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 WAR POWERS SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

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[1] Both parties consented to this filing via blanket letters on file with the Clerk's office. No counsel for any party authored this brief in whole or in part, and no one aside from *amici* and their counsel contributed monetary to its preparation or submission.

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SUMMARY OF ARGUMENT

Congress' war powers are, and always have been, both great and vast. To say this is not to elide the fundamental principle of our constitutional system that the federal government is one of only limited, enumerated powers. In most respects, the federal government's powers are indeed less capacious than the police powers enjoyed by the several states. But things are different when it comes to war. War is what made, and remade, the Nation. Without the ability to wage war effectively, the Nation could not endure.

This essential truth is reflected in both the fabric of the Nation's history and the text of the Constitution. The Framers, "wisely contemplating the ever-present possibility of war," declared in the Preamble "that one of [the Constitution's] purposes is to 'provide for the common defense'" of the Nation and its people. *United States v. Macintosh*, 283 U.S. 605, 622-23 (1931), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). Indeed, providing for the common defense comes before "promot[ing] the general Welfare, and secur[ing] the Blessings of Liberty to ourselves and our Posterity." U.S. Const.

pmbl. The Framers knew that, without the former, they could not hope to achieve the latter.

Consistent with that wisdom borne of experience, this Court has long affirmed dramatic exercises of authority by the federal government pursuant to its constitutional war powers, despite reining in federal power across an array of issues. The Court has upheld Congress' power to conscript citizens and ship them off to battle; to try American citizens in military tribunals outside the ordinary judicial system; to displace state courts; to fundamentally alter the domestic economy; to limit the speech in which Americans may engage; and more all on the home front, to say nothing of the exercises of authority the Court has blessed abroad.

This brief discusses but a few of the extraordinary exercises of authority this Court has upheld pursuant to the federal government's constitutional war powers. It also provides historical background and context for the Court's decisions in these cases, which affirmed Congress and the President's authority to severely intrude upon individual liberty and state sovereignty all in the service of waging war successfully. This history lends support to petitioner's position in this case that USERRA's authorization of private suits by servicemembers against nonconsenting state actors is a constitutionally valid exercise of the war powers.

ARGUMENT

I. Congress Has Often Displaced The Normal Order Of State Law Under Its War Powers.

It is obviously far from noteworthy that Congress has used its war powers to preempt state *law*. But that is not all the federal government has done in this area. To take just one example, Congress established

a provisional Louisiana court system following the Civil War; vested the courts with original and appellate jurisdiction over all cases, civil and criminal, arising under both federal and Louisiana law; and provided that the courts were administered by *federal army officers*, not Louisiana judicial officials. *See* An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (1866). The jurisdiction of Louisiana's provisional courts was sweeping and plenary, yet this Court had "no doubt" that they were constitutional, nor that the judgments that were issued by the presiding federal military officers could validly be transferred to proper civilian courts. *The Grapeshot*, 76 U.S. (9 Wall.) 129, 131-33 (1869); *see Mechanics' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 294-98 (1874).

Congress also altered the normal working of state courts during the Civil War with respect to "those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948). In 1864, Congress passed a statute that "suspended any action, civil or criminal, against federal soldiers or sailors while they were in the service of the Union and made them immune from service of process and arrest." Amy J. McDonough et al., *Crisis of the Soldiers' and Sailors' Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore*, 43 Mercer L. Rev. 667, 669 (1992); *see* Act of June 11, 1864, ch. 118, 13 Stat. 123. This Court upheld that Act's provision tolling cases that could not be prosecuted due to the rebellion in an opinion that overrode the (now-civil) Louisiana Supreme Court's construction of Louisiana law and procedure. *Stewart v. Kahn*, 78

U.S. (11 Wall.) 493, 500, 503-04 (1870); *see also Stogner v. California*, 539 U.S. 607, 620 (2003); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 542 (1867).

Congress' use of its war powers to fundamentally remake state justice did not end with the Civil War; variants of that 1864 law have been a hallmark of the U.S. Code for the better part of a century now. Congress revived this important protection during the First World War, enacting the Soldiers' and Sailors' Civil Relief Act ("SSCRA") "to prevent prejudice or injury to [servicemembers'] civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation." Pub. L. No. 65-103, §100, 40 Stat. 440, 440 (1918). "The Act provided several protections for those with the 'especial burdens' of active duty in the armed forces," *Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 458 (4th Cir. 2011), including, *inter alia*, protections against default judgments, foreclosure, and eviction, *e.g.*, Pub. L. No. 65-103, §§200, 300, 302. It also "abrogate[d] states' ability to tax servicemembers," which this Court upheld "as an appropriate exercise of the federal government's war powers" in *Dameron v. Brodhead*, 345 U.S. 322 (1953). Jeffrey M. Hirsch, *War Powers Abrogation*, 89 Geo. Wash. L. Rev. 593, 650 (2021).

"The Act expired after [WWI], but Congress reenacted [it] in 1940 and amended it several times from 1942 to 2003." *McGreevey v. PHH Mortg. Corp.*, 897 F.3d 1037, 1042 (9th Cir. 2018). In 2003, "Congress renamed the statute the Servicemembers Civil Relief Act ["SCRA"] and sought to modernize and 'strengthen many of [the SSCRA's] protections,'" *id.* at

1042 (quoting H.R. Rep. No. 108-81, at 35 (2003)), "to enable [servicemembers] to devote their entire energy to the defense needs of the Nation," 50 U.S.C. §3902(1). *See also id.* §3902(2) (Congress enacted the SCRA "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.").

The SCRA "accomplishes this purpose by imposing limitations on judicial proceedings that could take place while a member of the armed forces is on active duty, including insurance, taxation, loans, contract enforcement, and other civil actions." *Brewster v. Sun Tr. Mortg., Inc.*, 742 F.3d 876, 878 (9th Cir. 2014). Like its predecessors, the SCRA "precludes foreclosure if the mortgagor has been an active member of the uniformed services within the previous nine months." *McKenna v. Wells Fargo Bank, N.A.*, 693 F.3d 207, 210 n.1 (1st Cir. 2012); *see* 50 U.S.C. §3953. It also sweeps considerably more broadly. "The SCRA now provides a variety of protections against such diverse ills as cancellation of life insurance contracts, 50 U.S.C. app. §§541-549, and taxation in multiple jurisdictions, 50 U.S.C. app. §§570-571." *Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 458 (4th Cir. 2011). And "[u]nlike under the SSCRA, where it was left to the trial court's discretion whether to grant 'a stay on the ground that a party is absent in the military service and that his absence will materially affect his prosecution or defense of the action,' under the SCRA '[a] stay of proceedings is mandatory upon a properly supported application by the servicemember, but not so if the statutory conditions are not met.'" Sara

Estrin, *The Servicemembers Civil Relief Act: Why and How This Act Applies to Child Custody Proceedings*, 27 L. & Ineq. 211, 214-15 (2009) (quoting *Martin v. Wagner*, 25 So.2d 409, 411 (Ala. 1946), then *In re Marriage of Bradley*, 137 P.3d 1030, 1034 (Kan. 2006)). The SCRA further "affords protection to … servicemembers" in each branch ("Army, Navy, Air Force, Marine Corps, and Coast Guard"), "including active-duty members, reservists, and National Guard members called to active duty." *Id.*

The protections of the SCRA and its predecessors have "always [been] liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Le Maistre*, 333 U.S. at 6 (overturning a state tax sale by giving a broad construction to the Act in light of its "beneficient purpose," and noting that "the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call"); *cf., e.g.*, *United States v. B.C. Enters., Inc.*, 696 F.Supp.2d 593, 596 (E.D. Va. 2010) ("[T]he government has a non-statutory right to sue under the SCRA which is supported by its strong interest in the national defense and its need to enforce statutes that protect the interests of those in the armed forces."), *aff'd*, 447 F.App'x 468 (4th Cir. 2011). That remains the case today as well.

II. Congress And The President Wield Vast Power Over State National Guards.

In addition to overriding the ordinary operation of state courts and state law, Congress has used its war powers to regulate state militias and their members.

Members of state National Guards have been required to enlist in the federal National Guard as well for nearly 90 years. *See* National Defense Act Amendments of 1933, Pub. L. No. 73-64, §18, 48 Stat. 153, 160-61. And the President may transfer them into federal service without gubernatorial consent. That was not always the case. In the Armed Forces Reserve Act of 1952, Congress provided that members of a state National Guard could not be transferred to "full-time duty in the active military service of the United States" for training abroad without the consent of the Governor. Pub. L. No. 476, §101, 66 Stat. 481, 481. This federalism-preserving law remained on the books, and worked with little fuss, through Vietnam. "But in 1985, the Governors of California and Maine refused to consent to training missions in Honduras for their National Guard members"—"which prompted Congress in the next year to eliminate the consent requirement" in a statute known as the Montgomery Amendment. Hirsch, *supra*, at 652; *see* Pub. L. No. 99-661, §522, 100 Stat. 3816, 3871 (1986).

The Governor of Minnesota swiftly challenged the Montgomery Amendment on federalism grounds. According to the Governor, the Constitution permits the federal government to call up state National Guard members only for *domestic* emergencies, not for foreign service (and not in nonemergency situations). *Perpich v. Dep't of Def.*, 496 U.S. 334, 347 (1990). The Governor argued that giving force to the Montgomery Amendment would have "the practical effect of nullifying an important State power that is expressly reserved in the Constitution" in the Militia Clauses. *Id.* at 337, 351; *see* U.S. Const. art. I, §8, cls. 15-16. This Court unanimously "disagree[d]," upholding

Congress' decision in the Montgomery Amendment to allow the President to order members of state Guards to be transferred to active federal duty even without the consent of the state or a declaration of national emergency. *Perpich*, 496 U.S. at 331, 336-38.

Consistent with *Perpich*, challenges to the current Covid-19 vaccine mandate for members of state National Guards have met swift judicial rejection. "Nine vaccinations (now ten, with the COVID vaccination mandate) are required for all service members … includ[ing] … members of the Guard," and that such "military immunization mandates" "date back as far as General George Washington[.]" *Oklahoma v. Biden*, 2021 WL 6126230, at *8-9 (W.D. Okla. Dec. 28, 2021). And all of them have been upheld as "valid and enforceable as applied to the Guard," even though the Guard is ordinarily commanded by state, not federal, officers. *Id.* at *14. Yet the incursion on states' rights is both direct and palpable. Mandating what members of the Guard must put into their bodies treads on "state and local authorities['] … considerable power to regulate public health," which in other areas are proof against federal vaccination mandates. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S.Ct. 661, 667 (2022) (Gorsuch, J., concurring); *see id.* at 666-67 (majority) (striking down federal vaccine mandate as to civilian workers). It also treads on state governors' own military powers over their own Guardsmen. *See Oklahoma*, 2021 WL 6126230, at *9 ("Until such time as a unit of the Guard is 'federalized,' that is, ordered into federal service by the appropriate federal authority, the Commander in Chief of … the Oklahoma Guard … is the Governor."). Nevertheless,

whereas challenges to less sweeping mandates outside the military context have found success, challenges to the mandates for members of the Guard have all failed in light of the federal government's vast war powers.

III. Congress Has Used Its War Powers To Override Private Economic Ordering.

The Nation has understood the relationship between economic power and military might from the beginning. As Hamilton put it, "the Union ought to be invested with full power to levy troops; to build and equip fleets; *and to raise the revenues which will be required for the formation and support of an army and navy*." *The Federalist* No. 23 (Alexander Hamilton) (emphasis added). Historians note that the American victory at the Battle of New Orleans owed a great deal to "American-forged cannons that were among the early fruits of the onrushing industrial revolution." Daniel Walker Howe, *What Hath God Wrought* xiv (2007).

In the intervening years, the federal government has often exercised its war powers to control and direct the economic might of the Nation. For example, "[i]n July 1864, the Philadelphia & Reading Railroad was seized and operated by the War Department … [as a] result of a strike by operating employees." George Cadwalader et al., *The Seizure of the Reading Railroad in 1864*, 111 Pa. Mag. of Hist. & Biography no. 1, 49 (1987). *See generally* Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*, at 94-237 (1990).

Federal incursions into the economy in the name of war escalated in the twentieth century. Even before

formally entering World War I, Congress authorized the President "to take possession and assume control of any system or systems of transportation" in times of war, Act of August 29, 1916, Pub. L. No. 64-242, 39 Stat. 619, 645, which he did, Proclamation 1,419 (Dec. 26, 1917). Once the war began, federal regulation of the domestic economy took full swing. Congress enacted, *inter alia*, the Enemy Vessel Confiscation Joint Resolution, which allowed seizure of ships registered under enemy flag or owned by enemy corporation, ch. 13, 40 Stat. 75 (1917); the Emergency Shipping Fund Act, which created an agency to regulate the shipping industry soup to nuts, ch. 29, 40 Stat. 182 (1917); and the Trading with the Enemy Act, which prohibited commerce with enemy governments, corporations, and others, ch. 106, 40 Stat. 411 (1917). The most striking of all the statutes may well have been the Food and Fuel Control Act, commonly known as the Lever Act, which gave President Wilson near-plenary power "to regulate vast parts of the economy in furtherance of vast objectives." Matthew C. Waxman, *The Power to Wage War Successfully*, 117 Colum. L. Rev. 613, 651 (2017); *see* Pub. L. No. 65-41, §1, 40 Stat. 276, 276 (1917) (delegating to the President the authority "to make such regulations and to issue such orders as are essential").[2]

The third branch of government repeatedly blessed such measures necessary to have a "fighting constitution" in the twentieth century. Charles E. Hughes, *War Powers Under the Constitution*, 40 Ann.

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[2] President Wilson also created an alphabet soup of committees and boards to regulate private industry (more than a decade before the New Deal). *See* Waxman, *supra*, at 637 n.126.

Rep. A.B.A., 1917, at 248; *see, e.g.*, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 11-14 (1926) (upholding seizure and disposal of patents under the Trading with the Enemy Act and delegated Presidential authority to determine the terms of sale of enemy property); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156-61 (1919) (upholding wartime prohibition); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919) (upholding seizure of communications networks); *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 149-52 (1919) (upholding seizure of railroads); *see also United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86-93 (1921) (reversing criminal convictions on grounds of vagueness, but not questioning Congress' power to authorize regulation of food pricing). And as the date and circumstances of many of these cases show, the federal government's war powers were not deemed to end when formal hostilities ceased. Waxman, *supra*, at 658-71.

These assertions of authority were *even broader* than they might at first appear, because, at the time they were made, Congress' peacetime authority over the economy did not extend nearly so far as it does today. "Substantive due process rights of the Fifth and Fourteenth Amendments were generally understood during that period to bar, respectively, federal and state regulation of 'private' activities." Waxman, *supra*, at 653. Thus, for instance, the Lever Act's sweeping regulation of food prices is all the more startling when one considers it was still twenty-five years before this Court upheld the federal regulations on Farmer Filburn's corn. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942). And yet, even in the *Lochner*

era, government action under the war powers "cover[ed] practically every enterprise and activity within the country." Clarence A. Berdahl, *War Powers of the Executive in the United States* 204 (1921).

As with World War I, economic control pursuant to the war powers ratcheted up during World War II. Indeed, it began even before the U.S. entered the war; by the time "war was declared on December 8, 1941, the increasing tempo of economic mobilization and the inability of management and labor to reconcile differences had already caused the President to take over the operation of a large shipyard and an airplane parts factory, and temporarily police a third enterprise." Note, *American Economic Mobilization: A Study in the Mechanism of War*, 55 Harv. L. Rev. 427, 506 (1942); *see also United States v. City of Chester*, 144 F.2d 415, 419 (3d Cir. 1944) ("Nor can it be considered necessary that the United States must be at war in order that Congress and the Executive possess the constitutional sanction to prepare for it."). In June 1940, Congress passed an act authorizing the President to decree that military orders and contracts "take priority over all deliveries for private account or for export." Exec. Order 8,612, 5 Fed. Reg. 5,143 (Dec. 15, 1940); *see* Act of June 28, 1940, Pub. L. No. 76-671, §2(a), 54 Stat. 676, 676. And in May 1941, Congress empowered the President to allocate materials in short supply "in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." Act of May 31, 1941, Pub. L. No. 77-89, 55 Stat. 236; *see* Mariano-Florentino Cuéllar, *Foreword—Administrative War*, 82 Geo. Wash. L. Rev. 1343, 1369 (2014) (discussing these delegations).

Once America joined the war, "the [Emergency Price Control Act of 1942 ("EPCA")] entrusted [the Office of Price Administration ("OPA")] with virtually boundless discretion to set prices across the entire economy." James R. Conde & Michael S. Greve, Yakus *and the Administrative State*, 42 Harv. J.L. & Pub. Pol'y 807, 810-11 (2019). Moreover, such ceiling prices would be the presumptive measure of just compensation for takings under the Fifth Amendment, *see United States v. Commodities Trading Corp.*, 339 U.S. 121, 125 (1950) (citing "congressional purpose and the necessities of a wartime economy"), even when that was frequently far below fair market value, *see* Robert Braucher, *Requisition at a Ceiling Price*, 64 Harv. L. Rev. 1103, 1109 (1951). Meanwhile, under the Second War Powers Act in 1942, "the President's power grew further to encompass the allocation of any 'material or facilities' whenever the President believed that the fulfillment of requirements for the defense of the United States would result in a shortage in the supply of such material or facilities." Cuéllar, *supra*, at 1369 (quoting Pub. L. No. 77-507, 56 Stat. 176 (1942)).

Again, the third branch blessed this and other forms of wartime economic control. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 757-59 (1948) (upholding the compelled renegotiation of private contracts for war supplies). "In *United States v. Delano Park Homes*, [146 F.2d 473 (2d Cir. 1944),] Judge Learned Hand held that wartime restrictions on the use of land justified putting a low value on it in condemnation proceedings…. Other lower courts took the same view, and limited just compensation to prevailing prices in 'voluntary' sales, even though the

Government fixed the price and forbade sales to anyone but the Government." Braucher, *supra*, at 1105-06; *see id.* at 1106 n.15 (collecting cases).

Indeed, the courts blessed exercises of the federal government's war powers even when they overrode traditional state and local authority. For example, "local building regulations" were held to give way to "building emergency housing to house war workers in Chester[, Pennsylvania]." *City of Chester*, 144 F.2d at 416. Similarly, in *Case v. Bowles*, 327 U.S. 92 (1946), this Court "reaffirmed the original understanding of the Constitution that even core state functions must take a backseat to the federal war powers," Hirsch, *supra*, at 651, upholding an OPA injunction that prohibited the State of Washington from selling timber from state land in a manner that complied with state law. 327 U.S. at 100-02. The Court continued to uphold federal incursions in economic realms long left to the states even after hostilities ended. *See, e.g.*, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (upholding federal statute that limited the rent that could be charged for certain housing accommodations).

Congress did not stand down in the exercise of its wartime powers after the war ended—and some powers it did relinquish soon were revived for Korea and the Cold War that followed. The centerpiece of this effort was the Defense Production Act of 1950 ("DPA"), currently 50 U.S.C. §§4501 *et seq*. The DPA originally "granted broad authority to the President to control national economic policy … among other powers, to demand that manufacturers give priority to defense production, to requisition materials and property, to expand government and private defense

production capacity, ration consumer goods, fix wage and price ceilings, force settlement of some labor disputes, control consumer credit and regulate real estate construction credit and loans, [and] provide certain antitrust protections to industry." Cong. Research Serv., *The Defense Production Act of 1950*, at 2 (Mar. 2, 2020). Though substantial portions of the original DPA were repealed in 1953, what remained has been renewed more than fifty times and remains in force. The modern DPA authorizes the President to, *e.g.*, force private industries to accept and/or prioritize defense contracts over other customers or block foreign corporate mergers. *Id.* at i. The Act was used throughout the Cold War and beyond, and it was recently put to use to (among other things) accelerate production of Covid-19 vaccines. *See* Sidney Lupkin, *Defense Production Act Speeds Up Vaccine Production*, NPR (Mar. 13, 2021), https://n.pr/3Hoagvo.

The above are merely a sample of the economic powers exercised by the federal government during the bloody wars and cold conflicts of the twentieth century and the twilight struggles of the twenty-first. Cataloguing the uses of such power in detail would require more space than this brief affords, but there can be no doubt of their immense depth and breadth.

IV. This Court Has Long Upheld Congress' Power To Conscript Americans Into Service.

There is perhaps no more profound intrusion on individual liberty than being conscripted into military service and shipped off to war. Yet the Constitution "fully, completely, [and] unconditionally," *Lichter*, 334 U.S. at 765 n.4, grants Congress power to "raise and support Armies" and "provide and maintain a Navy,"

U.S. Const. art. I, §8, cls. 12-13, and this Court has long upheld exercises of the conscription power.

Congress' conscription power did not arise out of whole cloth in the Constitution; it followed the English practice of impressment. Impressment was seen as "perhaps the greatest anomaly in [England's] laws" and an "exception to personal freedom." 2 *May's Const. History of England* 259-60. Yet it "ha[d] always existed in England." *Kneedler v. Lane*, 45 Pa. 238, 291 (1863). As far back as 1378, "mariners [were] arrested and retained for the king's service." 1 Blackstone, *Commentaries*, at 418-19. By the mid-sixteenth century, impressment was a formalized legal practice. F.W. Maitland, *The Constitutional History of England* 278 (1st ed. 1908). And, in the Elizabethan era, the Crown often demanded of lords-lieutenant a quota of troops to be met only through impressment. Correlli Barnett, *Britain and Her Army 1509-1970: A Military, Political and Social Survey* 41 (1970).

Consistent with these English antecedents, forms of conscription were common in colonial America. *See* Allan R. Millett et al., *For the Common Defense* 3 (3d ed. 2012) ("Colonial laws regularly declared that all able-bodied men between certain ages automatically belonged to the militia."). During the Revolution, states conscripted citizens to fill troop quotas set by Congress. *See* John R. Van Atta, *Conscription in Revolutionary Virginia*, 92 Va. Mag. of Hist. & Biography 263, 263 (1984). And the practice continued well after the Constitution's ratification.

To be sure, no draft was successfully implemented until the Civil War, but that was largely contingent. Washington, for instance, requested a draft, only to be

rebuffed by a Congress that deemed it unnecessary to meet the military needs of the day. *See* Letter from George Washington to the Committee of Congress with the Army, in 10 *The Writings of George Washington* (John C. Fitzpatrick ed. 1932), at 362, 366. Madison and Monroe likewise proposed a draft during the War of 1812, but the war ended before Congress took up the issue in earnest. *See* John W. Chambers II, ed., *The Oxford Companion to American Military History* 180 (Oxford University Press 1999).

That changed after the southern states seceded. Facing an existential threat to the Union (and, of course, to the plan of the Convention), Congress turned to a national draft to provide fresh manpower. In 1863, Congress enacted the Conscription Act, which required the enrollment of all male citizens ages 20-45. ch. 75, 12 Stat. 731. As Lincoln then explained, the power to raise and support armies "is not a power to raise armies if State authorities consent, nor if the men to compose the armies are entirely willing." Abraham Lincoln, *Opinion on the Draft, Aug. 15, 1863*, in 2 *Abraham Lincoln: Complete Works* 388, 389 (John G. Nicolay & John Hay eds., 1920). Rather, "it is a power to raise and support armies given to Congress by the Constitution without an 'if.'" *Id.*

The issue came to a head during the Great War. One month after entering World War I, Congress enacted the Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76. The Act required all male citizens aged 21-30 to register for the draft upon presidential proclamation, and it delegated to the Executive the authority to determine which ones would be called into compulsory military service. *See* Matthew Waxman,

Remembering the Selective Draft Law Cases, Lawfare (Jan. 7, 2022), https://bit.ly/3okTtln.

The Act was controversial, to say the least. But it was not without its defenders. Charles Evan Hughes, the former Associate Justice (and future Chief Justice of the United States) who just had narrowly lost the 1916 presidential election, passionately defended the constitutionality of the Act. In a famous speech, he proclaimed that "[t]he power to wage war is the power to wage war successfully." Hughes, *supra*, at 238. Because the federal government clearly has power to wage war abroad, Hughes maintained it must have the power to create an army capable of doing so effectively. Waxman, *supra*, at 648. And if, a modern expeditionary army of sufficient size and composition can be assembled only by way of selective conscription, as was by then the case, then this power must be lodged in the federal government. Hughes thus concluded that "[t]here is no limitation upon the authority of Congress to create an army and it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on." Hughes, *supra*, at 238.

This Court ultimately agreed. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("The war power "is a power to wage war successfully.'" (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426 (1934))); *Lichter*, 334 U.S. at 780-82; *see also In re Yamashita*, 327 U.S. 1, 12 (1946). Indeed, the Court took to quoting Hughes' maxim "so extensively [that] it was as if the [Court] were reprinting the speech officially into [its] records." Waxman, *supra*, at 616-17, 658 & n.255.

What is more, the Court unanimously upheld the draft in a set of challenges grouped as the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the year after Hughes' speech. The Court held that the Raise and Support Clause and Necessary and Proper Clause give Congress wide latitude to assemble an army by means it sees fit. Waxman, *Remembering the Selective Draft Law Cases*, *supra.* The "army sphere … embraces … complete authority" of Congress, and "the duty of exerting the power thus conferred in all its plenitude … was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play." *Selective Draft Law Cases*, 245 U.S. at 382-83. The Court noted that the Fourteenth Amendment "broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant." *Id.* at 389.

Congress again turned to conscription in 1940—even before the attack on Pearl Harbor. The Selective Training and Service Act of 1940 was the nation's first peacetime draft, requiring all men ages 21-36 to register. Pub. L. No. 76-783, §3(a), 54 Stat. 885, 885-86. Despite being a peacetime law, the Act survived a series of challenges to its constitutionality. *See, e.g.*, *United States v. Lambert*, 123 F.2d 395 (3d Cir. 1941); *United States v. Herling*, 120 F.2d 236 (2d Cir. 1941); *United States v. Garst*, 39 F.Supp. 367 (E.D. Pa. 1941); *United States v. Rappeport*, 36 F.Supp. 915 (S.D.N.Y. 1941); *United States v. Cornell*, 36 F.Supp. 81 (S.D. Idaho 1940). This Court ultimately made clear that the Act was constitutional under the federal "war powers"—and, indeed, was "part of a national policy adopted in time of crisis in the conduct of total global

warfare by a nation dedicated to the preservation, practice and development of the maximum measure of individual freedom consistent with the unity of effort essential to success." *Lichter*, 334 U.S. at 754-55.

That has remained the law of land through Vietnam and today. Despite the severe incursion on individual liberty that conscription entails, Congress' power to impress Americans into military service is, and long has been, both plenary and beyond dispute—even vis-à-vis the ordinary police powers of the states, *see, e.g.*, *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408-09 (1872) (declaring that it is entirely up to the federal government to "determine, without question from any State authority, how the armies shall be raised").

CONCLUSION

The Framers left to posterity a Constitution that, while limiting the powers of the general government in many ways, ensured that the Nation could endure by conferring powers great and vast on Congress and the President when it comes to war. Nearly half of the powers enumerated in Article I, section 8, "are devoted in whole or in part to specification of powers connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950); *see* U.S. Const. art. I, §8, cls. 1, 10-16, 18. And still more are vested in the President in Article II. *See, e.g.*, *id.* art. II, §1, cl. 1; *id.* §2, cl. 1; *id.* §3. This was no accident. The plan of the Convention was not merely to trim off the defective pieces of the Articles of Confederation, but to ensure that the government the American people had fought a war to establish could endure. To that end, the Convention produced, and the states one by one ratified, a document that confers extraordinary war powers that by necessity "tolerate[]

no qualifications or limitations" except those explicitly provided in the text itself. *Macintosh*, 283 U.S. at 622. That is why this Court for nearly 200 years has upheld dramatic exercises of authority in the context of war, despite denying to Congress and the President many far lesser powers. And it is why the war powers, no less than the federal bankruptcy power, may validly abrogate states' sovereign immunity from suit.

The Court should reverse.

Respectfully submitted,

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