*, 321 F.3d at 499.

Government's interest in enforcing federal law against the states. *Id.* at 282 n.4; see *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 289 n.1 (4th Cir. 2001) ("A State's sovereign immunity does not preclude suits brought in federal court by the federal government . . . because inherent in the plan of the Constitutional Convention was the surrender by the States of immunity as to these suits.") (citations omitted).

The court further questioned the application of the nominal-party doctrine to cases brought by the Federal Government based on the fact that the Federal Government is a higher sovereign than a sister State and is the source of the supreme law of the land. "The Federal Government's superior position in the constitutional structure thus suggests that the limits of the States' consent to suit by other States do not coincide with the limits of the States' consent to suit by the United States." *Id.* As a result, the Fourth Circuit held that Virginia's sovereign immunity is no bar to the Secretary's FLSA suit.

3. This Court also has specifically rejected the nominal-party doctrine in numerous suits brought by the Federal Government to enforce federal law. Contrary to the State of Texas' argument, see State of Texas' Brief, at 12, 18, this Court's holdings are not based on "careless view[s]" of the

constitutional plan or a "doctrinal misstep," but rather are based on a well-informed understanding of the Constitution and the role of the Federal Government in ensuring that states follow federal laws. For example, this Court held that "the United States is not barred by the Eleventh Amendment from suing a state to enforce federal law and obtain the relief authorized by the [ADA]." *Miss. Dep't of Pub. Safety*, 321 F.3d at 499.⁸ This court addressed the same arguments advanced by the State of Texas, concluding that there is no case law to support the proposition that the doctrine of sovereign immunity protects a state entity from suit in federal court by the Federal Government to enforce federal law. *Id.* This Court noted that "the federal government *always* has a real and substantial federal interest in ensuring the states' compliance with federal law." *Id.* (emphasis included in original). In addition, this Court concluded that the fact that the Federal Government was pursuing the case for the benefit of the public generally and for the individual specifically did not make the United States a

⁸ In that case, the United States filed suit against the Mississippi Department of Public Safety ("MDPS"), alleging that the state agency violated the ADA when it dismissed Ronnie Collins from the training academy of the Mississippi Highway Safety Patrol on account of his disability. 321 F.3d at 497. The United States sought an injunction prohibiting the state agency from engaging in unlawful employment practices against individuals with disabilities as well as monetary damages and other compensatory relief for the losses personally suffered by Collins, including reinstatement, the payment of back wages and pension and other employment benefits owed. *Id.*

mere proxy, entitling the state agency to sovereign immunity.

Id. Specifically, the court stated that

[t]he fact that Collins could not sue the MDPS for the alleged violation of the law in no way diminishes the United States' interest in the action or the authority of the United States to bring suit against the MDPS for the benefit of the public generally and for Collins' benefit specifically. Nor does it transform the United States into a mere proxy for Collins. Collins has no right to compel the United States to bring suit or to dictate its complaint or prayer for relief in any way. . . . In short, the United States' interest in and control over this case is entirely real.

Id.

This Court has similarly held that a suit brought by the Equal Employment Opportunity Commission ("EEOC") under the Age Discrimination in Employment Act ("ADEA") against the University of Louisiana at Monroe was not barred by sovereign immunity. *See Bd. of Sup'rs for Univ. of Louisiana Sys.*, 559 F.3d at 273.⁹ Once again, this Court reiterated that sovereign immunity does not bar claims by the Federal Government against a state to ensure its compliance with federal law, and that Supreme Court precedent makes this understanding clear. *Id.* at 272. It is of note that this Court rejected an argument that the Federal

⁹ In that case, the EEOC alleged that the University's failure to re-hire Dr. Van McGraw was in retaliation for his prior ADEA suits and constituted discrimination on account of age. 559 F.3d at 271. The EEOC sought injunctive relief against the University's discriminatory practices and make-whole relief for Dr. McGraw, including reinstatement, backpay, and other monetary relief. *Id.*

Government was circumventing sovereign immunity by obtaining personal, make-whole relief on behalf of private individuals. *Id.* Citing the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), this Court recognized that it is within the EEOC's province to determine whether public resources should be committed to the recovery of personal, make-whole relief, and once that determination is made the statute authorizes it to proceed in a judicial forum. *Id.* at 273. Thus, the fact that the private party could not bring its own claim did not prevent the EEOC from seeking monetary damages on behalf of the individual. *Id.* at 274.

Significantly, this Court held that sovereign immunity does not prevent the Secretary from bringing suit on behalf of state employees under the Equal Pay Act, which is codified as part of the FLSA. *See Marshall*, 605 F.2d at 189-90.¹⁰ Specifically, this Court concluded that "a suit by the federal government can be in the public interest even if the money sued for passes to private individuals," *id.* at 189 (citing *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965)), and that "[a] suit brought by the Secretary of Labor under the Fair Labor Standards Act is treated

¹⁰ The Secretary brought suit against a Texas public school district in College Station, Texas, for paying male teachers \$300 more a year than female teachers. *See* 605 F.2d 187. The Secretary sought an injunction against future violations of the EPA and the withholding of back pay owed to female employees. *Id.*

as a suit brought by the United States." *Id.* at 188. In addition, this Court concluded that obtaining an injunction and back wages owed serves a public purpose by increasing the effectiveness of the enforcement of the Act and by depriving a violator of any gains accruing to him through his violation. See *id.* As this Court in *Marshall* explained, the purpose of an FLSA injunction is

"not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest. It is true that as a result, money may pass from the employer into the pocket of the employee or, if he is not available, then into the coffers of the United States Treasury, but that enforced payment, which must be made even if the employee or his representative or heirs no longer exist to claim it, is simply a part of a reasonable and effective means which Congress, after trial and error, found it necessary to adopt to bring about general compliance with [the Act]."

Id. at 189 (quoting *Jones*, 340 F.2d at 904-05); see *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1206 (5th Cir. 1981) ("[I]n no sense is the Government a mere representative of private interests where it brings suit under § 17."); *Wirtz v. Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968) ("[R]estraining appellees from withholding the minimum wage and overtime compensation is meant to vindicate a public, rather than a private, right, and . . . the withholding of the money due is considered a 'continuing public offense.'"). This Court recognized that requiring the state to pay the back wages owed

will encourage employers and other government entities to obey the law. *Id.* at 189-90. Thus, when the Secretary brings an action for back wages under the FLSA, she is acting on behalf of the United States to protect the public interest and, therefore, state sovereign immunity cannot bar her suit.¹¹

4. Because it is well-recognized under Supreme Court and Fifth Circuit precedent that states surrendered their immunity from suit by the Federal Government when they ratified the Constitution, any arguments that the Supreme Court has not had an opportunity to address the nominal-party argument or that this Court should revisit its holdings in an *en banc* hearing are unavailing. In this case, the Federal Government has the political control found lacking in *New Hampshire*; this case was brought by the Secretary and is being litigated by federal government attorneys acting on behalf of the United States. Employees do not control the litigation, pay any costs of such litigation, or have the ability to opt out of such litigation brought by the Secretary under sections 16(c) or 17. See 29 U.S.C. 216(c) ("The [private] right provided by subsection (b) of this section to bring an action by or on behalf of any

¹¹ The Eighth Circuit also has squarely held that suits brought by the Secretary of Labor to enforce the FLSA are suits brought by the United States and, consequently, are not barred by the constitutional principle of state sovereign immunity. See *Brennan v. State of Iowa*, 494 F.2d 100, 103 (8th Cir. 1974) ("Suits by the United States against a state are not barred by the eleventh amendment."), *cert. denied*, 421 U.S. 1015 (1975).

employee to recover [unpaid minimum wages and overtime payment] shall terminate upon the filing of a complaint by the Secretary"). Thus, the Secretary's FLSA claims are precisely the sort of suits that fall within the Federal Government's exemption from state sovereign immunity.

The State Texas' nominal-party argument is based on a misconception of the role of the Secretary in bringing FLSA actions. The FLSA was designed to serve the remedial purpose of eliminating substandard wages, oppressive working hours, and detrimental working conditions for employees in covered industries. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). Congress empowered the Secretary to impose obligations on a state under the FLSA, see 29 U.S.C. 203(d) (defining "Employer" under the FLSA to include a "public agency"), and bring actions on behalf of private individuals, including state employees. Specifically, section 16(c) of the FLSA gives the Secretary authority to bring suit for unpaid minimum wages or unpaid overtime compensation and section 17 gives the Secretary the power to seek to enjoin violations of the Act and to obtain monetary restitution on behalf of employees. 29 U.S.C. 216(c), 217.

In this case, the Secretary brought suit against the State of Texas to enforce the overtime and recordkeeping requirements

of the FLSA and ensure compliance with the Act. She seeks not only monetary damages but also a permanent injunction against future violations and the withholding of wages due under the FLSA. The Secretary is thus advancing a direct interest of her own - that is, to ensure that the State of Texas' adheres to and complies with the minimum wage, overtime, and recordkeeping requirements of the FLSA. She is not a mere collecting agent for private individuals.

The State of Texas ignores the very important public policy role that monetary remedies play in statutes regulating federal requirements. As the Supreme Court stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), a case concerning Title VII, "If employees faced only the prospect of an injunction order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of backpay award that provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices." *Id.* at 417-18 (internal quotation marks omitted). Ensuring that states adhere to the requirements of the FLSA and that state employees receive the wages that they are entitled to under the FLSA best serves the public interest. As recognized by this Court, enforcement against a state "obviously will encourage it and other

government entities to obey the law." *Marshall*, 605 F.2d at 190.

CONCLUSION

For the reasons discussed above, the Secretary respectfully requests that this Court hold that the State of Texas's sovereign immunity does not bar suits brought by the Secretary to enforce the FLSA requirements.

Respectfully submitted,

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Dated: May 4, 2012

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I certify on that on May 4, 2012, I electronically filed the foregoing Response Brief of the Secretary of Labor with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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