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 of Texas, Thirteenth District

BRIEF OF FORMER MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former members of the U.S. Senate and House of Representatives, all of whom have devoted varying years of service to the United States as members of Congress. As part of that in Congress, *amici* have developed an understanding of the importance of Congress's role in overseeing various aspects the Nation's military branches.

Whether through appropriations, oversight, or other activities, *amici* as former members of Congress have a unique and important perspective on what is necessary to ensure that the Nation's military forces remain adequately funded and prepared to defend the Nation. Many, if not all, of *amici* were actively involved with various legislation affecting the rights of servicemembers of our Nation's military branches. Some Former Members served on Senate or House committees responsible for military-related oversight or legislation. Others introduced or worked on bills that, directly or indirectly, concerned the rights and responsibilities of servicemembers and veterans. These legislative activities implicated in many ways Congress's important and weighty responsibilities under the Constitution's War Powers Clauses.

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[1] Pursuant to Supreme Court Rule 37.3, counsel of record for all parties consented to the filing of this brief through their respective letters of blanket consent filed with the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Additionally, several *amici* are veterans themselves. Through their military service and their relationships with other veterans, they understand the critical importance of protecting the reemployment rights of our Nation's men and women who serve in the military branches.

Amici therefore have a substantial interest in ensuring that this Court respects the constitutional structure as embodied by the War Powers Clauses. That structure flows from the text and structure of the Constitution, the historical evidence concerning the War Powers, and the utmost importance that the War Powers have in protecting and defending our Nation.

SUMMARY OF ARGUMENT

> He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

The sentiment expressed in Justice Douglas's words, when writing for the Court, applies with equal force today as they did almost eighty years ago—and perhaps with more force as the composition of our Nation's military force has expanded beyond just men.

First, the Constitution sets forth the War Powers in broad terms. That broad grant of authority to Congress from the States is evidenced in the text, structure, and history of the Constitution.

Second, USERRA is but one example of Congress exercising its authority under the War Powers Clauses and enacting legislation that relates directly to the recruitment and maintenance of the U.S. armed forces. USERRA is a critically important piece of legislation that ensures that our Nation's servicemembers and veterans are not discriminated against by State and private employers. As part of its responsibilities under the War Powers, Congress must be able to pass such legislation so that State and private employers do not discriminate against military servicemembers and veterans.

Third, an examination of the plan of the constitutional convention confirms that the States ceded any authority to claim immunity to Congressional action under the War Powers. A waiver of immunity under the "plan of the Convention" is and should be a rare instance under the Constitution. But if one area qualifies, it is certainly the War Powers. Congress must be able to uniformly make laws pursuant to its War Powers without being beholden to claims of State immunity. USERRA is one such critical piece of legislation.

As this Court held only last term, States waived any immunity, pursuant to the plan of the Convention, to being sued for money damages pursuant to the Constitution's eminent domain power. If the Constitution authorizes those types of suits against states, then the Constitution certainly authorizes suits and other remedies to enforce rights granted to servicemembers and veterans in legislation duly enacted pursuant to the War Powers.

ARGUMENT

I. The U.S. Constitution Empowers Congress with Its War Powers

Amici start with the Constitution and the broad War Powers granted to the Congress from the citizens of the States. Based on that broad grant of power, Congress—not the States—has been the critical component of our Government that is responsible for taking military actions necessary to protect the Nation.

A. The Constitution Broadly Grants War-Related Responsibilities to Congress

The Constitution establishes and assigns the various powers across the three branches of government: the Legislative Branch under Article I; the Executive Branch under Article II; and the Judicial Branch under Article III. Since the Nation's early days, the success of our form of government depends on a continued need to respect the separation of powers under the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J. concurring) (noting the "Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy").

The separation of powers is particularly acute for governing the Nation's wartime-related functions and activities. Congress is empowered "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Congress is also granted the power "[t]o raise and support Armies." U.S. Const. Art. I, § 8, cls. 12–13. It similarly has the power to "provide and maintain a Navy." *Id.*

The Constitution continues with further enumerated war-related powers, granted *only* to the Congress:

> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. Art. I, § 8, cls. 14–16.

As this Court has recognized time and again, the aforementioned war powers are "broad and sweeping." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006); *accord United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The power of Congress to classify and conscript manpower for military service is 'beyond question.'" (quoting *Lichter v. United States*, 334 U.S. 742, 756 (1948))); *United States v. Macintosh*, 283 U.S. 605, 622 (1931) ("From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law."), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946); *Selective Draft Law*

Cases, 245 U.S. 366, 381 (1918) (explaining that the Constitution "manifestly intended to give . . . all" authority "to raise armies" to Congress and "leave none to the States").

Moreover, the Constitution expressly forbids States from exercising war-related activities. No State can "grant Letters of Marque and Reprisal." U.S. Const. Art. 1 § 10, cl. 1. Nor can any State "keep Troops, or Ships of War in time of Peace." U.S. Const., Art. 1, cl. 3. Along similar lines, a State cannot "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.*

The express exclusion of the States from the authority or responsibility for war-related activities is eminently reasonable, from both historical and practical perspectives. The Framers understood that, in military matters, the new nation had to be as one, particularly given the failures of the less centralized powers of the Articles of Confederation. It is indeed difficult to envision any modern nation that could succeed without military responsibilities and authority being exclusive to the main national government.

This understanding of the Framers is evident through their contemporaneous writings. The writings of Alexander Hamilton, James Madison, and John Jay emphasized a strong national government being responsible for the Nation's military defense. *See e.g.*, The Federalist Nos. 3, 29.

For instance, John Jay explained, in Federalist No. 3, that a national military response would be far more effective than individual States when responding to threats from neighboring foreign territories:

> The neighborhood of Spanish and British territories, bordering on some States and not on others, naturally confines the causes of quarrel more immediately to the borderers. The bordering States, if any, will be those who, under the impulse of sudden irritation, and a quick sense of apparent interest or injury, will be most likely, by direct violence, to excite war with these 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.

The Federalist No. 3.

The debates in the state conventions highlighted the same understanding that the country's military was the responsibility of the federal government, not the States. *See* Jonathan Elliot, The Debates in the Several State Conventions of the Adoption of the Federal Constitution Vol. I, 419 (1827) (Alexander Hamilton: "To avoid the evils deducible from these observations, we must establish a general and national government, completely sovereign, and annihilate the state distinctions and state operations; and unless we do this, no good purpose can be answered."); *id.* at Vol. III, 393 (James Madison: "The safety of the Union and particular states re- quires that the general government should have power to repel foreign invasions."); *id.* at Vol. II, 214 (Robert Livingston expressing similar views).

The Constitution thus broadly authorized the federal government the near-exclusive power and responsibility

for war-related activities. At the same time, the Constitution affirmatively sets forth that the States are *not* permitted to engage in war-related activities. Of all the powers of a government, war-related powers are the powers that are most necessary to address an existential threat to the government itself. For that reason, of all the enumerated powers in the Constitution, the War Powers must be one where States ceded to the authority of the United States.

B. Congress Has Regularly and Necessarily Exercised Its Authority under the War Powers Clauses to Ensure the Nation's Military Readiness

Pursuant to the broad authorization of the War Powers Clauses, Congress has over the years used that authority to enact legislation to accomplish its responsibilities. Congress has sought to ensure a faithful execution of those responsibilities, whether through legislation or oversight activities.

Turning to earlier years of our Nation's history, Congress enacted legislation to raise armies as a federal fighting force. As this Court has previously noted, "[f]rom the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment." *Selective Draft Law Cases*, 245 U.S. 366, 384 (1918).

More recently, and more related to employment issues for servicemembers and veterans, Congress has

enacted numerous statutes to incentivize service in the U.S. Armed Forces. The related enactments reflect a "national policy to encourage service in the United States Armed Forces" by granting service members "the right to return to civilian employment without adverse effect on their career progress." H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998) (House Report). This safeguard is even more important today because reservists have become a critical element of the military personnel.

Although numerous, a few examples of Congress using its War Powers to enact legislation relating to the employment rights and remedies for U.S. military personnel include the following:

> Selective Training and Service Act, 1940 Act, Pub. L. No. 76-783, 54 Stat. 885 ("To provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training.");
>
> Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 ("To provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes.");
>
> Veterans Benefits Act, Pub. L. No. 85-857, 1958, 72 Stat. 1105 ("To consolidate into one Act all of the laws administered by the Veterans' Administration, and for other purposes.");

> Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (To make improvements and amendments to educational and vocational programs for veterans and their family members.);
>
> Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103-353, 108 Stat. 3149 ("[T]o improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, and for other purposes.");
>
> Veterans Programs Enhancement Assistance Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 ("[T]o improve benefits and services provided to Persian Gulf War veterans, to provide a cost-of-living adjustment in rates of compensation paid to veterans with service-connected disabilities, to enhance programs providing health care, compensation, education, insurance, and other benefits for veterans, and for other purposes.").

Congress passed each of the above-listed laws and many others pursuant to its constitutional War Powers. Covering a wide range of issues, the legislation enables Congress to execute its unique responsibilities under the Constitution.

Beyond legislation, in the current Congress, there are eight committees or subcommittees with oversight over the military matters. The Senate has the Senate Armed Services Committee, the Personnel Subcommittee, the Senate Appropriations Committee, and the Defense Subcommittee. The House of Representatives has the House Armed Services Committee, the Military Personnel Subcommittee, the House Appropriations Committee, and the Defense Subcommittee. The activities of these committees and subcommittees represent an important component of Congress's efforts to carry out its duties under the War Powers Clauses.

II. USERRA as an Effective Application of Congress's War Powers

In 1944, President Franklin D. Roosevelt said –

> It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.

President Franklin D. Roosevelt, Letter to Representative Ramspeck (1944) (cited in *Mitchell v. Cohen*, 333 U.S. 411, 419, n.12 (1948)). President Roosevelt's sentiment was not surprisingly shared by Congress, which, as noted above, over the last 80-plus years enacted numerous laws protecting the Nation's soldiers from employment discrimination and mistreatment during and after their service to the United States.

In 1940, Congress passed the Selective Training and Service Act, Pub. L. No. 76-783, providing veterans a right to reemployment. 54 Stat. 885, 890 (1940). Four years later, Congress passed the Veterans Preference Act of 1944 (VPA), Pub. L. No. 78-359, 58 Stat. 387, "recognizing that millions of Americans had delayed or put on hold their civilian careers so they could serve the Nation in uniform." *See* U.S. Merit Systems Protection Board, *Veterans' Employment Redress in the Federal Civil Service* 2 (2014).

Nevertheless, in the decades after 1944, veterans were still experiencing mistreatment in gaining employment after serving their Nation in uniform. As such, Congress found the need to act again and provided further protections to servicemembers. In 1974, Congress passed the Vietnam Era Veterans Readjustment Assistance Act ("VRRA"). *See* Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974). In passing the VRRA, Congress noted that veterans continued to experience a reluctance and unwillingness of State and local governments to reemploy them. *See* Rep. of Comm. On Vets' Affs., S. Rep. No. 93-907, at 109-10 (1974).

Still, this was not enough to protect servicememebers from unfair employment actions. In 1994, USERRA was passed to continue Congress's efforts to "raise and support Armies" and "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12-13. USERRA's purpose is three-fold:

> (1) 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;

> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301.[2] USERRA is the embodiment of Congress's express desire to eliminate—and provide a viable remedy for—discrimination by State and private employers on the basis of military service. On its face, USERRA was passed by Congress to protect servicemembers from discrimination during and after their service to the Nation—and is thus a critical tool when recruiting new members of the armed services.

USERRA's scope is broad, like the War Powers Clauses. USERRA prohibits discrimination against service members because of their service and service obligations, provides reemployment rights, and protects health insurance coverage and pensions. 38 U.S.C. §§ 4301–4333. The Act covers nearly all small and large private-sector employers, the Federal government, and

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[2] USERRA was amended in 1998 to, among other things, explicitly authorize suits against State employers in state court. USERRA Amendments Act of 1998, H.R. 3213, 105th Cong. § 2(a) (1998). Also in 1998, Congress passed the Veterans Employment Opportunities Act, 5 U.S.C. § 3330a, which provides a remedy if a federal agency improperly denies a veteran their preference rights in hiring and employment.

State governments. *Id.* § 4303(4). Notably, an "employer" need not have a minimum number of employees to be covered by USERRA. *Id.* § 4303(4).

Importantly, to ensure that servicemembers can effectively enforce their rights under USERRA, Congress provided that servicemembers would be able to file suit in court. A servicemember may enforce their USERRA rights against a State employer or private employer either by filing an administrative complaint or by filing suit in state court. *Id.* U.S.C. § 4323.[3] Significantly it is the *servicemember* who decides whether to file suit in court *or* pursue an administrative claim. *Id.* § 4323(a)(3).

USERRA provides significant remedies to those who have been discriminated against in violation of the law. A State or private employer can be subject to equitable and monetary relief. A court may require the employer (or potential employer) to provide the servicemember back pay, liquidated damages, lost benefits, prejudgment interest, and reimbursement of attorney fees. *Id.* § 4323(d) and § 4323(h). The Act also directs the state court to use its equity powers. In pertinent part, the Act states "The court shall use . . . its full equity powers, including temporary or permanent injunctions . . . to vindicate the rights of benefits of persons under this chapter. *Id.* § 4323I. Significantly, Congress made clear

[3] Actions against the Federal government as an employer are enforced only through administrative procedures with appellate review in the U.S. Courts of Appeals. 38 U.S.C. § 4324; *see also*, U.S. Merit Systems Protection Board, *Veterans' Employment Redress Laws in the Federal Civil Service* (Nov. 2014), at https://www.mspb.gov/studies/studies/Veterans_Employment_Redress_Laws_in_the_Federal_Civil_Service_1103655.pdf.

that State employers were subject to these same remedies as a private employer to ensure that all servicemembers and veterans are treated equally. *Id.* § 4323(d)(3).

Congress also wanted to ensure that servicemembers who experienced discrimination or suffered other violations of their rights under the law would have time to pursue their claims. In a departure from most laws providing for a cause of action against employers or potential employers, USERRA has *no statute of limitations*. *See* 38 U.S.C. § 4327(b) ("[T]here shall be no limit on the period for filing the complaint or claim.").

The importance of USERRA to servicemembers and their families cannot be overstated. As former Members of Congress, *amici* view USERRA as a critically important piece of War Powers legislation designed to recruit and retain the Nation's servicemembers and to protect their employment during and after their service to the country.

III. The States Cannot Be Immune from Compliance with USERRA

Under a proper reading of the Constitution, the States cannot opt out of legislation that is duly enacted pursuant to the War Powers Clauses. The test, structure, and history of the Constitution confirm this conclusion. The Constitution and the history of our Nation consistently make it clear that the States ceded any claim of immunity to being subject to the remedies necessary to effect duly enacted legislation pursuant to the War Powers Clauses.

A. The "Plan of the Convention" Does Not Allow States to Opt Out of Legislation Enacted Pursuant to Congress's War Powers

As noted above, the text and history of the Constitution evince an understanding that the War Powers were reserved exclusively for the Federal Government (through Congress and the President)—and not the States. This conclusion is consistent with the plan of the Convention, "which is shorthand for 'the structure of the original Constitution itself.'" *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (quoting *Alden v. Maine,* 527 U.S. 706, 728 (1999); *see also* The Federalist No. 81, at 548–49 (J. Cooke ed. 1961) (A. Hamilton).

Along those lines, and as this Court has noted, a State may be sued if it has agreed to suit in the "plan of the Convention." *PennEast*, 141 S. Ct. at 2258; *Alden*, 527 U.S., at 728. "The 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding. *PennEast*, 141 S. Ct. at 2258 (citing *Alden*, 527 U.S. at 755–56). The Court has recognized waivers with respect to: suits against States asserting eminent domain, *PennEast*, 141 S. Ct. at 2258; in bankruptcy proceedings, *Central Va. Community College v. Katz*, 546 U.S. 356, 379 (2006), suits by other States, *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), and suits by the Federal Government, *United States v. Texas*, 143 U.S. 621, 646 (1892).

Importantly, where the States "agreed in the plan of the Convention not to assert any sovereign immunity defense," Congress does not need to abrogate the States sovereign immunity through Section 5 of the Fourteenth Amendment. *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020).

In this sense—and not surprisingly—the War Powers Clauses are fundamentally different from other constitutional clauses that reserve certain powers to the Federal Government, such as the Intellectual Property Clauses, which require congressional abrogation in order to subject the States to suits. *See Allen*, 140 S. Ct. at 1007 (holding that Congress lacked authority to abrogate the States' immunity from copyright infringement suits in the Copyright Remedy Clarification Act of 1990); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647–48 (1999) (holding that Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), 35 U.S.C. §§ 271(h), 296(a), was not a valid abrogation of State immunity under the Fourteenth Amendment).

To be sure, and as a matter of constitutional governance, it should be a rare instance for a court to hold that the States agreed to be subject to suit in federal court, as part of the plan of the Convention. State sovereign immunity is an important feature of our Nation's constitutional structure. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) ("Interstate sovereign immunity is similarly integral to the structure of the Constitution."). This Court has rightfully held that the Constitution bars suits against nonconsenting States in a wide range of cases. *See, e.g.*, *Federal Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 769 (2002) (actions by private parties before federal administrative agencies); *Alden*, 527 U.S. at 759–60 (suits by private parties against a State in its own courts); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 788 (1991) (suits by Indian tribes in federal court); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934) (suits by foreign states in federal court); *Ex*

parte New York, 256 U.S. 490, 503 (1921) (admiralty suits by private parties in federal court); *Smith v. Reeves*, 178 U.S. 436, 448–49 (1900) (suits by federal corporations in federal court).

But none of this Court's prior cases dealt with a governmental power that is so fundamentally important to the existence of a country. The power to wage war and to defend a nation from military threats is, in many respects, part and parcel with the ability of a country to exist. The Founders of our Nation, who understood this axiomatic point, created our great Nation through the Revolutionary War.

B. The Court's 2021 Decision and Reasoning in *PennEast Pipeline Co. v. New Jersey* Support Petitioner's Position

Just last term, the Court considered the "plan of the Convention" issue in the context of whether New Jersey could claim immunity from a suit for takings under the Fifth Amendment. *See PennEast*, 141 S. Ct. at 2244. Although the Court's ruling was split, *amici* see strong support for Petitioner's position in both the opinion of the Court and the dissent in *PennEast*.

The case concerned the Natural Gas Act and whether a private party (acting on behalf of the federal government under the act) could sue a State using the federal government's eminent domain power. *Id.* at 2251–52. In the majority opinion, penned by Chief Justice Roberts, the Court held that "the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegatees." *Id.* at 2259. The majority relied on the "plan of the convention" and held that "PennEast's condemnation

action to give effect to the federal eminent domain power falls comfortably within the class of suits to which States consented under the plan of the Convention." *Id.*

In language that could securely and equally be applied to the Constitution's War Powers, the majority explained that the Federal Government's eminent domain power is necessarily superior to any State interest in that area:

> Since its inception, the Federal Government has wielded the power of eminent domain, and it has delegated that power to private parties. We have observed and approved of that practice. The eminent domain power may be exercised—whether by the Government or private delegatees—within state boundaries, including against state property. We have also stated, as a general matter, that "the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings."

Id. at 2257 (quoting *United States v. Dow*, 357 U.S. 17, 21 (1958)).

Speaking more generally, the Court explained that, "when the States entered the federal system, they renounced their right to the 'highest dominion in the lands

comprised within their limits.'" *Id.* (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656 (1890)). The plan of the Convention incorporated the principle that "States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'" *Id.* at 2259 (quoting *Kohl v. United States*, 91 U.S. 367, 372 (1876)). In other words, "[i]f 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." *Cherokee Nation*, 135 U.S. at 656 (quoting *Stockton v. Baltimore & N.Y.R., Co.*, 32 F. 9, 19 (D.N.J. 1887)).

And the Court correctly observed that the States' waiver at the Convention is more than simply an argument based on Congress's exclusive area of law. "Even 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." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

The dissent in *PennEast* disagreed, obviously. Penned by Justice Barrett, the primary dissent noted that, "even in areas where Article I grants it 'complete lawmaking authority,' Congress lacks a tool that it could otherwise use to implement its power: 'authorization of suits by private parties against unconsenting States.'" 141 S. Ct. at 2266 (quoting *Seminole Tribe*, 517 U.S. at 72). The dissent continued: "Consistent with this principle, we have rejected arguments that the Indian Commerce Clause, the Interstate Commerce Clause, or the Intellectual Property Clause allows Congress to abrogate

a State's immunity from suit." *Id.* The dissent further recognized that there has been "one exception to this general limit on Congress' Article I powers: the Bankruptcy Clause." *Id.* at 1002.

Whether applying the majority analysis or the dissent's analysis, it is difficult to see how *PennEast* could lead to any conclusion other than that the States agreed to be subject to any remedy—including private lawsuits for money damages—necessary to effect and comply with duly enacted federal legislation under the War Powers Clauses.

C. The Theory of State Immunity Would Be Dangerously Disruptive to Congress's Responsibility to Ensure Uniform Military Readiness

Moving beyond the plan of the Convention, *amici* offer their pragmatic perspective on Congress's role in considering whether the States can refuse, based on claims of state immunity, to comply with USERRA. From the perspective of the former members of Congress, it seems nearly infeasible to expect Congress to effectively execute its obligations and responsibilities under the War Powers Clauses if Congress is beholden to the States' agreement to comply.

Indeed, numerous States have refused to comply with USERRA. *See State of Florida, Dep't of Highway Safety & & Motor Vehicles v. Hightower*, 306 So. 3d 1193, 1201 (Fla. 2020); *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 362–63 (Ala. 2001); *Janowski v. Div. of State Police, Dep't of Safety & Homeland Sec.*, 981 A.2d 1166, 1170 (Del. 2009); *Anstadt v. Bd. of Regents of Univ. Sys. of Ga.*, 693 S.E.2d 868, 870–71 & n.14 (Ga.

Ct. App. 2010); *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 574–75 (Tenn. Ct. App. 2012), *cert. denied*, 133 S. Ct. 1471 (2013); *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 (Va. 2016); *see also* Jeffrey M. Hirsch, *War Powers Abrogation*, 89 Geo. Wash. L. Rev. 593 (2021).

These results have created unacceptable anomalies in trying to craft uniform legal requirements. Some veterans in certain States are subject to discrimination with no adequate remedy against State employers, while other veterans in other States enjoy their well-earned protections under USERRA against State employers.

Similarly, accepting the theory of state immunity, an individual employed by a local government can sue the local government for a USERRA violation but not the State government. State immunity, after all, does not apply to local governments and other political subdivisions within the state. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (holding that the Eleventh Amendment does not apply to local governmental entities); Settlement Agreement, *Goodman v. City of New York*, No. 1:10-cv-05236-RJS (S.D.N.Y. July 2, 2013) (ECF No. 97-1) (settlement of USERRA litigation against the City of New York brought by members of the New York Police Department who performed active military service, while employed by the NYPD, in response to the attacks on September 11, 2001).[4] *Amici* are hard-pressed to understand why, for example, state law enforcement officers should not be

[4] https://www.justice.gov/archive/usao/nys/pressreleases/January14/USERRASttlementPR/USERRA%20Approved%20Settlement%20Agreement.pdf; *see also* New York City Police Pension Fund, Goodman Settlement (announcing settlement), at https://www1.nyc.gov/html/nycppf/html/home/goodman_settlement.shtml

afforded the same rights and remedies, pursuant to the War Powers, as their fellow local law enforcement officers.

It should also not matter that Congress did not subject nonconsenting States to money-damages lawsuits by servicemembers until 1994. This is not an instance of congressional avoidance, *Printz v. United States*, 521 U.S. 898, 918 (1997)). As employment arrangements change over the years, Congress may choose different remedies to allow servicemembers and veterans to enforce their rights. Simply because Congress chose not to enact certain remedies at an earlier date does not mean that Congress now does not have the authority of the War Powers Act to provide a remedy to ensure that the States respect the rights of U.S. servicemembers and veterans.

Finally, it strains the imagination to think that the Founders expected their new Federal Government's war-time interests to be subject to the whims of the States. One can see how State sovereignty might trump, for example, the Intellectual Property Clause, but with war being an existential threat to the future of the Nation, and given their experience with the far-from-optimal structure of the Articles of Confederation, the only reasonable conclusion is that the States agreed to consent to any foreseeable remedy that Congress may enact in order to carry out its obligations under the War Powers Clauses, including lawsuit by servicemembers and veterans to remedy discrimination based on military service.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Former Members of Congress respectfully request that this Court

reverse the decision of the Texas state court. The Court should hold that, pursuant to the plan of the Convention, the States have waived their rights to claim immunity from private suits for money damages that are authorized by legislation duly enacted by Congress pursuant to its broad War Powers authorization under the U.S. constitution.

Respectfully submitted,

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Counsel for Amicus Curiae

February 7, 2022

APPENDIX:
LIST OF *AMICI*

Former Members

Ackerman, Gary
Representative of New York

Andrews, Tom
Representative of Maine

Barrow, John
Representative of Georgia

Begich, Mark
Senator of Alaska

Berman, Howard
Representative of California

Braley, Bruce
Representative of Iowa

Capps, Lois
Representative of California

Carnahan, Jean
Senator of Missouri

Carnahan, Russ
Representative of Missouri

Carr, Robert
Representative of Michigan

Coleman, Tom
Representative of Missouri

Costello, Jerry
Representative of Illinois

Daschle, Thomas
Senator of South Dakota

Dorgan, Byron
Senator of North Dakota
Representative of North Dakota

Edwards, Donna
Representative of Maryland

Edwards, Mickey
Representative of Oklahoma

Gephardt, Richard
Representative of Missouri

Gilchrest, Wayne
Representative of Maryland

Halvorson, Deborah
Representative of Illinois

Hanabusa, Colleen
Representative of Hawaii

Hodes, Paul
Representative of New Hampshire

Israel, Steve
Representative of New York

Kilroy, Mary Jo
Representative of Ohio

Klein, Ron
Representative of Florida

Lampson, Nick
Representative of Texas

LaRocco, Larry
Representative of Idaho

LeBoutillier, John
Representative of New York

Levine, Mel
Representative of California

McCloskey, Paul
Representative of California

McDermott, James
Representative of Washington

Miller, Brad
Representative of North Carolina

Morella, Connie
Representative of Maryland

Panetta, Leon
Representative of California

Sandlin, Max
Representative of Texas

Schneider, Claudine
Representative of Rhode Island

Schroeder, Patricia
Representative of Colorado

Schwartz, Allyson
Representative of Pennsylvania

Shays, Chris
Representative of Connecticut

Smith, Peter
Representative of Vermont

Stupak, Bart
Representative of Michigan