

No. 02-2143

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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Veterans Legal Defense Fund, an Illinois not-for-profit  
corporation, Tom Foster and Steven C. Terry,

Plaintiffs - Appellants,

v.

Michael S. Schwartz, in his official capacity as Director,  
Department of Central Management Services of the State of Illinois,  
individually and on behalf of all State agencies and political subdivisions  
of the State of Illinois, and Jesse White, in his official capacity as  
Secretary of State of the State of Illinois, individually and on behalf of  
all State agencies and all political subdivisions of the State of Illinois,

Defendants - Appellees.

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Appeal From The United State District Court  
For the Central District of Illinois, Springfield Division  
Case No. 97-3380

The Honorable Judge Richard Mills

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ORAL ARGUMENT REQUESTED

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BRIEF AND REQUIRED SHORT APPENDIX OF  
PLAINTIFFS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 02-2143

Short Caption: Veterans Legal Defense Fund, et al. v. Michael S. Schwartz, et al.

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i) Identify all its parent corporations, if any; and

N/A

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Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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## **JURISDICTIONAL STATEMENT**

The jurisdiction of the lower court arose under both 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights). The complaint alleged violation of the plaintiffs' property rights as guaranteed by the Fourteenth Amendment, U.S. CONST. Amend. XIV, as well as violation of their civil rights under 42 U.S.C. § 1983.

This court's appellate jurisdiction arises under 28 U.S.C. § 1291, for review of the final judgment order entered by the trial court on April 03, 2002, awarding summary judgment in favor of the Defendant and terminating the case. A timely notice of appeal to this court was filed on May 02, 2002.

## **ISSUES PRESENTED FOR REVIEW**

In a case brought by veterans under 42 U.S.C. § 1983 against state officials' continuing failure to honor plaintiffs' absolute preference in hiring for state jobs:

- I. Whether federal jurisdiction lies to prospectively enforce state-granted property rights to an absolute veterans' preference in State hiring, over the trial court's holding that the Eleventh Amendment to the constitution bars an action against the State to enforce state law,
- II. Whether the court wrongfully refused to certify as a class a group of 271 job candidates who were denied their statutory absolute veterans preference, in the view that, although they share a non-conflicted entitlement to their preference, they are nonetheless inherently conflicted because they may ultimately compete among themselves for the jobs that are available.

## **STATEMENT OF THE CASE**

Illinois law provides military veterans an absolute preference in filling state jobs over other applicants. However, Illinois state officials have violated, and continue to violate, that provision by hiring others over equally qualified veterans. Plaintiffs are military veterans who were rated as qualified at the top grade for state jobs, which were filled by hiring non-veterans, who sued Illinois state officials under 42 U.S.C. § 1983 to enforce veterans property right in their statutory veterans preference. The District Court (a) refused to certify the case as a class action, in the court's view that the proposed class of 273 veterans seeking to enforce their veterans preference had disqualifying conflicts because they would likely be applying in competition with each other for some of the same jobs, and (b) although initially finding that plaintiffs' preference constitutes a property right and finding jurisdiction under the *Ex Parte Young* exception to the Eleventh Amendment to the Constitution, eventually granted summary judgment to the defendants, in the court's view that the plaintiffs "are merely asking the Court to enforce the law of Illinois", and that *Pennhurst State School & Hosp. v*

*Halderman*, 465 U.S. 89 (1994), precludes the court from doing so.

Plaintiffs' appeal, asserting that the court should have certified the class (because the class has no internal conflicts over the preference) and should have found jurisdiction to prospectively enforce plaintiffs' property right in their preference.

Plaintiffs Veteran Legal Defense Fund (VLDF), an Illinois not-for-profit corporation, and U.S. Armed Forces veterans Tom Foster, Steven C. Terry, and Martin Wild filed a "double"<sup>1</sup> class action complaint (i) for themselves and other qualified veterans and (ii) against Michael S. Schwartz, in his official capacity as Director of the Department of Central Management Services of the State of Illinois, and the predecessor of Jesse White, in his official capacity as Secretary of State of the State of Illinois, individually and as representative defendants for all Illinois state agencies and political subdivisions. The complaint alleged Defendants deprived veterans of property without due process of law in violation of the 14<sup>th</sup> Amendment, by failing to give veterans the absolute preference in hiring, as mandated by State law.

Plaintiffs later filed an Amended Complaint and a First, Second and Third Amended Complaint. The later amended complaints sought only prospective reliefs.

Plaintiffs filed Motions for Class Certification and Partial Summary Judgment, and Defendants filed a Motion for Summary Judgment. Plaintiffs' motion was denied and Defendants' motion was granted.

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<sup>1</sup>"Double" meaning on behalf of a class of all qualified veterans against certain state officials as representatives of a class of all other state officials.

Judgment was then entered dismissing and closing the case. Plaintiffs then filed their Notice of Appeal.

## **STATEMENT OF FACTS**

On October 8, 1997, three U.S. Armed Forces veterans (hereinafter sometimes referred to as: “veterans”), who reside in Illinois, and the Veterans Legal Defense Fund (VLDF), an Illinois not-for-profit corporation that defends veterans’ rights, filed a double class action complaint against state and local government offices and private public works contractors. (D-1.)

The Plaintiffs sued for themselves and other veterans against State and local officials, individually and as representatives of all other State and local officials in Illinois, who are statutorily required to provide an absolute veterans’ preference in State and local civil service employment. The complaint alleged Defendants failed to grant veterans the absolute preference in hiring mandated by state law and that this violated the 14<sup>th</sup> Amendment to the U.S. Constitution by depriving veterans of property without due process of law. The Plaintiffs claimed they were entitled to relief therefore pursuant to 42 U.S.C. § 1983. (D-1. p. 18.)

Motions to dismiss were filed by Defendants (D-5 and 10), and Plaintiffs then filed an Amended Class Action Complaint (D-21). Further motions to dismiss were filed. (D-24 & 27.)

On November 3, 1998, the District Court granted the motions to dismiss, ruling that the Amended Complaint failed to fit within the exception carved out by the Supreme Court to the general rule that the 11<sup>th</sup> Amendment bars suits against states in federal courts. That exception permits such suits when there is an ongoing or

threatened violation of federal law. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (D-37, p.

7). The District Court held:

“The instant case is barred by the Eleventh Amendment because it does not present any allegations of an ‘ongoing or threatened violation of federal law.’” (D-37, p. 8.)

The District Court, noting that although Plaintiffs did not allege an ongoing or threatened violation, “the court expresses no opinion about whether such an allegation could be made,” then granted Plaintiffs leave to file a Second Amended Class Action Complaint to clarify any ambiguities. (D-37, p. 10-11.)

On December 3, 1998, Plaintiffs filed their Second Amended Class Action Complaint against Michael S. Schwartz in his official capacity as Director of the Department of Central Management Services (CMS) of the State of Illinois, and George Ryan, in his official capacity as the then Secretary of State of the State of Illinois. Both Defendants were sued individually and on behalf of all State agencies and political subdivisions of the State of Illinois. (D-39.)

The Second Amended Complaint alleged that but for the failure of Defendants to afford Plaintiffs an absolute hiring preference, Plaintiffs would have been hired, and “would still hold those positions today,” and thus continued to be deprived of the entitled preference by Defendants’ actions. (D-39, p. 8, 9, 10, 11, 12, 13 & 14). The Second Amended Complaint also alleged that Defendants deprived and continue to deprive Plaintiffs and their class members of property without due process of law. (D-39, p. 18.)

Defendants again filed motions to dismiss and to strike class action allegations. (D-41 & 42.)

On August 11, 1999 the District Court issued a 21-page order deciding those motions. (D-57) The District Court granted the motion to strike class allegations, ruling that Plaintiffs' failed to demonstrate numerosity, commonality, and typicality for federal class actions set forth in Rule 23 (a) of the Federal Rules of Civil Procedure. (D-57, p. 6-10.)

The District Court granted the motion to dismiss in part and denied it in part. On the 11<sup>th</sup> Amendment question, the District Court found that if the new allegations that "but for" the denial of the preference, Plaintiffs would have received the jobs, are true, then the denial of the preference is, in effect, a denial of a job. The District Court further held that denial of a job is an "ongoing violation" that is closely analogous to the wrongful termination cases that had been held to also be ongoing violations. Thus, the District Court declined to dismiss the Complaint based on the 11<sup>th</sup> Amendment. (D-57, p. 15-16.)

The District Court denied Defendants' motion to dismiss based on lack of standing. (D-57, p. 17.)

The District Court found that a veteran's "preference" is a property interest. The District Court then adopted the holding of the U.S. Court of Appeals for the Third Circuit that a similar Pennsylvania veteran's preference statute provided a property interest that was protected under the U.S. Constitution. *Carter v. City of Philadelphia*, 989

F. 2d 117, 122 (3rd Cir. 1993). (D-57, p. 18.)

The District Court held that a two year statute of limitations applied to this case. Since the complaint was filed October 8, 1997, the District Court dismissed any alleged violations of the preference statute that occurred prior to October 8, 1995. (D-57, p. 20.)

The District Court concluded its Order by limiting discovery for the next 60 days to evidence relating to whether these named Plaintiffs would have been hired for jobs they had applied for between October 8, 1995 and October 8, 1997 if Defendants had given them an absolute preference. The District Court directed that after those 60 days, the Plaintiffs were to make a proffer to create a genuine issue of material fact regarding whether they would have gotten the job, but for the denial of the preference. (D-57, p. 21.)

Plaintiffs then filed a Motion to Amend the District Court's August 11, 1999 Order by vacating the part of it that dismissed Plaintiffs' class action allegations (D-58). Plaintiffs argued in their memorandum in support that the ruling was premature, and that Defendants failed to meet their burden, under Fed. R. Civ. P. 12, of showing that the matter sought to be stricken would eliminate redundant, immaterial, impertinent, or scandalous matter. The Plaintiffs further noted in their memorandum that class allegation should not be stricken until the Plaintiffs have the opportunity to do discovery on the challenged class issues, according to case law. (D-59.)

On October 20, 1999, the District Court denied Plaintiffs' Motion to Amend the District Court's August 11, 1999 Order, but allowed Plaintiffs' Motion to Extend

Discovery to December 13, 1999 (D-64). The District Court then ordered that at the end of said discovery period, Plaintiffs are to show, through a written proffer, that Plaintiffs applied for a position with at least one of the Defendants, and that a non-veteran received the position (D-64). The District Court later extended the deadline to January 31, 2000. (D-66.)

On January 31, 2000, Plaintiffs submitted their proffer. The Plaintiffs showed, through a memorandum by Raymond Stroh (hereinafter: "Stroh"), Senior Public Service Administrator of the Transactions and Records Division of CMS, that Plaintiffs Terry and Wild had applied for multiple jobs with CMS, which they did not get, and which were filled by non-veterans. Further, in his deposition, Stroh swore that no other applicants were more qualified than Terry and Wild for the jobs for which they applied, and that Terry and Wild should have been offered those jobs before the non-veterans that were hired.

The proffer concluded that it had shown what was required by the District Court's October 20, 1999 Order – that Plaintiffs applied for positions with one of the Defendants; that non-veterans received the positions; and that Plaintiffs had thus met the District Court's standing requirement. (D-68.)

As to the third Plaintiff, Tom Foster, nothing was proffered because the Defendants' discovery response regarding him provided information about a Tommie W. Foster, who is a different person than Plaintiff Foster. (D-68.)

On June 20, 2000, the District Court entered a Minute Entry stating that

Plaintiffs succeeded in making their proffer. “The court is satisfied that the named Plaintiffs have applied for the positions and that a number of non-veterans received some of the positions”, according to the Minute Entry.

On March 12, 2001, Plaintiffs filed a motion to compel Defendants to respond to their Second Request for Production of Documents and Second Set of Interrogatories (D-86). That motion was denied on March 27, 2001. (D-89.)

On March 13, 2001, Plaintiffs filed their motion to file a Third Amended Complaint (D-85). On December 18, 2001, the District Court allowed the motion, with regard to all allegations, except for the class allegations (D-120). The District Court denied the motion to amend as to all class allegations. The District Court cited the Stroh Memorandum, claiming it showed 273 veterans applied for six (sic) jobs, but only 2 out of 8 people hired were veterans. Therefore, the District Court concluded 271 veterans were potentially denied their veterans’ preference. But only 6 were actually deprived of the preference because there were only 6 jobs. To prove he or she was actually deprived of the job, the veteran would have to show they were among the top 6 veterans. Thus, the District Court concluded there was inherent conflict within the class that prevented the class from being certified. (D-120, p. 8-9.)

On March 19, 2001, Plaintiff Steven Terry filed his Motion for Partial Summary Judgment (D-88). The motion asserted, as undisputed facts, four different positions, for which Terry had applied and has an A grade, but wasn’t hired. Non-veterans were hired for all 4 positions. Stroh testified that based on the grading scale, no other

applicant was more qualified for the positions than Terry (D-88, p. 4-6). For the Vital Records Quality Control Inspector position, the Department of Public Health was so blatant in depriving Terry his property interest in the veterans' preference, that it asked a private organization, the Illinois Vietnam Veterans Leadership Program, to approve its request for the "appointment of non-veteran eligible(s) over veteran eligible(s)" for that position. (D-88, p. 5 & Exhibit G.)

On April 9, 2001, Defendant Schwartz filed his response to Terry's partial summary judgment motion and his cross-motion for summary judgment. The cross-motion was based in part on the contention that the 11<sup>th</sup> Amendment barred this law suit because the Defendant argued there was no on-going or threatened violation of federal law.

On August 22, 2001, the District Court allowed Plaintiff Terry's motion to supplement second affidavit of Steven Terry with Amended Second Affidavit of Steven Terry and Supplemental Affidavit of William Bogot (D-109). The Amended Second Affidavit of Steven Terry shows conclusively that the Defendants' violation of the veterans' preference in hiring law is on-going. (D-110.)

In that affidavit, Terry swears he held "A" grades for 4 different position titles in the Secretary of State's Office. Between November, 1995 and November, 1997, 9 people were hired to fill these 4 position titles, none of whom were veterans. Since November, 1997, 7 more people were hired to fill these 4 position titles, none of whom were veterans. (D-110.)

According to the deposition testimony of Tina Prose, Director of the Personnel Department for the Secretary of State, when there is a vacancy in a position, persons who have an A grade for it in the county where the position is, are to be placed on the eligible list for hire and sent an interview letter, giving them the opportunity to interview for the position. With regard to all 16 job openings mentioned above, Terry was not placed on the eligible list, or sent an interview letter, to give him an opportunity to interview for the job. (D-110 & D-98, Prose dep. excerpt.)

Defendants never filed a counter affidavit, or any other document, to contest the accuracy of Terry's Amended Second Affidavit.

On December 20, 2001, the District Court ordered the parties to brief the issue of whether a lawsuit based upon the denial of the preference (absent proof that the named Plaintiffs would have been hired for these positions had the preference been applied) would be barred by the 11<sup>th</sup> Amendment. Also, Plaintiffs were ordered to offer proof that they alone were entitled to one of the jobs for which they applied, more so than any other veteran or non-veteran applicant. (D-121.)

In their response to the December 20<sup>th</sup> Order, Plaintiffs stated they could not "at this time" prove that they alone were entitled to one of the jobs for which they applied more so than any veteran or non-veteran. However, Plaintiffs argued that their suit was not barred by the 11<sup>th</sup> Amendment because Plaintiff Terry demonstrated, through his Amended Second Affidavit, that there is an on-going violation of federal law. In the affidavit, Terry testified at a minimum that Defendants had between April, 1998 and

May 2000, illegally hired 7 non-veterans for positions for which Terry had an A grade. In addition, Plaintiffs pointed out that they appropriately sought prospective relief not barred by the 14<sup>th</sup> Amendment. (D-124.)

Defendants' response to the December 20<sup>th</sup> Order contended that Plaintiffs failed to establish an on-going, or threatened, violation of federal law, and that their case was, therefore, barred by the 11<sup>th</sup> Amendment. But, Defendants did not address Terry's Amended Second Affidavit.

On April 3, 2002, the District Court granted Summary Judgment to Defendants. The District Court acknowledged that Plaintiffs had presented evidence that non-veterans had been hired in violation of the veterans' preference law as recently as May 2000. (D-125, p. 4.)

Nevertheless, the District Court apparently reversed the holding it had made August 11, 1999, that the veterans' preference was a property interest protected by the U.S. Constitution (D-57, p. 18), and ruled that Plaintiffs' attempt to couch their cause of action in terms of due process and the 14<sup>th</sup> Amendment failed (D-125, p. 5). The District Court found Plaintiffs' cause of action to be "nothing more than a state law claim". As such, the District Court ruled the 11<sup>th</sup> Amendment precluded it from enforcing the law of Illinois. (D-125, p. 6.)

Judgment was then entered dismissing and closing this case (D-126). Plaintiffs then filed their Notice of Appeal on May 2, 2002. (D-127.)

## **STANDARD OF REVIEW**

The District Court's grant of Defendants' Motion for Summary Judgment is reviewed *de novo*. *Doe v. Howe Military School*, 227 F.3d 981, 990 (7<sup>th</sup> Cir. 2000).

The District Court's denial of Class certification is reviewed for abuse of discretion, *Hewitt v. Joyce Beverages*, 721 F.2d 625, 627 (7<sup>th</sup> Cir. 1983), but based as it was on a clear error of law, the decision is essentially reviewed *de novo*. *Jaffee v. Redmond*, 142 F.3d 409, 412 (7<sup>th</sup> Cir. 1998).

## **SUMMARY OF ARGUMENT**

In an action under 42 U.S.C. 1983, brought by military veterans, seeking prospective enforcement of their property right to an absolute preference in state hiring under Illinois law, the district court recognized plaintiffs' property right, but then erroneously held the action barred by the Eleventh amendment to the Constitution and refused to certify the case for a class of veterans, because class members would likely be competing with each other for job positions. In these respects, the court erred because (i) under the *Ex parte Young* doctrine, the Eleventh Amendment is not a bar to an action seeking prospective enforcement of a property right, and (ii) the veterans class' common goal of obtaining their rightful preference is shared by all members of the class, and no hurdle to class certification is posed by the mere fact that class members may in the future otherwise compete with each other for job positions that become available.

Plaintiffs' action for prospective enforcement of their property right to an absolute preference in state hiring is not barred by the Eleventh Amendment, because it seeks prospective enforcement of a property right, and the class, commonly seeking enforcement of their entitled preference has no conflict in obtaining enforcement of that preference. the mere fact that similarly preferred class members may otherwise compete with each other for jobs is not a conflict between class members that would bar certifying the class.

## ARGUMENT

**I. The enforcement of a military veteran's hiring preference is a property right, whose prospective enforcement against state officials is an appropriate *Ex Parte Young* federal action and is not barred by the Eleventh Amendment.**

A. The statutory veterans preference in state hiring is a property right, enforceable under 42 U.S.C. §1983.

As the lower court properly held, the various Veterans Preference Acts applicable to civil service employment in Illinois confer an absolute preference in employment on eligible veterans, *Denton v. Civil Service Commission*, 176 Ill. 2d 144, 679 N.E.2d 1234 (1997), which is a protectable property interest under the Fourteenth Amendment to the United States Constitution. *Veterans Legal Defense Fund, et al. v. Schwartz, et al.*, No. 97-3380, Order of August 11, 1999 (D-57, p. 18); *Carter v. City of Philadelphia*, 989 F.2d 117 (3<sup>rd</sup> Cir. 1993), *cert denied*, 12 L. Ed. 2d 868, 114 S. Ct. 2139 (1994). Furthermore, since most property interests are created by State, rather than federal, law, the mere fact that the property interest involved was created by a state law, regulation or policy does not make the cause of action for its deprivation under color of law any less "federal" in nature:

Property interests are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law...

*Perry v. Sindermann*, 408 U.S. 593, 602 n. 7, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *see also, Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 365, 116 L. Ed. 2d 301 (1991).

Similar to the present case, *Carter* involved a veteran, seeking to enforce the Pennsylvania Veterans' Preference Act's conferred preference for veterans in

appointment or promotion, as an enforceable property right. Carter, a veteran and a Philadelphia policeman, alleged that Pennsylvania's Act entitled him to a preference in promotion, and that the denial of that preference deprived him of his legitimate claim of entitlement to the property interest of promotion. The Court held that Carter stated an appropriate § 1983 claim, in that he had a legitimate entitlement to and protected property interest in preferential treatment resulting from the Pennsylvania Act.

In doing so, *Carter* distinguished its facts from three Seventh Circuit cases, *Petru v. City of Berwin*, 872 F.2d 1359 (7<sup>th</sup> Cir. 1989), *United States v. Chicago*, 869 F.2d 1033 (7<sup>th</sup> Cir. 1989) and *Webster v. Redman* 599 F.2d 793 (7<sup>th</sup> Cir. 1979). *Carter*, 989 F.2d at 122, 123 n.6.

In *Petru*, this Court held that no property interest existed in an appointment to a position as a city firefighter because there was no statutory or regulatory provision which could confer such an interest. 872 F.2d at 1364. Similarly, in *City of Chicago*, this Court found no property interest where no state statute provided such a right, and the ranking on a promotion list was based in part upon subjective performance ratings, granting the promoting authorities "unfettered discretion to choose from among the five highest rated applicants for each available promotion." 869 F.2d at 1036. Finally, Carter noted this court's decision in *Webster* that surer footing must exist in Illinois law to create a claim of entitlement to a promotion than mere placement on an eligibility list. 599 F.2d at 801, n.6. This court, in footnote 13, suggested such footing would be a state statute. *Id.* at 801 n. 13.

Similar to *Carter*, and likewise distinguishable from *Petru*, *City of Chicago* and

*Webster*, the property interest here is created by state statutes, namely the Veterans Preference Acts. Therefore, as the lower court properly held, Plaintiffs have a protected property interest in a veterans' preference.

- B. Defendants' failure to give Plaintiffs a veterans' preference constitutes a substantive Due Process violation.

Substantive due process claims may be brought for the deprivation of property interests. *New Burnham Prairie Homes, Inc. v. Village of New Burnham*, 910 F.2d 1474, 1480 (7<sup>th</sup> Cir. 1990); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 5777 (7<sup>th</sup> Cir. 1990); *Polenz v. Parrott*, 883 F.2d 551, 558 (7<sup>th</sup> Cir. 1989). While most circuits require only that a Plaintiff show the violation was arbitrary and irrational, the Seventh Circuit has added a second requirement, namely that "the decision makers either committed another substantive constitutional violation or that state remedies are inadequate." *Stratsburger v. Board of Education, Hardin County Community Unit School Dist. No. 1*, 143 F.3d 351, 357 (7<sup>th</sup> Cir. 1998). Plaintiffs believe that this is an impermissible requirement in the Section 1983 context, in light of the Supreme Court's holding that Plaintiffs need not exhaust state remedies before pursuing federal ones. *See Monroe v. Page*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."); *see also Patsy v. Board of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557, 2567 (1982) ("exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.").

Nevertheless, Plaintiffs can meet the more arduous standard established by this Court, in that Defendants conduct was both arbitrary and irrational, and that no adequate state remedy exists.

1. Failure to give a Veterans' Preference is both irrational and arbitrary.

It is undisputed that the Veterans' Preference statute gives an *absolute* preference to veterans over non-veterans. *Denton v. Civil Service Commission of the State of Illinois*, 176 Ill. 2d 144, 679 N.E.2d 1234, 1237 (Ill. 1997) (“[W]e conclude that the unambiguous language of the statute requires an absolute preference in being hired over non-veterans of the same grade category.”) Thus, the plain language of the statute clearly and unambiguously “mandated” an *absolute* veterans preference.<sup>2</sup> *Id.* at 1238. Moreover, the Illinois Appellate Court further noted that “[g]iving the words their commonly understood meaning, the logical meaning of such language is an absolute preference.” *Denton v. Civil Service Commission of the State of Illinois*, 277 Ill. App. 3d 770, 661 N.E.2d 520, 524 (Ill. App. 4<sup>th</sup> Dist. 1996).

Defendant not only failed to follow the mandate of the statute prior to the decision in *Denton*, but it continues to do so to this date. As illustrated by the *Amended Second Affidavit of Steven Terry*, the Secretary of State Personnel Department illegally

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<sup>2</sup>20 ILCS 415/8b.7 provides that:

[w]hen the Director establishes eligible lists on the basis of category ratings... the veterans eligibles in each such category *shall* be preferred for appointment before the non-veteran eligibles in the same category. (emphasis added).

hired at least seven non-veteran persons *after the Illinois Supreme Court's decision in Denton* for four position titles that plaintiff Steven Terry had applied for and held a valid category grade of "A". See Amended Second Affidavit of Steven Terry and Supplemental Affidavit of William Bogot In Support of Plaintiff Steven Terry's Motion for Summary Judgment (App. B, B-3). Post-*Denton*, Defendants failure to follow the unambiguous "mandate" of the statute is, *per se*, arbitrary and irrational.

2. No adequate state remedy exists.

Plaintiffs vehemently believe that this requirement usurps the specific dictate of the United State Supreme Court noted above. Notwithstanding, no adequate remedy exists in state court for Plaintiffs to pursue.

Under 745 ILCS 5/1, the state of Illinois shall enjoy sovereign immunity as provided:

Except as provided in the "Illinois Public Labor Relations Act" [5 ILCS 315/1 et seq.], enacted by the 83<sup>rd</sup> General Assembly, or except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named". Filed July 17, 1945, as amended [705 ILCS 505/1 et seq.], the State of Illinois shall not be made a defendant or party in any court.

Thus, the only state "court" in which an action may be brought against the State of Illinois is in the Court of Claims, whose decisions are not more than recommendations to the legislature for monetary appropriation . *S.J. Groves & Sons Co. v. State*, 93 Ill.2d 397, 402 (Ill. 1982). Thus, the Court of Claims cannot provide an adequate remedy, where the Plaintiffs here seek not monetary relief, but their preference as guaranteed

by Illinois law and protected by the United States Constitution. Here, Plaintiffs brought their claim as a Section 1983 claim, viable only in federal court. *See Will*, 491 U.S. at 66 (holding that state courts were precisely the courts Congress sought to allow civil rights claimants to avoid through Section 1983.); *Alencastro v. Sheahan*, 297 Ill. App. 3d 478, 484 (Ill. App. 1<sup>st</sup> Dist. 1998) (“[W]e conclude that defendant’s actions as an official on behalf of the Illinois judiciary preclude plaintiff’s ‘official capacity’ section 1983 claim in state court.”)

Because there is no State court in which Plaintiffs can bring a Section 1983 claim nor does the Court of Claims provide an adequate remedy, Plaintiffs have fulfilled the Seventh Circuit’s additional hurdle of no adequate state remedy.<sup>3</sup>

C. Defendants failure to give Plaintiffs a veterans’ preference constitutes a procedural Due Process violation.

Procedural due process claims require a two-step analysis: (1) first determine whether the plaintiff has been deprived of a protected interest; and (2) next determine what process is due. *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7<sup>th</sup> Cir. 1996)(citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 71 L. Ed. 2d. 265, 102 S. Ct. 1148 (1982); *Forbes v. Trigg*, 976 F.2d 308, 315 (7<sup>th</sup> Cir. 1992)). When bringing a procedural due process claim under § 1983,

[t]he constitutional duty to provide fair procedures gives the citizen the

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<sup>3</sup>Moreover, even if Plaintiffs could bring the claim under the Court of Claims Act, the Act only provides a remedy of \$5,000 or less, which is less than adequate for the case-at-hand. 705 ILCS 505/24 (West 2001)

opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any 'abuse' of state power.

*Daniels v. Williams*, 474 U.S. 327, 328-9, 106 S. Ct. 662, 678 (1986)(Stevens, concurring).

Thus, for a procedural due process violation, a court, when determining whether a violation has occurred, must "ask what process the State provided, and whether it was constitutionally adequate." *Zinermon* 494 U.S. at 126. Moreover, "the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S. Ct. 975, 984 (1990)(emphasis original).

Here, the issue is not whether a "supplied" process was inadequate; but rather that *no* process exists for a veteran who has been deprived of his preference– neither pre- nor post-deprivation and not in statute or procedure. Additionally, no actual process was provided to the veterans. As stated in Plaintiff Terry's affidavit:

Prior to Terry being denied employment for the above reference jobs, and being deprived an absolute veterans' preference, he was not afforded an opportunity for a hearing to try and prevent the deprivation from happening.

Terry Affidavit. (App. B, B-3). Consequently, Defendants failure to provide an adequate hearing violated Plaintiffs' procedural due process rights.

## **II. The Eleventh Amendment does not bar Plaintiffs Federal Claims because they Seek Only Prospective Relief Against an Ongoing Violation of Federal Law.**

Because plaintiffs seek future, injunctive relief against state officials, the Eleventh Amendment poses no bar to their federal claims.

In its pure form, the Eleventh Amendment does bar actions by citizens of one state against another State:

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. The accepted interpretation is that the Eleventh Amendment presumes that the Constitution already bars federal suits against a non-consenting State brought by her own citizens, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997)(citing *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890)), and regardless whether the suit is in law or equity. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100-101 (1984). Nonetheless, every good rule must have an exception, and the exception is clearly applicable here.

Where the suit is brought against a state official, and not the State itself, the Eleventh Amendment status of the suit is less straightforward. *Papasan v. Allain*, 478 U.S. 265, 276, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). The doctrine of *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), long followed and cast in stone,<sup>4</sup> holds that a suit to enjoin a state official's unconstitutional action is not barred by the Amendment.

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<sup>4</sup> That prospective federal relief suits are not barred is widely accepted. *Mathias v. WorldCom Techs, Inc.*, 122 S. Ct. 1780, 152 L. Ed. 2d. 911, 2002 U.S. LEXIS 3789 (May 20, 2002); *Coeur d'Alene*, 521 U.S. at 270; *Pennhurst*, 465 U.S. at 100-101; *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 73 L. Ed. 2d. 1057, 102 S. Ct. 3304 (1982); *Vargas v. Trainer*, 508 F.2d 485 (7<sup>th</sup> Cir. 1974); *Amaurotic Corp. v. McCann*, 2002 U.S. App. LEXIS 14668 (7<sup>th</sup> Cir. July 22, 2002); *MCI Telecoms. Corp v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7<sup>th</sup> Cir. 2001); *Lett v. Magnant*, 965 F.2d 251 (7<sup>th</sup> Cir. 1992)

Young’s applicability has been tailored to conform as precisely as possible to those specific situation in which it is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. 123). Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which the that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. *Papasan*, 478 U.S. at 277-78. Thus, the Supreme Court created a known irony in that a state official’s conduct may be considered “state action” for the purposes of the Fourteenth Amendment yet not for the purposes of the Eleventh Amendment. *Treasure Salvors, Inc.*, 458 U.S. at 685.

In *Edelman v. Jordan*, the court clarified the applicability of the Eleventh Amendment in § 1983 claims, stating “a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief... and may not include a retroactive award which requires the payment of funds from the state treasury.” 415 U.S. 651,666-667, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). The Eleventh Amendment, therefore, presents no bar where a plaintiff alleges (1) an ongoing violation of federal law, and (2) where the relief sought is prospective, rather

than retrospective. *McCann*, 2002 U.S. App. LEXIS 14668, \*11 (citing *Verizon Maryland, Inc. v. Public Service Comm. of Maryland*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 1959, 2002 U.S. LEXIS 3590, 2002 WL 1008485 (May 20, 2002); *Coeur d'Alene*, 521 U.S. at 276-77. As detailed below, Plaintiffs requested prospective injunctive relief from an ongoing violation of their property interests. Therefore, the District Court erred in finding an Eleventh Amendment bar to Plaintiffs claims.

A. Plaintiffs demonstrated an ongoing violation of federal law.

Plaintiff previously detailed, *supra* § I, the existence of a violation of their due process rights under federal law. The only remaining issue, then, is whether the violation is ongoing. The Supreme Court has defined ongoing as “continuing” rather than “at one time, or over a period of time in the past,” and allows federal courts to grant relief that “served directly to bring an end to the to a present violation of federal law...even though accompanied by a substantial ancillary effect on the state treasury. *Papasan*, 478 U.S. at 277-78.

Despite Defendants’ repeated contentions otherwise, an ongoing violation of federal law exists. On August 27, 2001, Plaintiff Steven Terry filed with the District Court an Amended Second Affidavit, wherein Terry testified that, at a minimum, from April 1998 to May 2000, Defendants illegally hired seven (7) people *after the Denton decision* (April 24, 1997) for position he had applied for, and that these individuals were not veterans entitled to a veterans’ preference in State hiring and that they all had a category grade equal or lower than his category grade rating of “A”. The Terry

Affidavit further states:

6. ... These individuals, and the dates of their hiring are:  
  
Mary L. Gott, hired for Administrative Clerk, 4-22-98  
Theresa M. Oller, hired for Administrative Clerk, 11-16-98  
Jean-Paul Schwartz, hired for Administrative Clerk, 12-2-98  
Linda O. Fisher, hired for Administrative Assistant III, 7-19-99  
Brenda M. Sawyer, hired for Administrative Assistant III, 11-16-99  
Retha A. Riemer, hired for Administrative Assistant I, 1-10-00  
Laura M. Pickett, hired for Administrative Assistant II, 5-1-00
7. I received the information regarding these hirings, and their dates, in the summer of the year 2000 from a seniority list of professional employees in the Secretary of State from the General Services Employees Union. A copy of that seniority list was previously provided with my Second Affidavit of Steven Terry.
8. I received information confirming that none of the individuals in the above hirings have been or are members of the Armed Forces of the United States, to wit: the United States Army, Navy, Air Force, Marine Corps or Coast Guard, from my attorney, William Bogot, who performed a search of the names of said individuals on the Lexis-Nexis Air Force, Army, Coast Guard, Marine and Navy Personnel database, which contains data on all persons who currently and in the past served in the Armed Forces of the United States. (The Supplemental Affidavit of William Bogot on his aforementioned database search is being tendered to the court simultaneously with my affidavit).

Amended Second Affidavit of Steven Terry at 2. To date, Defendants have not disputed or challenged these sworn assertions in the Terry Affidavit. Consequently, by operation of law, Defendants have acknowledged that even after *Denton*, Plaintiffs are still not being afforded an absolute veterans' preference in state hiring.

- B. Plaintiffs sought prospective, not retrospective, relief.

The Court below held that Plaintiffs sought "retroactive relief", despite the fact

that Plaintiffs' Third Amended Class Action Complaint sought only prospective relief, including an order from the Court "directing Defendants Schwartz, Ryan, and the members of the defendant class to afford an absolute veterans' preference to Plaintiffs and the plaintiff class members" and "naming a court-appointed monitor to ensure that Defendant Schwartz, Ryan, and members of the defendant class afford an absolute preference to qualified veterans". See Third Amended Class Action Complaint at 16. By Defendants own admission, only one paragraph, sub-paragraph "d" of the Third Amended Class Action Complaint's prayer for relief, is barred by the Eleventh Amendment because it allegedly asks the Court for retrospective relief.<sup>5</sup> Apparently, on this paragraph alone, the Court below dismissed Plaintiffs Complaint for "retroactive relief".

The closest thing to "retrospective" relief cited by Defendants below was Plaintiffs' request to reinstate, or allow Plaintiffs to re-apply for, their applications for employment appointments that they should have been offered rather than the non-veterans that were hired had Defendants applied an absolute veterans preference. But, this is not retrospective relief. Reinstatement is not retrospective relief and claims for reinstatement are not barred by the Eleventh Amendment.

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<sup>5</sup>Sub-paragraph "d" of the Third Amended Class Action Complaint asks the Court for an order "directing Defendants Schwartz, Ryan, and the members of the defendant class to allow Plaintiffs and the plaintiff class members to re-apply for appointments previously denied them because defendants Schwartz, Ryan and the members of the defendant class had not afforded them an absolute veterans' preference". See Third Amended Class Action Complaint at 16.

For example, in *Bennett v. Tucker*, 827 F.2d 63 (7<sup>th</sup> Cir. 1987), the plaintiff filed an action under 42 U.S.C. § 1983 against the Director of the Illinois Department of Human Rights for refusing to process his discrimination claims in accordance with the Illinois Fair Employment Practices Act. The defendant moved to dismiss the action arguing that the Eleventh Amendment barred the federal court from issuing an injunction requiring the defendant to reopen closed claims because such an injunction would constitute “retrospective relief”. *Bennett*, 827 F.2d at 71. The court denied the defendant’s motion, holding that an injunction requiring a state agency head to go back and reopen closed claims was not retrospective relief. The court further stated:

the question of whether relief is prospective or retrospective is to be determined by reference to the purpose of the intended remedy. If the purpose of the remedy is to force the state to pay money to compensate the plaintiff for the state’s prior actions, the remedy is retrospective, and is proscribed even if the remedy is cast in the form of an injunction governing future conduct. In contrast, if the purpose of the remedy is to force the state officer to conform his or her future conduct to the dictates of federal law, then the remedy is prospective, and is permissible even if it has significant financial consequences to the state.

*Bennett*, 827 F.2d at 71 (citations omitted). *See also Lowrance v. Coughlin*, 862 F. Supp. 1090, 1097 (S.D.N.Y. 1994) (holding that the plaintiff’s action seeking a new parole hearing was not barred by the Eleventh Amendment).

Similarly, as in *Bennett*, Plaintiffs in this case are seeking prospective relief in sub-paragraph “d” of their prayer for relief by requesting reinstatement or re-application of their applications for employment appointments that they should have been offered rather than the non-veterans that were hired had Defendants applied an

absolute veterans preference. Consequently, Plaintiffs' sub-paragraph "d" of their prayer for relief is not barred by the Eleventh Amendment.

C. *Pennhurst* is inapposite.

The Court below perfunctorily declared that the decision in *Pennhurst*, which prohibits a federal court from ordering state officials to comply with state law, "clearly stated" that the Eleventh Amendment "precluded" them from hearing Plaintiffs case. The Court below, however, misread Plaintiffs' claims and misapplied *Pennhurst*.

Plaintiffs have alleged and demonstrated that Defendants' continuing failure to afford them an absolute veterans' preference violates the Due Process Clause of the United States Constitution, Fourteenth Amendment, and 42 U.S.C. § 1983. Plaintiffs therefore seek relief against Defendants *pursuant to federal law*, not state law. Under *Pennhurst*, the determinative question is not the relief ordered, but whether the relief was ordered pursuant to state or federal law. *See Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018, 1023 (11<sup>th</sup> Cir. 1989). The Court in *Pennhurst* clearly stated the difference between the claim they found barred, a pendant state claim, and a claim brought under federal law, stating that the Eleventh Amendment bar does not apply to federal claims, "particularly in light of the Civil War Amendments." *Pennhurst*, 465 U.S. at 109 n.17. Because Plaintiffs seek relief under federal law for Defendants' violations of federal law (deprivation under color of law of a property right), *Pennhurst* does not bar this action.

The same issue was raised in *Bennett v. Tucker*, 827 F.2d 63, where the plaintiff

filed an action under 42 U.S.C. §1983 for the State of Illinois' failure to process his discrimination claims in accordance with the Illinois Fair Employment Practices Act.

The court noted that *Pennhurst* was not a bar to the action because:

[In *Pennhurst*, the Supreme Court held that a federal court may not issue an injunction requiring a state officer to conform his or her conduct to the dictates of state law. In this case, however, the plaintiffs do not ground their claim on the defendant's alleged failure to comply with state law. Rather, the plaintiffs allege that the defendant has refused to comply with the dictates of the Due Process Clause. Although existing state procedures may be relevant in determining the dictates of due process, any injunction that may issue in this case will be based on the defendant's obligation to comply with minimal federal standards.

*Bennett*, 827 F.2d at 71, n. 3 (internal citations omitted). See also *Elliott v. Hinds*, 786 F.2d 298 (action brought under §1983 and state defamation law, seeking to compel state officials to cease actions in violation of federal law and to comply with constitutional requirements, was not barred by Eleventh Amendment); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 670 (7<sup>th</sup> Cir. 1985), cert. denied, 474 U.S. 1102, 106 S. Ct. 884 (1986) ("the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law" (citing *Schueur v. Rhodes*, 416 U.S. 232, 237, 94 S. Ct. 1683, 1687 (1974))); See also *Libby v. Marshall*, 653 F. Supp. 359, 363 (D. Mass. 1986)(holding that *Pennhurst* does not apply to claims seeking "an injunction requiring state defendants to do certain acts which the defendants are authorized to do under state law in order to remedy violations of plaintiffs' federal rights.")

Similarly, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1036 (7<sup>th</sup> Cir.

1987), the Plaintiff brought their action under § 1983 on behalf of Spanish-speaking children of limited English proficiency enrolled in Illinois schools. The Plaintiffs alleged that the Defendants failure to implement a state enactment, namely the Illinois Transitional Bilingual Education Act, caused their injuries. As this Court held, however, this was not a state action, but a violation of *federal law*:

They alleged only that the defendants failed to discharge the duties imposed by *federal law* under the Fourteenth Amendment... As we understand the complaint, the plaintiffs have no quarrel with Illinois's Transitional Bilingual Education Act. Thus, the plaintiffs' position is not that they could hold the defendants liable under Illinois law, but rather that they have been injured by the defendants' failure to implement that state enactment to the extent required by *federal law*. *Pennhurst*, therefore, is not controlling.

*Gomez*, 811 F.2d at 1036 (emphasis original).

In the case *sub judice*, as in *Bennett*, Plaintiffs' claims are grounded in the Due Process Clause of the United States Constitution and 42 U.S.C. § 1983, for Defendant's deprivation of Plaintiff's property interest in an absolute veterans' preference in violation of the Due Process Clause. Although existing state statutory requirements are relevant in determining the dictates of federal constitutional requirements, any injunctive relief granted in this case will be based on Defendants' obligations to comply with federal standards. Therefore, the Eleventh Amendment does not bar this action.

**III. A Class of Veterans seeking recognition or enforcement of their veterans preference should be certified, and the mere possibility that some of them may, similarly preferred, in the future be competing with each other for some jobs does not create any internal class conflict in their common seeking of the**

**enforcement of their preference.**

The mere fact that class members might compete with each other on other issues does not constitute a conflict that bars certification of a Rule 23 (b)(2) class for a property right they all share. The district court made a clear error of law in its December 18, 2001, ruling at 9, denying class certification on the notion that since there were only 6 positions that were available for the 271 veterans in the applicant class, that certifying a “claim” [class] of veterans who were only potentially deprived of their absolute preference, would result in “an inherent conflict within the class” which would prevent the class from being certified, citing *Walvis v. Southern Bell Tel. & Tel. Co.*, 1977 WL 78 (N.D. Ga Nov. 11, 1997).

That conclusion of inherent conflict was clear error. Such a holding would eliminate class certification in all hiring list cases, because although all of the persons seeking a position on the list were generally discriminated against for the same trait (e.g. sex or race), the successful members on the list will be competing against each other for the ultimate jobs. As Judge Shader declared, in *Marystown v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989) in which the plaintiffs sought to represent a class of all female management trainees:

Marriott also contends that because class members compete against each other for the same promotions, none can adequately represent the class. That absurd proposition would of course doom almost every class action charging discrimination in promotion--a drastic rewrite of the law in this area. After all, when no woman is promoted, it is impossible to determine which one should have been (see *Armstrong*, 117 F.R.D. at 627 & n.10 and cases cited there). In the universe Marriott would create, discrimination

law would be simpler because class-discriminatory promotion would be cost-free. That view must of course be rejected.

Following that, in *Orlowski v. Dominick's Fine Foods, Inc.*, 172 F.R.D. 370, 374 (N.D. Ill. 1997), Judge Bucklo agreed:

The fourth and final requirement is that "the representative parties . . . fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation requires first, "the adequacy of the named plaintiff's counsel," *Retired Chicago Police Ass'n*, 7 F.3d at 598, and second, the absence of "antagonistic or conflicting interests" among the class members. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986). Dominick's does not dispute the first part of this requirement. Dominick's argues, however, that the named plaintiffs' interests conflict with those of the class members because all competed for a scarce number of promotion opportunities. Judge Shadur rejected this precise argument in *Marystown*, noting that, were he to accept it, "almost every class action charging discrimination in promotion" would be "doomed." 124 F.R.D. at 625. I agree with Judge Shadur.

I conclude that plaintiffs have met the requirements for certification of a subclass of female employees under Rule 23(a), Fed. R. Civ. P.

Thus, a class of persons who share a common deprivation of a status in competing for scarce job resources do not have a class-defeating conflict, even if they are otherwise in competition with each other on other grounds. See e.g., *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569 (D. Minn. 1995) (competing GM car dealers challenging their common franchisor's imposition of a uniform 1% advertising charge on all new vehicles sold in the state); *Lewis v. National Football League*, 146 F.R.D. 5 (D. D.C. 1992) (certifies class of professional football players challenging implementation of league's implementation of first refusal/compensation system, were not inadequate class representatives by the fact that they were competing with each other); and a host of

hiring list cases, in which discrimination commonly kept a group of competing workers off a list that only a limited number would ultimately obtain the sought-after jobs. *Nash v. Oakwood*, 94 F.R.D. 83, 88 -92 (S.D. Ohio 1982); *see also, Taylor v. Charley Bros. Co.*, 26 FEP 395 (W.D. Pa. 1981). Women employed by, and applicants to, Charley Brothers were certified in a class. The court held that a speculative future competition for jobs and seniority did not warrant decertification. "A mere possibility of future conflict is not sufficient to deny the applicant class the relief to which we believe they are entitled." *Mayfield v. Meese*, 53 FEP 1310 (D. D.C. 1987). Potential conflicts did not go to the central issues in the case.

Moreover, *Walvis*, itself, is readily distinguishable. In *Walvis*, the court's denial of class certification was primarily based on the class representative's lack of diligence in pursuing the action; only secondarily did the court mention the competition for ultimate jobs as a disqualifying problem. *Walvis v. Southern Bell Tel. & Tel. Co.*, 17 FEP 1158 (N.D. Ga. 1977). In a Title VII action, the plaintiff sought to represent a class of females who had been denied employment as Communications Advisors. The court dismissed the class allegations, ruling that the named plaintiff's failure to initiate discovery or to move for class certification within the time granted by the court indicated that she would be an inadequate class representative. In view of the limited number of openings for the position in question, the court also concluded that there was potential conflict between the plaintiff and the class of applicants she sought to represent.

### **CONCLUSION**

Plaintiffs respectfully request the Court to reverse the decision of the lower court regarding the bar of Plaintiffs federal claim by the Eleventh Amendment, and

remand this case to the District Court to proceed ahead, certify the classes as requested under Fed. R. Civ. P. 23(b)(2) and order the enforcement of class members' absolute veterans preference.

Respectfully submitted,

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