No. 20-603

In the Supreme Court of the United States

LEROY TORRES, PETITIONER

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE THIRTEENTH JUDICIAL DISTRICT, CORPUS CHRISTI, TEXAS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the Veterans Programs Enhancement Act of 1998, Congress purported to authorize servicemembers to sue their state employers for discrimination on the grounds of military service in the State's own courts. Pub. L. No. 105-368, sec. 211, § 4323, 112 Stat. 3315, 3329-30 (codified at 38 U.S.C. § 4323 (2000)) ("1998 Act"). Though Congress did not specify on what it grounds it sought to abrogate state sovereign immunity, petitioner has acknowledged that the power must be derived from Article I of the Constitution. Just last term, however, this Court reaffirmed that while Article I's Bankruptcy Clause contains a limited waiver of sovereign immunity, *Congress* cannot abrogate state sovereign immunity using an Article I power. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020). The question presented is:

Whether the Texas Court of Appeals for the Thirteenth Judicial District correctly held that Congress may not abrogate state sovereign immunity under the Army, Navy, or Necessary and Proper Clauses.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

***Cases (ctd.)*:**

Page(s)

***Cases (ctd.)*:**

Page(s)

***Cases (ctd.)*:**

Constitutional Provisions and Statutes:

Page(s)

***Constitutional Provisions and Statutes (ctd.)*:**

Page(s)

***Constitutional Provisions and Statutes (ctd.)*:**

Page(s)

Other Authorities:

Page(s)

***Other Authorities (ctd.)*:**

Page(s)

***Other Authorities (ctd.)*:**

BRIEF IN OPPOSITION

In the late twentieth century, Congress amended the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-34 ("USERRA"), to permit servicemembers to sue their state employers for money damages in state court. Just last Term, this Court unequivocally held that Article I does not permit Congress to authorize such suits against a non-consenting State. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020). In so doing, the Court explicitly rejected the type of "'clause-by-clause' reexamination of Article I that [Torres] proposes." *Id.* at 1003. Though it ruled before *Allen*, the Texas Court of Appeals for the Thirteenth Judicial District correctly anticipated this holding and concluded that USERRA was unenforceable through a private right of action that is not otherwise authorized by state law. Pet. App. 15a.

Further review is neither necessary nor warranted. In ruling against Torres, the court of appeals joined every other court to have considered the issue since *Alden v. Maine*, 527 U.S. 706 (1999). Pet. App. 12a-15a (collecting cases). Indeed, Torres admits as much. *E.g.*, Pet. 3-4. His dire predictions that this rule leaves servicemembers without any remedy from States bent on discriminating against men and women who serve their country is without basis in fact or law. Cases of States discriminating against servicemembers are vanishingly rare. Moreover, both Texas and federal law afforded Torres numerous other remedies for any alleged discrimination. He simply chose not to use them. The petition should be denied.

STATEMENT

I. Statutory History and Background

A. Evolution of USERRA

During the Second World War, Congress passed the first federal statute addressing servicemembers' post-service employment. *See* Selective Training and Service Act of 1940, Pub. L. No. 76-783, ch. 740, 54 Stat. 885 ("1940 Act"). It provided that a returning servicemember was entitled to his previous position, or if that were unavailable, one "of like seniority, status, and pay." *Id.* § 8(b)(A)-(B). The 1940 Act created a private right of action, *id.* § 8(e), but it was extremely limited: It did not cover Reservists, *id.* §§ 3(b), 8(b); impose obligations on state employers, *id.* § 8(b)(C); or permit suit in state courts, *id.* §§ 8(e), 15(e). This statute was amended several times, but those amendments are not relevant here.

The framework that became USERRA began to take shape in the Veterans Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 ("1974 Act"). For the first time in this Nation's 200-year history, Congress sought to authorize damage suits against state—but not federal—employers for discriminating against servicemembers. *Id.* sec. 404, §§ 2021(a)(B), 2023. The cause of action was still limited to federal courts. *Id.* sec. 404, § 2022.

Congress passed USERRA along the lines of the 1974 Act in 1994: The new statute permitted damage suits against States, 38 U.S.C. § 4323 (1996), but *not* the federal government, *id.* § 4324-25. *Contra* Reservists Br. 19-20 (implying that USERRA applies equally to state and federal governments). And it limited suits against state employers to "[t]he district courts of the United States." *Id.* § 4323(c)(1)(A) (1996).

The provision at issue here was enacted following *Seminole Tribe of Florida v. Florida*, where this Court held that Congress may not use its Article I powers to abrogate States' immunity for suits in federal court. 517 U.S. 44, 64-65 (1996). Congress responded to this holding by amending USERRA to subject States to suit in *state court*. 1998 Act, Pub. L. No. 105-368, sec. 211, § 4323. Contrary to the repeated suggestions of petitioner and his amici, Congress did not make extensive findings that subjecting States to suit was necessary to provide a national defense. Indeed, as the court of appeals noted, the 1998 Act "was not, strictly speaking, enacted pursuant to Congress's war powers" at all, but instead is better read as passed "pursuant to the Necessary and Proper Clause." Pet. App. 11a.

One year after the 1998 Act was passed, however, this Court held in *Alden v. Maine* that "the powers delegated to Congress under Article I" do not include the power to subject nonconsenting States to private suits in state courts any more than in federal courts. 527 U.S. at 712. Indeed, the Court noted that allowing Congress to force States to submit to suit in their own courts would be "more offensive to state sovereignty than" permitting it "to authorize suits in a federal forum." *Id.* at 709. The Court expressly extended its ruling to laws passed under the Necessary and Proper Clause.[1]

[1] *Alden* recognized that Congress may abrogate sovereign immunity as necessary to enforce the Fourteenth Amendment. 527 U.S. at 756. But, as petitioner long ago conceded that such power cannot support USERRA, Pet. App. 9a, this brief does not address that power.

B. Available remedies to servicemembers

Though *Alden* foreclosed a private suit for damages directly under USERRA, servicemembers retain other options. *Contra, e.g.*, Pet. 30 (suggesting that no remedy would be available); Bobbitt Br. 21-22 (same).

1. USERRA itself authorizes the servicemember to file a complaint with the Secretary of Labor. 38 U.S.C. § 4322(a). The statute both obligates the Secretary to investigate complaints with an eye to informal resolution and empowers him with broad authority to abrogate that immunity. *Id.* §§ 4322(d), 4326(b)-(c). Where informal resolution proves impossible, a complaint may also be referred to the Attorney General, who may bring suit "in the name of the United States as the plaintiff." *Id.* § 4323(a)(1). Any "compensation [awarded] shall be held in a special deposit account" on behalf of the aggrieved servicemember. *Id.* § 4323(d)(2)(B).

2. Even absent USERRA's mechanisms, there are other federal remedies available. For example, the statute defines the servicemember's "employer" to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4303(4)(A)(i). If that person violates the requirements of USERRA, the servicemember may seek prospective relief under *Ex parte Young*, 209 U.S. 123 (1908). This would not provide the full panoply of damages available against a private employer. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). But "in many cases, injunctive relief may be the most important remedy" to a servicemember. Lt. Col. H. Craig Mason, *The*

Uniformed Services Employment and Reemployment Rights Act of 1994, 47 AIR FORCE L. REV. 55, 82 (1994).[2]

Texas law also provides servicemembers who are subject to discrimination options for relief. For example, like Congress, Texas's Legislature has provided that servicemembers are entitled "to return to the same employment" after military service. TEX. GOV'T CODE §§ 437.001(8), .204; *see also id.* §§ 613.001(3), .002(a) (addressing similar rights for public employees). If an employer refuses to comply, the aggrieved servicemember may file a complaint with the Texas Workforce Commission. *Id.* §§ 437.204(b), .402. Like the Secretary of Labor, the Commission is required to investigate the complaint and endeavor to resolve it informally. *Id.* §§ 437.404, .407. If that does not work, the Commission may seek injunctive relief against the employer, *id.* §§ 437.409, .415, .418; as well as compensatory or punitive damages, *id.* §§ 437.410(a), .416. For public employees, a district attorney is also empowered to seek "an amicable adjustment of the claim" or sue "to specifically require compliance." *Id.* § 613.022.

It is admittedly unclear how chapters 437 and 613 would be applied if they were ever to conflict. Because Texas is proud of and does not discriminate against returning veterans, respondent is aware of no Texas appellate-court decision applying *either* chapter 437 or 613 against a state employer.[3] In the unlikely event that the

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[2] This does not account for remedies available under other federal statutes should a State discriminate on the basis of a returning veteran's combat-related injury—*e.g.*, the Americans with Disabilities Act. *Contra* Reservists Br. 22.

[3] Indeed, Texas law *favors* returning veterans through various statutory preferences for public employment. TEX. GOV'T CODE ch. 657.

statute's other processes fail, the Texas Legislature has provided that servicemembers may themselves file suit under limited circumstances. TEX. GOV'T CODE §§ 437.412, 613.021(a).

II. Torres's Employment History

Petitioner LeRoy Torres enlisted in the U.S. Army Reserve in 1989. Pet. App. 73a. Roughly ten years later, he sought a position as a state trooper with the Texas Department of Public Safety ("DPS"). *Id.* Fully aware of his ongoing service obligations, DPS hired Torres and employed him without apparent incident for over ten years. RR.8.[4]

In 2007, the Army called Torres to active duty. Pet. App. 74a. Torres deployed to Iraq for one year before being honorably discharged. *Id.* During that year, Torres alleges he was exposed to toxic burn pits that harmed his lungs. *Id.*

When Torres returned from Iraq, he notified DPS that he intended to return to work. *Id.* Though DPS welcomed him back, Torres acknowledged that his respiratory condition prevented him from serving on the road as a state trooper. *Id.*; RR.7. DPS sought to employ him in an administrative position that might better suit his physical needs. Carson Frame, *Texas Supreme Court to Weigh In*, TEX. PUB. RADIO (Sept. 17, 2019), https://bit.ly/35adv5W. Though the petition strains (at 8) to describe this position as "temporary," Torres held this post for nearly two years. Frame, *supra.*

Even in this administrative role, however, Torres "often missed work." *Id.* Accordingly, his DPS supervisors

[4] "RR" refers to the Reporter's Record filed with the Texas Court of Appeals for the Thirteenth Judicial District in No. 13-17-00659-CV. "CR" refers to the Clerk's Record filed in the same case.

placed him on leave in 2010. *Id.* Torres asked DPS to employ him in a different capacity. *Id.* In 2011, DPS offered Torres another position on condition that he reported to work. Pet. App. at 74a-75a. Torres opted to resign instead. *Id.*; RR.25-26.

III. Procedural History

Rather than pursue one of the remedies discussed above, Torres waited five years to seek damages under USERRA. Pet. App. 72a; RR.5, 7-10. He alleged that DPS discriminated against him on the basis of his service in the U.S. Army by changing his employment status. Pet. App. 75a-78a. Moreover, he maintained that conditioning his continued employment on his reporting for duty amounted to "constructive discharge." RR.26.

DPS moved to dismiss on the grounds of sovereign immunity. CR.36-44. The trial court ruled in favor of Torres without reasoned opinion. Pet. App. 49a. DPS filed an interlocutory appeal. CR.135-37.

A divided court of appeals reversed for two reasons. *First*, the court held that DPS has immunity under federal law because Congress lacked the authority to do so under Article I, *id.* at 15a. Anticipating this Court's subsequent ruling in *Allen*, it rejected Torres's theory that this Court had overturned its *Alden* holding in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), in favor of a clause-by-clause analysis of Congress's ability to abrogate. *Compare* Pet. App. 12a-13a (describing *Katz* as limited to the Bankruptcy Clause); *with Allen*, 140 S. Ct. at 1003 (describing *Katz* as a "good-for-one-clause-only holding"). *Second*, the court of appeals recognized that DPS also has immunity under state law. Pet. App. 16a-18a. Without addressing the constitutional question, Justice Benavides dissented on the

ground that Congress had expressed a clear intent to abrogate the State's immunity. *Id.* at 22a-23a, 28a.[5]

Torres unsuccessfully sought en banc review in the court of appeals, *id.* at 47a-48a, and review before the Supreme Court of Texas, *id.* at 33a.

REASONS FOR DENYING CERTIORARI

This Court should deny review. Less than a year ago, this Court confirmed that, while Article I includes a limited waiver of state sovereign immunity in the form of the Bankruptcy Clause, it does not empower Congress to abrogate that immunity. *Allen*, 140 S. Ct. at 1003. Torres's claim does not fall within the bankruptcy waiver. And though DPS agrees that providing for a national defense was an important consideration at the Founding, so was sovereign immunity from civil suit. As Torres, his amici, and the United States have all recognized, every court to examine USERRA since *Alden* has held that Congress lacks power to abrogate sovereign immunity under its so-called "war powers." *E.g.*, Pet. 3-4; Reservists Br. 4; Brief for the United States as Amicus Curiae, *Clark v. Va. Dep't of State Police*, 138 S. Ct. 500 (2017) (No. 16-1043) ("*Clark Br.*") (arguing in response to CVSG that certiorari was unnecessary). It is unnecessary for this Court to grant review to reaffirm this unanimous and correct conclusion.

I. *Allen v. Cooper* Confirms That USERRA Did Not Validly Abrogate DPS's Sovereign Immunity.

Article I of the Constitution confers many important powers on Congress. But nowhere does Article I vest Congress with the power to strip a State of its immunity

[5] The majority expressly did not reach this statutory question. Pet. App. 6a n.1.

from suit—particularly in its own courts. *Allen* confirmed just last year that this rule applies to *any* Article I power. 140 S. Ct. at 1002. *Allen* also rejected Torres's view of *Katz* and, by extension, his theory of how this Court analyzes abrogation. *Id.* at 1003. Though the court of appeals ruled without the benefit of *Allen*, it correctly anticipated this Court's conclusions regarding the scope of *Katz* and dismissed Torres's claims.

A. Congress may not use its Article I powers to abrogate States' immunity from suit.

Twice in the last two Terms, this Court has reaffirmed that "States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *see also Allen*, 140 S. Ct. at 1000 (citing *inter alia Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). This immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713. Instead, it is "inherent in the nature of sovereignty." THE FEDERALIST No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Torres and his amici repeatedly insist that States have no sovereignty that could be implicated by USERRA because they ceded their powers to wage war and make peace to the federal government. *E.g.*, Pet. 22-23; Hirsch Br. 17-23. Not so. Sovereignty is not an all-or-nothing concept, and the Constitution's use of the word "States" shows that our founding charter "retained these aspects of sovereignty" except where the Constitution (as amended) strips them away. *Hyatt*, 139 S. Ct. at 1494. Ceding a general substantive power to Congress—whether it be to wage war or regulate commerce—does *not* cede control of the State's sovereign immunity

regarding the subject matter of that power. *Alden*, 527 U.S. at 713.

Even in the specific context of immunity from suit, this Court parses what rights a State surrendered more carefully than Torres suggests. The Constitution permits one State to sue another in this Court. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 84 (1907). And the federal government may sue a State in federal court (as USERRA contemplates). *See United States v. Texas*, 143 U.S. 621, 646 (1892). But a foreign nation may *not* sue a State. *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). This is true *even though* Article III specifically provides federal courts with jurisdiction over suits "between a State . . . and foreign States." U.S. CONST. art. III, § 2, cl. 1.

That is, in this context, the Court treats the Constitution as a type of contract: The States agreed to submit to the resolution of controversies with other contracting parties—*i.e.*, other States and the union they formed together. *Monaco*, 292 U.S. at 330. That consent is strictly construed and does not "run in favor of" non-parties to that compact such as individual persons or foreign States. *Id.* Nor does it run in favor of Indian tribes, *Blatchford*, 501 U.S. at 779-81, or federal corporations, *Smith v. Reeves*, 178 U.S. 436, 445-46 (1900).

"[N]otably lacking" from the terms of our founding charter "is any mention of Congress's power to abrogate the State's immunity." *Seminole Tribe*, 517 U.S. at 70 n.13. USERRA does not specify under what power Congress *thought* it was acting in abrogating sovereign immunity. Torres and his amici repeatedly point to Congress's general "war powers." *E.g.*, Bobbitt Br. 5-6; Hirsch Br. 15-16. But even if there were a "war powers" clause (and there is not), the power to declare war on another sovereign is not equivalent to the power to force

one sovereign to submit to the courts of another. *Cf.* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 14-15 (2017) (warning that the power to abrogate sovereign immunity is "a great and important power" in its own right). A court with jurisdiction can force a State to divert funds from priorities set by the State's popularly elected legislature, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977)—if not halt the activities all together, *e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). As a result, no less than the power to tax, the power to judge contemplates "a power to destroy." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819).

Properly speaking, Congress can never abrogate States' sovereign immunity by passing a statute under its Article I powers. Because sovereign immunity is inherent in the structure of the Constitution, it is not defeasible by simple statute. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (citing U.S. Const. art. VI). Any abrogation must therefore come from the text of Article I itself.

This Court has repeatedly rejected the proposition that the enumeration of powers abrogates state sovereign immunity over the relevant subject matter. It did so first in *Seminole Tribe*, where Congress purported to allow an Indian tribe to sue Florida under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. 517 U.S. at 47. The Court compared the long lineage of state sovereign immunity to the recent vintage of efforts to abrogate it. *Id.* at 71-72. And the Court unequivocally held that "Article I cannot be used to circumvent" state sovereign immunity in federal court. *Id.* at 83.

Because the statute in *Seminole Tribe* limited suit to federal court, Congress's initial response was to amend

a number of statutes (including USERRA) to waive sovereign immunity in *state* court. *E.g.*, 1998 Act, Pub. L. No. 105-368, sec. 211, § 4323. But this Court has since rejected that work around and held that "a congressional power to authorize suits against States in their own courts would be even more offensive to state sovereignty than a power to authorize suits in a federal forum." *Alden*, 527 U.S. at 709.

Since *Seminole Tribe* and *Alden*, this Court has repeatedly adhered to the rule that Article I does not authorize Congress to abrogate state sovereign immunity. *E.g.*, *Allen*, 140 S. Ct. at 1003; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000); *Fla. Prepaid Post-Secondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 636 (1999). The court below properly applied that line of precedent to hold that Congress lacked authority to abrogate DPS's sovereign immunity in USERRA.

B. Torres's argument depends on a view of *Katz* that this Court has rejected.

Torres argues (at 13) that this Court's repeated statement that "Congress lacks the power to abrogate sovereign immunity under its Article I powers" is nothing more than "nonbinding dicta." Instead, Torres insists (at 20), the "constitutional test announced by Alexander Hamilton" requires a clause-by-clause analysis of whether States permitted Congress to abrogate their immunity on a given topic. Though Torres tries to hide it,

this argument traces its origin entirely to *Katz*. Pet. 20-21.[6]

But this Court rejected Torres's view of *Katz* last year. In *Allen*, this Court recognized that "everything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism." 140 S. Ct. at 1002. Its reasoning derived from the Clause's "unique history," and the debtor- and estate-focused nature of the bankruptcy jurisdiction. *Id.* In particular, the Court noted the uniquely litigation-focused origin of the Clause, which arose because of the States' "refus[al] to respect one another's discharge orders." *Id.* (quotation marks omitted). Even in the presence of these factors, however, the Court did not find that Congress has the power to abrogate state sovereign immunity. *Contra* Pet. 20-21. Instead, "the Court found that *the Bankruptcy Clause itself* did the abrogating." *Allen*, 140 S. Ct. at 1003 (emphasis in original). Because nothing else in Article I was designed to "curb" the behavior of States in their own courts, *id.* at 1002, this Court "viewed bankruptcy as on a different plane," *id.* at 1003.

Torres does not attempt to argue that his claim falls on the plane recognized by *Katz*, and his arguments that *Katz* should be extended are foreclosed by *Allen*.

C. The Army and Navy Clauses did not waive state sovereign immunity.

"[E]ven if *Katz's* confines were not so clear," history, congressional practice and precedent "would still doom [Torres's] argument." *Id.*

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[6] This can be seen even more clearly in Torres's briefs below. *See, e.g.*, Petitioner's Brief on the Merits at 13-16, *Torres v. Tex. DPS* (Tex. Nov. 30, 2019) (No. 19-0107).

1. USERRA presents a threshold problem for conducting a plan-of-the-convention analysis: Congress did not invoke any particular power to subject States to civil suit. Torres and his amici try to obscure this problem by repeatedly referring to Congress's "war powers." *E.g.*, Pet. 2-3, 21-28; Reservists Br. 5-7. But Congress has no "vague, undefined, and undefinable 'war power.'" *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring). And this Court's precedent focuses on the constitutional text, including individual phrases within a clause, *not* the kind of vague characterization presented by petitioner. *Compare Seminole Tribe*, 517 U.S. at 47 (Indian Commerce Clause), *with Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989) (Interstate Commerce Clause).

Congress's so-called "war powers" should be no exception, because they represent a collection of specific powers, which (like other areas of the Constitution) are checked and balanced by powers held by others. These include the powers to declare War, U.S. Const. art. I, § 8, cl. 11; raise an Army, *id.* cl. 12; maintain a Navy, *id.* cl. 13; and (under certain conditions) to call forth and regulate State militias, *id.* cls. 14-15. At the same time, the President serves as the Commander in Chief of the Army and (on rare occasions) state militias. *Id.* art. II, § 2, cl. 1. It is the President who has the power to end a war by signing a treaty, subject to the approval of the Senate. *Id.* art. II, § 2, cl. 2. And militias, known today as the National Guard, remain under control of the States except when duly called into national service. *Perpich v. Dep't of Defense*, 496 U.S. 334, 347-48 (1990).

Each of these provisions conveys separate powers, subject to separate conditions, which were debated separately. 2 MAX FARRAND, RECORDS OF THE FEDERAL

CONVENTION OF 1787 312-33 (1966). As a result, if the Court were to walk back from *Allen* and adopt a clause-by-clause analysis of whether Congress may abrogate state immunity, it would need to account for the differences between the individual clauses and their respective histories.

This process is made nearly impossible because neither USERRA nor its associated legislative materials reference the phrases "raise and support an Army," "provide and maintain a Navy," "make rules" regarding the armed "Forces," or even "war powers." The court of appeals thought that the statute itself is best read as relying on the Necessary and Proper Clause—a conclusion that petitioner does not seem to challenge here. *See* Pet. App. 11a. If that is the power upon which Congress relied, then Torres's argument is foreclosed by *Alden*, 527 U.S. at 732. More fundamentally, the lack of clarity should count against abrogation. Neither States nor this Court should be left to guess as to why or how Congress has stripped States' "constitutionally secured immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

2. Even if USERRA were *not* passed under the Necessary and Proper Clause, there is no historical evidence supporting a plan-of-the-convention waiver of immunity applicable here. In other contexts, Congress has relied on the Army and Navy Clauses to pass regulations regarding the Reserves. *See* Cong. Res. Serv., *Reserve Component Personnel Issues* 6 (2020), https://fas.org/sgp/crs/natsec/RL30802.pdf. That would be consistent with USERRA's stated purpose "to encourage noncareer service in the uniformed services." 38 U.S.C. § 4301(a)(1). But the history of these Clauses does not even *hint* that in agreeing to ratify these Clauses,

States understood that they were subjecting themselves to private suit.

Indeed, unlike the Bankruptcy Clause, cross-state limitations on litigation and respect for the judgments of sister States' courts did not figure into the founding-era debates over the Army and Navy Clauses. Instead, the main topics of conversation were Congress's ability to create a standing army, its power to perpetually fund such an army, the remaining role of the state militias, and the availability of conscription. *E.g.*, FARRAND, *supra*, at 312-33. And far from delegating the type of all-encompassing power that Torres suggests, these debates reflect a desire to protect liberty by providing Congress only those powers it *needed* to provide an effective defense.

What would later become the Army and Navy Clauses were debated at the Philadelphia Convention on August 18, 1787. The Army Clause originally permitted Congress only to raise an Army, rather than to "raise and support armies" as it currently reads. *Id* at 329. Opponents of a strong army included Elbridge Gerry of Massachusetts, who witnessed firsthand the oppressions inflicted on colonial Boston and barely escaped the British as they marched on Lexington and Concord.[7] Gerry understandably expressed concerns about permitting Congress to maintain "standing armies in times of peace." *Id.* Supporters of a strong national government insisted that it was not practicable to wait "until[] an attack should be made" to begin raising troops. *Id.* at 330. Ultimately, the compromise was reached that Congress could maintain an army, but appropriations were limited

[7] *The Founding Fathers: Massachusetts*, National Archives, https://tinyurl.com/y5nc9jlb.

to two years. *Id.*; *id.* at 509. Nevertheless, the same issue remained contentious throughout the ratification debates. *Compare, e.g.*, Brutus No. 10, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 291 (Ralph Ketcham ed., 1986), *with* Statement of James Wilson, *in* 2 JONATHAN ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS 520-21 (1901).

During these debates, the role of the state militias was also discussed. Some suggested that Congress did not need the power to raise an army because it could call on those militias, FARRAND, *supra*, at 331; others that militias were not up to the task of defending such a large nation, *id.* at 332; *see also* THE FEDERALIST No. 24, at 157-58 (Alexander Hamilton) (Clinton Rossiter ed. 1961). In light of the Massachusetts militia's difficulties in suppressing Shay's Rebellion, there was general consensus that Congress needed to be able to set standards to reform militias. Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 43-45 (1998). But, contrary to Torres's assessment, there was no view that Congress was expected to exercise ultimate control over all things military. *Id.* at 49 (noting that Federalists dismissed concerns about congressional overreach precisely because "with very rare exceptions, [militias] would remain under the direct control of the states").

During the ratification debates, the Anti-Federalists also raised concerns that the Constitution might be read to give Congress the power to conscript soldiers, but even this did not feature heavily in the debates. Leon Freidman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1518-19 (1969). Then-President James Madison raised the issue

again when he proposed a draft during the War of 1812. Far from receiving universal acceptance as part of a plenary war powers, the bill was decried as "unconstitutional and illegal," by Daniel Webster, who urged "State Governments to protect their own authority over their own militia." Speech on the Conscription Bill, Dec. 9, 1814, *in* 14 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 68 (1903). This Court did not ultimately resolve the issue until World War I. *See generally Selective Draft Law Cases*, 245 U.S. 366 (1918).

At no time during these heated discussions of Congress's ability to create and support federal forces was the topic of civil litigation by servicemembers against States ever discussed—even though controversies over veteran compensation were well known in the early days of the Republic. *E.g.*, John P. Resch, *Politics and Public Culture: The Revolutionary War Pension Act of 1818*, 8 J. OF EARLY REPUBLIC 139, 140-41 (1988).

3. Early congressional practice accord with this more limited view of federal authority. After ratification, Congress almost immediately authorized the creation of federal forces. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, 95-96. A few years later, Congress passed a statute providing standards to promote uniformity of organization of the state militias which might be called into federal service. Act of May 8, 1792, ch. 33, 1 Stat. 271, 271-74. But it would be 150 years before Congress first regulated servicemembers' post-service employment rights by passing the 1940 Act, *supra* at 2-3.

The U.S. Army existed for nearly two centuries before Congress first purported to authorize damage suits against state employers in the 1974 Act, Pub. L. No. 93-508, sec. 404, §§ 2021(a)(B), 2022. It did not require States to submit to suit in their own courts until 1998—

209 years after Congress first created the Army. Congress still does not authorize the same remedy against a *federal* employer, 38 U.S.C. §§ 4324-25.

This history stands in sharp contrast to the "unique history" of "legislation considered and enacted in the immediate wake" of ratification to subject States to suit, which formed the backbone of this Court's decision in *Katz*. 546 U.S. at 369 n.9, 373. Put another way, there could have been no plan-of-the-convention waiver in Congress's so-called war powers because "the nation"—and the armed forces—"survived for nearly two centuries without" one. *Seminole Tribe*, 517 U.S. at 71.

4. Finally, this Court's precedent forecloses Torres's argument that USERRA validly abrogated DPS's sovereign immunity because Congress's "war powers" are "plenary and *exclusive*." Pet. at 2. In *Seminole Tribe*, this Court recognized that Congress's power under the Indian Commerce Clause is "exclusive," and its power under the Interstate Commerce Clause is "plenary." 517 U.S. at 60-62; *see also, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (noting that Indian tribes (and their relations to States) are subject to "plenary control by Congress"). That did not matter. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area," sovereign immunity "prevents congressional authorization of suits by private parties against [non]consenting States." *Seminole Tribe*, 517 U.S. at 72.

In re Tarble, 80 U.S. (13 Wall.) 397 (1871), is not to the contrary. Indeed, that case has nothing to do with whether States waived their immunity regarding lawsuits by servicemembers. It stands for the more prosaic proposition that a state court may not order the release of a federal prisoner based on the state court's view of

state law. *Id.* at 406-07. The crime in question was military desertion, but the same result would have occurred outside the military context. Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 267-68 (2007) (noting that the Court reached the same conclusion in a case from the same lower court in a nonmilitary context in *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858)).

In sum, review is not necessary because the court of appeals properly concluded that under this Court's binding caselaw—reaffirmed just last year—Congress lacked authority to authorize suit against a nonconsenting State in USERRA.

II. This Is Not a Good Vehicle to Resolve Whether Congress May Abrogate State Immunity Under Its "War Powers."

Even if this Court were inclined to revisit whether to adopt a clause-by-clause appraisal of Congress's ability under Article I to abrogate States' sovereign immunity, this would not be a good case to do so for two reasons. *First*, because Torres did not comply with the limitations that the Texas legislature imposed on the use of its courts, DPS remains immune under *state* law. *Second*, to the extent that Congress purports to override those limits, it has improperly sought to commandeer state courts to do its bidding. These issues were properly raised below. Brief for Respondents at 30-44, *Torres v. Tex. DPS* (Tex. Jan. 21, 2020) (No. 19-0107). The Texas Supreme Court did not need to reach them because the court of appeals properly applied *Alden*, but their existence counsels against review here.

A. DPS remains immune under Texas law.

Sovereign immunity is "an amalgam of two quite different concepts." *Alden*, 527 U.S. at 738 (quoting *Nevada v. Hall*, 440 U.S. 410, 414 (1979)). The first, discussed above, is the immunity that one sovereign affords in its courts to claims against another—in this instance, federal-law immunity to claims against a State in federal courts. *Hyatt*, 139 S. Ct. at 1499. The second is immunity that a sovereign derives from its "sole control" over "its own courts"—in this instance, Texas-law immunity to claims against Texas in Texas courts. *Alden*, 527 U.S. at 749. Because Torres sought to bring his claim against Texas in Texas courts, he must show that the Texas Legislature has provided jurisdiction over this claim. He has not.

It has long been established that a sovereign has the right "to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions." *Missouri v. Lewis*, 101 U.S. 22, 30 (1879); *accord* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 518 (2d ed. 1923). Moreover, "the state courts are not bound by . . . federal rules of justiciability even when they address issues of federal law." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Congress recognized this fact in USERRA by directing that plaintiffs bring their suits "in a state court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2).

Torres did *not* bring his claim in a court with jurisdiction and in accordance with the laws of Texas. Under Texas law, sovereign immunity is jurisdictional. *E.g.*, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550

(Tex. 2019); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Only the Legislature may waive state-law immunity. TEX. GOV'T CODE § 311.034; *see Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006).

In the lower courts, Torres relied on chapters 437 and 613 of the Texas Government Code to establish the necessary waiver of state-law immunity. The court of appeals rejected that argument. Pet. App. 16a-18a. With multiple good reasons: For example, assuming chapter 437 extends to this type of claim, Torres failed to comply with the statutory requirements to exhaust his administrative remedies and to receive "a notice of the right to file a civil action." TEX. GOV'T CODE § 437.412; Pet. App. 17a n.8. This failure defeats his claim because any "[s]tatutory prerequisites" to suit against a governmental entity "are jurisdictional requirements." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 511 (Tex. 2012) (emphasis omitted); *see also Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

It is no response to say that USERRA itself overrides this immunity as well. Congress generally lacks the power to force States to hear federal causes of action. *See Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also, e.g.*, *Claflin v. Houseman*, 93 U.S. 130, 141 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27-28 (1820). As a result, with respect to procedural rules, "federal law takes the state courts as it finds them." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954). The only limitation is that Texas's "rule[s] regarding the administration of the courts" must be neutral. *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 372 (1990). Texas may not "entertain[] similar state-law actions" while refusing a forum to federal-

law actions. *Id.* at 375; *see also Testa*, 330 U.S. at 394. Because Torres has never claimed that Texas has applied chapters 437 and 613 unequally to state- and federal-law claims, there is no ground to hold that Texas may not apply its own rules regarding immunity.[8]

Because state-law immunity forms a "separate, adequate, and independent grounds" for affirming the lower court's decision, this case is a poor candidate to resolve any lingering questions about DPS's federal-law immunity. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *see also* STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE 207-10 (10th ed. 2013).

B. Questions remain about whether USERRA unlawfully commandeers state courts and discriminates against States.

This suit is also a poor vehicle for the Court to address Congress's powers to abrogate state immunity because DPS raised, but the lower courts did not rule on, a separate constitutional fault with USERRA: It violates the Tenth Amendment by singling out state courts to hear USERRA claims, 38 U.S.C. § 4323(b)(2), and singling out state employers while leaving federal employers immune, *compare id.* § 4323, *with id.* §§ 4324-25.

Just three years ago, this Court reiterated that "[t]he Federal Government may not command the States' officers . . . to administer or enforce a federal regulatory program" because the Constitution "confers upon Congress

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[8] Because state-law remedies exist, this case also does not present an appropriate vehicle to address amici's concerns that a State might entirely deny a servicemember any remedy for alleged discrimination. *E.g.*, Bobbitt Br. 20-22. Texas has not done so. It has merely required servicemembers to seek informal remedies first in the hopes that the employment relationship might be salvaged—rather than be rendered unsalvageable through adversarial litigation.

the power to regulate individuals, not States." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476-77 (2018) (quotations omitted). Though federal law is "Supreme" and binds "the Judges in every State," U.S. CONST. art. VI, cl. 2, this "anticommandeering principle bars the commandeering of a [S]tate's judiciary" as much as it bars the coopting of state executives or legislatures. Richard A. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319, 321 (1998). That is, litigation is a recognized form of regulation. *See BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 585 (1996). State courts may be obliged to entertain federal-law claims on equal terms. *See Testa*, 330 U.S. at 394. But Congress has no "power to press a State's own courts into federal service to coerce the other branches of the State." *Alden*, 527 U.S. at 749, 754.

And coercing other state actors is precisely what USERRA seeks to do. According to amici, this Court should allow suits against the State precisely because Congress has not allocated sufficient resources to enforce USERRA systematically against all employers. Reservists Br. 26. Assuming that this view of USERRA is correct, it places the burden of policing employment discrimination against servicemen on state courts for the sake of pursuing Congress's goal of "encourag[ing] non-career service." 38 U.S.C. §§ 4301(a)(1), 4323(b)(2), (d).

USERRA's efforts "to commandeer the entire political machinery of the State against its will and at the behest of individuals" is made even worse by the fact that it has done so in a discriminatory fashion. *Alden*, 527 U.S. at 749. Congress has not waived immunity for federal employers even though one study cited by amici has found the federal government to be the "biggest offender" for USERRA violations. Jessica Vasil, *The*

Beginning of the End: Implications of Violating USERRA, 11 DEPAUL J. FOR SOC. JUST. 1, 1 (2018). This unequal treatment cannot be squared with the "fundamental principle of *equal* sovereignty" of the States. *Shelby County v. Holder*, 570 U.S. 529, 544 (2013). The lower courts did not reach this issue because the court of appeals correctly dismissed Torres's claims under *Alden.* But this open, dispositive question makes the case a poor candidate for review of the issue presented in the petition. *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam).

III. There Is No Need for This Court's Intercession.

Finally, review is unnecessary in light of the absence of any conflict among the lower courts and the near absence of state-sponsored discrimination against individuals who choose to serve their country—particularly in Texas.

The last time that a party presented the question whether USERRA may abrogate state sovereign immunity, this Court called for the views of the United States. The United States responded that review was "unnecessary" because, among other reasons, "no conflict exists on the question presented; and state-law rights and procedures may provide an alternative avenue for claims like the one here." *Clark* Br. at 6. Moreover, the United States observed, "[t]he relative scarcity of decisions on the question presented suggests that suits alleging that state agencies have failed to comply with USERRA and analogous state laws are rare." *Id.* at 13.

Nothing has changed in the three years since the Solicitor General wrote those words. The court of appeals simply joined every other court to have considered the question since *Alden.* Pet. 3. And state-sponsored discrimination remains from endemic. Indeed, amici cite the

lack of cases against a State for reasons why this Court should become involved. Reservists Br. 26. Specifically, amici argue that because the federal government has never sued a State to enforce USERRA, USERRA's remedial mechanisms are "illusory at best." *Id.* This argument presumes, however, that the Departments of Labor and Justice are callously turning away meritorious claims. Because the law has long presumed that public officials act in good faith, the proper inference from these statistics is that States are complying with USERRA. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918).

This inference is strengthened by the scarcity of court cases invoking USERRA's key provisions. As of January 25, 2021, a Key Cite search of Westlaw yields only 822 cases citing USERRA's anti-discrimination provision (38 U.S.C. § 4311), and 268 cases citing its provision guaranteeing reemployment (38 U.S.C. § 4312). The petition asserts (at 16) "10% of employed veterans ... work for their state or local government." Assume that each one of the 1,090 cases cited is unique, that every one of them is meritorious, and that they are spread proportionately across types of employers. That yields an estimated total of 109 cases citing USERRA against any state employer in the 27-year history of a statute—approximately 0.08 claims per year, per State.[9] Claims against Texas under its parallel laws are nonexistent. *Supra* at 5-6.

While discrimination against someone who served his country is never acceptable, this is simply not an instance

[9] Searching "USERRA" across all state and federal courts brings the total up to 1,739, but that still equates to an estimated 0.13 claims per State per year.

where the Court needs to become involved to resolve a non-existent conflict among lower courts or to ensure that 800,000 people are not left without a remedy. *Contra* Pet. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2021