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 SCHOLARS OF CONSTITUTIONAL LAW AND THE LAW OF FEDERAL AND STATE COURTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*[1]

Amici curiae, listed in the Appendix, are professors of constitutional law and of the law of federal and state courts. *Amici* hold varying views on state sovereign immunity and the interpretation of the Eleventh Amendment. But *amici* join in this brief

[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. The parties have filed blanket consents with this Court.

because they agree that the Court's jurisprudence on these issues reflects inherent tensions that justify consideration of a new approach. *Amici* propose an approach to sovereign immunity that is grounded in both constitutional text and broader common law principles, and that, in *amici*'s view, is faithful to the original constitutional design and the text and purpose of the Eleventh Amendment. This approach builds on much of this Court's jurisprudence and its concerns about state interests, while also respecting the critical role of Congress in setting forth nationally uniform laws that emanate from a democratically elected body exercising powers granted in the Constitution. *Amici* do not believe that this Court needs to revisit its prior decisions to resolve this case, but do believe that the Court should not extend its prior recognitions of immunity in a manner that moves further afield from constitutional text, structure, and history. The Court should instead build on its more recent decisions adopting a nuanced approach to sovereign immunity—and, in light of that approach, sustain the federal statute at issue here.

SUMMARY OF ARGUMENT

A. The historical evolution of this Court's Eleventh Amendment doctrine has led to a complex body of law and competing rules and exceptions.

1. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court concluded that the Eleventh Amendment represented broader principles of state sovereign immunity than its terms. But in its 1989 decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court, by a 5–4 vote, held that Congress had power to abrogate state immunity from suit when it acted under its Commerce Clause powers.

2. *Union Gas* soon yielded to another 5–4 decision. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court overruled *Union Gas* and held that constitutional principles of sovereign immunity prohibited Congress from authorizing private damages suits against States in federal court under the Indian Commerce Clause. Shortly thereafter, the Court in *Alden v. Maine*, 527 U.S. 706 (1999), extended *Seminole Tribe* to damages suits in *state* courts. *Seminole Tribe* and *Alden* seemed to stand for a categorical rule: Congress cannot use its Article I powers to overcome state sovereign immunity.

3. Yet since then, the Court has moved away from that categorical principle and adopted a more nuanced approach grounded in analyses of specific exercises of Article I powers. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court held that states can be subject to preferential transfer proceedings because such suits are within the scope of Congress' power to enact "Laws on the subject of Bankruptcies." *Id.* at 377. The Court reasoned that the history of the Bankruptcy Clause indicated that states had "agreed in the plan of the Convention" not to assert any sovereign immunity from bankruptcy suits. *Id.* And just last Term, in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), the Court concluded that the states, by ratifying the Constitution, surrendered their immunity to suit in federal eminent domain proceedings, including when instituted by private parties exercising delegated federal power. Both decisions were, again, 5–4 splits.

B. The intricate web of doctrine that has emerged, with its internal tensions and shifting positions, invites reconsideration of the basic frame of analysis.

An alternative approach to state sovereign immunity would explain this area by relying on constitutional text, historical practice, and the judicial role in crafting state-regarding rules in our federal structure.

This approach, as explicated by Justices and commentators, understands the Eleventh Amendment to embody a specific diversity-based prohibition on federal court jurisdiction over states, with the balance of state sovereign immunity law reflecting common law precepts. The common law framework incorporates classical concerns about state-federal relations. At the same time, it respects the role of Congress to devise national policy through a process that is itself responsive to state interests. As others have noted, the doctrine of abstention provides a useful analogy. Judicially crafted abstention principles reflect sensitivities about federal-state relations while not adopting constitutional barriers that would prevent enforcement of important federal interests. A common law approach to state sovereign immunity (outside of the Eleventh Amendment's text) likewise protects significant federalism and state fiscal interests, while leaving room for congressional discretion to create private actions against states when the national legislature makes clear that it views that remedy as necessary to enforce valid federal laws.

C. Here, the Court need not recast its existing law to conclude that the statute at issue is constitutionally valid. The *Seminole Tribe* line of authority, while it may warrant reconsideration in a future case, has recognized exceptions where states surrendered their immunity in the plan of the Convention. This Court should build on those exceptions to recognize the

distinctive federal nature of Congress's war powers as a source of authority to create private actions against states. Applying that principle, this Court should hold that the private cause of action in state court authorized by the Uniformed Services Employment and Reemployment Right Act (USERRA) is a valid exercise of Congress's war powers.

ARGUMENT

A. A Longstanding Debate Over The Contours Of State Sovereign Immunity Has Produced A Doctrinally Complex Body Of Case Law

1. This Court's complex framework for addressing state sovereign immunity claims dates from the earliest years of the nation. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court, by a 4–1 vote, upheld its jurisdiction over a South Carolina citizen's state law claim for money damages against Georgia. Two years later, the Eleventh Amendment to the Constitution was ratified, overturning the result in Chisholm.

Courts and scholars have long debated the impetus for the Amendment. *See*, *e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1940 (1983) (arguing for the "instrumental role" played by the treaties between the United States and Great Britain after the Revolutionary War in "shaping the narrow contours of the [E]leventh [A]mendment"); Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State and Tribal: The Story of Seminole Tribe of Florida v. Florida, in* Federal Courts Stories 329, 331 (2009) ("[The Eleventh Amendment] plainly was directed at changing outcomes in

situations like *Chisholm*[.]"); Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. Sup. Ct. Hist. 73, 73 (1993) ("While it is true that many were outraged by *Chisholm* . . . [states'] opinion on the subject was far from unanimous."). Whatever the animating force behind the amendment, the result was an amendment that enshrines in constitutional text a specific form of immunity covering "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.[2]

Beyond the text of the Eleventh Amendment, state sovereign immunity is best understood as grounded in common law, not constitutional rules. *See, e.g.*, John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1750 (2004) (arguing that the Court "must not readjust the [Eleventh] Amendment's precise terms to capture their apparent background purpose. . . . [T]he Amendment's precise enumeration of exceptions to the grant of Article III power carries a

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[2] Some decisions and authorities read the Eleventh Amendment as conferring a specific form of immunity, while other jurists and scholars interpret it as a withdrawal of some part of Article III's grant of federal jurisdiction. *Compare*, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("Eleventh Amendment immunity"), *with, e.g.*, *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) (jurisdictional rule). This brief does not enter into that debate. What is important here is that the Eleventh Amendment's text states a clear rule delineating a particular form of protection for states. Consistent with this Court's general use, this brief refers to it as a form of immunity created by the Eleventh Amendment.

negative implication, the product of an apparent decision to go so far and no farther in defining the desired exceptions to federal jurisdiction").

Soon after the Eleventh Amendment was added to the Constitution, the Court made clear that the Amendment's scope is limited to its terms. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), this Court, in an opinion by Chief Justice John Marshall, rejected arguments that the Court lacked jurisdiction over an appeal by a Virginia citizen, against Virginia, in a criminal case originating in the Virginia courts. The Court explained that if the appeal were viewed as a "suit," which the Court believed it was not, it was not one "commenced or prosecuted 'by a citizen of another State,'" and so was not "within the amendment, but is governed entirely by the constitution as originally framed, . . . [in which] the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." *Id.* at 412.

Yet, this text-based clarity was diminished in the aftermath of the Civil War, as the Court wrestled with how to apply common law conceptions of immunity in actions against states brought on bonds issued during the War. *See* Gibbons, *supra*, at 1974–98 (tracing the history of the bond wars). In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that the Eleventh Amendment should be understood to signify state immunity from suit by any private persons—whether citizens of the same state or of a different state, and whether the basis for federal jurisdiction was diversity or a federal question. *Hans* took an "expansive" view of the Eleventh Amendment, reading its text to "stand for a more general principle of sovereign immunity

than [the] words" of the Amendment themselves support. Jackson & Resnik, *supra*, at 332. Some scholars view *Hans* largely as the product of the decision's post-Reconstruction historical context and the resulting concerns for state fiscal integrity.[3] In *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), this Court extended that holding—again beyond the Amendment's text—to bar claims by foreign states in federal court, reasoning that this immunity flowed from an implicit assumption (or "postulate") of the Constitution itself. This decision, too, can be understood as expressing a concern for

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[3] After the Civil War and the Reconstruction era, one scholar has argued, national policy goals shifted to "sectional reconciliation" with the Southern states when "most Americans had turned their backs on the goals and policies of Reconstruction." Edward A. Purcell Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and Federal Courts*, 81 N.C. L. Rev. 1927, 1946 (2003). In this framing, *Hans* can be understood as only one of many "wobbling . . . post-Reconstruction cases" that permitted Southern states to repudiate the bonds owed at the end of the Civil War and formed "an integral part of the Court's broader and quite purposeful effort to reshape federal jurisdiction to serve its evolving ideas of desirable national policy in a new, post-Reconstruction, industrial age." *Id.* at 1934, 1950; *see also* Jackson & Resnik, *supra*, at 332 ("[Some scholars] have argued that one way to understand [*Hans*] . . . is by reference to the political situation: after 1876, when federal troops were withdrawn from the South, defiance of judgments by the southern states might have been thought more likely, and Eleventh Amendment doctrine developed . . . [to protect] states . . . from the claims of bondholders." (*citing* John Orth, *The Judicial Power of the United States* 9, 47–57, 67–77, 110–20 (1987)).

state fiscal interests that could be undermined by federal court enforcement of bond obligations.[4]

For several decades beginning in the 1950s, the pendulum swung in a different direction as the Court recognized that federal courts could, if directed by Congress, hear claims against states. This recognition emphasized the role of Congress in creating remedies. *See*, *e.g.*, *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964) (holding that by operating a railroad in interstate commerce the state had consented to suit under the Federal Employers Liability Act); *cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that state sovereign immunity could be abrogated by laws passed under § 5 of the Fourteenth Amendment). At the same time, scholars re-examined past case law, and with some increased skepticism about *Hans*, reframed the analysis.[5] They argued that whatever immunity rules the Constitution provided

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[4] See Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 Harv. J. L. & Pub. Pol. 593, 602–03 & n.50 (2012).

[5] See, e.g., William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *supra*; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 Harv. L. Rev. 682 (1976); *cf.* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203 (1978) (arguing that the Eleventh Amendment restored only a common law immunity that Congress could overcome).

against *judicial* power to infer causes of action against states for monetary remedies (as was at issue in *Hans*), Congress—as the body in which the interests of all of the states were represented—could authorize such suits when acting under its enumerated powers, provided it did so with clarity.[6]

These developments culminated in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), when this Court, in a 5–4 decision, held that Congress had power to abrogate state immunity from suit when Congress acted under its Commerce Clause powers. The Court thus upheld a provision regulating environmental harms, concluding that Congress expressed its intention to authorize a private action against states with the requisite clarity. Justice Brennan, writing for four Justices, explained that "[b]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress . . . it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 19–20 (plurality opinion). The plurality also reasoned that the states "gave their consent" to such actions "all at once, in ratifying the Constitution containing the

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[6] *See, e.g.*, Jackson, *supra* note 5, at 110–11 (arguing that "understanding sovereign immunity as a form of federal common law" would support a "clear evidence approach to questions of statutory abrogation of immunity" which in turn could "increase the likelihood that Congress will actually focus on these questions [of state liability and remedies] and that the states have sufficient notice to permit them to advocate their interests in Congress"); Tribe, *supra* note 5 (arguing that federal question jurisdiction would extend to statutory claims where Congress abrogates immunity).

Commerce Clause, rather than on a case-by-case basis." *Id.* at 20. Justice Stevens, in a concurring opinion, explained why "much of [the Court's] state immunity doctrine has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment." *Id.* at 25 (Stevens, J., concurring); *id.* at 27 (explaining the Court's cases as reflecting a "balancing of state and federal interests"). Justice White, who concurred in the judgment, "agree[d] with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," although not with the plurality's reasoning. *Id.* at 57 (White, J., concurring in the judgment).

2. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court, again by a 5–4 vote, took another turn when it overruled *Union Gas* and held that Congress did not have the power under the Indian Commerce Clause to abrogate Florida's sovereign immunity in suits brought in federal court. The Court reasoned that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 72. The Court painted with a broad brush in rejecting arguments for Article I authority to override state sovereign immunity. "[C]ontrary to the implication of Justice Stevens's" dissent, the Court stated, "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes[.]" *Id.* at 72 n.16. In treating state sovereign

immunity as a constitutional doctrine beyond Congress's power to supplant through the exercise of Article I powers, the Court dismissed what it termed a "blind reliance upon the text of the Eleventh Amendment." *Id.* at 69. Instead, the Court concluded that the Framers did not intend to cabin that Amendment to the specific diversity-jurisdiction scenarios described in its text while leaving federal-question jurisdiction untouched. Because federal courts did not have federal question jurisdiction at the time the Amendment was enacted, the Court believed, "it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States." *Id.* at 69–70.

Shortly thereafter, the Court extended *Seminole Tribe* by holding in *Alden v. Maine*, 527 U.S. 706 (1999), that Congress cannot use its Article I powers to abrogate a state's sovereign immunity in suits for damages under the Fair Labor Standards Act filed in *state* courts. The Court stated that referring to "the States' immunity from suit as 'Eleventh Amendment immunity'" is "convenient shorthand but something of a misnomer." *Id.* at 712–13. The Court reasoned that state sovereign immunity does not derive from the text of the Eleventh Amendment, *id.*, but rather from "well established . . . English law" that heavily influenced the values of the Constitution, *id.* at 715–16. *See also id.* at 716 ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted." (quoting *Hans*, 134 U.S. at 16)). The Eleventh Amendment, the Court stated, "confirmed" the immunity principle, leading the Court to hold that

this background principle, rather than the Eleventh Amendment's text, delineates the scope of immunity implicit in the Constitution. *Id.* at 728–29.

Seminole Tribe and *Alden* thus seemingly embraced a bright-line rule: Congress cannot use any of its Article I powers to authorize suits against states brought in federal or state courts. That rule carried through several subsequent decisions, including *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), in which the Court held that neither the Interstate Commerce Clause nor the Patent Clause gave Congress the power to abrogate state sovereign immunity from patent-infringement claims; *College Savings Bank v. Fla. Prepaid, Postsecondary Education Expense Board*, 527 U.S. 666 (1999), holding that Congress could not abrogate immunity for Lanham Act claims and overruling *Parden v. Terminal Railway*, 377 U.S. 184 (1964); and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), where the Court considered the Age Discrimination in Employment Act of 1967 and "adhere[d]" to *Seminole Tribe*'s holding that "Congress' power under Article I . . . do not include the power to subject States to suit at the hands of private individuals," *id.* at 79–80. *See also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727 (2003) ("Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce."); *Allen v. Cooper*, 140 S. Ct. 994, 1001–02 (2020) (holding that Congress

may not rely on the Copyright Clause to abrogate state sovereign immunity).[7]

3. More recently, however, the Court has reevaluated its undifferentiated account of congressional authority under Article I. The Court held, in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that states *can* be subject to suits concerning bankruptcy. The Court reasoned that for some aspects of Congress's Article I power, states had "agreed in the plan of the Convention not to assert [their] immunity." *Id.* at 377. And despite "statements in . . . *Seminole Tribe* . . . [that] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause," *id.* at 363 (citation omitted), the Court held that the bankruptcy power was an exception to that rule. *Katz* reasoned that the Bankruptcy Clause not only granted "legislative authority to Congress, but also [] authorize[d] limited subordination of state sovereign immunity in the bankruptcy arena." *Id.*

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[7] *See, e.g.*, Jackson & Resnik, *supra*, at 355 (noting that during this period "the Court repeatedly found statutes, otherwise valid under the Commerce Clause, insufficient under the Fourteenth Amendment to authorize suits against states. Thus, victims of state violations of patent and trademark laws or of age or disability discrimination could not sue states for damages"); Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 Ind. L.J. 543, 545, 563 (2003) (citing to these cases and concluding "the Article I-based federal laws whose abrogations of state immunity have fallen victim to *Seminole* all typify the modern administrative state's reach and ability to cause injury [w]hether it is the state's appropriation of intellectual property, its discrimination against the aged or disabled in employment, or its denial of basic overtime pay to its employees").

This Court made another significant inroad into *Seminole Tribe*'s broad categorical approach last Term in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021). The Court held that New Jersey could not claim sovereign immunity as a defense to condemnation proceedings brought by a private party to which Congress had delegated its eminent domain authority. Writing for a 5–4 majority, Chief Justice Roberts began by outlining modern state sovereign immunity doctrine. *Id.* at 2258. A state may be party to a suit if the state "unequivocally expresse[s]" consent, *id.* (quoting *Sossamon v. Texas*, 563 U.S. 277, 284 (2011)); if Congress has abrogated the state's immunity under § 5 of the Fourteenth Amendment, *id.* (citing *Fitzpatrick*, 427 U.S. at 446); or if the state agreed to suit in the "'plan of the Convention,' which is shorthand for the structure of the original Constitution itself," *id.* (quoting *Alden*, 527 U.S. at 728). These waivers, "to which all States implicitly consented at the founding," *id.*, apply in bankruptcy proceedings, *Katz*, 546 U.S. at 379; suits by other states, *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); and suits by the United States, *see United States v. Texas*, 143 U.S. 621 (1892). In *PennEast*, this Court concluded that eminent domain proceedings, including when instituted by private parties exercising delegated federal power, were part of a set of waivers of immunity implied by the State's implicit founding-era consent. *PennEast*, 141 S. Ct. at 2259.

B. Analyses Of State Sovereign Immunity And The Eleventh Amendment Should Focus On The Constitutional Text And On Common Law Principles

As the history sketched above indicates, this Court's sovereign immunity jurisprudence has long reflected internal tensions and positional shifts. From *Hans* onward, the Court has to a great degree relied on non-textual considerations to constitutionalize this area of the law, culminating in the broad, non-textual rules espoused in *Seminole Tribe* and *Alden*. As Chief Justice Rehnquist wrote in *Seminole Tribe*, "[a]lthough the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms." *Seminole Tribe*, 517 U.S. at 54 (internal quotation marks and alterations omitted).

Yet as *Katz* and *PennEast* illustrate, this atextual approach has since given way to more nuanced assessments of when and how state immunities operate in the many different clauses that constitute Article I. Those analytical developments are a logical consequence of the breadth and diversity of Article I's textual commitments of powers to Congress and of the lack of a clear constitutional source for the implicit immunities that the Court has recognized.

The Court need not here reconsider the entire framework and its long history of grappling with states as defendants in the federal courts. What the shifts and adjustments in the doctrine do invite is reconsideration of an approach that returns the focus to the Eleventh Amendment's text as the sole

constitutional basis for state sovereign immunity, and that understands the balance of state sovereign immunity law as a federal common law doctrine informed by comity considerations that are inherent in our federal structure.

1. As an initial matter, the Eleventh Amendment itself should be read as a targeted revision of the party-based jurisdiction found in Article III. The text of the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity . . . against one of the United States by Citizens of another State[.]" U.S. Const. amend. XI. The Amendment's language is "specific, technical, and limited." Jackson, *supra* note 5, at 3. It directly addresses the party-based grant of jurisdiction originally given in Article III, namely, over "Controversies . . . between a State and Citizens of another State" (or foreign citizens). U.S. Const. art. III, § 2. As discussed *supra*, early decisions by this Court generally gave the Amendment this literal reading. *See, e.g.*, *Cohens*, 19 U.S. at 264 (holding that the Eleventh Amendment does not apply to controversies between a citizen and his own state). While the Court has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of constitutional structure which it confirms," *PennEast*, 141 S. Ct. at 2258 (internal quotation marks omitted), the textual boundaries of the Eleventh Amendment provide a concrete source for a constitutional protection of an immunity that protects states from suit by citizens of another state in defined circumstances.

Of course, judges and scholars alike have recognized aspects of state sovereign immunity in

addition to and separate from the words of the Amendment. As noted, the prevailing view in this Court's jurisprudence infers additional aspects of state sovereign immunity from presumed intentions underlying the Constitution. *See Seminole Tribe,* 517 U.S. at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.") (citation omitted). Because of its constitutional status, this type of immunity applies in both federal and state courts, and is recognized regardless of whether the plaintiff is a citizen of the same state or a different state.

A competing approach—grounded in history and responsive to balancing state and federal interests—grounds state sovereign immunity in common law principles. Under this view, state sovereign immunity is non-constitutional, can be waived by the state, and is subject to congressional abrogation. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 158 (Souter, J., dissenting); *Union Gas Co.*, 491 U.S. at 18 (plurality opinion of Brennan, J.) ("The language of the Eleventh Amendment gives us no hint that it limits *congressional* authority . . . It would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power."); *id.* at 24 (Stevens, J., concurring) (discussing the Court's "two Eleventh Amendments" and concluding that the non-textual, "judicially created doctrine of state immunity" yields to Congress's "plenary power to subject the States to suit [on federal questions] in federal court").

Regardless of the analytic approach taken, neither the constitutional position on state sovereign immunity nor the common law account expands or contracts the express language of the Eleventh Amendment. That provision should be interpreted as a constitutional rule limited to its text.

2. Stepping beyond the textual confines of the Eleventh Amendment, the residual sovereign immunity enjoyed by the states is best understood as a common law principle that can be overcome by federal legislation if Congress speaks clearly in an exercise of its enumerated powers. To the extent that judicial supplementation of the Constitution's text has treated state sovereign immunity as an implied constitutional rule, it sweeps too broadly. Rather, the common law approach is more faithful to history, our federal system, and core democratic values.

Before the ratification of the Constitution, sovereign immunity was understood as a feature of the common law, *see Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) ("The Founders believed that both 'common law sovereign immunity' and 'law-of-nations sovereign immunity' prevented States from being amenable to process in any court without their consent."), and scholars taking a variety of positions agree that the Constitution did not create or abolish this common law principle. *Compare* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 619 (2021) (describing one "distinct principle[] of state sovereign immunity" as the "common-law principle against forcing states into court—neither created by the Constitution, nor abolished by Article III, nor supplanted by the Eleventh Amendment") *with*

Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 538 (1978) (reviewing the history of ratification of the Constitution and concluding that "sovereign immunity did survive the Constitution, but it survived as a common law requirement. Historical sources do not support the position that [A]rticle III imposes a requirement of sovereign immunity").

This Court in *Hans* derived a constitutional basis of state sovereignty immunity from its understanding of founding-era history and the adoption of the Eleventh Amendment. 134 U.S. at 12–14. But that decision has been criticized as elevating "two sentences of dicta" from Justice Iredell's *Chisholm* dissent to conclude that the Constitution "would not permit a compulsive suit against a State for the recovery of money." *Seminole Tribe*, 517 U.S. at 80 n. 4 (Stevens, J., dissenting) (internal quotation marks omitted). And as others have persuasively argued, the common law view is equally consistent with the result in *Hans* itself. *See* Field, *supra*, at 537 & n.81 (describing *Hans* as "wholly consistent with the view that sovereign immunity survived [A]rticle III as only a common law doctrine"); Purcell, *supra* note 3, at 1934 (arguing that the "reasoning employed in *Hans* . . . shows that the opinion was rooted in pre-Civil War common-law ideas"). At the very least, the historical record is mixed. As the plurality observed in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 484 (1987), after surveying the background of the Eleventh Amendment, "the historical materials show that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous."

In the face of what is at least an ambiguous historical record and given the absence of textual support for state immunity outside of the Eleventh Amendment, viewing state sovereign immunity as a species of federal common law is the best approach. As an initial matter, treating state sovereign immunity as common law is consistent with this Court's development of common law in related contexts. Generally, the power of federal courts to develop federal common law is limited to "protect[ing] uniquely federal interests." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (internal quotation marks omitted); *see* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 15–17 (1985). Respecting our federal structure and the role of states as sovereigns is one such interest. In a related context, the Court has developed federal common law immunity rules for foreign officials. *See Samantar v. Yousuf*, 560 U.S. 305, 324 (2010) ("Even if a suit is not governed by the [Foreign Sovereign Immunities Act], it may still be barred by foreign sovereign immunity under the common law."). Those judicially devised common law rules protect foreign sovereigns in order to further comity interests. They thus provide an instructive parallel to judicially devised common law rules that protect states in order to further comity and federalism interests in our federal structure.

The common law doctrine of state immunity balances the key role that states play in our constitutional system with the authority of Congress, which is itself composed of representatives elected by the several states, to set national policy. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552–53 (1985). A common law approach respects

federalism and the separation of powers by requiring Congress to declare that federal interests justify an action against the states. *See* Merrill, *supra*, at 15–16. And it is consistent with the Constitution's provision that federal law is the supreme law of the land. U.S. Const. art. VI, cl. 2. *See Seminole Tribe*, 517 U.S. at 104 (Souter, J., dissenting) (with the Constitution, "States would become parts of a system in which sovereignty . . . would be divided or parcelled out between the States and the Nation, the latter to be invested with its own judicial power and the right to prevail against the States whenever their respective substantive laws might be in conflict").[8]

The common law approach is also respectful of the states' role in the federal system. Within their own legal systems, of course, states remain free to assert immunity from state-created claims. And claims based on federal law can be adjudicated in accordance with presumptions and norms that seek to limit federal interference with states, such as abstention and the clear-statement rule. *See* Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*,

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[8] Understanding state sovereign immunity as common law also answers questions that may be raised about this Court's authority to sit in appellate review of state court judgments involving questions of federal law, even when brought against a state. *See* U.S. Const. art. III, §§ 1–2 (vesting the "judicial Power" in "one supreme Court" with appellate and original jurisdiction); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 26–31 (1990) (recognizing that it "has long been implicit" and "uniformly endorsed in [the Court's] cases " that the Framers did not intend to "constrain" the Court's appellate jurisdiction through the Eleventh Amendment); *see generally* Jackson, *supra* note 5, at 13 (discussing this "anomaly" in current Eleventh Amendment jurisprudence).

1996 Sup. Ct. Rev. 1, 12–13 (1996). But because state interests are represented in Congress, states have a powerful voice in protecting their own interests before Congress creates a private action cognizable against the states. *See Garcia*, 469 U.S. at 552–53. Indeed, one of the progenitors of the scholarship of "the federal courts"—Herbert Wechsler—famously made this same point. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558 (1954) ("[T]he national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to . . . restraining new intrusions by the center on the domain of the states.").[9] Thus, to the extent that Congress finds that federal interests take precedence, that is the product of the Constitution's allocation of power to a legislative body that reflects state interests and has responsibility within its enumerated powers to safeguard the interests of the nation.

Finally, the common law approach to state sovereign immunity accords with core "values deeply

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[9] Despite some countervailing analyses, Wechsler's central insight still has force. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1506 & n.150 (2007) ("Congress's political accountability makes it a better barometer of when interstate restrictions threaten national union and when they do not, as well as provides it with greater legitimacy in legislating substantive limits on the states."); *cf.* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 109–28 (2001) (arguing for substantive judicial review in protection of federalism concerns).

ingrained in our democratic form of government, including the accountability of democratic governments to their citizens." Robel, *supra*, at 545. Sovereign immunity sits uneasily "in a constitutional republic vesting sovereignty in the people." Meltzer, *supra*, at 11. Recognizing Congress's authority to allow private suits against states that violate binding federal law addresses that concern.

At the same time, recognizing Congress's authority to provide that remedy does not threaten the critical role of states in our federal system. This is particularly true because of the various strands of doctrine that protect state interests in legislation that applies to them. These include clear-statement rules that ensure that Congress has focused on the need to apply federal law to the states, *see*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991); anti-commandeering rules that limit when federal law can direct state activity, *see*, *e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1476–77 (2018); *Printz v. United States*, 521 U.S. 898 (1997); and principles that limit congressional exercises of power under the Spending Clause, *see*, *e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 575–85 (2012) (Roberts, C.J.); *South Dakota v. Dole*, 483 U.S. 203, 207–11 (1987).

In sum, the common law approach respects history, the states' role in our federal system, and national legislative authority conferred in the Constitution. It is also more modest. It acknowledges the ambiguous, contested history surrounding these issues and avoids unnecessary constitutional pronouncements.

Once it is understood that state sovereign immunity does not have a constitutional foundation

beyond the specific text of the Eleventh Amendment, it follows that when Congress acts pursuant to a valid exercise of an enumerated power and has clearly indicated that it intends to apply its provisions—including private causes of action for money damages, as here—to states, it can do so. *See Nev. Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721, 741 (2003) (Souter, J., concurring) (treating the state sovereign immunity defense at issue as having "its source in judge-made common law" and concluding that "[a]s long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce 'among the several States'" (quoting U.S. Const. art. I, § 8)).

3. This Court's abstention doctrine serves as a useful analogy. While federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), this Court has fashioned a set of judicially created abstention doctrines that serve as exceptions to this general rule. These doctrines are grounded in principles of "comity" and "Our Federalism." *Younger v. Harris*, 401 U.S. 37, 44 (1971). "Although the Court [in *Younger*] makes no claim that abstention is constitutionally required, its discussion of the applicable principles has proceeded from constitutional norms." Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 79 (1989). These norms include a "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to

perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. Abstention is often considered to be a form of common law. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 545 (1985) (noting abstention's "ancient and honorable roots at common law as well as in equity"). Even though abstention doctrine in some sense "rest[s]" on "constitutional 'postulates,'" "it has not been thought that the Constitution would prohibit Congress from barring federal courts from abstaining." *Seminole Tribe*, 517 U.S. at 89 (Stevens, J., dissenting).

The same general principles hold true for the common law aspects of state sovereign immunity: they are informed by constitutional values and respect the role of the states in our constitutional system, but are not themselves incorporated in the Constitution as broad restraints on Congress. Like other aspects of federal common law, they can also be abrogated when Congress speaks clearly. *See City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."); *cf. Union Gas Co.*, 491 U.S. at 25, 26 (Stevens, J., concurring) (characterizing those elements of state sovereign immunity not based on the Eleventh Amendment's text as "prudential" in character, and thus surmountable by Congress). Accordingly, outside of the narrow textual Eleventh Amendment grant of state sovereign immunity in the context of diversity suits against states, Congress should otherwise be permitted to allow citizens to sue

states for violations of federal rights provided that it makes its intention clear.

This approach does not necessarily call into question the result in *Hans*, where the cause of action relied on the Contracts Clause, U.S. Const. art I, § 10, cl. 5, rather than a specific federal statute. Where Congress has *not* specifically authorized such suits, the common law immunity remains undisturbed—even when the underlying claim still arises under federal law. But *Hans*'s scope should not reach so far as to limit the powers of Congress to speak for the nation on the remedies that are "necessary and proper" to implement its validly enacted laws.

C. The Court Should Not Extend Its Sovereign Immunity Case Law To Bar Congress From Creating The Private Action Under USERRA, Enacted Pursuant To Congress's War Powers

Although reconsideration of this Court's current approach may be warranted in a future case, the Court need not recast its broader sovereign immunity framework to resolve *this* case. At a minimum, the *Seminole Tribe* line of cases should not be expanded. Instead, the Court can build on its post-*Seminole Tribe* decisions in *Katz* and *PennEast* finding exceptions to that doctrine. Applying those cases, and reserving broader questions for another day, the Court should hold that Eleventh Amendment principles do not justify barring Congress from exercising powers that the Constitution specifically allocates to the federal government in the context of war powers. Whether framed as statutory abrogation or inherent constitutional surrender, the end result ought to be the same: outside of the text of the Eleventh Amendment,

Congress may subject non-consenting states to suit under its war powers so long as it does so expressly.

1. The war powers are unusual in that they belong to the national government, and in the plan of the Convention states yielded authority to Congress. The Constitution gives the authority to Congress to "raise and support Armies" and "provide and maintain a Navy." U.S. Const. art. I, § 8, cls. 12–13. These powers have been described as "broad and sweeping," and they include the ability to recruit servicemembers. *See Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006). Relatedly, this power exclusively belongs to the national government. The states are expressly prohibited from "keep[ing] Troops . . . or engag[ing] in War, unless actually invaded." U.S. Const. art. I, § 10, cl. 3. The case for limiting state sovereign immunity is at its zenith where the Constitution bestows authority on Congress while withholding it from the states. *See* The Federalist No. 32 (Alexander Hamilton) (discussing limitations on state sovereignty in the plan of the convention "where [the Constitution] granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority"). And the Court has routinely struck down acts by states that impede Congress's ability to raise and support armies. *See, e.g.*, *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down a Texas constitutional provision that prohibited any member of the U.S. armed forces who moves to Texas from voting in a state election).

Even under *Seminole Tribe*, the Court has recognized exceptions to state sovereign immunity. These include, as relevant to this case, suits to which the state has "implicitly" waived immunity as part of

the "plan of the Convention," that is, "the structure of the original Constitution." *PennEast*, 141 S. Ct. at 2258 (internal quotation marks omitted). As discussed, the Court has found "such waivers in the context of bankruptcy proceedings, suits by other States, . . . suits by the Federal Government," and suits under the federal eminent domain power. *Id.* (citations omitted). As petitioner explains, the text, structure, and history of the Constitution support the conclusion that states likewise consented to suits authorized by Congress's war powers. *See* Pet's Merits Br. 21–40; Petition Stage Br. for the United States as *Amicus Curiae*, *Torres v. Tex. Dep't of Pub. Safety*, No. 20-603, at 11–17*; see also* Br. of *Amici Curiae* Philip C. Bobbitt, Michael C. Dorf, & H. Jefferson Powell in Support of Petition for Certiorari, *Torres v. Tex. Dep't of Pub. Safety*, No. 20-603, at 18–20.

2. Separation of powers principles likewise counsel caution before preventing Congress from exercising its enumerated war powers to make policy judgments to effectuate distinct national concerns that affect the entire Nation. Here, Congress has enacted a series of statutes expressing a clear national policy to encourage military service by requiring state and local governments to reemploy veterans or service members. In doing so, Congress expressly authorized service members to sue state employers for damages to redress any violations. It took care to provide that claims against states could be brought only in state courts, in contrast to claims against private employers, which can be brought in federal courts. And Congress capped the amount to which states and other employers would be subject to the loss of wages or benefits to which the employee was entitled, with

"liquidated damages"—available only in the event of proof of a willful violation—capped at that amount. 38 U.S.C. § 4323(d)(1).

Such a decision is within the sound discretion of Congress. It is consistent with the text of the Eleventh Amendment, not prohibited by any other clause in the Constitution, and not inconsistent with the results in *Seminole Tribe*, *Alden*, and their progeny. The Constitution should not be read to prohibit Congress's informed choices here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX 1: LIST OF *AMICI CURIAE*[10]

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[10] Institution names are provided for purposes of identification only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

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