No. 20-603

IN THE

Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Thirteenth District

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that courts construe the scope of state sovereign immunity with fidelity to the text, structure, and history of the Constitution, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Federalist Papers*, Alexander Hamilton explained that states joining the union would retain their sovereign immunity "[u]nless . . . there is a surrender of this immunity in the plan of the convention." *The Federalist No. 81*, at 487 (Hamilton) (Clinton Rossiter ed., 2003). Since our nation's Founding, this Court has adhered to Hamilton's formulation, holding in case after case that "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 Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (quotation marks omitted).

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Constitutional text, structure, and history are all critical sources for discerning whether states surrendered their sovereign immunity in the plan of the Convention. Yet the court below failed to engage with any of those sources when it held that Congress cannot authorize suits against state employers in state courts under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), a law passed under Congress's war powers to protect military personnel from adverse employment actions based on their service.

Had the court below engaged in the correct analysis, it would have recognized that the states surrendered their immunity from suits brought under laws passed pursuant to Congress's war powers in the plan of the Convention. And because USERRA is an exercise of Congress's war powers, state sovereign immunity is no bar to Petitioner's suit seeking redress against his state employer for effectively terminating him because of an injury developed while serving in the presence of toxic burn pits during the war in Iraq. Pet'r Br. 15-16. This Court should thus reverse the judgment of the court below dismissing Petitioner's suit on the basis of state sovereign immunity.

The Constitution vests Congress with multiple powers relevant to national security and defense, including the power "[t]o declare War," U.S. Const. art. I, § 8, cl. 11, and "[t]o raise and support Armies," *id.* art. I, § 8, cl. 12. The language of these Clauses is sweeping, granting the federal government broad power over the field of national military affairs, and these powers are enjoyed by the national legislature alone and not shared with the states.

Indeed, one of the Framers' chief reasons for holding the Constitutional Convention was to vest the

federal government with the power to manage its military affairs without reliance upon the states. In the wake of the Revolutionary War, throughout which the Union had struggled to accumulate adequate resources to defeat the British under the defective Articles of Confederation, the Founders were intent on creating a stronger federal government with the power to protect the nation from future invasions and foreign military threats. By ratifying the Constitution, states accepted the enhanced protection and fortitude that comes with a strong federal military and, in exchange, gave up the vast majority of their sovereign interests in matters of war—including their immunity from suit.

That the states relinquished their immunity from suits authorized by Congress's war powers is further demonstrated by constitutional text and history that make clear that the states agreed in the plan of the Convention to be sued under treaties. The Constitution gives the President, with the advice and consent of the Senate, the power to enter into treaties, U.S. Const. art. II, § 2, cl. 2, and declares those treaties part of the "supreme Law of the Land," *id.* art. VI, cl. 2. The Framers believed that ensuring that states would be subject to suit for treaty violations was essential to maintaining the federal government's supremacy in international affairs and thereby preventing the "laws of the whole" from "being contravened by the laws of the parts." *The Federalist No. 22*, *supra*, at 146 (Hamilton).

Before the Constitutional Convention, the states had "collectively incurred significant contractual and treaty obligations to foreign nations," and so the "effective conduct of relations—at the very least, the deterrence of war—counseled the provision of credible

rights to remediation for treaty violations in the federal courts." Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1090 (2002). Providing federal jurisdiction for treaty claims, including those against states, was essential to preventing a "rupture with other powers." James Madison, Reply to the New Jersey Plan (June 19, 1787), *Founders Online*, https://founders.archives.gov/documents/Madison/01-10-02-0036 [hereinafter "*Reply*"]. The power to declare war and the power to avoid or end war through treaty are complementary, both grounded in the Framers' desire to build a strong nation and avoid military entanglements with more established countries in the vulnerable post-Revolutionary War era. *Ware v. Hylton*, 3 U.S. 199, 232 (1796) (opinion of Chase, J.) ("The authority to make war, of necessity implies the power to make peace; or the war must be perpetual."). Thus, the states' consent to suit for the one strongly implies consent to suit for the other. *See* Pet'r Br. 27-28.

Finally, the court below failed to consider relevant post-ratification evidence. In the 1830s and 1840s, after the ratification of the Eleventh Amendment, Congress exercised its war powers to extend habeas jurisdiction to certain state prisoners. Although this legislation would have made state officials amenable to suit, virtually no immunity-related objections were raised.

In sum, constitutional text, history, and structure make clear that states surrendered their immunity from suits brought under laws authorized by Congress's war powers. "[T]he Constitution in express terms granted an exclusive authority to the Union" through the war powers, and it would be "totally contradictory and repugnant" for states to retain

authority in areas of national military affairs. *The Federalist No. 32*, *supra*, at 194 (Hamilton). Because USERRA was passed as an exercise of Congress's war powers, states have no immunity from suits, like the one here, brought to redress violations of USERRA. The decision of the court below should be reversed.

ARGUMENT

I. In the "Plan of the Convention," States Consented to Suits Brought Under Laws Passed Pursuant to Congress's War Powers.

A. "[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 (quotation marks omitted). This concept of waiver through the plan of the Convention has its roots in Alexander Hamilton's writings in the *Federalist Papers*, *see The Federalist No. 81*, *supra*, at 487 ("[u]nless . . . there is a surrender of this immunity in the plan of the convention, it will remain with the States"), and it has been repeatedly affirmed by this Court, *see Seminole Tribe v. Florida*, 517 U.S. 44, 68 (1996) (describing "the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention" (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934))); *Alden v. Maine*, 527 U.S. 706, 728 (1999) (same).

The concept of acquiescence to suit under the plan of the Convention, or "plan waiver," as it is sometimes called, follows naturally from this Court's understanding of the origin and scope of state sovereign immunity. In *Alden*, this Court said that describing states'

immunity from suit as "Eleventh Amendment immunity" is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." 527 U.S. at 713; *see Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) ("[S]ince *Hans v. Louisiana*, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms."). Thus, under this Court's precedents, "States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . *except as altered by the plan of the Convention* or certain constitutional Amendments." *Alden*, 527 U.S. at 713 (emphasis added).

Put another way, states brought their inherent sovereignty—and the immunity that comes with it—to the "bargaining table" when they decided to ratify the Constitution, agreeing in exchange for certain rights and benefits to "waiv[e] their immunity for certain types of suits but not for others." Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 Mich. L. Rev. 92, 109 (1999). Thus, whenever this Court confronts the question of whether a certain category of suit against a state is permissible, it asks whether "all States implicitly consented at the founding" to such suits. *PennEast*, 141 S. Ct. at 2258.

This Court has considered a wide variety of sources when assessing whether states consented to suit under a particular constitutional provision. In *Central Virginia Community College v. Katz*, this Court looked to the "history of the Bankruptcy Clause," including the discussion of the Clause during

ratification debates, "the reasons it was inserted in the Constitution," and "the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution," to conclude that the states consented to be sued under laws passed pursuant to Congress's Bankruptcy Clause power. 546 U.S. 356, 362-63, 379 (2006).

In *PennEast*, this Court focused primarily on constitutional structural principles and early historical practice to conclude that "when the States entered the federal system, they renounced their right to the highest dominion in the lands comprised within their limits . . . [and] contemplated that [their] eminent domain power would yield to that of the Federal Government so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." 141 S. Ct. at 2259 (internal citations and quotation marks omitted). In examining historical practice from the Founding era, the Court in *PennEast* emphasized that it could "reason[] as a structural matter" that suits against states are authorized by the federal eminent domain power based on the exercise of that power, and states' assent to it, during the Founding era, even in the "absence of a perfect historical analogue"—*i.e.*, a distinct Founding-era example of a suit against a state pursuant to the federal eminent domain power being sustained. *Id.* at 2261.

And finally, this Court has often looked for clues in the Constitution's text itself to ascertain whether states waived their sovereign immunity in the plan of the Convention. *See, e.g.*, *Katz*, 546 U.S. at 370 (examining the text of the Bankruptcy Clause); *United States v. Texas*, 143 U.S. 621, 646 (1892) (parsing the Supremacy Clause and Article III's grant of federal jurisdiction, along with constitutional structure, to

conclude that states surrendered their immunity from suit by the United States in the plan of the Convention); *Rhode Island v. Massachusetts*, 37 U.S. 657, 720 (1838) (holding that states are not immune from suits by one another, in part because they ratified a provision of the Constitution granting the Supreme Court original jurisdiction over "controversies between two or more states"). Importantly, however, the absence of textual clues is not dispositive if other sources point to "the consent of the State in the constitutional plan." *PennEast*, 141 S. Ct. at 2262 (quotation marks omitted).

The court below did not engage in any meaningful analysis of the text, history, or structure of the war powers. Instead, relying on this Court's decisions in *Alden v. Maine*, 527 U.S. 706 (1999), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), it held that Congress cannot authorize suits against states pursuant to its War Powers solely because those powers are located in Article I of the Constitution. Pet. App. 12a ("state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation"). But those cases—particularly when considered in light of this Court's more recent decisions in *Katz* and *PennEast*—do not stand for nearly so broad a principle. As this Court's more recent cases make clear, the fact that this Court has held that Congress cannot abrogate states' sovereign immunity pursuant to its Article I powers says nothing about whether states waived those powers in the "plan of the Convention." *See* Pet'r Br. 19-20.

B. To determine whether states waived immunity in the plan of the Convention, courts must look to the "conventional tools of constitutional interpretation," including the Constitution's text, history, and

structure, and the behavior of legislators in the "wake of the [its] ratification," *Katz*, 546 U.S. at 362, 373. When it comes to the war powers, *all* of these sources—the Constitution's text, history, and structure—demonstrate that states surrendered their immunity from suit under laws passed pursuant to those powers when they agreed to ratify the Constitution.

The war powers include a number of authorities embedded in Article I that give Congress *exclusive* power "[t]o declare War," U.S. Const. art. I, § 8, cl. 11, "[t]o raise and support Armies," *id.* cl. 12, "[t]o provide and maintain a Navy," *id.* cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14. The sheer number and breadth of these powers, none of which are shared in any respect with the states, demonstrate the federal government's complete occupation of the field of national military affairs.

History makes clear why the Framers granted such sweeping powers exclusively to the federal government. "When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation." *PennEast*, 141 S. Ct. at 2263. Those Articles, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built upon a mere "firm league of friendship" between thirteen independent states, Arts. of Confed. of 1781, art. III, with Congress as the single branch of the national government, *id.* art. V. Although the Articles of Confederation delegated certain discrete powers to Congress—including, theoretically, the power to raise and support armies—it gave the national government no means to execute its powers. *See* 1 Joseph Story, *Commentaries on the Constitution of*

the United States § 246 (1833) (Congress could "declare everything but do nothing").

This scheme created such an ineffective central government that it nearly cost the Americans victory in the Revolutionary War. In the midst of several setbacks during the war, George Washington lamented that "unless Congress speaks in a more decisive tone; unless they are vested with powers by the several States competent to the great purposes of War . . . our Cause is lost." 18 *The Writings of George Washington* 453 (John C. Fitzpatrick ed., 1931) (Letter to Joseph Jones, May 31, 1780).

Washington believed that the central government's inability to address common concerns—especially the maintenance of a functioning military—could bring disaster: "The sufferings of a complaining Army on the one hand, —& the inability of Congress & tardiness of the States on the other are the forebodings of evil." Letter from George Washington to Alexander Hamilton (March 1783), *Founders Online*, https://founders.archives.gov/documents/Washington/99-01-02-10767. Thus, as the war approached its end, he announced in a circular sent to state governments that it was "indispens[a]ble to [their] happiness" that "there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration." Letter from George Washington to the States (June 1783), *Founders Online*, https://founders.archives.gov/documents/Washington/99-01-02-11404.

The war powers were the Framers' primary response to these shortcomings. "Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess," including "the

independent power . . . to wage war." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1497 (2019); *see Selective Draft Law Cases*, 245 U.S. 366, 381 (1918) (Article I "manifestly intended to give . . . all" power "to raise armies" to Congress "and leave none to the States."). And when the Constitution was ratified, Article I also authorized Congress for the first time to raise funds, including for matters of war and military affairs, without "requisitioning" contributions from the states. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987).

According to James Madison, this enhancement and consolidation of the war powers in the federal government was a central reason for the Convention itself. In the *Federalist Papers*, Madison delineated various classes of powers belonging to the federal government under the new governing charter: "The powers falling within the *first* class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money." *The Federalist No. 41*, *supra*, at 252 (Madison). As he further explained, the new nation could not endure unless Congress was given "an *indefinite power* of raising *troops*." *Id.* at 253. These powers were granted to the federal government exclusively to ensure "[s]ecurity against foreign danger," the "avowed and essential object of the American Union." *Id.* at 252; *see also* 1 *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 426 (J. Elliot ed., 1866) [hereinafter "*Elliot's Debates*"] (Rufus King) ("None of the states, individually or collectively, but in Congress, have the rights of peace or war.").

At the Convention, the states' sacrifice of the power to wage war and control national military

affairs included a sacrifice of immunity from suits brought under laws passed pursuant to the war powers. Alexander Hamilton's writings again make the point: "as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *See The Federalist No. 32*, *supra*, at 194 (Hamilton). Because, as described above, the war powers are given *exclusively* to Congress, the result is an "alienation of state sovereignty" and the sovereign immunity that goes with it. *Id.* To permit states to retain their immunity from suits authorized by Congress's powers of war would, in Hamilton's words, be "totally contradictory and repugnant" to the Constitution. *Id.*

II. The States' Consent to Suits Under the War Powers Is Further Supported by Strong Historical Evidence that They Consented to Treaty-Based Suits.

When the Framers created the federal judiciary and established the supremacy of federal treaties, the Framers invoked the same concerns as those underlying the war powers—the need for a strong federal power when the "peace of the whole union" depended on it. *The Federalist No. 22*, *supra*, at 147 (Hamilton). In the case of the treaty power, they were explicit that the federal government's treaty power would allow for suits against the states. Because the power to make war and the power to avoid or end war through treaties are flip sides of the same coin, the strong historical evidence that states consented to treaty-based suits further underscores that they consented to all suits authorized by Congress's war powers.

A. In addition to delegating to Congress the exclusive right to provide "[s]ecurity against foreign danger," *The Federalist No. 41*, *supra*, at 252 (Madison), the Framers created a federal judiciary with the power to hear suits that were essential to preserving the federal government's authority over war, peace, and international affairs, including suits against the states.

When they convened to reform the Articles of Confederation, the Framers were deeply concerned about noncompliance with international treaties—a persistent issue under the Articles. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94-97 (2002) (describing Article III as a response to the "penchant of the state courts to disrupt international relations" before the Constitution). After the Revolutionary War, American debtors owed almost $28 million—two years' worth of imports—to British merchants. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1900 (1983). In the Treaty of Peace with Great Britain, the Confederation government had promised that the states would create no "lawful impediment" to debt collection so that creditors would receive "the full value in sterling money, of all bona fide debts." Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, U.S.-Gr. Brit., art. IV, 8 Stat. 82 (1783). It had also promised that the Confederation Congress would "earnestly" request that the state legislatures "provide for the restitution of all estates, rights and properties, which have been confiscated." *Id.* art. V.

Despite these assurances, many states mounted a "vehement" resistance to the Treaty's terms. Gibbons, *supra*, at 1901. State legislatures passed laws that allowed them to expropriate British property, *id.*, and

otherwise "hobble[d] British debt collection by statute," *Traffic Stream*, 536 U.S. at 94. State courts were also "notoriously frosty" to British creditors. *Id.*; *see* Gibbons, *supra*, at 1902 (adding that "[t]he absence of a national court assured that this noncompliance would remain"). Reports of "infractions" mounted, and members of the Continental Congress worried that "in some of the States too little attention is paid to the public faith pledged by the treaty." Resolution (Apr. 13, 1787), *in* 32 *Journals of the Continental Congress 1774-1789*, at 177 (1936); *id.* at 180 (adding that "[h]istory furnishes no precedent of such liberties taken with treaties under form of Law in any nation"); *see also* Madison, *Reply* ("The files of Cong[ress] contain complaints . . . from almost every nation with which treaties have been formed.").

By the summer of 1787, the problem of treaty compliance "loomed large to the leaders of the young republic." Lee, *supra*, at 1090. In addition to eroding the war-weary nation's relationship with the British government, *Traffic Stream*, 536 U.S. at 94, treaty infractions pointed to a structural problem. Without a central "judiciary power" to ensure consistent application of treaties, the "peace of the whole union . . . [was] continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." *The Federalist No. 22*, *supra*, at 146-47 (Hamilton). Edmund Randolph, Governor of Virginia and member of the Committee of Detail that drafted the initial Constitution, raised this issue on the first day of the Constitutional Convention. He explained that the Articles of Confederation "fulfilled *none* of the objects for which it was framed." *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 Am. Hist. Rev. 595, 596 (1906). Specifically, the Articles

did not "provide against foreign invasion," because "[i]f a State . . . violates a treaty, [the Confederation] cannot punish that State, or compel its obedience." *Id.*

Accordingly, the Framers made certain that the nation's judiciary could "compel the observance of treaties," particularly by the states of the Union. 4 *Elliot's Debates*, at 146 (James Iredell). The Supremacy Clause ensured that "all Treaties made, or which shall be made," by the Union would be part of "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. And Article VI promised that "[a]ll Debts contracted and Engagements entered into" before the Constitution would remain valid against the new federal government." *Id.* art. VI, cl. 1. To enforce these provisions, Article III provided federal jurisdiction over existing and future treaties. *Id.* art. III, § 2, cl. 1; *cf. Ware*, 3 U.S. at 237 (opinion of Chase, J.) ("It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide.").

B. In addition to providing for federal jurisdiction over claims that could affect the nation's security, the Framers specifically sought to ensure that states could be sued for violating international treaties. In 1787, many states were in debt to holders of public securities that were issued during the Revolutionary War, 5 *Documentary History of the Supreme Court of the United States 1789-1800* 2 (Maeva Marcus ed., 1994), and others had confiscated British property during the war, Gibbons, *supra*, at 1903. More broadly, the Framers were aware that, under international law, a sovereign state's failure to pay a debt owed to a citizen of another state was an acceptable reason to go to war. As Hamilton put it, the "denial or perversion of justice by the

sentences of courts . . . [was] classed among the just causes of war." *The Federalist No. 80*, *supra,* at 476 (Hamilton); *see also* Lee, *supra*, at 1089-90 (describing the international law doctrine of "espousal," which "recognized the right of nations to go to war to vindicate just claims" of individual citizens); *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883) ("There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former.").

The Framers wanted to demonstrate to their sister nations that under the new constitutional order, the federal judicial power was ready and able to compel and punish states that did not uphold their obligations to foreign powers. In other words, the new nation needed to ensure that states could be sued under treaties in order to "show the world that we make the faith of treaties a constitutional part of the character of the United States," 2 *Elliot's Debates*, at 490 (James Wilson), and preserve the "security of the public tranquility," *The Federalist No. 80*, *supra,* at 476 (Hamilton). The Framers therefore crafted a national charter that permitted incursions into states' immunity from suit when "public tranquility" was at stake. They provided that the "judicial Power" would extend to "Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" and provided original jurisdiction in the Supreme Court for "all Cases . . . in which a State shall be Party." U.S. Const. art. III, § 2. This would guarantee compliance with treaties, "restore credit with foreign states," 2 *Elliot's Debates*, at 492 (James Wilson), and "avoid controversies with foreign powers," 3 *Elliot's Debates*, at 534 (James Madison); *see also The Federalist No. 80*, *supra*, at 476-

77 (Hamilton) (noting that "the power of determining causes between two States, between one State and the citizens of another . . . is perhaps not less essential to the peace of the Union than" jurisdiction over "causes in which the citizens of other countries are concerned").

During the state conventions, supporters of the Constitution emphasized that it would give those with claims against a state, including foreign creditors, the "full opportunity of obtaining justice in the general courts." 2 *Elliot's Debates*, at 492 (James Wilson). Some, like Governor Randolph, touted the virtues of a system that would "make us all honest." 3 *Elliot's Debates*, at 574-75 (explaining that the Constitution permitted courts to "direct a compensation to be made by the State"); *id.* at 549 (statement of Edmund Pendleton describing the "propriety and necessity of vesting [the Supreme Court] with the decision of controversies to which a state shall be a party"). Others simply noted that the proposed Constitution gave the federal courts "cognizance of contracts between this state and citizens of another state." 4 *Elliot's Debates*, at 210 (Richard Spaight).

Indeed, this aspect of the proposed Constitution generated complaints from foes of ratification, who objected that it enabled a "state to be brought to the bar of justice like a delinquent individual" in treaty cases. *Id.* at 527 (George Mason); *see also* 3 *Elliot's Debates*, at 567 (statement of William Grayson noting that it was "fixed in the Constitution that [states] shall become parties" and objecting that this arrangement was "not reciprocal" given the stance of foreign nations). When describing the "danger" of the proposed federal judiciary, Patrick Henry explained that it would "have cognizance of controversies between a state and

citizens of another state, without discriminating between plaintiff and defendant," and could review "[e]verything with respect to the treaty with Great Britain," *id.* at 542-43. Delegates to the Virginia and North Carolina conventions proposed versions of Article III that would have eliminated federal jurisdiction over causes of action that arose before ratification, thereby preventing British creditors from recovering against states, but those amendments were rejected. 3 *Elliot's Debates*, at 660-61 (Virginia); 4 *Elliot's Debates*, at 246 (North Carolina).

In sum, the accepted view at the Founding was that the Constitution permitted federal jurisdiction over suits against states arising under peace treaties. The Framers viewed this jurisdiction as essential for preventing a "rupture with other powers," Madison, *Reply*, and preserving "the peace of the Union," *The Federalist No. 80*, *supra,* at 477 (Hamilton). In this way, Congress's power to make and enforce treaties—its "powers of war and peace," *Ware*, 3 U.S. at 281 (opinion of Wilson, J.)—was the complement to its powers to make war. By permitting states to be sued under treaties, the Framers made a powerful statement about the role of the war powers in the "plan of the convention," *PennEast*, 141 S. Ct. at 2258, namely, that states enjoyed no sovereign immunity in matters of international affairs that had a bearing on the national military and the effort to maintain international peace.

III. Post-Ratification Evidence Supports the Conclusion that States Surrendered Their Immunity from Suits Under the War Powers.

Post-ratification evidence supports what the Constitution's text, history, and structure make clear: the states surrendered their immunity from suits under laws authorized by Congress's war powers. *See Katz*, 546 U.S. at 362 (considering historical practice and "legislation considered and enacted in the immediate wake of the Constitution's ratification" to ascertain the "plan of the Convention").

To start, the First Congress enacted the Judiciary Act of 1789, which gave the Supreme Court original, but not exclusive, jurisdiction over controversies "between a state and citizens of other states, or aliens," Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, a "decision almost certain to result in suits against the states," Gibbons, *supra*, at 1915; *see id.* (adding that circuit courts were given jurisdiction over cases "where an alien is a party," so that states could be sued by foreign creditors in those courts).

After this Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), which permitted jurisdiction over an out-of-state creditor's suit against Georgia, the states ratified the Eleventh Amendment. *PennEast*, 141 S. Ct. at 2258. While the Amendment prohibited federal jurisdiction over cases like Chisholm's—involving an out-of-state plaintiff's contract claims against a state—it was drafted narrowly to address only that situation and preserve the courts' ability to hear treaty-based claims against the states. *See* Pet'r Br. 30-31; Gibbons, *supra*, at 1934 ("[T]he Federalists sought to draft the amendment in the narrowest possible form that would serve to quiet the rapidly mobilizing reaction to *Chisholm*."). The Eleventh Amendment in no

way altered the breadth of Congress's Article I war powers, or the principle that states surrendered their sovereign immunity in cases that implicated Congress's power to preserve "the peace of the union," *The Federalist No. 80*, *supra*, at 477 (Hamilton).

Following the passage of the Eleventh Amendment, Congress exercised its war powers to enact legislation that would presumably have led to immunity-related objections if nineteenth century lawmakers believed state sovereign immunity existed in this context. As Petitioner explains, Congress passed the Force Bill in 1833, extending federal habeas corpus protections to state detainees. Pet'r Br. 34. This "remarkable" extension of the habeas power, *id.* (citing *Katz*, 546 U.S. at 374), permitted state officers to be haled into federal court, yet no one objected on immunity grounds, *id.* at 36.

And later, in 1842, after President Tyler requested Congress's intervention because of a thorny incident involving the "discharge of [our] international obligations," Cong. Globe, 27th Cong., 2d Sess. 292 (1842) (statement of President Tyler); Jake Karr, *Federalism, Foreign Affairs, and State Courts: The Habeas Corpus Act of 1842 and the Permanent Debate Over the Status of International Law*, 50 N.M. L. Rev. 320, 321 (2020) (describing the "diplomatic row" following the arrest and detention of Alexander McLeod, a British citizen, by New York officials eager to support Canadian rebels), Congress extended federal jurisdiction to writs of habeas corpus filed by "subjects or citizens of a foreign state" in state custody for acts done under the authority of "any foreign State or Sovereignty," Act of August 29, 1842, ch. 252, 5 Stat. 539 (providing jurisdiction for petitioners held "on account of any act done or omitted" under the authority of a foreign state when

the "validity or effect whereof depend upon the law of nations"). The lawmakers who proposed the bill invoked the "treaty-making power" and "war power," both of which they believed to be "subjected to control of the Federal Government." Cong. Globe, 27th Cong., 2d Sess. 444 (1842).

While members of Congress vehemently objected to this extension of judicial authority, they did not argue that the law intruded on state sovereign immunity. Instead, opponents of the law expressed the fear that it would constrain state power against abolitionist "emissaries," Karr, *supra*, at 336 (citing Cong. Globe, 27th Cong., 2d Sess. app. 555 (1842) (Sen. Bagby)), and argued that it constituted "interference with the authority of the state," Cong. Globe, 27th Cong., 2d Sess. app. 557 (Sen. Calhoun), intruded on the states' "independent powers," *id.* at 611 (Sen. Walker), and ousted state court jurisdiction over the "boundless" and "unfathomable" law of nations, *id.* at 615 (adding that "[t]he law of nations is said to embrace the laws of nature; and these laws, . . . writers tell us, are against slavery"). The sole reference to states' sovereign immunity came up only in passing—to emphasize that the judicial power was limited and that the bill's supporters were therefore compelled to prove that Congress retained "the power to pass it." *Id.* at 555. That the lawmakers who vehemently objected to the habeas bill never explicitly argued that it was barred by state sovereign immunity provides strong support for the view that the statute "simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify." *Katz*, 546 U.S. at 375. In other words, even after ratification of the Eleventh Amendment, states were not immune from suits authorized by Congress's war powers.

* * *

In short, the text of the war powers, *Katz*, 546 U.S. at 370, the reasons for their "insert[ion] in the Constitution," *id.* at 362, and the "structure of the original Constitution itself," *Alden*, 527 U.S. at 741, all make clear that states surrendered their immunity from suits authorized by the war powers in the plan of the Convention. The Framers of the Constitution gave Congress plenary and exclusive authority to ensure "[s]ecurity against foreign danger," *The Federalist No. 41*, *supra*, at 252 (Madison), and in order to further protect Congress's exclusive "rights of peace or war," 1 *Elliot's Debates*, at 426 (Rufus King), the Framers also gave the federal judiciary jurisdiction in cases involving treaties, including claims against states. In agreeing to these terms of the new Constitution, the states relinquished their immunity from suits involving the war powers. And evidence of historical practice in the years following ratification, including after the passage of the Eleventh Amendment, supports the conclusion that state sovereign immunity poses no bar to suits authorized by Congress's war powers.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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