

*Premo v. Martin**

I. INTRODUCTION

The Randolph-Sheppard Vending Stand Act (the Act) was created in order to provide employment opportunities for the blind.¹ The Act established a cooperative federal-state program aimed at granting priority to blind persons who wished to operate vending facilities on federal property.² At the federal level, the Department of Education oversees the administration of the Act.³ Designated state licensing agencies implement the program at the state level.⁴ To become designated, a state licensing agency must first apply to the Secretary of Education and agree to follow requirements set forth by federal law.⁵ When a potential blind vendor wishes to become licensed, he must then apply to the state agency.⁶ The state agency in turn applies to a federal agency for the placement of the licensee on federal property.⁷ Once a vending location is determined, the state licensing agency then becomes responsible for equipping the facility.⁸

In the event of a complaint or a dispute on the part of the licensee, he may request that an arbitration panel resolve his grievance.⁹ As a result of

* 119 F.3d 764 (9th Cir. 1997).

¹ See 20 U.S.C. §§ 107–107f (1990). The Act was enacted:

For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed . . . shall be authorized to operate vending facilities on any Federal property.

Id. § 107(a).

² See *id.* § 107(b).

³ See *id.* § 107a.

⁴ See *id.* § 107a(a)(5).

⁵ See *id.* § 107b. “State participation in the program is voluntary, and a[n] [interested] state agency . . . must apply to the Secretary of Education and agree to a number of conditions.” *Premo*, 119 F.3d at 767.

⁶ See *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 93, 102 (D.C. Cir. 1986); see also 20 U.S.C. § 107a(a)(5).

⁷ See 20 U.S.C. § 107a(a)(5), (c).

⁸ See *id.* § 107b(2).

⁹ See *id.* § 107b(6). One of the conditions a state agency agrees to in its application to the Secretary of Education is:

[T]o provide to any blind licensee dissatisfied with any action arising from the

the ability of arbitration panels to award relief, two issues have arisen in the interpretation of the Act: (1) whether the Eleventh Amendment prohibits the awarding of compensatory relief by Randolph-Sheppard arbitration panels; and (2) whether an arbitration award under the Act violates due process.¹⁰ Only four circuits have addressed these issues, with varying results. Although there has been a split in the circuits, the Supreme Court has yet to address the aforementioned issues.

This Note will first examine the facts and procedural history of the Ninth Circuit's decision in *Premo*. Next, it will address the three other circuit court decisions that have dealt with similar issues and their different approaches to the same problem. Lastly, the Note will support the *Premo* decision as a correct decision, in that compensatory awards are not prevented by the Eleventh Amendment, based on statutory interpretation and policy matters.

II. FACTS AND PROCEDURAL HISTORY

In *Premo*, the Ninth Circuit Court of Appeals addressed these issues in the context of a licensee, Jeana Martin, invoking her right to arbitration after her license was revoked. Martin had been issued a license in 1985 by the California Department of Rehabilitation so that she could operate a snack bar and lunch room at a United States Post Office.¹¹ After several years of financial difficulties and relocations, the State revoked her license.¹² Martin had requested two state hearings during her time of financial difficulty and was denied relief by the State both times.¹³

operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration

Premo, 119 F.3d at 767.

¹⁰ See *Premo*, 119 F.3d at 766. The issue of due process is a secondary issue to the Eleventh Amendment issue. See *infra* note 66 and accompanying text.

¹¹ See *id.* at 767. Brenda Premo was the Director of the California Department of Rehabilitation, who appealed the circuit court's granting of summary judgment to Martin. See *infra* text accompanying notes 22-28.

¹² See *Premo*, 119 F.3d at 767. Martin's license was revoked by the State of California in 1992. See *id.*

¹³ See *id.* "In 1990, she [Martin] filed a complaint alleging that the State had violated the Act by failing to take adequate steps to ensure compliance by the Postal Service. In 1992, she challenged the State's termination of her vendor's license." *Id.*

Subsequent to the state hearings, Martin invoked her right to arbitration pursuant to the Act.¹⁴

Once Martin invoked her right to arbitration by panel, the arbitrators were selected in accordance with the Act.¹⁵ Each party selected one panel member, and the two members chosen by Martin and the State in turn selected the third member.¹⁶ The panel reached its decision in August 1994, ruling that the State had improperly revoked Martin's license.¹⁷ The panel ruled that "lapses" by the State had caused Martin's financial difficulties.¹⁸ Among the State's lapses cited by the panel were: (1) the failure to renovate the Postal Office facilities; (2) the failure to assign income from competing machines to Martin; and (3) the failure to prevent the Postal Office from awarding the contract to another vendor.¹⁹ As a result, Martin was awarded \$379,025.05 in lost income and \$70,898.65 in attorney's fees and costs.²⁰ Additionally, the panel "ordered the State to reinstate Martin's license, restore her to a comparable vending facility and to pay her at a rate of \$5,731.94 per month" until restoration was complete.²¹

Following the arbitration panel's decision, the State proceeded to file an action in federal court.²² The state alleged that an award of compensatory damages under the Act violates its Eleventh Amendment sovereign immunity from such awards.²³ In an alternative claim, the State alleged that

¹⁴ *See id.*

¹⁵ *See* 20 U.S.C. §§ 107d-1, d-2. If a blind vendor is displeased with the results of a state hearing, the vendor "may ask the Secretary to convene an arbitration panel to resolve the dispute." *Tennessee Dep't. of Human Services. v. United States Dep't. of Educ.*, 979 F.2d 1162, 1164 (6th Cir. 1992).

¹⁶ *See Premo*, 119 F.3d at 767.

¹⁷ *See id.* The State's attorney had requested a continuance during the arbitration, objected to Martin's panel member selection and objected to testimony introduced by Martin's former attorney. The State's objections and requests were all denied. *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *Id.*

²² The State identified the following defendants in its claim: the Secretary of Education, the United States Department of Education and Martin. *See id.*

²³ *See id.* The Eleventh Amendment states that: "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. For more information regarding the Eleventh Amendment and its role in jurisprudence, see JOHN E. NOWAK

the panel's denials of the state's requests and objections during the arbitration constituted a violation of due process.²⁴ Martin counterclaimed and both parties filed motions for summary judgment.²⁵

The district court, in granting Martin's motion for summary judgment, held that sovereign immunity had been waived by the State. Additionally, the district court found that because the state is not a person under the meaning of the Fifth Amendment, there was no violation of due process.²⁶ The State appealed the district court decision to the United States Court of Appeals for the Ninth Circuit.²⁷ The court reviewed the Eleventh Amendment immunity issue de novo, and reviewed the arbitral award under the Act as an agency action, governed by the Administrative Procedure Act.²⁸ Upon review, the Ninth Circuit affirmed the holding of the district court.²⁹

III. DISCUSSION

In affirming the district court decision, the Ninth Circuit held that: (1) "[T]he Eleventh Amendment does not apply to Randolph-Sheppard arbitration proceedings and thus does not limit the authority of arbitration panels convened under the Act to award compensatory relief";³⁰ (2) "states have waived their sovereign immunity to enforcement of such awards in federal court";³¹ and (3) the arbitration proceedings complied with the provisions of the APA.³²

& RONALD D. ROTUNDA ET. AL, CONSTITUTIONAL LAW 44-54 (1991).

²⁴ See *Premo*, 119 F.3d at 767; see also *supra* note 10.

²⁵ See *Premo*, 119 F.3d. at 767-768.

²⁶ See *id.* The court also held that the award granted by the arbitration was neither "arbitrary" nor "capricious." See *id.*

²⁷ See *id.*

²⁸ See *id.*; 5 U.S.C. § 706 (1996). "Under the APA, agency action may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Premo*, 119 F.3d at 768 (citing 5 U.S.C. § 706(2)(A); *In re Transcon Lines*, 89 F.3d 559, 563 (9th Cir. 1996)).

²⁹ See *Premo*, 119 F.3d. at 772.

³⁰ *Id.* at 769.

³¹ *Id.* at 771.

³² See *id.* at 772.

First, the court held that the Eleventh Amendment is inapplicable to arbitration proceedings.³³ Conceptually, the State is protected because the Amendment bars both suits in federal courts by other states and suits by the State's own citizens.³⁴ Additionally, the court determined that nothing in the plain meaning of the text represented that the Amendment applies to arbitration awards.³⁵ However, the court found that the State had relinquished its Eleventh Amendment protection through waiving its sovereign immunity when it agreed to partake in the terms and conditions of the Act.³⁶ In reaching this conclusion, the court analyzed three separate circuit court decisions which have considered the question of whether the Eleventh Amendment applies to the Act.³⁷

The Sixth Circuit Court of Appeals, in *Tennessee Department of Natural Resources v. United States Department of Education*,³⁸ held that the Eleventh Amendment does not prevent an award of damages by an arbitration panel.³⁹ However, in coming to this conclusion, the Sixth Circuit found that the State had waived its immunity to such suits, holding that the Eleventh Amendment does not prohibit an arbitrator's award of retroactive damages against a state.⁴⁰ Waiver of a state's immunity occurs

³³ See *id.* at 769.

³⁴ See *Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890). Suit may also be barred even though the state is not a named party. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

³⁵ See *Premo*, 119 F.3d at 769.

³⁶ See *id.* “There are two well-recognized exceptions to the Eleventh Amendment protection from suits for damages. Congress can abrogate a state's Eleventh Amendment sovereign immunity without the consent of the state in certain instances, or a state can waive its immunity by consenting to suit in federal court.” *Id.* at 768 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)).

³⁷ See *Tennessee Dep't of Human Services v. United States Dep't of Educ.*, 979 F.2d 1162, 1165–1168 (6th Cir. 1992); *McNabb v. United States Dep't of Educ.*, 862 F.2d 81, 683–684 (8th Cir. 1988); *Delaware Dep't of Health & Soc. Services v. United States Dep't of Educ.*, 772 F.2d 1123, 1137–1138 (3d Cir. 1985).

³⁸ 979 F.2d 1162 (6th Cir. 1992).

³⁹ See *id.* at 1167. The court based its decision on the fact that at the time Congress passed the Act, they “surely [were] aware that arbitration panels routinely awarded retroactive relief.” *Id.* at 1165. The court noted, however, that “while the amendment may not prevent the arbitration panel from making the award, it will prevent a subsequent attempt to collect the award through the federal courts.” *Id.* at 1167.

⁴⁰ See *id.* at 1168.

when a state "opts to participate in a federal program in which Congress clearly has conditioned participation on such a waiver."⁴¹ It should be noted that the Sixth Circuit did not find the plain meaning of the Act to be a persuasive factor in its decision.⁴²

Interestingly enough, the court found its greatest difficulty in determining whether damages could be awarded, finding "no mention [in the Act] of retroactive liability or of states' liability for, or immunity from, damages."⁴³ As a result, the court held that the Eleventh Amendment does not prohibit the awarding of retroactive damages by "an Article I body."⁴⁴ However, the court distinguished between federal and private enforcement, holding that the Eleventh Amendment bars private enforcement by a federal court.⁴⁵

The *Tennessee* court seemed to have reached a somewhat inconsistent holding. The Sixth Circuit held that the Act allows the awarding of relief, but does not allow blind vendors to enforce the awards in federal court. If the federal statute allows for the awarding of relief, then it follows that such awards should be enforceable in federal court.

The Eighth Circuit Court of Appeals reached a different result in considering the Eleventh Amendment issue in *McNabb v. United States Department of Education*.⁴⁶ A divided panel determined that an award of compensatory damages would not be enforced, finding no authority under the Act for awarding retroactive damages.⁴⁷ However, the panel did find

⁴¹ *Id.* at 1166.

⁴² *See id.* at 1168. "The text of the Randolph-Sheppard Act reflects neither an unmistakable intention by Congress to abrogate the states' sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity." *Id.*

⁴³ *Id.* at 1168.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ 862 F.2d 681 (8th Cir. 1988).

⁴⁷ *See id.* at 683. Judge Doty determined that Congress intended for prospective relief to be awarded, but not retroactive relief. *See id.* at 687. Judge Fagg found that no relief whatsoever can be awarded under the Act. *See id.* at 683. Chief Judge Lay held that there could be an award of compensatory relief against a state agency: "I would hold both that the Act authorizes arbitration panels to assess compensatory damage awards against state agencies and that Congress has abrogated sovereign immunity for states which participate in the blind vendor program." *Id.* at 684.

that the Act was authorized to award prospective damages.⁴⁸ One judge held that the awarding of compensatory damages was authorized against a state.⁴⁹ Without a consistent and unified holding by the Eighth Circuit, though, *McNabb* is arguably not a very persuasive authority in resolving the issue at hand.

The *Premo* court also considered the Third Circuit's interpretation of the Act in *Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education, et al.*⁵⁰ The Third Circuit held that a blind vendor was entitled to compensatory damages awarded by an arbitration panel.⁵¹ The Third Circuit based its reasoning on the premise that Delaware had waived its sovereign immunity because "after full notice of the Act's requirements, one of which was an agreement to arbitration, it voluntarily made application with the Secretary to participate in the Randolph-Sheppard program."⁵² Additionally, the court found that there was an absence of textual support that the Act was to be "subject to the vagaries of state law."⁵³ Providing further support is that at the time of the amendment to the Act, compensatory relief awarded by arbitration panels was a common occurrence. If Congress wanted to change the Act it could have; instead, a state's waiver of sovereign immunity under the Eleventh Amendment is conditioned on participation in the program.⁵⁴ *Delaware* is important because the court determined that by voluntarily participating in the Act, the state waives any Eleventh Amendment protections, similar to *Tennessee*.

After the *Premo* court analyzed the aforementioned circuit cases addressing the Eleventh Amendment's effect on the Act, the court elected to follow the Sixth Circuit's opinion in *Tennessee*, holding that the Eleventh Amendment does not apply to arbitration proceedings under the Act.⁵⁵ The

⁴⁸ See *id.* at 683-684. Chief Judge Lay and Judge Doty were the two judges that found that "the arbitration panel is authorized to award prospective damages" *Id.*

⁴⁹ See *id.* at 684; see also *supra* note 47.

⁵⁰ 772 F.2d 1123 (3rd Cir. 1985).

⁵¹ See *id.* at 1136-1138.

⁵² *Id.* at 1138. The court further noted that "[t]he waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly." *Id.* For a further analysis by the Third Circuit as to the legislative history and statutory interpretation of the Act, see *id.* at 1125-1134.

⁵³ *Id.* at 1137.

⁵⁴ See *id.* at 1137-1138.

⁵⁵ See *Premo v. Martin*, 119 F.3d 764, 769 (9th Cir. 1997); see also *supra* notes

Premo court, in determining whether the arbitration panel had the authority to award compensatory relief on the text of the Amendment, found that because the Eleventh Amendment refers “to the ‘Judicial power of the United States,’ the Amendment on its face limits only the authority of Article III courts.”⁵⁶ Additionally, the court looked to the text of the Act, which provides for arbitration hearings for dissatisfied vendors.⁵⁷ The Act further declares that the results of such arbitration proceedings “shall be final and binding on the parties.”⁵⁸ Therefore, the *Premo* court, following traditional statutory construction and the decisions in *Tennessee* and *Delaware*, held that compensatory awards by arbitration panels are not precluded by the Eleventh Amendment.⁵⁹

Once the *Premo* court determined that arbitration panels have the authority to award compensatory relief, it proceeded to resolve whether such an award is enforceable in federal court.⁶⁰ Because waiver is a recognized exception to immunity under the Eleventh Amendment, the court analyzed the doctrine of waiver and whether the State had renounced its sovereign immunity.⁶¹ The test for determining whether a state has waived its sovereign immunity is if: “(1) the state expressly consents to suit; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state’s participation in a program or activity on the state’s waiver of immunity.”⁶²

From the facts of the case, the court determined that the first two elements of the test were inapplicable to the case at bar. However, in investigating the third element, the court found “overwhelming” evidence

38-45 and accompanying text.

⁵⁶ *Premo*, 119 F.3d at 769 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)). See also *supra* note 23.

⁵⁷ See *supra* note 9 and accompanying text. If a vendor’s grievance is not settled by a hearing, the states must “agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1” *Premo*, 119 F.3d at 769 (citing 20 U.S.C. § 107b(6)).

⁵⁸ 20 U.S.C. § 107d-1(a).

⁵⁹ See *Premo*, 119 F.3d at 769-770.

⁶⁰ See *id.* at 770-771.

⁶¹ See *id.*; see also *supra* note 36 and accompanying text.

⁶² *Premo*, 119 F.3d at 770 (citing *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995)). California’s counterpart statute to the Act provides that an arbitration decision “shall be final and binding on the parties except as otherwise provided in this act.” CAL. WELF. & INST. CODE § 19635 (West 1991).

that state participation in the Act was grounded “on consent to federal judicial enforcement of compensatory awards”⁶³ The State participated in the Act voluntarily, subject to the condition of arbitration as set forth in the Act.⁶⁴ Additionally, the text of the Act states that the decision by the panel “shall be subject to appeal and review as a final agency action for purposes of chapter 7 of [the APA]”⁶⁵ From a statutory analysis of the Act and its intersection with the APA, the Ninth Circuit determined that the State had clearly consented to the conditions of the Act, thereby waiving any immunity claims under the Eleventh Amendment.

The *Premo* court also analyzed the State’s due process claims, finding that the procedural decisions of the panel during the arbitration process complied with the provisions of the Act and the APA; therefore, the State’s claims were meritless.⁶⁶ The court held that “[b]ecause the State is not a ‘person’ for the purposes of the Fifth Amendment, the State’s reliance on the Due Process Clause was misplaced.”⁶⁷ For the purposes of analyzing the impact of *Premo*, however, the due process claims are a minor aspect of the significance of the case.⁶⁸

IV. CONCLUSION

The *Premo* court is the fourth circuit court to have examined the issue of whether an award of compensatory relief by Randolph-Sheppard arbitration panels is prohibited by the Eleventh Amendment. The Sixth

⁶³ *Premo*, 119 F.3d at 770. See also *supra* note 9 and accompanying text. For an explanation of participation in the Act, see *supra* note 5 and accompanying text.

⁶⁴ See *Premo*, 119 F.3d at 770.

⁶⁵ *Id.* (citing 5 U.S.C. §§ 701–706). The APA, in pertinent part, allows “for appeal and review under the APA, . . . [and] unequivocally guarantees that arbitration awards will be judicially enforceable.” *Premo*, 119 F.3d at 770 (citing 5 U.S.C. § 703). See also *supra* note 28 and accompanying text.

⁶⁶ See *Premo*, 119 F.3d at 771–772.

⁶⁷ *Id.* at 771 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–324 (1966)). The court noted that the State should have utilized the APA as the correct standard for judicial review. See *id.* The court went on to find that Martin’s panel member choice complied with the Act, that the panel was correct in denying the State’s motion for continuance and that the testimony introduced by Martin’s former attorney was appropriate. See *id.* at 771–772.

⁶⁸ See *id.*

Circuit, in the *Tennessee* case, held that the Eleventh Amendment does not prevent the awarding of damages by an arbitration panel.⁶⁹ The Eighth Circuit, in the *McNabb* case, reached a split decision, reflecting a lack of consensus, and providing little guidance in any analysis of the Eleventh Amendment and its affect on the Act.⁷⁰ The Third Circuit, in the *Delaware* case, held that a blind vendor is entitled to compensatory damages irrespective of the Eleventh Amendment, because the State had waived its sovereign immunity.⁷¹ With an obvious split in the circuits, and the absence of controlling authority from the Supreme Court, a definitive answer to this issue remains unavailable.

However, the *Premo* court's decision, holding that compensatory awards against a state are not prevented by the Eleventh Amendment, is a correct decision. First, upon examination, the direction of jurisprudence seems to be heading toward the awarding of compensatory relief by arbitration panels. By following *Tennessee* and *Delaware*, in which the courts found that the Eleventh Amendment protections were waived when states applied to partake in the Act, the *Premo* court followed a sound and logical precedent. Second, the very words of the Act state that an arbitration decision "shall be final and binding on the parties" in an action under the Act.⁷² The plain meaning of the Act mandates that arbitration decisions are binding, and that would include awards of compensatory relief. Finally, as a policy matter, a party should be entitled to compensation for injuries sustained. When the State has willingly agreed to comply with the terms and conditions of the Act, including arbitration, a party who is a victim of a wrongful state action within the parameters of the Act deserves to be restored by compensatory awards. These three factors support the *Premo* court's correct analysis of the issue.

Although there is a current lack of unanimity among the circuits concerning whether such awards against a state can overcome a state's immunity, notably the Eighth Circuit's failure to conclusively resolve the issue,⁷³ the *Premo* court followed a very logical, textual approach in its interpretation of the Act and the Eleventh Amendment. However, absent

⁶⁹ See *id.*

⁷⁰ See *supra* notes 46-48 and accompanying text.

⁷¹ See *supra* notes 50-54 and accompanying text.

⁷² 20 U.S.C. § 107d-1(a).

⁷³ See *supra* notes 46-48.

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any decision from the Supreme Court, for the near future these issues will have to be resolved case-by-case, circuit-by-circuit.

Nina M. Person

