No. 20-603

In the Supreme Court of the United States

LE ROY TORRES, PETITIONER

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
THIRTEENTH DISTRICT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Congress has the power to authorize suits against nonconsenting states pursuant to its constitutional war powers.

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OPINIONS BELOW

The order of the Supreme Court of Texas (Pet. App. 29a-43a) denying a petition for review is unreported. The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 583 S.W.3d 221. The trial court's order (Pet. App. 49a) is not reported.

JURISDICTION

The court of appeals entered judgment on November 20, 2018. Pet. App. 20a. The Supreme Court of Texas denied a timely petition for review on June 5, 2020. Pet. App. 33a. The petition for a writ of certiorari was filed on November 2, 2020, and granted on December 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the U.S. Constitution and the Uniformed Services Employment and Reemployment

Rights Act of 1994 (USERRA), are reproduced at Pet. App. 50a-71a.

STATEMENT OF THE CASE

This case is about the war powers, the powers the Constitution vests in the federal government to protect the United States' national security. These powers are broader and reach farther than the federal government's other powers, and they stem from a higher and more basic source, because without the ability to wage war effectively, the United States could not survive as a nation. The war powers have been used to conscript troops, detain enemies, impose curfews, create crimes, try crimes, modify state court procedural rules, toll statutes of limitations, settle legal claims, revive legal claims, establish provisional courts, create causes of action, take property without compensation, impose price controls, take over the Nation's essential infrastructure, order soldiers into battle, and in other ways.

The question in this case is whether Congress may authorize suits against nonconsenting states pursuant to these powers to protect the federal government's ability to raise and support armies. Specifically, the question is whether Congress may grant service members the right to sue state employers that discriminate against them on the basis of their military service even when the state has not consented to the suit. It can. Nonconsenting states are generally immune from suit, but they surrendered their immunity from suits authorized by the war powers when they ratified the Constitution. The Constitution's text, structure, and history show that the war powers confer on Congress the powers to raise and support armies and to wage war successfully, and that those powers include the power to authorize suits against nonconsenting states when necessary to achieve those ends. The court below erred in holding otherwise, and its decision should be reversed.

A. Constitutional Background

The Constitution confers "war powers" on the federal government to ensure its ability to carry out its primary responsibility of protecting the United States. These powers are rooted in the Constitution's text, but also in the fundamental postulate that the national government must have these powers to ensure the nation's external sovereignty, prevent war by and between the states, and maintain the supremacy of federal law. A key aspect of the war powers is the power to raise and support an army and navy. The Court has long recognized that the power to raise and support armies, like the power to wage war itself, is broad and sweeping.

1. A basic purpose of the Constitution was to "provide for the common Defence."[1] Art. I, § 8, cl. 1. To that end, the Framers conferred on Congress and the President several powers which have come to be known as the "war powers." Congress's war powers make up almost half of the enumerated powers in Article I, section 8. "[O]ut of seventeen specific paragraphs of congressional power [in Article I, section 8], eight of them are devoted in whole or in part to specification of powers connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). They include the enumerated powers in clauses 1, 10 to 16, and 18. *See Ex parte Quirin*, 317 U.S. 1, 25-26 (1942); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 212 n.15

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[1] *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010); *Wayte v. United States*, 470 U.S. 598, 612 (1985) ("[T]he Framers listed 'provid[ing] for the common defence' [in the Preamble] as a motivating purpose for the Constitution . . . ."); *United States v. Macintosh*, 283 U.S. 605, 622-23 (1931) ("The Constitution . . . wisely contemplating the ever-present possibility of war, declares that one of its purposes is to 'provide for the common defense.'"), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946); *see also The Federalist* No. 23, at 153 (Alexander Hamilton) (C. Rossiter ed., 1961); *id.* No. 41, at 256 (James Madison).

(1963) (Stewart, J., dissenting). Specifically, Article I, section 8 provides:

> The Congress shall have Power . . . to . . . provide for the common Defence . . .
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Art. I, § 8, cls. 1, 10-16, 18.

The war powers also include powers vested in the President. These powers appear in Article II, section 1, clause 1; Article II, section 2, clause 1; and Article II, section 3. *Ex parte Quirin*, 317 U.S. at 26. In addition to the clause vesting "[t]he executive Power" in the President, relevant sections and clauses of Article II provide:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .
>
> . . . he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Art. II, § 1, cl. 1; art. II, § 2, cl. 1; art. II, § 3.

The war powers also include additional powers not expressly enumerated but that arise by necessary implication from the structure of the constitution and the nature of the federal government. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 34 (2015) (Thomas, J., concurring in part). As the Court has explained, "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 3118 (1936). Rather, "[a]s a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."[2] *Burnet v. Brooks*, 288 U.S. 378, 396 (1933).

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[2] *See Perez v. Brownell*, 356 U.S. 44, 57 (1958) (similar); *Fong v. United States*, 149 U.S. 698, 711 (1893) (similar); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (similar); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 556 (1871) (Bradley, J., concurring) (similar); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796) (Chase, J.) (similar); *Penhallow v. Doan's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-81, 92-96 (1795)

Thus, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Curtiss-Wright*, 299 U.S. at 318. "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family." *Id.* "Otherwise, the United States is not completely sovereign." *Id.*

2. The Court has recognized the depth and breadth of Congress's war powers on numerous occasions, both individually and in combination. *See Rostker v. Goldberg*, 453 U.S. 57, 65 (1981). The Court has said that the war power "is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (quoting John Quincy Adams), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). "From *its very nature* the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law." *Id.* (emphasis added). These "drastic

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(Paterson, J.); *see also Brown v. United States*, 12 U.S. (8 Cranch) 110, 150-51 (1814) (Story, J., dissenting) ("The power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of congress. The authority to grant letters of marque and reprisal, and to regulate captures, are ordinary and necessary incidents to the power of declaring war. It would be utterly ineffectual without them. The expression, therefore, of that which is implied in the very nature of the grant, cannot weaken the force of the grant itself.").

powers" are necessary "[t]o the end that war may not result in defeat." *Id.*[3]

The war powers are substantial because they exist to protect the national security of the United States. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)). "The national security, after all, is the primary responsibility and purpose of the Federal Government." *Id.* "[B]ecause the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation." *Id.*

This Court has opined that "[t]he war power of the national government is 'the power to wage war successfully.'" *Lichter v. United States,* 334 U.S. 742, 767, n.9, 780-81 (1948) (quoting Charles Evan Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238

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[3] *See also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) ("Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success . . . ."); 1 George Sutherland, The Constitutional Power and World Affairs 96-97 (1919) ("The power to declare war includes every subsidiary power necessary to make the declaration effective . . . . [T]he power to proceed to the last extremity [is] . . . a power that . . . admits of no limitations . . . except as such as are of a more vital character than the imperious necessity with which they compete . . . ."); 2 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1212 (1910) ("[C]onstitutional power . . . to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion.").

(1917)); *see Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (same). This power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict." *Hamdi*, 542 U.S. at 587 (2004) (Thomas, J., dissenting) (quoting *In re Yamashita*, 327 U.S. 1, 12 (1946)). And, quoting Alexander Hamilton in *The Federalist* No. 23, the Court has said that this power

> ought to exist without limitation . . . *[b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Loving v. United States, 517 U.S. 748, 767 (1996) (quoting *The Federalist* No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis in original). "The later-added Bill of Rights limited this power to some degree," but it "did not alter the allocation to Congress of the primary responsibility for the delicate task of balancing" individual rights "against the needs of the military." *Id.* (quotation marks omitted); *see also Rostker*, 453 U.S. at 67 (the Constitution's "tests and limitations . . . may differ because of the military context").

Thus, under the war powers, this Court has sustained takeover and operation of the railroads, *Northern Pacific Railway Co. v. North Dakota*, 250 U.S. 135, 141-42, 150-51 (1919); takeover and operation of systems of communications, *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, 179-80, 183 (1919); regulation of maximum prices, *Highland v. Russell Car & Snowplow Co.*, 279 U.S. 253, 258-59 (1929); imposition of rent controls, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 140-41 (1948); the criminalization of speech that constitutes

material support to terrorists, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010); the tolling of state statutes of limitations, *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1871); the taking and destruction of property without compensation, *United States v. Caltex*, 344 U.S. 149, 152-54 (1952); and the trial of enemy combatants by military commission, *Hamdan v. Rumsfeld*, 548 U.S. 557, 591-92 (2006). The Court has also sustained the power of the President to eliminate outstanding claims by American citizens against foreign governments to reduce "'friction' between the two sovereigns." *Dames & Moore v. Regan*, 453 U.S. 654, 679-80, 683 (1981).

3. With respect to the specific power of raising and supporting armies, "[t]his Court has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies." *Rostker*, 453 U.S. at 65 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)). "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Quoting Lincoln, the Court has endorsed the proposition that the constitutional power to raise and support armies "is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution, without an 'if.'" *Lichter*, 334 U.S. at 756 n.4 (quoting Abraham Lincoln, *Opinion on the Draft*, Aug. 15, 1863, *in* 2 Abraham Lincoln: Complete Works 388, 389 (John G. Nicolay & John Hay eds., 1920)).

The Court has thus upheld, among other measures, the compulsory draft of persons to serve in the armed forces, *Arver v. United States*, 245 U.S. 366, 377 (1918), the criminalization of knowingly altering a draft card, *O'Brien*, 391 U.S. at 370, 386, a ban on political speeches

by civilians on a military base, *Greer v. Spock*, 424 U.S. 828, 837-838 (1976), the criminalization of prostitution in military areas, *McKinley v. United States*, 249 U.S. 397, 398-99 (1919), and a prohibition on the sale of liquor for beverage purposes nationwide, *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 154, 157 (1919).

4. Sovereign immunity is an aspect of state sovereignty that protects states from suit without their consent except in limited circumstances. The doctrine derives from the fact that the states generally entered the federal system "with their sovereignty intact" and immunity from suit without consent was a "fundamental aspect" of that sovereignty. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (quotation marks omitted).

The Court has held that the Constitution typically does not permit the federal government to abrogate state sovereign immunity pursuant to its Article I powers. The Constitution does not permit the federal government to abrogate the states' immunity from suit pursuant to the Intellectual Property Clause, the Interstate Commerce Clause, or the Indian Commerce Clause. *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Alden v. Maine*, 527 U.S. 706, 754 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). And the language that the Court has used to describe the limits of Article I was sometimes broad. In *Seminole Tribe*, the Court stated that "Article I cannot be used to circumvent" state sovereign immunity. 517 U.S. at 73. In *Alden*, the Court stated that "States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Alden*, 527 U.S. at 754.

But the Court has consistently reiterated that—including under Article I—"a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" *PennEast*, 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 728); *see Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934)).[4] The "plan of the Convention" "includes certain waivers of sovereign immunity to which all States implicitly consented at the founding." *PennEast*, 141 S. Ct. at 2258. The Court has recognized such waivers in the context of eminent domain, bankruptcy proceedings, suits by other States, and suits by the federal government. *PennEast*, 141 S. Ct. at 2263 (eminent domain); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (suits in bankruptcy); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904) (suits by other states); *United States v. Texas*, 143 U.S. 621, 646 (1892) (suits by the United States). The Court has never considered whether the states surrendered their sovereign immunity to suits authorized by the war powers in the plan of the Convention.

B. Statutory Background

Knowing that protecting veterans as they return from duty is critical to ensuring its ability to raise and support armies and otherwise wage war effectively, over the past 80 years Congress has consistently expanded protections for veterans reentering the workforce. Congress enacted those protections "to compensate for the disruption of careers and the financial setback that military service meant for many veterans." 140 Cong.

[4] Congress may also abrogate state sovereign immunity under the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), assuming it does so with the requisite clarity, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003).

Rec. 14408 (June 27, 1994) (statement of Sen. Rockefeller).

1. Congress's efforts began in the midst of World War II, when it established a right to reemployment for draftees and voluntary enlistees to ensure they could not be punished for "serv[ing] their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see* Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, 890. Congress recognized that some servicemembers worked for state and local government employers and declared as "the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay." 54 Stat. at 890.

In the decades after the war, Congress extended reemployment rights to reservists and National Guard members, whom Congress described as "essential to our national defense." H.R. Rep. No. 89-1303, at 3 (1966). Congress also expanded substantive protections to prohibit employment discrimination on the basis of military service—discrimination that by the late 1960s had "become an increasing problem." S. Rep. No. 90-1477, at 2 (1968).

Congress further enhanced protections for servicemembers during the Vietnam War. *See* Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974). In the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Congress concluded that its earlier approach had proven insufficiently protective and authorized servicemembers to sue states in federal court to enforce the Act. *See* 88 Stat. at 1594-96. Congress found that expansion necessary to protect the many servicemembers and veterans who had also chosen to serve the public in civilian life as "school teachers, policemen, firemen, and other State, county, and city employees." S. Rep. No. 93-907, at 109-10 (1974) ("[S]ome State and local jurisdictions

have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Or if they do, they seem unwilling to grant them seniority or other benefits which would have [accrued] to them had they not served their country in the military.").

2. In the wake of the Persian Gulf War, Congress enacted USERRA to "restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law" while correcting judicial misinterpretations. 137 Cong. Rec. 11313, 11315 (May 16, 1991) (statement of Sen. Cranston). USERRA aimed to "clarify and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." 137 Cong. Rec. 10701-03 (May 14, 1991) (statement of Rep. Penny); *see* 137 Cong. Rec. 11313-16 (May 16, 1991) (statement of Sen. Cranston).

Congress enacted USERRA, like the statute's predecessors, pursuant to its constitutional war powers. *See* 144 Cong. Rec. H4458 (1998) (statement of Rep. Evans) (noting that "the authority for laws involving veterans benefits is derived from the War Powers clause").

USERRA establishes broad substantive protections for servicemembers, including the right to take military leave from civilian jobs, to be promptly reemployed upon return from service, and to be free from discrimination based on military service. 38 U.S.C. §§ 4311-4313, 4316. For servicemembers who incur disabilities during their military service, USERRA requires employers to make reasonable efforts to accommodate those disabilities and to rehire the servicemembers in the position they would have held but for their military service or in a position of equivalent "seniority, status, and pay." 38 U.S.C. § 4313(a)(3); *see* 20 C.F.R. § 1002.225.

An employee who has suffered discrimination in violation of USERRA may bring an action against his or

her employer for damages and equitable relief. 38 U.S.C. § 4323. Unlike most federal employment statutes, USERRA applies to private- and public-sector employers of all sizes, including federal, state, and local governments. § 4303(4).

3. Shortly after USERRA's enactment, this Court held in *Seminole Tribe*, 517 U.S. at 76, that Congress's powers under the Indian Commerce Clause of Article I do not include the power to subject state governments to suit in federal court. Congress responded by amending USERRA to expressly authorize suit against state employers in *state* court. *See* Pub. L. No. 105-368, § 211 (Nov. 11, 1998). USERRA now provides that, "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). The purpose is "to assure that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA" and "to preclude a defense of sovereign immunity" "in an action brought under this chapter." H.R. Rep. No. 105-448, at 5-6 (1998).

C. Factual Background

The Reserve and National Guard are components of the armed forces that allow soldiers to perform part-time military service while still leading a civilian life. *Reserve Component Personnel Issues: Questions and Answers*, Cong. Res. Serv. 4 (Nov. 2, 2021), https://bit.ly/3KEY4IX. The Reserve and National Guard have more than one million members and represent nearly half of the total U.S. military force. *See Defense Primer: Reserve Forces*, Cong. Res. Serv. 2 (Jan. 28, 2021), https://bit.ly/3AoOcye (1 million in the Ready Reserve); *Defense Primer: Military Enlisted Personnel*, Cong. Res. Serv. 1 (Dec. 1, 2021), https://bit.ly/32pdTC3 (1.1 million enlisted in the

active duty military). Soldiers in the Reserve complete the same training as active-duty soldiers and stand ready, "in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components." *Reserve Component Personnel*, *supra*, at 1 (quoting 10 U.S.C. § 10102).

Petitioner Le Roy Torres enlisted in the U.S. Army Reserve in 1989. Pet. App. 73a. For 18 years, he served as an Army reservist, nine of those years while employed as a state trooper for the Texas Department of Public Safety. *Id.* at 73a-74a. Petitioner, at this point a Second Lieutenant, was called to active duty in November 2007 and subsequently deployed to Iraq. *Id.*

While deployed, petitioner, like thousands of fellow soldiers serving in Iraq, suffered lung damage after being exposed to toxic fumes emanating from the now-infamous "burn pits." Pet. App. 74a. These huge open-air pits smoldered 24 hours a day on many military bases, spouting thick, black smoke as they burned everything from trash, to ammunition, to medicine, to human waste. *See* Peggy McCarthy, *Toxic Exposure on Army Bases Sparks Battle for Health Benefits*, Associated Press (May 14, 2019), https://perma.cc/YH32-4LHS; James Risen, V*eterans Sound Alarm Over Burn-Pit Exposure*, N.Y. Times (Aug. 6, 2010), https://nyti.ms/31wbCyz.

Petitioner was honorably discharged a year after his deployment. Pet. App. 74a. When he returned to Texas, petitioner notified the Texas Department of Public Safety of his intent to be reemployed. *Id.* He explained that his lung damage prevented him from performing all of his previous duties as a Texas state trooper. *Id.* Petitioner thus requested to be placed in a different position within the Department. *Id.* He meanwhile received a diagnosis of constrictive bronchiolitis—a devastating respiratory

condition that causes narrowing of the airways and difficulty breathing. *Id.*; *see* Matthew S. King et al., *Constrictive Bronchiolitis in Soldiers Returning from Iraq and Afghanistan*, 365 New Eng. J. Med. 222, 224 (2011).

The Department declined petitioner's requested accommodation. It instead offered him a temporary position in his previous capacity as a state trooper and informed him that he would be fired if he did not report to duty. Pet. App. 74a-75a. Rather than take on duties he could not perform, petitioner resigned. Pet. App. 75a. Petitioner and his wife Rosie have since co-founded a nonprofit organization, Burn Pits 360, which for over a decade has advocated for servicemembers and families of servicemembers injured by toxic burn pits while serving their country.[5]

D. Proceedings Below

1. On May 25, 2017, Petitioner filed suit against the Department of Public Safety seeking declaratory and monetary relief under USERRA. Pet. App. 79a. Petitioner alleged that the Department violated USERRA by failing to offer him a job after his return from active duty that would accommodate his disability. Pet. App. 75a-78a. The Department moved to dismiss for lack of jurisdiction. *Id.* at 49a. Acknowledging that USERRA expressly allows individuals to sue Texas in state court, the Department nevertheless contended that Texas had sovereign immunity from suit under USERRA. Clerk's Record at 40-44. Following a hearing, the trial court denied the Department's motion. Pet. App. 49a.

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[5] *See* Statement of Le Roy Torres, *An Assessment of the Potential Health Effects of Burn Pit Exposure Among Veterans: Hearing Before the Subcomm. on Health, H. Comm. on Veterans' Affs.*, (2018), https://bit.ly/35mJCkO; *About Burn Pits 360*, Burn Pits 360, https://bit.ly/34fHeNo.

2. A divided court of appeals reversed. The court held that USERRA was unconstitutional insofar as it authorized suits against states because Congress lacks the power to abrogate sovereign immunity pursuant to its war powers. Pet. App. 15a. The court of appeals read *Seminole Tribe* and *Alden* as foreclosing Congress from abrogating state sovereign immunity using any of its Article I powers, including its war powers. *Id.* at 7a-11a. The court viewed as irrelevant this Court's later decision in *Katz*, 546 U.S. 356, which held that Congress has the power to authorize suits against nonconsenting states pursuant to its Article I Bankruptcy Power. Pet. App. 12a-13a.

Justice Benavides dissented. Pet. App. 21a-28a. "Congress," she explained, "intended to protect citizens who served our country in suits against a state when they were discriminated against by an employer upon returning from combat." *Id.* at 23a. Yet the majority left "our armed forces [with] no remedy in state courts when they have faced employment discrimination from a state agency due to their service to our country." *Id.* at 22a. Petitioner moved for rehearing en banc, which the court denied over two dissents. *Id.* at 47a-48a.

On February 22, 2019, petitioner sought review in the Supreme Court of Texas. The court requested full briefing on the merits before denying review on June 5, 2020. Pet. App. 33a, 44a-46a.

SUMMARY OF ARGUMENT

I. Congress has the power to authorize suits against nonconsenting states pursuant to its war powers.

A. States typically retain immunity from suits, but "a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" *PennEast*, 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 728).

The Constitution's text and structure show that the states relinquished their sovereignty in the context of the war powers. The war powers clauses exclusively delegate military matters to the national government. The Constitution also expressly divests the states of several of these powers. And in the narrow circumstances where aspects of selecting and training personnel for the Militia are shared with the states, they are shared expressly.

Moreover, the war powers by their nature required the states to relinquish their sovereignty. These powers are uniquely national in scope, purpose, and consequence. The Constitution made national defense and foreign affairs quintessentially federal zones where the nation would act with singular purpose. Vesting individual states with the power to interfere with war making would not have merely inconvenienced the other states, it could have put their existence and the existence of the union in jeopardy. The Constitution therefore divested the states of their sovereignty when it came to the war powers.

The history of the understanding of the war powers immediately preceding and following the ratification of the Constitution confirms that the states understood that they relinquished their ability to assert sovereign immunity as a defense to suits authorized by the war powers. Article III and the Eleventh Amendment were written to permit Congress to authorize suits against nonconsenting states when necessary to prevent the outbreak of renewed hostilities with a foreign power due to state noncompliance with treaty obligations.

The history of the uses of the war powers throughout United States history further confirms that the states relinquished their sovereignty when it came to the war powers. The war powers have been used in ways that trench on state sovereignty to a degree no other federal powers ever have or could. And in the specific context of state court jurisdiction and sovereign immunity, the

national government has used these powers in similarly expansive ways, including by creating an entire provisional state court system.

Two historical precedents are particularly telling. The United States has for over a century tolled state statutes of limitations for state court causes of action against the states themselves pursuant to its war powers apparently without ever confronting an assertion of sovereign immunity. Additionally, since 1833, seventy-five years before this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), Congress has authorized federal military officers to sue for writs of habeas corpus in federal court when detained by states in the course of their duties, apparently without provoking assertions of sovereign immunity. These exercises of the war powers show that the states have long understood that they surrendered their immunity to suits pursuant to the war powers in the plan of the Convention.

B. The Court's precedents support a finding that the states agreed in the plan of the Convention to surrender their sovereign immunity to suits authorized by the war powers. The evidence and arguments for a plan of the Convention waiver here are as strong as they were in the context of the bankruptcy power in *Katz*, 546 U.S. 356 and the eminent domain power in *PennEast*, 141 S. Ct. 2244.

The Court's broad statements about "Article I" powers in *Seminole Tribe*, 517 U.S. at 73 and *Alden*, 527 U.S. at 712, do not change the result in this case. The war powers are not the kind of "Article I" powers those cases were referring to; the Court held in *Katz* that those general statements were "dicta" it was not "bound to follow" and recognized in *Allen* that those cases stated a "general rule," not an absolute one; and, as the Court explained in *PennEast*, because this case involves a plan of the Convention waiver and not the abrogation of the

states' immunity, the discussion in those cases does not apply.

II. Permitting states to assert sovereign immunity in this context would damage the ability of the United States to provide for the national defense and harm thousands of veterans. The reserve components of the United States military, including the National Guard and the Army Reserve, are key elements of the national government's plan to meet the evolving national defense needs of the twenty-first century. That plan requires that soldiers be able to hold dual-employment in the Guard and Reserves while also working for state employers without being penalized for their service. Permitting state employers to discriminate against soldiers for their military service will materially interfere with the ability of the United States to provide for the national defense. It will also harm thousands of veterans and servicemembers, leaving them without a remedy when their state employers discriminate against them on the basis of their service. These consequences cannot have been what the Framers contemplated in the summer months of 1787 when they conferred the war powers on the national government.

ARGUMENT

I. THE STATES SURRENDERED THEIR SOVEREIGN IMMUNITY TO SUITS AUTHORIZED BY THE WAR POWERS IN THE PLAN OF THE CONVENTION

The states relinquished their sovereign immunity against suits authorized pursuant to the war powers in the plan of the Convention. The Constitution's text, structure, original understanding, and history all show that to be true. The logic of this Court's precedents dictate the same result.

A. The Constitution's text, structure, and history confirm that states ceded their sovereign immunity in the plan of the Convention

Notwithstanding the doctrine of sovereign immunity, "a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" *PennEast*, 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 728). The question is whether consent to suits under a particular power is "inherent in the constitutional plan" and reflects the "fundamental postulates implicit in the constitutional design." *Id.* at 2259, 2261-62 (quotation marks omitted). The Court has looked to "history, practice, precedent, and the structure of the Constitution" to determine whether states surrendered their immunity when they entered the constitutional compact. *Alden*, 527 U.S. at 741. Following these guideposts, the war powers satisfy the plan of the Convention test.

1. *Text and Structure.* "The Framers of the Constitution paid careful attention to the allocation of war powers between the national government and the states, and within the national government." *Bahlul v. United States*, 840 F.3d 757, 762 (D.C. Cir. 2016) (Kavanaugh, J., concurring). "The Framers assigned the national government—in particular, Congress and the President—the authority to make wartime decisions on behalf of the United States." *Id.* "The Framers assigned that power to the national government in part because the inability to wage war effectively had been one of the key weaknesses of the Articles of Confederation, and the Framers sought to fix that flaw." *Id.*

The Constitution thus provides Congress with specific, sweeping, textually enumerated powers that leave no doubt about the national government's exclusive role in war making. As the Court explained in *Barron v. City of Baltimore*, the question of the relationship of the

federal government to the states with respect to the war powers "is not left to construction. It is averred in positive words." 32 U.S. (7 Pet.) 243, 249 (1833).

The Constitution confers on Congress the powers "To declare War," Art. I, § 8, cl. 11, "To raise and support Armies," cl. 12, "To provide and maintain a Navy," cl. 13, "To make Rules for the Government and Regulation of the land and naval Forces," cl. 14, "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," cl. 15, and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress," cl. 16.

The Constitution also divests the states of several of these powers. It provides: "No State shall enter into any Treaty, Alliance, or Confederation" nor "grant Letters of Marque and Reprisal." Art. I, § 10, cl. 1. It further provides: "No State shall, without the Consent of Congress ... keep Troops, or Ships of War in time of Peace, ... or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Art. I, § 10, cls. 2, 3. The Constitution grants the states a limited role in relation to the Militia, but ultimate control is vested in Congress and the President. *See* Art. I, § 8, cls. 15, 16; *Perpich v. Dep't of Def.*, 496 U.S. 334, 351-54 (1990).

And unique among the federal government's powers, the Constitution requires Congress to exercise the war powers. In the same Clause in which the Constitution "guarantee[s] to every State in this Union a Republican Form of Government," it mandates that the United States "*shall* protect each [state] against Invasion; and on Application [from the state] ... against domestic Violence." Art. IV, § 4 (emphasis added).

As a consequence of the foregoing textual commitments, this Court has recognized that the war powers are exclusively federal. *See Perpich*, 496 U.S. at 353; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-59 (1832); *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-81, 95 (1795) (Paterson, J.). As the Court recognized shortly after the Founding, and in numerous cases thereafter, "[t]he whole powers of war" are "by the constitution of the United States . . . vested in congress." *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).[6]

Thus, unlike the Commerce Clause and many other clauses of Article I, power over military policy resides solely in the federal government. States can legislate to protect the "writings" and "discoveries" described in the Intellectual Property Clause unless Congress preempts their efforts. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974). And under the commerce powers, the Federal and state governments share "concurrent" power to regulate—i.e. states may regulate commerce subject only to certain "boundaries" defined by this Court. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089-91 (2018). Congress even has the power to enable states to regulate beyond those boundaries. *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

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[6] *See also Fong v. United States*, 149 U.S. 698, 711-12 (1893) (similar); *Ex parte Virginia*, 100 U.S. 339, 354-55 (1879) ("[T]he common government . . . was granted exclusive jurisdiction over external affairs, including the great powers of declaring war, making peace, and concluding treaties . . . ."); *Luther v. Borden*, 48 U.S. (7 How.) 1, 71-72 (1849) ("[L]est it might be argued that this power to declare war and raise troops and navies was not exclusive in the general government, as is the case with some other grants to it deemed concurrent, about weights and measures, bankrupt laws, &[] . . . the reasons for this grant as to war, and an express prohibition on the States as to it, both show the power to be exclusive in Congress."); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (similar).

In contrast, "the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare." *Saleh v. Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009) (Silberman, J., joined by Kavanaugh, J.); *see also id.* ("[t]he states . . . constitutionally and traditionally have no involvement in federal wartime policy-making.") (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)). *Only* Congress declares war. *Only* Congress raises and supports armies and provides for and maintains a navy. *Only* Congress has unfettered authority to keep troops or ships of war in time of peace.

The Constitution's express divestment of state power in this area further highlights the unique exclusivity of the federal government's war powers. This divestment is critical because if the states could make war "the union could never be secure of peace," "since the whole confederacy is responsible for any such act." 1 William Blackstone, Commentaries 271 (St. George Tucker ed. 1803). The Constitution's textual divestment of war powers from the states makes Congress's war powers unlike virtually all other powers granted in Article I.[7]

The textual divestment is also powerful evidence that the states surrendered their sovereign immunity to suits under these powers. *See The Federalist* No. 81, at 487-88 (Alexander Hamilton); No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that a plan of the Convention waiver arises where the Constitution "prohibited the States from exercising" a federal authority or the exercise of that "authority in the

[7] The only other Article I powers that are accompanied by an explicit divestment of state power are two commercial powers with undeniable national consequences. Art. I, § 8, cl. 5 (coin money); § 10, cl. 1 (forbidding the same to the states); § 8, cl. 1 (imposts and excises); § 10, cl. 2 (forbidding the same to the states).

States would be absolutely and totally *contradictory* and *repugnant*" to its exercise by the federal government).

The war powers are also unique from the other Article I powers because their effective exercise requires the states not merely to refrain from regulating in a particular sphere, but to surrender "the traditional diplomatic and military tools that . . . sovereigns possess." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019). As this Court opined in the closely related foreign affairs context, investing the federal government with exclusive foreign affairs powers resulted in "limitations on the sovereignty of the States." *United States v. Pink*, 315 U.S. 203, 233-34 (1942); *see United States v. Belmont*, 301 U.S. 324, 331 (1937); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). "The[ ] States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821). For the United States to be "the only government in this country that has the character of nationality," the powers of "war, peace, and negotiations and intercourse with other nations" was "forbidden to the state governments." *Ping v. United States*, 130 U.S. 581, 605 (1889).

The conferral of war powers on the federal government requires the surrender of state sovereignty by its very nature. "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns . . . is not only broad—it is also obvious." *Saleh*, 580 F.3d at 11; *see Luther v. Borden*, 48 U.S. (7 How.) 1, 72 (1849) (citing 1 William Blackstone, Commentaries 270 (St. George Tucker ed. 1803)) (same). As Edmund Randolph explained on the first day of the Constitutional Convention, the new Constitution was needed to prevent the states from "provok[ing] war." Records of the Federal Convention, Tuesday, May 29,

1787 at 19 (M. Farrand ed. 1937). Had the states retained any role in war making "there would have been as many supreme wills as there were states, and as many wars as there were wills." *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 80-81 (1795) (Paterson, J.); *accord Smith v. Turner*, 48 U.S. (7 How.) 283, 450 (1849) (similar). A power in the states to interfere with the exercise of the war powers not only would have jeopardized the safety of the United States against foreign enemies, it would have deprived the United States of the power to maintain the supremacy of federal law, guarantee a republican form of government to the states, and ensure peace among them.

At bottom, if the Constitution had left to the States the ultimate authority to regulate commerce and intellectual property, the United States could still have been a nation. The same could not be said had the states retained the ability to interfere with the exercise of the war powers. The surrender of state sovereignty, which includes sovereign immunity, thus is an essential part of the conferral of the war powers on the national government. The states could not be safely vested with a residual authority to interfere with the war powers' exercise without "utterly destroy[ing]" those powers. *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1872).

2. *Original Understanding.* National defense under the Articles of Confederation was utterly inadequate and "replete with obstructions." *The Federalist* No. 22, at 145 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Framers, whose overriding goal was to "respon[d] to the failings of the Articles," *PennEast*, 141 S. Ct. at 2263, viewed plenary and exclusive federal war powers as uniquely critical to the nation's success. Madison and Hamilton insisted that these powers could have "no limitation[s]" or "constitutional barriers." *The Federalist* No. 23, at 153 (Alexander Hamilton), No. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961). They were

adamant that Congress have the "*indefinite power* of raising *troops* … in *peace*, as well as in *war*," and that "[s]ecurity against foreign danger … is an avowed and essential object of the American Union." *The Federalist* No. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961). "The powers requisite for attaining it must be effectually confided to the federal councils." *Id.*

Lawsuits against states where necessary to preserve foreign relations and keep the peace were not merely contemplated in the plan of the Convention—they were a *reason for* the Convention. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1416-17 & n.3 (Gorsuch, J., concurring); *see also id.* at 1396-97 (majority op.) (similar). In particular, the Framers recognized a pressing need, in the interest of national security, for Congress to have the ability to authorize suits under the recently ratified Treaty of Paris for the collection of war debts. *See id.* at 1416-17 (Gorsuch, J., concurring). And as explained below, they specifically anticipated that treaty-based suits could be authorized *against states*.

That history is significant because the Framers understood that the power to end wars and enter binding peace treaties—and the Treaty of Paris in particular—was a vital incident of the federal government's war powers. "The authority to make war, of necessity implies the power to make peace; or the war must be perpetual." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796) (Chase, J.); *id.* at 259 (Iredell, J.) ("the power of making treaties" and "the power of declaring war" both could support actions for "an infraction of a treaty"). "The powers to declare and wage war" and "to conclude peace" spring from the same source: both are "necessary concomitants of nationality," that "would have vested in the federal government" even "if they had never been mentioned in the Constitution." *Curtiss-Wright*, 299 U.S. at 318. Accordingly, the Court has consistently referred to war-

making and peace-making as two sides of the same coin. *Id.*; *see Ex parte Virginia*, 100 U.S. 339, 354-55 (1879) ("[T]he common government … was granted exclusive jurisdiction over external affairs, including the great powers of declaring war, making peace, and concluding treaties."). The United States has the power to end a war by passing a law instead of signing a treaty. *See Curtiss-Wright*, 299 U.S. at 318. Thus, evidence that states gave up their immunity in the plan of the Convention with respect to peace-making is evidence they surrendered it as to the war powers.

The evidence that the states surrendered the immunity to treaty-based suits at the founding is strong. The Treaty of Paris promised British creditors the power to collect on war debts, providing broadly that suits against American debtors would "meet with no lawful impediment." Provisional Articles Between the United States of America, and his Britannic Majesty, 8 Stat. 54, 56 (1782). Despite that unequivocal language, concerns about "unenforceability of the peace treaty[,] and the consequent threat to the nation's security," "became a significant factor that both suggested the need for a national judiciary and provided a major impetus for the Philadelphia Convention." John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1902 (1983). If debts went unpaid, war could reignite.

States repeatedly took actions that magnified this threat. "[M]any of the states, especially those in the South, had passed laws providing for expropriation of debts due British creditors, or making Continental or state bills of credit legal tender." *Id.* at 1901 (citing 12 Va. Stat. 52 (W. Hening ed. 1823)). Given states' efforts to co-opt these war debts, the Framers were acutely aware "of the likelihood that suits would be brought against the states under article III to enforce the peace treaty." *Id.*

at 1913-14. They debated the propriety of those suits bitterly. But their debate shared a key premise: that "the judiciary article as originally written" allowed war-debt creditors in particular to "sue the states." *Id.* at 1908.

During the Pennsylvania ratification debate, for example, James Wilson stressed that the new constitution would "show the world that we make the faith of treaties a constitutional part of the character of the United States." 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 490 (2d ed. 1891) (Elliot's Debates).[8] The nation would "secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." *Id.* In New York, Hamilton explained the necessity of permitting suits in federal court for treaty violations: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members," he wrote, and "it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *The Federalist* No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "[C]ases between a State . . . and foreign States, citizens, or subjects" would "be, in a peculiar manner, the subjects of the national judicature." *Id.* at 481.

Even the constitution's opponents shared this premise. In Virginia, one of George Mason's primary concerns with Article III was that it permitted peace-treaty suits against states. Criticizing the portion of Article III dealing with foreign plaintiffs, Mason warned that "a suit will be brought against Virginia," 3 Elliot's

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[8] *See* 5 Annals of Cong. 776 (1796) (Statement of Rep. Madison) (explaining that the most significant guide to the Constitution's meaning other than its text is to be found "not in the General Convention, . . . but in the State Conventions, which accepted and ratified the Constitution").

Debates, *supra*, at 527. "This, at the time, could refer only to suits against Virginia for enforcement of the peace treaty, there being no other potential disputes between foreign citizens and the state." Gibbons, *supra*, at 1904. The debate, in short, assumed that Article III would allow suits against states to enforce the peace treaty.

The Eleventh Amendment's ratification history bolsters this account. Congress in considering various proposals for a post-*Chisholm* amendment "was acutely aware of the nexus between the peace treaty issue and the resolutions before them." *Id.* at 1935. Indeed, the first proposal for such a constitutional amendment responded to a "treaty-based" suit against Massachusetts "commenced by a British Loyalist whose properties had been confiscated." *Id.* at 1931. The proposed amendment, introduced in the House by Theodore Sedgewick on instructions from Massachusetts, would have made states completely immune from being "made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States." Gazette of the U.S. (Phila.), Feb. 20, 1793, at 303.

Congress rejected that language and adopted a narrow Amendment instead—expressly limited to reducing Article III's reach. U.S. Const. amend. XI. Congress's compromise language, adopted in the face of concerns about peace-treaty suits, confirms that "[t]he amendment's specific wording derives . . . from the desire . . . to assuage the . . . clamor over . . . *Chisholm v. Georgia* while guaranteeing the enforceability against the states of the controversial peace treaty with Great Britain." Gibbons, *supra*, at 1894. "[T]he perceived need to convince the British that the courts would correct peace treaty violations counseled against restricting the scope

of . . . article III over suits against states." *Id.* at 1935. Thus, while diplomatic efforts ultimately would head off direct suits against the states, *id.* at 1940, the Eleventh Amendment was drafted so that "[i]t could still be accurately represented to Great Britain that the state courts were open, and that the Supreme Court would continue to exercise appellate jurisdiction over federal questions to compel treaty compliance by a state," *id.* at 1935.

3. *Post-Founding History.* The uses of the war powers throughout the Nation's history confirm a plan of the Convention waiver. As explained earlier, *see supra* pp. 8-9, 10, Congress has taken many actions throughout this nation's history that would not and could not be authorized by any source of constitutional power other than the war powers. It has regulated or taken over the economic life of the country, regulated the morals of the community, denied freedom of speech to an extent not permissible when restricted under other powers, and commanded individuals to give up their freedom and lay down their lives. *See id.*

Congress's extraordinary actions under its war powers have included altering the most basic rules of state and federal court jurisdiction and even displacing an entire state judicial system. In *The Grapeshot*, 76 U.S. (9 Wall.) 129, 133 (1870), and *Mechanics' & Traders' Bank v. Union Bank of Louisiana*, 89 U.S. (22 Wall.) 276, 295-98 (1875), in the Civil War's aftermath, this Court affirmed Congress's power to establish an entire provisional Louisiana court system, administered by federal military officers, with original and appellate jurisdiction to hear and decide all cases, civil and criminal, arising under federal and Louisiana law. The authority of these courts was sweeping and plenary, *Mechanics' & Traders' Bank*, 89 U.S. (22 Wall.) at 294-95, and Congress later transferred "all judgments, orders, and decrees of the

Provisional Court" to the appropriate Louisiana court, ordering that they "should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly," *The Grapeshot*, 76 U.S. (9 Wall.) at 132. Displacing a state's judicial system would be a significant affront to state sovereignty if any such sovereignty had survived the Convention. Yet this Court had "no doubt" that both the provisional courts and the transfer of judgments were constitutional. *Id.* at 133.

Two specific historical practices confirm that states surrendered their sovereign immunity to suits authorized by the war powers. *First*, for over a century Congress has tolled statutes of limitations in state law money damages actions against states pursuant to the war powers, and it appears no state has ever raised a sovereign immunity defense to such tolling. *Second*, for seventy five years before this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), federal courts heard habeas corpus suits against states by federal military officers, yet states similarly did not raise sovereign immunity as a defense to such actions. The states raised no sovereign immunity objections because they had none to assert.

a. Congress has a long, uninterrupted history of tolling state statutes of limitations pursuant to its war powers, and cases where states were sued pursuant to this tolling are strong evidence that states had no immunity to assert. This Court has "recognized that a limitations period may be 'a central condition' of the sovereign's waiver of immunity," *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 542-44 (2002) (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986)), and that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity," *Block v. North Dakota ex rel. Board of University and School*

Lands, 461 U.S. 273, 287 (1983). Thus, although this Court has "not directly addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants … the notion at least raises a serious constitutional doubt." *Raygor*, 534 U.S. at 543.

That principle is important because, since the Civil War, the federal government has enacted statutes that "tolled *all* civil and criminal limitations for periods during which the war had made service of process impossible or courts inaccessible." *Stogner v. California*, 539 U.S. 607, 620 (2003) (citing *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 503-04 (1871)) (emphasis in original); *see* An Act In Relation To The Limitation Of Actions In Certain Cases, ch. CXVIII, 13 Stat. 123 (1864); Transportation Act of 1920, § 206(f), 41 Stat. 456, 462; 50 U.S.C. § 4308(c) (Trading with the Enemy Act); 50 U.S.C. § 3936 (Soldiers And Sailors' Civil Relief Act Of 1940).

These statutes have long tolled state law causes of action for money against *states* that would otherwise be time-barred. And yet, in cases brought under state causes of action tolled by these federal laws it appears no state has ever raised sovereign immunity as a defense. *See Parker v. State*, 57 N.Y.S.2d 242 (N.Y. Ct. Cl. 1945) (action against New York by New York State employee for differential pay tolled by Soldiers' and Sailors' Civil Relief Act of 1940); *Murray v. Rogers*, 78 N.J. Super. 163 (Hudson County Ct. 1962) (official capacity action against New Jersey to pay on an earlier money judgment tolled by Soldiers' and Sailors' Civil Relief Act of 1940); *Perkins v. Manning*, 122 P.2d 857, 859 (Ariz. 1942) (official capacity action against Arizona for payment of salary tolled by Soldiers' and Sailors' Civil Relief Act of 1940).

The apparent absence of any claims of sovereign immunity by the states in an area that would otherwise raise "serious constitutional doubt," *Raygor*, 534 U.S. at

542-43, is strong evidence that the states have understood that they have no immunity to assert.

b. Another relevant practice is the extension of federal habeas corpus protections to federal officers beginning in the 1830s. That practice is noteworthy because habeas corpus actions are suits against state officials in their official capacities, and "[d]efendants in an official-capacity action may assert sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). It was not until *Ex parte Young,* 209 U.S. 123 (1908), that this Court "established an important limit on the sovereign-immunity principle" that would permit suits against state officers in some circumstances. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254 (2011); *see Katz*, 546 U.S. at 374 (calling grants of federal habeas power against the states in the early republic "remarkable"). Yet the federal government authorized suits against states to release federal officers from custody in the 1830s. For decades thereafter states apparently never raised sovereign immunity as a defense to suits by federal military officers seeking release under the statute.

In 1833, Congress enacted the Force Bill, 4 Stat. 632 (1833), amidst the backdrop of the Nullification Crisis of 1832-33. *See Fay v. Noia*, 372 U.S. 391, 402 n.9 (1963); *Cunningham v. Neagle*, 135 U.S. 1, 70-71 (1890); H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 Yale L.J. 1285, 1292-93 (1985). In the early nineteenth century, the United States was divided over whether Congress had the power to "lay duties and imposts on foreign importations for the protection of domestic manufacturers." *Discharge on habeas corpus in Federal court from custody under process of state court for acts done under Federal authority*, 65 A.L.R. 733. This culminated in South Carolina assembling a convention in 1832 to pass the South Carolina Ordinance of Nullification, which declared

tariffs that Congress passed in 1828 and 1832 to be "null, void, and no law, nor binding upon this State, its officers or citizens." South Carolina Ordinance of Nullification, 1 Stat. (S.C.) 329 (Nov. 24, 1832).

In response, President Andrew Jackson issued a fiery message to Congress seeking authorization for the use of military force against South Carolina. *See* Andrew Jackson, *Message to Congress of January 16, 1833*, *in* 2 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, 610-32 (1895). Congress responded by passing the Force Bill. *See* An Act further to provide for the collection of duties on imports, ch. 57, 4 Stat. 632 (1833). The Force Bill authorized the president to use military force if necessary to bring states into compliance with the tariffs and to use force to protect customs officers and secure ports and harbors. *Id.* The Force Bill also enlisted federal judges as a first line of defense, to potentially avert the need to use the military.[9] In section 7, the Force Bill gave federal judges the power to free federal officers from confinement where "they shall be committed or confined on, or by any authority of law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof." 4 Stat. at 634.

The Force Bill was a war measure. As President Jackson told Congress: "South Carolina presents herself in the attitude of hostile preparation, and ready even for military violence." Jackson, *Message*, *supra*, at 612. This created an "emergency" that "endanger[ed] the integrity of the Union." *Id.* at 610. Proponents of the Bill cited earlier war powers measures as precedent for its key

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[9] *See* Jackson, *Message*, *supra*, at 630-31 (explaining that enhancing the authority of federal judges "would prove adequate unless the military forces of the State of South Carolina authorized by the late act of the legislature should be actually embodied and called out," in which case the President would use military force).

provisions. *See, e.g.*, 9 Reg. Deb. 262-63 (1833) (Statement of Sen. Wilkins). One Senator opined: "This bill is intended to make war on South Carolina." 9 Reg. Deb. 649-50 (1833) (Statement of Sen. Poindexter adopting the remarks of Sen. Forsyth). Opponents attacked the Bill as a violation of state sovereignty. *See, e.g.*, 9 Reg. Deb. 1849-50 (1833) (Statement of Rep. Clayton); *id.* at 1889-896 (Statement of Rep. Daniel). Following the Force Bill's enactment, South Carolina purported to nullify it. *See* Powell, *supra*, at 1293.

Yet, over the ensuing decades, in suits by military officers seeking release under the Force Bill it appears no state raised sovereign immunity as a defense. *See In re Neill*, 17 F. Cas. 1296 (S.D.N.Y. 1871) (No. 10,089); *In re Farrand*, 8 F. Cas. 1070 (D. Ky. 1867) (No. 4,678); *In re Hurst*, 12 F. Cas. 1024 (M.D. Tenn. 1879) (No. 6,926). This early practice supports the view that suits pursuant to war powers did not violate the states' immunity, because they had already surrendered that immunity in the plan of the Convention.

c. Even if the Court were unpersuaded by this history, "the absence of a perfect historical analogue" is not a prerequisite to finding a plan of the Convention waiver. *PennEast*, 141 S. Ct. at 2261. The war powers, especially, were known to those who wrote and ratified the Constitution to require the flexibility to address evolving and unforeseeable circumstances. The Framers explained that it was "*impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.*" *Hamdi*, 542 U.S. at 580 (2004) (Thomas, J., dissenting) (quoting *The Federalist* No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis in original). The modern role of the United States as a global military superpower, the relationship that has developed between the states and

the federal government, and the relationship that has developed between citizens and the states, were all things the Framers could not foresee. The need to protect servicemembers from discrimination on the basis of their service when they hold dual roles as state employees and citizen-soldiers is a modern problem for which Congress devised a modern solution.

B. The Court's precedents support a finding of a plan of the Convention waiver for the war powers

The analysis above shows that the Constitution's text, structure, original understanding, and history establish that the states surrendered their sovereign immunity to suits under the war powers in the plan of the Convention. This Court's analyses in *Katz* and *PennEast* further support a finding of a plan of the Convention waiver here.

1. The reasoning of *Katz* shows that the states ceded their sovereign immunity to suits authorized by the war powers in the plan of the Convention. The Court in *Katz* found three points particularly relevant: (1) the intent to create national uniformity in the exercise of the federal bankruptcy power through the use of the word "uniform," 546 U.S. at 368-69; (2) the ancillary nature of suits against states pursuant to the bankruptcy power, *id.* at 370-71; and (3) the existence of habeas corpus suits to discharge debtors that predated *Ex Parte Young*, *id.* at 374-75.

Measured against the evidence the Court found relevant in *Katz*, the war powers effect a plan of the Convention waiver. In the closely related field of foreign affairs, the Court has explained that "concern for uniformity in this country's dealings with foreign nations" is what "animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quotation marks omitted). The war and foreign affairs powers were placed in the national government to prevent the states from provoking war

with foreign nations by carrying out their own conflicting foreign policy.

Additionally, causes of action against the states pursuant to the war powers are ancillary to the primary purpose of raising and supporting armies and waging war. The *Katz* court found it relevant that suits against states under the bankruptcy power were "merely" "ancillary to and in furtherance of" *in rem* bankruptcy proceedings because it made the relevant surrender of state sovereign in the context of bankruptcy "limited." *Katz*, 546 U.S. at 372, 378. Suits against the states under the war powers are ancillary and limited in exactly the same way. Suits against the states under the war powers do not themselves wage war or raise armies; they are ancillary and help protect the ability of the United States to do so.

Finally, just as the history of habeas corpus actions to free debtors show that states never asserted sovereign immunity in bankruptcy suits, *id.* at 373-77, the history of habeas corpus actions to free military officers from state custody shows that the states never asserted sovereign immunity as a defense against the exercise of the war powers. Under the logic of *Katz*, states in the plan of the Convention ceded any sovereign immunity they might otherwise have had in war-powers suits.

2. The reasoning of *PennEast* similarly shows that the states ceded their sovereign immunity to suits authorized by the war powers in the plan of the Convention. *PennEast* explained that the federal government is "invested with full and complete power to execute and carry out" the eminent domain power, and state immunity would thus "violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign." 141 S. Ct. at 2260. The Court explained that, given that the eminent domain power permits the states' property to be taken outright, *a fortiori* the Constitution permits condemnation actions

that obviate the need for such aggression. *See id.* at 2260 & n.*. As the court reasoned: the "authorization to take property interests imply a means through which those interests can be peaceably transferred." *Id.* at 2260.

Measured against the reasoning in *PennEast*, the states surrendered their immunity to suits under the war powers. The federal government is invested with an authority to carry out the war powers just as "full and complete" as its authority to exercise eminent domain. *See id.* at 2259. As the Court held in *In re Tarble*, the federal government's war powers are "plenary and exclusive." 80 U.S. (13 Wall.) at 408. "It can determine, without question from any State authority, how the armies shall be raised." *Id.* "No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials" is permissible. *Id.* State interference with the war powers would make the United States less than "completely sovereign." *Curtiss-Wright*, 299 U.S. at 318.

The war powers, like the eminent domain power, also permit the federal government to use any effective means to carry out their purposes. The delegation of the war powers to the federal government, like the delegation of the eminent domain power to the federal government, implies the means to exercise it. *See Lichter*, 334 U.S. at 778-79 ("[B]road discretion as to methods to be employed may be essential to an effective use of its war powers by Congress."). The United States would not be able to exercise its war powers if states could fire with impunity all servicemembers from state employment to stymy a war that they opposed. A power to raise and support armies that is incapable of being exercised amounts to no power at all. Under the logic of *PennEast*, the states surrendered their immunity to suits under the war powers in the plan of the Convention.

3. The statements in *Seminole Tribe*, 517 U.S. at 73, and *Alden*, 527 U.S. at 754, that Congress lacks the power to abrogate state sovereign immunity under its "Article I" powers do not change the result in this case. The war powers are not the kinds of "Article I" powers to which those cases were referring. The war powers are "*sui generis*"—"unique"—among the grants of authority to the federal government, and thus fall outside any "general rule" applicable to Article I grants of authority. *Allen*, 140 S. Ct. at 1002.

The statements about "Article I" powers in those cases are also inapplicable because "the language in those . . . cases is far broader than the holdings," *United States v. Caltex*, 344 U.S. 149, 153 (1952), and thus is "dicta" that the Court is "not bound to follow," *Katz*, 546 U.S. at 363. In *Allen*, the Court described these cases as stating a "general rule," not an absolute rule. 140 S. Ct. at 1002. The Court has never considered the question whether Congress may authorize suits against the states pursuant to its war powers.

Additionally, as *PennEast* held, the statements in *Alden* and *Seminole Tribe* were about *abrogation*, not plan of the Convention wavers. 141 S. Ct. at 2259. Those cases do not apply "where the States 'agreed in the plan of the Convention not to assert any sovereign immunity defense,'" because for such powers "'no congressional abrogation [is] needed.'" *Id.* (quoting *Allen*, 140 S. Ct. at 1003).

II. AN ADVERSE RULING WOULD HARM THE NATIONAL DEFENSE AND LEAVE THOUSANDS OF VETERANS VULNERABLE TO DISCRIMINATION ON THE BASIS OF THEIR MILITARY SERVICE

Allowing states to assert sovereign immunity in suits authorized by the war powers would harm the ability of the United States to provide for the national defense and

leave thousands of soldiers and their families unprotected from service-related discrimination.

Over the last century, Congress has increasingly come to rely on the Reserve and Guard to provide for the national defense. Congress has determined that maintaining a large standing army is not only prohibitively expensive, but also contrary to the country's ideals and the vision of the Framers. *See* 97 Cong. Rec. 2293 (1951) (statement of Rep. Teague). Congress has also concluded that raising armies only when war is imminent makes it difficult to deploy rapidly and risks sending poorly trained troops into the field. *See id.* at 6001 (statement of Rep. Russell). Congress has found that maintaining robust reserve components strikes the appropriate balance between maintaining an army in peacetime and drafting an army in wartime. *See* 96 Cong. Rec. A5789 (1950) (Rep. Brynes' Speech on Universal Military Training); *see* 59 Cong. Rec. 4029 (1920) (statement of Rep. Hull).

As Congress has turned to the Guard and Reserve to protect and defend the United States, it has consistently recognized that these forces cannot function unless the soldiers who constitute them are protected from service-related discrimination by their civilian employers. USERRA's very first stated purpose is to "[e]ncourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. § 4301(a)(1). That purpose has been recognized in House and Senate reports for more than two decades. The Senate Committee Report on the Veterans' Benefits Improvement Act amending USERRA recognized:

> Because the National Guard and Reserves have become an essential part of the military's operational force, it is imperative that employers comply with

> USERRA and that the statute be rigorously enforced by the federal government. If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces.

S. Rep. No. 110-449, at 24 (2008); *see also* S. Rep. No. 104-371, at 27-28 (1996) (similar). The House Report to the 1998 Amendments likewise explained that USERRA's protections are "particularly important today to such persons who are integral to this country's defense" because "the Guard and Reserve are frequently called to active duty to carry out missions integral to the national defense." H.R. Rep. No. 105-448, at 2 (1998). The elimination of USERRA's protections would "threaten not only a long-standing policy protecting individuals' employment right, but also raise serious questions about the United States' ability to provide for a strong national defense." *Id.* at 5-6.

Following the terror attacks of 9/11, Congress has relied heavily on the Army Reserve and the National Guard to defend the United States at home and abroad. *Army Reserve: A Concise History*, Office of Army Reserve History 15 (2013), https://bit.ly/3IwSaHI. At least 200,000 reservists and 430,000 National Guard soldiers have served on active duty in the War on Terror. *See Army Reserve: A Concise History*, *supra*, at 15; *Implementing the Army Force Generation Model in the Army National Guard*, National Guard Bureau 2 (2011), https://bit.ly/3tG2GIq. Of those 200,000 reservists and 430,000 guardsmen who have fought for the United States in these operations, thousands work for state employers. USERRA's guarantee that they will be protected from discrimination ensures that the United States has an adequate number of troops and that those troops are effective on the battlefield. If states assert blanket

immunity to USERRA's cause of action it could hobble those aims, interfering with the ability of the United States to raise and organize the armed forces in a manner that has proven essential to the Nation's security.

Permitting states to assert a sovereign immunity defense to USERRA's cause of action would also have a profound impact on servicemembers and their families. Soldiers who work for state employers joined the military on the understanding that they would not have to worry that they would lose their jobs or seniority when they returned to civilian life. They joined knowing that if they became disabled in the line of duty their state employer would accommodate their disability or help to find them a similar job. They were made this promise so that they would not hesitate while fighting on a foreign battlefield for fear an injury would cost them their livelihoods when they came home.

The elimination of USERRA's remedy against states would have devastating consequences for the morale of the United States' armed forces and for thousands of veterans and their families. The Constitution's Framers and ratifiers, and the states that formed the union, never could have intended such a result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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