No. 20-603

IN THE
Supreme Court of the United States

LEROY 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 PROFESSOR JEFFREY M. HIRSCH AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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FEBRUARY 7, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a law professor and scholar at the University of North Carolina School of Law who teaches, researches, and writes about constitutional law, including state sovereign immunity. His scholarship makes clear that sovereign immunity is not a bar to private actions against States brought under legislation enacted pursuant to Congress's war powers.

[1] The parties have filed blanket consents to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

States ordinarily enjoy sovereign immunity from suit. This Court has held, however, that history, practice, and precedent demonstrate that the States surrendered their immunity in certain areas under the "plan of the Convention" by ratifying the Constitution. War powers is one such area. Because Congress exercised its war powers when it enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the lower court erred in holding that sovereign immunity bars private suits against States under USERRA.

1. The dual sovereignty of the States and the federal government is a fundamental feature of our constitutional design. Sovereign immunity is an aspect of that sovereignty. However, the States surrendered their immunity in certain areas by ratifying the Constitution. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1495 (2019). Whether a constitutional provision strips the States of immunity depends on "history, practice, precedent, and the structure of the Constitution." *Alden v. Maine*, 527 U.S. 706, 741 (1999).

As Alexander Hamilton explained in *Federalist No. 32*, the Constitution strips the States of sovereign immunity in three different ways: where it expressly provides the federal government exclusive authority in a certain area; where it imparts a power to the federal government and prohibits the States from exercising that same power; and where "it grant[s] an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." THE FEDERALIST NO.

32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

Applying these principles, this Court has held that the States waived their sovereign immunity by agreeing to the provision in Article III extending the federal judicial power to suits in which "the United States shall be a Party," U.S. CONST. art. III, § 2. *See United States v. Texas*, 143 U.S. 621, 644–45 (1892); *Hyatt*, 139 S. Ct. at 1495. Likewise, this Court has held that the States surrendered their immunity when they agreed to the provision of Article III authorizing federal court jurisdiction over disputes between States when one State sues another. *See Hyatt*, 139 S. Ct. at 1495. Similarly, the States surrendered their immunity with respect to bankruptcy matters when they agreed to the Bankruptcy Clause in Article I. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, at 362–69, 374–77 (2006); *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020). Finally, just last Term, this Court held that, by ratifying the Constitution, the States relinquished their sovereign immunity with respect to the exercise of the federal eminent domain power. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021).

Of course, constitutional abrogation of state sovereign immunity is the exception, not the rule. Under long-established principles articulated by this Court, whether a particular clause strips States of immunity depends on whether history, practice, precedent, and structure of the Constitution establish that States "were required to surrender [their immunity] to Congress pursuant to the constitutional design." *See Alden*, 527 U.S. at 731, 741.

2. War and military matters are core features of sovereignty essential to the preservation of any nation. In the Articles of Confederation, the States surrendered their sovereignty as to war powers to the federal government. The Articles vested war powers directly in the federal government. They gave Congress "the sole and exclusive right and power of determining on peace and war." ARTICLES OF CONFEDERATION OF 1777, art. IX. Likewise, the Articles explicitly restricted the States' conduct in war and military matters and declared that "No vessels of war shall be kept up in time of peace, by any State," and "No State shall engage in any war without the consent of the United States in congress assembled." *Id.* art. VI.

States were required to "keep up a well regulated and disciplined militia," but that militia was largely for the benefit of the nation as a whole. The Articles generally prohibited the States from engaging in war "without the consent of the United States in congress assembled." *Id.* Only in the event of an invasion or imminent threat were the States empowered to protect themselves. *Id.* art. IX. Apart from these few enumerated exceptions allowing States to act pursuant to an emergency or congressional consent, war powers belonged exclusively to the federal government during the Confederation period.

In short, the States' complete surrender of their sovereign war powers under the Articles of Confederation shows that even before adoption of the Constitution, the States had no sovereign immunity in war-related matters.

3. The Constitution continued to vest war powers solely in the United States. In particular, by imparting a wide range of war-related powers to the federal government, and prohibiting them to the States, the Constitution establishes that the States relinquished their sovereign immunity in matters relating to war and the military. Articles I and II both broadly vest war powers solely in the United States, from authorizing Congress to declare war and regulate the armies to making the President Commander in Chief. At the same time, the Constitution expressly limits the States from exercising comparable powers. Although States may maintain militias, the Constitution confers on the federal government ultimate control over them. Together, these provisions establish that the federal government has exclusive power over the military.

The history surrounding the drafting and ratification of the Constitution further illustrates that the Framers recognized the importance of establishing a unitary source of authority on all matters concerning war and the military and subordinating state sovereignty in such matters, despite establishing a government of dual sovereignty in most areas. The constitutional debates made clear the Framers' concerns that leaving the States with authority over war-related matters would lead to the "dreadful evils which for so many ages plagued England." *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 502 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter ELLIOT'S DEBATES] (John Jay). The Framers

emphasized the importance of concentrating war powers in the federal government when it came to the nation's safety and how "there can be no limitation of that authority . . . in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES." *See, e.g.*, THE FEDERALIST NO. 23, at 154 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

Similarly, the state ratification debates demonstrate that the States were well aware that ratification of the Constitution meant that they had little role in war and military-related affairs—any other arrangement would be a "solecism." *See* 2 ELLIOT'S DEBATES, *supra*, at 520 (James Wilson). Even those who opposed ratification recognized this core aspect of the Constitution. Opponents lamented that the Constitution would grant "indefinite" powers that would allow Congress, in the name of the common defense, to "essentially destroy[]" the State "without any check or impediment." *Id.* at 338 (John Williams).

Consistent with this history and the text of the Constitution, this Court's precedents and practice also demonstrate that there is no independent role for the States in matters concerning war or the military. Early opinions recognized it a "self-evident proposition" that the federal war powers necessarily entailed "a curtailing of the power and prerogatives of States." *Chisholm v. Georgia*, 2 U.S. 419, 468 (1793) (opinion of Cushing, J.). Recent cases reaffirm the notion that the Constitution "divests the States of the traditional diplomatic and military tools that foreign sovereigns possess." *Hyatt*, 139 S. Ct. at 1497.

4. In sum, the States surrendered their sovereign immunity in "the plan of the Convention" by ratifying the Constitution and therefore cannot assert sovereign immunity in suits alleging violations of federal statutes enacted pursuant to the war powers. Because Congress exercised its war powers in enacting USERRA, the Court should reverse the judgment of the Texas Court of Appeals.

ARGUMENT

States ordinarily enjoy sovereign immunity from suit. That immunity does not apply, however, where history, practice, and precedent demonstrate that the States surrendered their immunity in a particular area under the "plan of the Convention" by ratifying the Constitution.[2] Here, history, practice, and precedent all demonstrate that by ratifying the Constitution the States surrendered their sovereign immunity with respect to war powers.

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[2] Even when they have not surrendered their immunity by ratifying the Constitution, States may choose to waive sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 17 (1890). In addition, Congress can abrogate sovereign immunity when it passes legislation pursuant to its powers under Section 5 of the Fourteenth Amendment. In contrast, State surrender of sovereign immunity under the plan of the Convention does not depend on a state waiver of immunity or congressional action. *See Allen*, 140 S. Ct. at 1003; *Katz*, 546 U.S. at 377. Instead, the analysis focuses on whether the States surrendered their immunity when they ratified the Constitution, rendering express waiver or congressional abrogation unnecessary.

Exercising its war powers, Congress enacted the Uniformed Services Employment and Reemployment Act ("USERRA") to ensure national security by granting protections necessary to maintain our all-volunteer armed forces. USERRA prohibits employers, including States, from taking adverse employment actions against military servicemembers because of their military service. It also creates a cause of action against employers that violate its provisions. 38 U.S.C. §§ 4311, 4323(a)(3). Because the States surrendered their immunity with respect to military matters by ratifying the Constitution, the lower court erred in holding that sovereign immunity bars private suits under USERRA against States. This Court should reverse the lower court's erroneous decision.

I. State sovereign immunity does not bar actions brought under federal legislation enacted pursuant to the war powers.

A. The Constitution limits the States' sovereign immunity from suit.

The dual sovereignty of the States and the federal government is a fundamental feature of our constitutional design; the Constitution "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996). Immunity from suit is an important aspect of sovereignty. *See Hans*, 134 U.S. at 16. Where it applies, that immunity bars a private suit against a State, *Allen*, 140 S. Ct. at 1000, in both state and federal court. *Alden,* 527 U.S. at 713.

State sovereign immunity does not derive from the Constitution. *See id.* at 741. Rather, it "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Id.* at 713. It rests on the "inherent . . . nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent." *Seminole Tribe*, 517 U.S. at 54 (quoting THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Accordingly, although reflected in part in the Eleventh Amendment, U.S. CONST. amend. XI, the States' immunity is not derived from or limited to the text of that amendment. *Hans*, 134 U.S. at 15; *Alden*, 527 U.S. at 713.

Sovereign immunity does not, however, preclude all suits against a State. As Justice Story explained, a State's sovereignty may be limited by bounds which a State "chooses to impose upon itself." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 194 (1833). For this reason, States may waive their immunity in specific cases or as to entire categories of lawsuits. *See Hans*, 134 U.S. at 17.

The States also relinquished their sovereignty in some respects by agreeing to "surrender" it when they ratified the Constitution. *See Hans*, 134 U.S. at 13 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)); *Alden*, 527 U.S. at 716–17 (same); *PennEast*, 141 S. Ct. at 2258 (same); THE FEDERALIST NO. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, States do not have sovereignty where it has been "altered by the plan of the Convention or

certain constitutional Amendments." *Alden*, 527 U.S. at 713.

The Federalist Papers provide a detailed account of the understanding of States' immunity against federal legislation. This Court often has emphasized Alexander Hamilton's description of state sovereign immunity in *Federalist No. 81*, including its recognition that there are areas for which state sovereign immunity does not exist—or in Hamilton's words, areas where the "alienation" of state immunity was necessary. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 54; *PennEast*, 141 S. Ct. at 2258; THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . . The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation . . . ."). Hamilton's reference to alienation pointed to *Federalist No. 32*, which lays out the contours of state sovereignty.

In *Federalist No. 32*, Hamilton explained that the Constitution stripped States of sovereignty in three different ways. First, it expressly granted exclusive authority to the federal government in certain areas. *See* THE FEDERALIST NO. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing, as an example, the federal government's exclusive power to enact legislation over the district that serves as the seat of government). Second, the States surrendered their immunity under the Constitution "where it granted in one instance an authority to the Union, and in another, prohibited the states from exercising the

like authority." *Id.* at 198. (discussing, as an example, the exclusive power of the federal government, and the inability of States "without the consent of Congress," to impose taxes and duties on imports and exports). And finally, the Constitution stripped state sovereignty "where it granted an authority to the Union to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*." *Id.* at 198 (emphasis in original) (describing, as an example, Congress's power to establish a uniform rule of naturalization).

Following the view that States do not retain sovereign immunity when it would be contradictory and repugnant to the Constitution, this Court has held that the States surrendered sovereign immunity when they agreed to the provision in Article III extending the federal judicial power to suits in which "the United States shall be a Party," U.S. CONST. art. III, § 2. *See United States v. Texas*, 143 U.S. 621, 644–45 (1892); *Hyatt*, 139 S. Ct. at 1495. Although Article III does not expressly authorize the United States to sue States, the broad extension of federal judicial power to all suits in which the United States is a party reflects that relinquishment of state sovereign immunity was "inherent in the constitutional plan." *Hyatt*, 139 S. Ct. at 1495 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328 (1934)). Indeed, permitting the United States to bring suits against States was necessary to "the permanence of the Union." *United States v. Texas*, 143 U.S. at 644–45; *see also Hyatt*, 139 S. Ct. at 1495.

Likewise, this Court has held that the States surrendered their immunity when they agreed to the

provision of Article III authorizing federal court jurisdiction over disputes between States when one State sues another. *See Hyatt*, 139 S. Ct. at 1495. Recognizing federal jurisdiction over these matters provided a "substitute for the diplomatic settlement of controversies between sovereigns" that would have otherwise been necessary and protected each State from "a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372–73 (1923). The agreement was "essential to the peace of the Union." *Hyatt*, 139 S. Ct. at 1495 (quoting *Monaco*, 292 U.S. at 328).

The Court relied on similar reasoning to conclude that the States surrendered their immunity with respect to bankruptcy matters when they agreed to the Bankruptcy Clause in Article I. *Katz*, 546 U.S. at 362–69, 374–77; *Allen*, 140 S. Ct. at 1003. As the Court explained, one of the "intractable problems" facing the new union was the practice of "one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State." *Katz*, 546 U.S. at 363. To address that problem, the Bankruptcy Clause not only authorized Congress to enact "uniform" bankruptcy laws, but also created a "limited subordination of state sovereign immunity," which was necessary to "harmoniz[e]" bankruptcy law in the United States. *Id.* at 362–63. The Court emphasized that that there was no need for congressional abrogation in the Bankruptcy Code because the States had already "agreed in the plan of the Convention not to assert any sovereign immunity defense" in bankruptcy proceedings. *Id.* at 377.

Just last Term, this Court again relied on plan-of-the-Convention reasoning to hold that, by ratifying the Constitution, the States relinquished their sovereign immunity with respect to the exercise of the federal eminent domain power. *PennEast*, 141 S. Ct. at 2251–52. Although the Constitution does not expressly confer on the federal government the power of eminent domain, the Court explained that eminent domain is a traditional government power that the federal government had been understood to hold since its inception. *Id.* at 2254–55. Because that power extends to federal taking of state property, the Court concluded that it would hamstring the federal government's ability to exercise its eminent domain power if the States retained sovereign immunity in that area. *Id.* at 2260–61 ("An eminent domain power that is incapable of being exercised amounts to no eminent domain power at all. And that is contrary to the plan of the Convention . . . ."); *see also Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890) ("If it is necessary that the United States government should have an eminent domain still higher than that of the State in order that it may fully carry out the objects and purposes of the Constitution, then it has it."). Accordingly, the Court held that it was understood that the "States' eminent domain power would yield to that of the Federal Government." *PennEast*, 141 S. Ct. at 2259.

Of course, not every delegation of power to the federal government implies an abrogation of the States' immunity from suit. To the contrary, this Court has held that, as a general matter, States retain immunity with respect to most areas in which Congress may legislate under Article I. *Seminole*

Tribe, 517 U.S. at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Thus, for example, this Court has held that the Commerce Clauses do not strip States of sovereign immunity, nor do they authorize Congress to abrogate state sovereign immunity through federal legislation. *Id.* at 66; *Alden*, 527 U.S. at 712. The same is true of the Intellectual Property Clause. *Allen*, 140 S. Ct. at 1007.

As these cases suggest, constitutional abrogation of state sovereign immunity is the exception, not the rule. It extends only to those constitutional powers where recognizing state sovereign immunity would be "contradictory and repugnant" to the existence of the power in the first instance. THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It is limited to those powers that are "on a different plane" than the typical federal powers, *Allen*, 140 S. Ct. at 1003, because of the significant federal interests they implicate.

Thus, under long-established principles articulated by this Court, whether a particular clause strips States of immunity depends on whether history, practice, precedent, and structure of the Constitution establish that States "were required to surrender [their immunity] to Congress pursuant to the constitutional design." *See Alden*, 527 U.S. at 731, 741. Where States traditionally did not have immunity in a particular area, or where maintaining state immunity would threaten the stability of the Union or undermine the ability of the federal government to exercise its powers, this Court has held that a State does not enjoy sovereign immunity. *See,*

e.g., *United States v. Texas*, 143 U.S. at 644–45; *North Dakota v. Minnesota*, 263 U.S. at 372–73; *Katz*, 546 U.S. at 362; *PennEast*, 141 S. Ct. at 2259.

B. States have no sovereignty in military matters.

1. History shows the States relinquished sovereignty in military matters.

a. It has long been understood that war and military matters are core features of sovereignty essential to the preservation of any nation. *See, e.g.*, SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS, bk. VII, ch. IX, at 11 (Basil Kennet trans., 3d ed. 1717) (1672) ("[I]t was found necessary to the Preservation of Civil Government, that the Sovereign should have some Power over the Lives of his Subjects, and that for these two ends. First, to guard the Common-wealth from Evils and Dangers . . . By the first, The Sovereign hath Power to hazard the Lives of his Subjects in Defence of the Common-wealth, and to assert the Rights that belong to it . . . .").

As one eighteenth century commentator put it, "the sovereign power alone is possessed of authority to make war." EMERICH DE VATTEL, THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, bk. III, ch. I, at 292 (G.G. & J. Robinson, Paternoster Row 1797) (1758); *see also id.* at bk. I, ch. XIV, at 87 ("One of the ends of political society is to defend itself with its combined strength against all external insult or violence. If society is not in a condition to repulse an aggressor, it is very

imperfect . . . . The nation ought to put itself in such as state as to be able to repel and humble an unjust enemy . . . .").

In short, the power to make war was an essential feature of sovereignty that only the sovereign could exercise. This theory formed the historical backdrop when the United States was established. Under this view, the power to make war rests solely in the United States as sovereign. By contrast, because they are subordinate to the United States, the States could not hold independent power to make war.

b. The Articles of Confederation, which formed the United States, confirm this understanding. The States' strongest claim to sovereignty in war matters was during the time immediately following the Revolutionary War, just as they had gained independence from England. *See, e.g.*, Hyatt, 139 S. Ct. at 1493 ("After independence, the States considered themselves fully sovereign nations. . . . "[T]hey were 'Free and Independent States' with 'full Power to levy War, conclude Peace, . . . and to do all other Acts and Things which Independent States may of right do.'" (quoting THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776))).

Instead of providing the States' with unrestricted, sovereign war powers, the Articles of Confederation vested war powers directly in the federal government. They gave Congress "the sole and exclusive right and power of determining on peace and war." ARTICLES OF CONFEDERATION OF 1777, art. IX. The Articles explicitly restricted the States' conduct in war and military matters and declared that "No vessels of war shall be kept up in time of peace, by any state," and

"No State shall engage in any war without the consent of the United States in Congress." *Id.* art. VI.

And while States were required to "keep up a well regulated and disciplined militia," that militia was largely for the benefit of the nation as a whole. The Articles generally prohibited the States from engaging in war "without the consent of the United States in Congress assembled." *Id.* Only in the event of an invasion or imminent threat were the States empowered to protect themselves. *Id.* art. IX. Apart from these few enumerated exceptions allowing States to act pursuant to an emergency or congressional consent, war powers belonged exclusively to the federal government.

By ratifying the Articles of Confederation, the States thus relinquished any sovereignty they previously held in war-related matters. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties." (quoting 5 ELLIOT'S DEBATES, *supra*, at 212 (Rufus King))). The concentration of war powers in the federal government under the Articles is striking—especially considering the federal government's weakness in virtually every other area. *See* Jeffrey M. Hirsch, *War Powers Abrogation*, 89 GEO. WASH. L. REV 593, 619 (2021).

The States' complete surrender of their sovereign war powers under the Articles of Confederation shows that even before adoption of the Constitution, the States had no sovereign immunity in war-related

matters. *See, e.g.*, Charles Lofgren, *War Powers, Treaties, and the Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 242, 242 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (observing that the Articles "granted Congress a near monopoly of overtly war-related and foreign relations powers").

c. The Constitution continued to vest war power solely in the United States. In that regard, even early drafts of the Constitution at the Convention divested the States of sovereignty in matters of war and included explicit restrictions on their powers. *See* 1 ELLIOT'S DEBATES, *supra*, at 226, 228, 229. The concentration of war powers in the federal government, and accompanying restrictions on States, were expanded in successive drafts. *See id.* at 254 (altering a provision in the initial drafts that allowed States to appoint officers and train militias to restrict that power by requiring it to be exercised "according to the discipline prescribed by Congress").

Article I, Section 8 empowers Congress to "provide for the common Defence"; "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"; "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; and "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."

U.S. CONST. art. I, § 8. Article II, Section 2 makes the President "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 . . . ." U.S. CONST. art. II, § 2.

These grants of war powers are unique in that they permeate multiple clauses and articles throughout the Constitution. The sheer number of those clauses shows both the breadth of the federal government's power and the Framers' goal to concentrate that power in the federal government.

To the same effect, the Constitution makes clear that these sweeping war-related powers granted to the federal government do not extend to the States. Indeed, the Constitution "reveals an explicit centralization of war powers in the federal government, as well as prohibitions against state war powers activity. In the limited instances in which states retain a role, their activity is exclusively under the control of the federal government." Hirsch, *supra*, at 626–27. For example, States are permitted to appoint officers and train militias, but only "according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16. Congress holds the power to call up the States' militias "to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.* art. I, § 8, cl. 15. And Article I, Section 10 expressly prohibits the States from keeping troops or ships during peacetime, granting letters of marque or reprisal, or engaging in war unless actually invaded or invasion is imminent. *Id.* art. I, § 10, cls. 1, 3.

Article 1, Section 8 thus grants Congress a comprehensive, broad array of powers over military

matters, and Article II expands those powers further to the Executive. In contrast, the States are explicitly prohibited from acting independently in war-related matters. *See id.* art. I, § 10, cls. 1, 3. Even where the States are permitted some power, that power is subject to the ultimate control and direction of the federal government. *See id.* art. I, § 8, cls. 15–16.

Constitutional provisions granting Congress war powers and withholding from the States those powers constitute an "alienation" of the States' sovereignty just as Hamilton described in *Federalist No. 32*. In addition to express grants of exclusive authority to the federal government, the War Powers Clauses in some provisions grant immense "authority to the Union" and in others "prohibit[] the States from exercising the like authority." THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Further, in light of these provisions, recognizing in the States "a similar authority" as the federal authority over military matters would be "absolutely and totally *contradictory* and *repugnant*." *Id.*

As the several clauses restricting the States' power over military matters confirm, permitting States to make decisions relating to war would interfere with the federal war powers. Accordingly, just as the States surrendered their immunity in suits by the United States or other States by agreeing to Article III, it is "inherent in the constitutional plan" that States do not retain sovereign immunity with respect to war and military matters. *Hyatt*, 139 S. Ct. at 1495 (quoting *Monaco*, 292 U.S. at 329). And like the bankruptcy power, the consolidation of war powers in the federal government supports the "pressing goal" of

"harmonizing" military action across the States. *See Katz*, 546 U.S. at 362.

d. The Framers had good reason for the Constitution to reaffirm the Articles of Confederation on this point: they recognized that leaving the States with authority over war-related matters would directly interfere with the federal government's war powers and imperil the nation. *See, e.g.*, 1 ELLIOT'S DEBATES, *supra*, at 423 (Alexander Hamilton) (advocating for the "sole direction of all military operations" to be placed in the hands of the federal government); THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("These [war] powers ought to exist without limitation, because *it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them*." (emphasis in original)); *see also* Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *in* 30 THE PAPERS OF THOMAS JEFFERSON 238, 239 (Barbara B. Oberg ed., 2003) ("The constitution supposes, what the History of all Govts. demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.").

Granting the federal government exclusive war powers prevented the States from warring against the national government or other States and from undermining the federal government's relationships with other countries. *See, e.g.*, THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (explaining causes of war that are more easily avoided

"by one national government than it could be either by thirteen separate States, or by three or four distinct confederacies"); 1 ELLIOT'S DEBATES, *supra*, at 502 (John Jay) (warning that if the federal government's war powers were not centralized under the Constitution, among the States "would arise mutual restrictions and fears, mutual garrisons and standing armies, and all those dreadful evils which for so many ages plagued England, Scotland, Wales, and Ireland"); THE FEDERALIST NO. 6, at 53–54 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "dissensions between the States" could lead to "a state of disunion").

Similarly, concentrating war powers with the federal government prevented the inefficient expenditure of resources in wars that do not serve the nation's interests as a whole because it reduced the risks of States entering into such conflicts. *See, e.g.*, 1 ELLIOT'S DEBATES, *supra*, at 424 (Alexander Hamilton) (noting how Georgia "made war with the Indians" and "concluded treaties" in violation of the Articles of Confederation as evidence why the States should not be able to engage in war powers); THE FEDERALIST NO. 3, at 44–45 (John Jay) (Clinton Rossiter ed., 1961) (explaining that States may "excite war with [bordering] nations" and "nothing can so effectually obviate that danger as a national government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested").

Conferring military powers solely on the federal government also ensured that the United States would operate as a single body in war instead of as an

alliance of confederates. The Framers repeatedly stressed the importance of avoiding the inefficiencies inherent in a confederacy of States with different interests when securing the safety of the nation. *See, e.g.*, THE FEDERALIST NO. 23, at 153–54 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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 . . . . [T]here can be no limitation of that authority . . . in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES." (emphasis in original); THE FEDERALIST NO. 41, at 258 (James Madison) (Clinton Rossiter ed., 1961) ("America united, with a handful of troops, or without a single solider, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat."). The Framers, including during the state ratification debates, often commented on the shortcomings and weaknesses of foreign confederations to further underscore the need for consolidated federal war powers under the Constitution. 1 ELLIOT'S DEBATES, *supra*, at 419 (Alexander Hamilton); *id.* at 424 (James Madison); 2 ELLIOT'S DEBATES, *supra*, at 214 (Robert Livingston); *id.* at 187–88 (Oliver Ellsworth).

The debates at the Constitutional Convention reinforce the conclusion that the States would have no meaningful role in war and military-related matters. Hamilton advocated that the "sole direction of all military operations" be placed in the hands of the federal government. 1 ELLIOT'S DEBATES, *supra*, at 423. In Hamilton's view, it was the exclusive object of

the federal government to provide protection against foreign invasion; maintain military bodies; and procure alliances and treaties with foreign nations. 2 ELLIOT'S DEBATES, *supra*, at 350. In contrast, the objects of the state governments were "merely civil and domestic." *Id.*; *cf. Curtiss-Wright*, 299 U.S. at 316 (noting that the States possessed sovereign powers over "internal affairs" but not "international powers").

e. The States, when voting to ratify the Constitution, knowingly consented to the federal government's near-exclusive authority over war powers. This grant of authority was among the most thoroughly discussed issues during the state ratification debates, whose records "clearly demonstrate that the states were well aware that ratification of the Constitution meant that they had little role in military affairs, and what authority they did have was entirely under the control of the federal government." Hirsch, *supra*, at 631.

In the New York ratification debates, for example, Robert Livingston echoed Hamilton's sentiment about the need for the federal government alone to be the guarantor of the nation's security, explaining that the States were ill-suited to defend the nation and should not claim war powers from the government. *See* 2 ELLIOT'S DEBATES, *supra*, at 386 ("How is Congress to defend us without a sword?"); *see also id.* at 384 (asking in a sarcastic manner, "Have the state governments the power of war and peace, of raising troops, and making treaties?" then noting that States only have limited power to regulate militias). James Wilson also expressed this opinion in the Pennsylvania debates, commenting that a federal

government "without the power of defence" would be a "solecism." *Id.* at 520; *see also* 1 ELLIOT'S DEBATES, *supra*, at 427 (James Wilson) ("The power of war, peace, alliances, and trade, are declared to be vested in Congress.").

The positions advocated by those opposing ratification confirm the broad scope of the federal government's war powers. In that regard, in the New York ratification debates, John Williams criticized the Constitution for granting "indefinite" powers that would allow Congress, in the name of the common defense, to "essentially destroy[]" state governments "without any check or impediment." 2 ELLIOT'S DEBATES, *supra*, at 338; *see also id.* (arguing that the power over the militia is "wrested from [the States'] hands by [the] Constitution, and bestowed upon the general government").

Likewise, Patrick Henry lamented that the Constitution places the militia "into the hands of Congress" and argued that the States were powerless to protect themselves if Congress failed to discipline or arm the militia, because that power is "exclusively given to Congress." 3 ELLIOT'S DEBATES, *supra*, at 48–52; *see also* THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (Dec. 18, 1787), *reprinted in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 12 (David Wootton ed., 2003) ("The powers of Congress under the new constitution, are complete and unlimited over the *purse* and the *sword*, and are perfectly independent of, and supreme over, the state governments, whose intervention in these great points is entirely destroyed.").

In sum, our history shows that the Framers sought to ensure a unitary source of authority on all matters concerning war and the military. There was broad agreement that the States lacked war powers under the Constitution and that all war powers were instead vested solely in the federal government. *See* Hirsch, *supra*, at 665 ("[T]he history of the War Powers Clauses reveals that one of the central goals of the plan of the Convention was for the nation's war powers to lie with a centralized federal government."). The States, therefore, ceded any residual sovereignty they possessed with respect to war and military matters when they ratified the Constitution.

2. Precedent and practice show the States relinquished sovereignty in military matters.

Although this Court has never squarely decided the issue, its decisions support the conclusion that States have no sovereign immunity in matters related to war. In *Chisholm v. Georgia*, for example, Justice Cushing explained that "the power of declaring war, making peace, raising and supporting armies for public defence . . . are lodged in Congress; and *are a most essential abridgement of State sovereignty*." 2 U.S. 419, 468 (1793) (emphasis added). Justice Cushing found it a "self-evident proposition" that the federal war powers necessarily entailed "a curtailing of the power and prerogatives of States." *Id.* Similarly, Chief Justice Jay observed that "making war and peace" was one of the "prerogatives . . . transferred to the national Government." *Id.* at 471.

This Court recognized a similar point in *Tarble's Case* in holding that state courts lack the power to issue writs of habeas corpus to discharge individuals held by the United States military. 80 U.S. 397, 412 (1871). Recognizing the federal government's "plenary and exclusive" control over matters of war, this Court proclaimed that allowing state officials to interfere with that power would "greatly impair[] the efficiency, if it did not utterly destroy," the military. *Id.* at 408; *see also Ableman v. Booth*, 62 U.S. 506, 516 (1858) (making clear that the state and federal governments operate in independent spheres of sovereignty, and "the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge"); Pet'r's Br. at 6–9, 10, 31–37 (providing historical examples of the federal government's reliance on war powers).

More recently, the Court directly addressed the federal government's war powers over States in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). There, the Court held that the President, acting pursuant to authority provided by Congress, can order state National Guard members into active federal military duty during peacetime, despite a governor's objection. *Id.* at 353–55. *Perpich* reaffirmed that the authority of States to establish their own militias remains subject to the control of the federal government. The Court explained the state militia power is a limited exception to the otherwise "exclusive control of the National Government" over matters of foreign policy and military affairs. *Id.* at 353. Similarly, in *Hyatt*, this Court further clarified that the Constitution "divests the States of the traditional diplomatic and military tools that foreign

sovereigns possess," including "the independent power . . . to wage war." 139 S. Ct. at 1497.

In a similar vein, this Court has consistently emphasized the exclusively federal nature of foreign relations powers, of which the war powers are part. For example, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court described how the "powers to declare and wage war, to conclude peace, to make treaties, [and] to maintain diplomatic relations with other sovereignties" were in fact "*never* possessed" by the States. *Id.* at 316–18 (emphasis added).

In short, along with the structure of the Constitution and its history, practice and precedent show that the States have no sovereign immunity in matters relating to war or the military. The States surrendered that immunity in the plan of the Convention, and accordingly have no sovereign immunity defense against private actions brought under legislation enacted pursuant to Congress's war powers.

II. Because Congress validly enacted USERRA pursuant to its war powers, States have no sovereign immunity against actions brought under that Act.

Congress's ability to protect veterans as they return from duty is essential to its ability to raise and support armies. In that context, Congress has enacted legislation to protect veterans' employment and reemployment rights upon returning from service. H.R. Rep. No. 105-448 (1998) (noting that such legislation exemplifies a "national policy to encourage

service in the United States Armed Forces"). Congress relies on its war powers to enact such legislation. *See* 144 CONG. REC. H4458 (daily ed. Mar. 24, 1998) (statement of Rep. Evans) (noting that "the authority for laws involving veterans benefits is derived from the War Powers clause").

USERRA is war powers legislation designed to protect Congress's ability to encourage service in the armed forces. 38 U.S.C. § 4301(a)(1) (stating the purpose of the Act "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"); *see also* 137 CONG. REC. H2977 (daily ed. May 14, 1991) (statement of Rep. Penny) (explaining the purpose of the Act to "clarify and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions"); U.S. Intervenor Br. at 11, *McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440), https://bit.ly/3oUIoX8 (explaining that "[c]ourts of appeals . . . have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to its War Powers" and that "USERRA plays a central role in maintaining Congress's ability to raise and support an Army and Navy"); Pet'r's Br. at 40–43 (discussing congressional aims in enacting USERRA).

Congress included in USERRA a private cause of action against state employers that violate its requirements. *See* 38 U.S.C. § 4303(4)(A)(iii) (defining "employer" to include "a State"); *id.* § 4323 (outlining the enforcement of rights under USERRA with respect to a State or private employer). Because

USERRA is war powers legislation, States have no sovereign immunity defense against those actions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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FEBRUARY 7, 2022