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 FOR THE THIRTEENTH JUDICIAL DISTRICT, CORPUS CHRISTI, TEXAS

## BRIEF OF *AMICI CURIAE* PHILIP C. BOBBITT, MICHAEL C. DORF, AND H. JEFFERSON POWELL IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, *amici* represent that this brief was written by counsel for *amici*, and not by counsel for any party. No party or counsel for a party, or any other person other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties participating in this litigation have granted blanket consent for the filing of *amicus* briefs.

the executive branch and the role of the Constitution in legislative and judicial decisionmaking.

## SUMMARY OF ARGUMENT

This case presents a question of exceptional importance: whether Congress has authority pursuant to its war powers to abrogate state sovereign immunity, which it has done for purposes of authorizing private enforcement actions by service members under the Uniformed Services Employment and Reemployment Act ("USERRA"). In the court below, the parties disagreed as to which doctrinal test governs this question. Respondent Texas Department of Public Safety ("Texas") pointed to *Alden v. Maine*, 527 U.S. 706 (1999), where this Court found that the Commerce Clause did not authorize Congress to abrogate state sovereign immunity in state courts, reasoning that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design," *id.* at 730-31. Petitioner Le Roy Torres ("Mr. Torres") pointed instead to *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), where this Court, having examined the text and history of the Bankruptcy Clause, including "the reasons it was inserted in the Constitution" and the "legislation . . . enacted under its auspices immediately following ratification," held that Congress is authorized to abrogate state sovereign immunity with respect to bankruptcy suits in federal court, *id.* at 362-63.

This brief argues that this Court's holdings in *Alden* and its progeny and *Katz* can be harmonized by focusing on the Article I power that is actually at

issue in this case. Congress's decision to abrogate state sovereign immunity for private suits under USERRA should be construed as an appropriate exercise of its Article I "Power . . . To raise and support Armies." U.S. Const. art. I, § 8, cl. 12. The text and history of the Raise and Support Clause, as well as constitutional structure and ethos, prudence, and precedent all support the conclusion that the Clause authorizes Congress's limited abrogation of state sovereign immunity where the invocation of state immunity would impede Congress's exercise of its plenary and exclusive power.

The recruitment and retention of personnel for the armed forces are unquestionably within the scope of Congress's power to raise and maintain the U.S. armed forces, and in authorizing private suits under USERRA Congress intended "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." H.R. Rep. No. 105-448, at 5 (1998). Texas's assertion of state sovereign immunity to block Mr. Torres's suit applies a penalty to federal military service that impermissibly impedes Congress's exclusive power to provide for the recruitment and retention of service members. Moreover, Congress has authority to prevent that result by abrogating state sovereign immunity for private suits under USERRA. This conclusion is consistent with this Court's explicit recognition in both *Alden* and *Katz* that states were in some circumstances required to surrender their sovereign immunity depending on the nature of the governing constitutional design. Unlike in *Alden* (where Congress's Commerce power is concurrent with that of the states), and more than in *Katz* (where Congress's power in proceedings brought

pursuant to the Bankruptcy Clause is exclusive), Congress's power to raise and support national armies was by design deliberately delegated entirely to national authority.

## ARGUMENT

### I. Constitutional text and history indicate that Congress's power to raise and maintain the armed forces of the United States is plenary and exclusive.

1. Article I of the Constitution provides that "Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12. Article VI provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

As required by the Supremacy Clause, this Court's decisions are governed by the text of Article I, which expressly gives Congress the authority "To raise and support Armies," limited only by the command that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. Const. art. I, § 8, cl. 12. "The language of the Constitution authorizing such measures is broad rather than restrictive. . . . [It] places emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied." *Lichter v. United States*, 334 U.S. 742, 755-56 (1948). The text expressly assigns to Congress the "plenary

and exclusive" authority both to raise and to support armies. *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1871); see *infra* 8-9.

2. The history of the drafting of the Clause confirms the breadth of Congress's power. An initial committee draft of the Constitution granted Congress only the "legislative power 'to raise armies.'" William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787: An Effort to Trace the Origin and Development of Each Separate Clause from Its First Suggestion in That Body to the Form Finally Approved* at 148 (1900) (quoting Edmund Randolph's committee draft). When the draft came before the Convention, however, the text was broadened to "to raise and support armies," an amendment that was adopted without opposition. 3 J. Story, *Commentaries on the Constitution* § 1177 (1833) ("*Commentaries*"); Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1514 (1969). The Framers understood the broadened text to provide for the full range of "authorities essential to the common defense"—namely, "to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support." *The Federalist* No. 23 (Hamilton).

The drafting history also shows that the Framers understood Congress's power to raise and support armies to be exclusive vis-à-vis the states. To begin with, the Framers granted Congress this broad power believing it was critical to the legislature's role in authorizing war. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*,

92 Mich. L. Rev. 1364, 1389-92 (1994). As Justice Story explained, the power to raise and support armies was "an indispensable incident to the power to declare war; and the latter—would be literally brutum fulmen without the former, a means of mischief without a power of defence." *Commentaries* § 1174. And states, of course, have no power to declare war. Indeed, the need for a war power was the driving force behind the formation of a greatly strengthened national government. "Among the many objects to which a wise and free people find it necessary to direct their attention," John Jay wrote, "that of providing for their safety seems to be the first." *The Federalist* No. 3 (Jay) (capitalization altered). Accordingly, the first topic Jay addressed was "whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords them the best security that can be devised against hostilities from abroad." *Id.* (capitalization altered) (emphasis added).

The Framers included the power to raise and support armies in the Constitution to address a perceived defect of the Confederation—namely, state resistance to the national government's requisitions for men and supplies. See *The Federalist* No. 22 (Hamilton). Edmund Randolph, in opening the first day of the Convention, explained that the first defect that must be addressed by the new Constitution was,

> that the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority—Of this he cited many examples; most of whi[ch] tended to shew . . . that particular states might by

> their conduct provoke war without controul; and that neither militia nor draughts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money.

*Records of the Federal Convention*, Tuesday, May 29, 1787 at 19 (M. Farrand ed. 1937). The national government, therefore, "ought to secure . . . against foreign invasion," "against dissentions between members of the Union, or seditions in particular states," "to p[ro]cure to the several States various blessings, of which an isolated situation was i[n]capable," "to be able to defend itself against incroachment," and "to be paramount to the state constitutions." *Id.* at 18.

As Hamilton further explained, although the Articles of Confederation gave the national government in principle unlimited power to raise and support armies, in practice it was able to do so only by issuing requisitions to the states. Because the states could thus frustrate the national government's power to raise armies, there developed a consensus among the Framers that "the mode adopted to carry [the national government's power] into effect was utterly inadequate and illusory." *Commentaries* § 1178. States close to a given threat competed to fulfill the national requisitions, while those far away resisted such requisitions. *The Federalist* Nos. 22, 25 (Hamilton). The Framers understood this system to be "replete with obstructions to a vigorous and to an economical system of defense." *The Federalist* No. 22 (Hamilton). The military experienced "slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled

expense; [and] continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army." *Id.* The lesson the Framers learned was unequivocal: "The experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition." *Commentaries* § 1174.

In drafting the Constitution, therefore, the Framers gave Congress plenary and exclusive power "in the formation, direction, and support of the national forces" without state interference. *Commentaries* § 1178; *The Federalist* No. 23 (Hamilton) ("These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." (capitalization altered)). In so doing, they expressly rejected the notion that the power "ought to be provided for by the State governments, under the direction of the Union." *The Federalist* No. 25 (Hamilton). As Hamilton explained, "[T]his would be, in reality, an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members." *Id.*

The exclusivity of Congress's power is further confirmed by deliberations in the state conventions, where the Raise and Support Clause was "assailed" by Antifederalists as "dangerous to liberty, and subversive of the state governments." *Commentaries* § 1176; see also *The Federalist* Nos. 23, 24 (Hamilton), No. 41 (Madison); Friedman, *Conscription and the Constitution* at 1525-27.

"Objections were made against the general and indefinite power to raise 9 armies, not limiting the number of troops; and to the maintenance of them in peace, as well as in war." *Commentaries* § 1176. The sole concession to these objections was one restriction on Congress's power—the necessity of biennial appropriations. *The Federalist* Nos. 23, 24 (Hamilton), No. 41 (Madison); *Commentaries* § 1177-78. Any other restrictions on Congress's power to raise and support armies were rejected as inconsistent with the intended objective of achieving a robust and common national defense. *The Federalist* No. 23 (Hamilton) ("Whether there ought to be a federal government intrusted with the care of the common defense, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust.").

By contrast, the Framers did reserve to the states some authority to regulate their militias. U.S. Const. art. I, § 8, cl. 16 ("The Congress shall have Power . . . 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"). This leaves no doubt that the Framers rejected any concurrent power with respect to the national army. See *The Federalist* No. 29 (Hamilton). Indeed, even as to control of the state militias, the federal power is paramount. See *infra* 15.

Finally, the First Congress immediately enacted various statutes pursuant to the power to raise and

support armies, including legislation establishing and enlarging the military and creating compensation and recruitment structures. See Act of September 29, 1789, ch. 25, 1 Stat. 95; Act of April 30, 1790, ch. 10, 1 Stat. 119; Act of August 10, 1790, ch. 40, 1 Stat. 182; Act of March 3, 1791, ch. 28, 1 Stat. 222. Significantly, in at least two instances, Congress exercised its power in a way that overrode state sovereignty: 1 Stat. 182 (requiring the state of Virginia to provide lands to certain officers who served in the revolutionary army); 1 Stat. 119 (authorizing the President to call state militia members into federal service, provided they be compensated as federal military officers).

## II. The structure of the Constitution prohibits states from impeding Congress's power to raise and support armies.

1. As the late Professor Charles Black has written, the structural relationship between the federal government and the states itself compels the conclusion that there are some national powers with which state measures cannot interfere. See Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969). One of these national powers, Professor Black concluded, is Congress's power to raise and support armies, and a state's imposition of a penalty on federal service unconstitutionally arrogates to that state a power that only Congress possesses, and thus impermissibly interferes with the exercise of congressional authority.

Professor Black's reading of *Carrington v. Rash*, 380 U.S. 89, 96-96 (1965), is instructive. In *Carrington*, this Court struck down a Texas

constitutional provision prohibiting any member of the U.S. armed forces who moved to Texas as part of her military service from voting in any election in that state as long as she was a member of the military. Offering what is now regarded as a classic defense of the decision, see *Philip Bobbitt, Constitutional Fate: Theory of the Constitution* 76-78 (1984), Professor Black argued that Texas's ban was an "imposition, by a state, of a distinctive disadvantage based solely on membership in the Army," *Structure and Relationship* at 11. In other words, "no state may annex any disadvantage simply and solely to the performance of a federal duty." *Id.* Applying the proper structural constitutional analysis, "it would have been held—probably per curiam by the Supreme Court of Texas—that the subjecting of a federal soldier, strictly as such and on no other showing than that of his being a federal soldier, to an adverse discrimination, so clearly tended to impede the operation of the national government as to be forbidden quite without regard to its violation of any specific textual guarantee." *Id.* at 23-24.

2. Consistent with that principle, this Court has repeatedly held that states may not interfere with Congress's enumerated power to raise and support armies, regardless of other aspects of state sovereignty. "'The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent.'" *Lichter*, 334 U.S. at 756 n. 4 (quoting President Lincoln). In *In re Tarble*, 80 U.S. at 402, for instance, the Court held that state courts had no authority to issue writs of habeas corpus to discharge minors illegally enlisted in the U.S. army. In so holding the Court stated in no uncertain terms:

> [A]mong the powers assigned to the National government, is the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, *without question from any State authority*, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. *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 could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.*

*Id.* at 408 (emphases added).

Similarly, in *Arver v. United States*, 245 U.S. 366 (1918), this Court held that Congress had the authority to compel military service by a selective draft. It emphatically rejected the argument from concurrent powers that "since under the Constitution

as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship." *Id.* at 377. That proposition, the Court said, "simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme." *Id.* In *Arver*, as here, the state urged that the special, protective features of the states' status in the federal system were in conflict with Congress's plenary power to raise armed forces. Chief Justice White's opinion forcefully rejected that position.

And in *Dameron v. Brodhead*, 345 U.S. 322, 324-25 (1953), this Court upheld the constitutionality of a federal statute providing that the location of a military assignment could not change the taxable domicile of a service member and reserving the sole right of taxation to the service member's original state of residence, regardless whether that state exercised its right to tax. "The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service," the Court held, "cannot be doubted." *Id.* at 324.

So too here. As described below (*infra* 16-18) Texas's invocation of state sovereign immunity to block Mr. Torres's suit for damages does precisely what a state may not do under the Constitution—it impedes Congress's exclusive authority to provide for recruitment and retention of the U.S. military.

Congress's decision in USERRA to prevent such a result is entirely consistent with—indeed it derives from—the structure of the Constitution's allocation of federal authority.

## III. Congress's limited abrogation of state sovereign immunity in USERRA is a valid exercise of its power to raise and support armies.

1. There is no serious question that recruitment and retention are essential elements of raising and supporting the U.S. armed forces. See *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (registration and the draft cannot be "divorce[d] . . . from the military and national defense context"); see also *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 58 (2006) (holding that Congress had the authority to require colleges to grant military recruiters access to their campuses, and recognizing that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." (quoting *Rostker*, 453 U.S. at 70)).

This Court has consistently held that the power to raise and support armies gives Congress plenary control "over the whole subject of the formation, organization, and government of the national armies." *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878). Examples of Congress's plenary and exclusive authority are varied. Perhaps most relevant to the instant case is *Perpich v. Department of Defense*, 496 U.S. 334 (1990), where a state governor challenged the Montgomery Amendment, which provides that a governor cannot withhold consent to active duty by a member of the state National Guard outside the United States owing to any objection to the location,

purpose, type, or schedule of such deployment. The governor of Minnesota argued that giving force to the Amendment would unconstitutionally infringe the scope of the Militia Clause, thus having "the practical effect of nullifying an important State power that is expressly reserved in the Constitution." *Id.* at 351. In response, this Court wrote, "We disagree. [Our construction of the Clause as limited by Congress's authority] merely recognizes the supremacy of federal power in the area of military affairs." *Id.* The Court noted that this "supremacy is evidenced by several constitutional provisions, especially the prohibition in Art. I, § 10, of the Constitution," *id.* at 351 n.22, and that "several constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government," *id.* at 353. Thus this Court held that Congress could override even the states' explicit Militia Clause authority and allow the Executive Branch to order state military units to active federal duty without either the consent of the state or the declaration of a national emergency. *Id.* at 336-38.

Many cases further confirm the extent of Congress's comprehensive power under the Raise and Support Clause. In *Chappell v. Wallace*, 462 U.S. 296, 301-04 (1983), for instance, this Court upheld Congress's decision not to provide a remedy to enlisted military personnel against their superior officers for constitutional violations, reasoning that Congress had plenary authority "over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline." And in *Lichter*, 334 U.S. at 757-59, it upheld a federal statute compelling the renegotiation of private contracts for war supplies.

2. There can be little doubt that Congress's decision in USERRA to prohibit adverse employment actions against employees based on their military service, and its corresponding decision to authorize employees to sue offending employers in state court, are well within its constitutional power to raise and support armies. It is within Congress's authority to create incentives and protections that encourage voluntary military service, including USERRA's commitment to service members of an enforceable right against employment discrimination on the basis of their service. Indeed, Congress expressly recognized as much in enacting USERRA's grant of a private right of action against state employers. The legislative history of the statute makes clear that Congress was not only aware of court decisions dismissing USERRA actions on sovereign-immunity grounds, but also concluded that such decisions "raise serious questions about the United States ability to provide for a strong national defense." H.R. Rep. No. 105-448, at 5. Congress reasonably concluded that a state's discrimination on the basis of military service discourages that service, in contravention of Congress's exclusive and comprehensive power to raise and support armies.

## IV. Texas's invocation of state sovereign immunity in this context would make it substantially more difficult to recruit and retain personnel for the U.S. armed services.

Allowing states to invoke sovereign immunity to defeat USERRA actions would result in the military's having to tell a potential recruit that she may not regain her employment when she returns from service. It would enable states to fire a Reservist if

she needed to spend two weeks performing annual training, or even if she volunteered to deploy to provide relief in a humanitarian crisis. It would permit states to refuse to make reasonable accommodations for a service member's injuries sustained in the course of duty. Allowing states to insulate themselves from USERRA's protections and incentives makes the cost of service substantially higher for service members—and thus for the nation as a whole.

Texas's policy would also hinder recruiting of Reservists, as well as dissuade active-duty military members leaving active duty from continuing their service in the Reserves. These populations derive particular benefit from the ability to transition between their military service and their civilian lives and jobs. In the context of 21st century warfare, such persons are especially valuable to the military. Reservists bring a wealth of civilian knowledge, training, and experience to their military jobs. Complex defense tasks involving information systems, precision guidance and coordination, and the development of artificial intelligence protocols require abilities nurtured primarily in the private sector. See Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-first Century* (2008). And there are many less exotic examples. A military police unit benefits from the experiences and training of a civilian police officer who is accustomed to interacting with members of the community not just for security purposes, but also to solve problems and build relationships. An attorney in a state attorney general's office will bring to the military knowledge of legal systems and different forms of the rule of law, and can offer an invaluable perspective to allied foreign governments trying to gain credibility with

disaffected local populations and provide services and support to local communities. Nor should we neglect the crucial role of retention in maintaining an effective force structure. Former active-duty service members have already been trained and educated in military operations at great expense to the United States. Keeping their services available and on-hand when needed is one of the U.S. military's greatest assets. Congress could quite rationally conclude that Texas's policy would substantially hinder military recruitment and retention, particularly among these especially valuable populations.

Leaving the decision to grant or withhold USERRA's protections in the hands of the states—that is, letting them decide whether to waive sovereign immunity for purposes of suits by service members—would lead, as it has in the present case, to precisely the state interference with the national military that led the Framers to draft the Raise and Support Clause as they did. See *supra* 5-8. States less committed to or concerned by the particular conflicts or operations for which the military requires support could wield their sovereign immunity broadly to discourage their citizens from service. As the Framers recognized, this state interference with the national military mission weakens the nation's ability to defend and protect national interests.

## V. The conclusion that Congress may abrogate state sovereign immunity to protect its power to raise and support armies is consistent with this Court's sovereign-immunity precedents.

Neither *Katz* nor *Alden* is on all fours with this case. *Katz* construed the Bankruptcy power of

Congress; *Alden*, Congress's Commerce power. But a holding in favor of Mr. Torres that the state of Texas may not interpose a significant obstruction to the performance of a federal duty such as service in the armed forces is consistent not only with the framework set forth above, but also with this Court's recognition in both *Katz* and *Alden* that the "background principle" of state sovereign immunity does not apply where states have surrendered that sovereignty as part of the overall design of the Constitution. See *Alden*, 527 U.S. at 713; *Katz*, 546 U.S. at 376-77.[2]

This Court's application of that principle in *Katz* supports the conclusion that Congress has authority to abrogate state sovereign immunity to protect its power to raise and support armies. In *Katz*, the Court held that Article I's Bankruptcy Clause, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States," authorizes Congress to abrogate state sovereign immunity for private suits under the Bankruptcy Code. 546 U.S. at 359 (citation omitted). Looking to the "history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution," the Court concluded that "it was intended not just as a grant of legislative authority to

[2] The Court's decision in *Allen v. Cooper*, 140 S. Ct. 994 (2020), is inapposite when viewed through the lens proposed above. Whereas in *Allen* the question was whether Congress could regulate intellectual property by subjecting states to suits for copyright infringement, here the question is whether a state may encumber Congress's power to raise and support armies by denying benefits to service members.

Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." *Id.* at 362-63. The Court recognized that states have no power under the Constitution to enact bankruptcy laws, and that one of the animating concerns behind the Bankruptcy Clause was the difficulty posed by a patchwork of state insolvency and bankruptcy laws and states' refusal to respect one another's discharge orders. *Id.* at 365-66, 369, 376-77.

As discussed above (*supra* 5-8) a similar concern—namely, varied state compliance with the national government's requisitions for men and supplies—animated the Raise and Support Clause. The drafting history of that Clause and the subsequently enacted legislation of the First Congress demonstrate that the Clause was intended to abrogate state sovereignty where that sovereignty would compromise Congress's exclusive power to raise and support armies. *Id.*

What is more, if any case meets the criteria in *Alden* for an exception to *Alden*'s general rule, it is this one. It is difficult to imagine an enumerated power more significant to the national government under "'the structure of the original Constitution itself'" than the war power. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (quoting *Alden*, 527 U.S. at 728) (holding that state sovereign immunity does not bar condemnation actions pursuant to the federal eminent domain power). The conclusion that the power to raise and support armies authorizes Congress's limited abrogation of sovereign immunity in USERRA is entirely consistent with this Court's sovereign immunity precedents. It "'does no violence to the

inherent nature of sovereignty' for a State to be sued" pursuant to Congress's exercise of this power. *Id.* at 2261.[3]

## VI. Justice would be defied were Texas's closure of its courts' doors to a U.S. veteran upheld.

Finally, the spirit of the Constitution—its ethos and the traditions of our country—bear mention, and they are aligned with the text, structure, and history of the Constitution and precedent interpreting Congress's power to raise and support armies. Put simply, it is inconsistent with our constitutional heritage and traditions to penalize a person who makes the difficult and life-altering decision to serve our country. This is certainly true where a person joined the military based in part on the understanding that she could return to her existing

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[3] The court below mistakenly invoked the statement in *Alden* that the Necessary and Proper Clause does not afford Congress "'incidental authority to subject the States to private suits'" in implementing Article I powers that do not themselves authorize congressional abrogation of state sovereign immunity. Pet. App. 12a (quoting *Alden*, 527 U.S. at 732); see also *id.* ("regardless of whether the ruling in *Alden* is applicable to War Powers legislation, it is indisputably applicable to USERRA as legislation enacted under the Necessary and Proper Clause"). As this brief has demonstrated, USERRA is well within the core authority that the Raise and Support Clause delegates to Congress. Contrary to the court below, even if "the plain language of USERRA" did suggest Congress thought "it was enacted pursuant to the Necessary and Proper Clause," Pet. App. 11a, that does not affect the constitutional analysis. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

employment upon completing her service. It is truer still where, as here, a veteran is further penalized after sustaining an injury in his nation's service. After all, the law "must be read with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

The Court has once before denied the claims of injured persons from the armed forces, but in a constitutional context that actually strengthens Petitioner's claim here. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Court held that federal courts have common law authority to fashion a defense for federal contractors to a state tort law claim. The case arose from the death of a Marine, killed in a crash caused by the defendant's defective design of a helicopter the Marine was co-piloting. Thus, even in the absence of a congressional statute, the *Boyle* Court was prepared to block the operation of a state statute in order to protect the national government's defense budget from higher contracting costs. In the instant case, where Congress has unmistakably acted, there should be little reluctance to displacing state obstacles to the efficient maintenance of the national defense.

But imagine if the Texas court's ruling in *Torres* were to stand. Upholding state sovereign immunity here can only be reconciled with *Boyle* on the basis of a new and grotesque principle. The Court would be saying that while the national defense requires that the federal fisc must be protected from tort claims by servicemen and women, state budgets too must be protected from the claims of those who lose their health, and sometimes their lives, in U.S. military service; and this even when there is a federal statute

to the contrary, grounded in the national defense, directly on point. Such an illogical and indecent message cannot be reconciled with the duty the United States owes those men and women from whom duty called forth sacrifices no monetary award can fully compensate.

* * *

The court below failed to recognize that Texas's invocation of sovereign immunity impedes Congress's exclusive power to raise and support armies. That mistake led the court to invalidate a provision of federal law critical to supporting the nation's service members. The alternative approach offered here, which would preserve USERRA, is compelled by constitutional text, history, structure, precedent, and ethos. This Court should correct the erroneous and unjust decision below.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

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Respectfully submitted,

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