No. 20-603

In the Supreme Court of the United States

LE ROY TORRES, PETITIONER

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS FOR THE
THIRTEENTH JUDICIAL DISTRICT,
CORPUS CHRISTI, TEXAS

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (USERRA), as amended by the Veterans Programs Enhancement Act of 1998, Congress purported to rely on its Article I powers to authorize servicemembers to sue their state employers in the State's own courts for discrimination on the basis of military service. Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329-30 (codified at 38 U.S.C. § 4323 (2000)). The question presented is:

Whether the States agreed to subject themselves to private employment-discrimination lawsuits in their own courts when they ratified the Constitution.

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INTRODUCTION

No one disputes that national security is an awesome responsibility or that warmaking is a fearsome power. That is precisely why the Founding generation declined to include in the Constitution the expansive, amorphous "war powers" to which Torres constantly alludes. Instead, because the power to wage war is both the final bulwark of freedom and its greatest threat, the Founding generation—after months of debate—granted Congress only limited, specific powers, some of which could be used to prosecute a war. Not one of those powers includes the ability to subject nonconsenting States to civil lawsuits by servicemembers. Nevertheless, Torres asks this Court to adopt a view of the "war powers" that would empower Congress to dispense with the States' sovereign immunity through virtually any Article I power and render most of this Court's sovereign-immunity doctrine incorrect. This Court treats neither state sovereignty nor its precedents so cavalierly.

Because Torres cannot identify a textual basis for the proposition that the States subjected themselves to private-party lawsuits to enable the Nation to defend itself, he insists that the States ceded all sovereignty relating to anything touching on war. But, unlike the Bankruptcy Clause and the power of eminent domain—areas in which the States acquiesced to lawsuits in the plan of the Convention—Congress's power to make war does not imply the power to authorize private-party suits. Indeed, the United States survived nearly 200 years, defeating the British Empire, putting down the Confederate rebellion, and saving the world from the Axis powers before Congress passed USERRA. The Republic has managed the terrible burden and responsibility of war without

subjecting States to private-party lawsuits in their own courts. It can do so still.

STATEMENT

I. Constitutional Background

Despite Torres's repeated insistence (*e.g.*, at 3, 5, 8), the Constitution does not vest Congress with plenary and aggregated "war powers." To the contrary, ours is a government of enumerated powers, and "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). As Torres himself notes (at 3), "out of seventeen specific paragraphs of congressional power [in Article I, section 8], eight of them are devoted in whole or in part to specification of powers connected with warfare," *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950), including the powers to declare war, raise an army, maintain a navy, regulate the national armed forces, and call state militias into federal service, U.S. CONST. art I, § 8, cls. 11-15.

Even beyond these powers directly associated with war, nearly all of Congress's enumerated powers relate in some way to its "authority to make war" or its "power to make peace." Pet. Br. 27. For example, its power to "regulate Commerce with foreign Nations" allows Congress to either provoke or prevent conflict, U.S. CONST. art. I, § 8, cl. 3, such as by the imposition or lifting of economic sanctions on belligerent nations. *Highland v. Russell Car & Snowplow Co.*, 279 U.S. 253, 258-59 (1929) (price controls); *Regan v. Wald*, 468 U.S. 222 (1984) (sanctions against Cuba). Nor can war be waged without the power to raise, U.S. CONST. art. I, § 8, cl. 1, borrow, *id.* cl. 2, or mint, *id.* cl. 5, the funds to pay troops or buy equipment. Congress's power to "regulate Commerce . . . among the several States" similarly allows the imposition of wartime price controls and rationing to support the war effort and

to ensure an adequate supply of materiel, *id.* cl. 3, and to "promote the Progress of Science and useful Arts" to incentivize innovations in weaponry, *id.* cl. 8.

Nonetheless, this Court's landmark sovereign immunity cases arose in the context of lawsuits attempting to enforce debts against States arising from the consequences of war. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Hans v. Louisiana*, 134 U.S. 1 (1890). *Hans* confirmed that the States' immunity from private-party suits remained intact even against claims arising from debts accrued to rebuild after an existential military conflict. And *Chisholm*'s contrary holding—arising from a Revolutionary War debt—occasioned such severe nationwide backlash that the same generation that ratified the Constitution promptly overturned that decision by enacting the Eleventh Amendment. *Infra* at 10-11.

II. Statutory Background

A. USERRA's Development

Not once during this country's first two centuries—or first five declared wars—did Congress attempt to use its warmaking powers to allow soldiers to sue their home States. Not until World War II did Congress first require employers to restore returning servicemembers to their previous positions or ones of like seniority. Selective Training and Service Act of 1940, Pub. L. No. 76-793, ch. 740, 54 Stat. 885 (1940 Act). Even then, this requirement did not apply to reservists, state employers, or federal employers.

In 1974, Congress extended this requirement to permit private-party suits against state—but not federal—employers. Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578. Still, servicemembers' suits were limited to federal court. In 1994, USERRA expanded servicemembers' employment

guarantees to reservists and created the current federal administrative enforcement mechanisms. USERRA, Pub. L. No. 103-353, §§ 2(a), 5, 108 Stat. 3149. It continued to permit servicemembers to sue state employers, but not federal ones, in federal court.

After this Court held that Congress may not use its Article I powers to abrogate state sovereign immunity in federal court, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996), Congress amended USERRA to authorize private-party suits against States in state courts. Pub. L. No. 105-368, § 211, 112 Stat. at 3329, 3330. The following year, this Court concluded that the immunity recognized in *Seminole Tribe* also applied in state courts. *Alden v. Maine*, 527 U.S. 706, 754 (1999).

B. Remedies available to servicemembers

1. Despite sovereign immunity, state-employed servicemembers still possess multiple remedies for alleged employment discrimination. Administrative remedies provide the most common avenue for relief: the U.S. Department of Labor has overseen thousands of successful negotiations since World War II between returning servicemembers and their pre-deployment employers. *See* Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals at 4, Hearing before S. Comm. on Veterans Affairs, 102d Cong., 1st Sess. (May 23, 1991) (citing 90% success rate), https://files.eric.ed.gov/fulltext/ED344099.pdf. This administrative system remains USERRA's preferred enforcement mechanism. 38 U.S.C. §§ 4322(a), 4322(d), 4326(b)-(c).

In the rare instance where administrative remedies prove inadequate, USERRA allows the Attorney General to bring suit "in the name of the United States as the plaintiff," *id.* § 4323(a)(1), which does not implicate

sovereign immunity, *United States v. Texas*, 143 U.S. 621, 646 (1892). Other statutes prohibit discrimination based on disabling injuries, including those sustained by servicemembers while on active duty—particularly for entities (including many state entities) who receive federal funds. *E.g.*, 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 12112 (Americans with Disabilities Act).

2. Nor are servicemembers limited to federal remedies. Texas law affirmatively favors veterans for public employment and provides state-law remedies for anti-servicemember discrimination as well. Tex. Gov't Code ch. 657. These protections include a guaranteed right to "return to the same employment" after military service, including protections against "loss of time, efficiency rating, vacation time, or any benefit of employment during or because of the absence." Tex. Gov't Code §§ 437.001(8), .204(a). As with federal law, that right is primarily enforced through an administrative process aimed at informal resolution, *id.* §§ 437.204(b), .402, which is managed by the Texas Workforce Commission, *id.* §§ 437.404, .407. Where informal processes are insufficient, the Commission can seek injunctive relief, *id.* §§ 437.409, .415, .418, and compensatory or punitive damages, *id.* §§ 437.410(a), .416. For public employees, a district attorney can also seek injunctive relief. *Id.* § 613.022.

III. Factual Background

A. Torres's termination following repeated accommodations

Torres enlisted in the U.S. Army Reserve in 1989. Pet. App. 73a. Fully aware of his ongoing service obligation, the Texas Department of Public Safety (DPS) hired and employed him for approximately a decade. *Id.* In 2007, while Torres was deployed to Iraq, toxic fumes emanating

from burn pits damaged his lungs. *Id.* at 74a. After a year's service, Torres was honorably discharged. *Id.*

DPS welcomed Torres back to his previous position as a state trooper. *Id.* But Torres's lung damage prevented him from fulfilling some of his duties, including patrolling state highways. *Id.* DPS therefore accommodated Torres by transferring him to an administrative position. Carson Frame, *Texas Supreme Court to Weigh In: Can Military Reservists Sue the State for Employment Violations?*, TEX. PUB. RADIO (Sept. 17, 2019), https://tinyurl.com/2s49vkx8. And though Torres referred (at 16) to his new position as "temporary," DPS employed him at full pay in that position for more than two years. Frame, *supra*.

In his new position, Torres "often missed work," forcing his supervisors to put him on administrative leave in 2010. *Id.* Only after he was put on leave because of his unreliable attendance did Torres ask DPS to employ him in a different capacity. *Id.* In 2011, DPS offered to do so on one condition: that Torres reliably report for work. Pet. App. 74a-75a. Torres opted to resign instead. *Id.* at 75a; RR.25-26.[1]

B. Torres's belated claims of discrimination

Torres waited five years after his resignation to seek any form of redress. Pet App. 72a; RR.5, 7-10. Bypassing both federal and state administrative remedies, he filed a lawsuit in Texas state court seeking damages under USERRA, alleging that DPS had discriminated against him based on his army service. Pet. App. 75a-78a.

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[1] "RR" refers to the Reporter's Record filed with the Texas Court of Appeals of the Thirteenth Judicial District in No. 13-17-00659-CV. "CR" refers to the Clerk's Record filed in the same case.

DPS moved to dismiss on sovereign-immunity grounds, CR.36-45, which the trial court denied. Pet. App. 49a. A divided court of appeals reversed without deciding whether USERRA had abrogated DPS's sovereign immunity, *id.* at 6a n.1, instead concluding that Congress lacked the power to abrogate the State's immunity under Article I. *Id.* at 16a. That court also recognized that DPS retained its immunity as a matter of state law. *Id.* at 16a-18a. Without addressing the majority's constitutional holding, the dissent concluded that USERRA abrogated state immunity as a matter of statutory interpretation. *Id.* at 22a-23a, 28a. The Texas Supreme Court declined further review, *id.* at 32a-33a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

I. States retain sovereign immunity absent "compelling evidence that the Founders thought such a surrender inherent in the constitutional compact." *Blatchford v. Native Vill. Of Noatak & Circle Vill.*, 501 U.S. 775, 781 (1991). Nothing in the Constitution's text, history, or structure suggests that the States assented to—or even contemplated—private-party suits by conferring war powers on the federal government. Two centuries of practice confirm that Congress did not believe it could authorize private-party suits as a means of exercising its war powers. And principles of federalism and the special role of the state courts in the Constitution preclude such suits. The debates surrounding Article I's specific clauses related to warmaking refute Torres's broader suggestion that States surrendered all sovereignty from any topic relating to war, including—by emanations, penumbras, or otherwise—sovereign immunity.

II. This Court's precedents also foreclose Torres's attempt to vitiate state sovereign immunity through Congress's Article I powers. Beginning with *Seminole Tribe*, this Court has repeatedly held that Congress cannot abrogate state sovereign immunity by exercising its Article I powers, including by exercising several powers that fall within Torres's broad definition of "war powers." Torres counters that the need to protect national security is so grave that the "war powers" must be greater than the sum of their parts. But accepting that argument would repudiate almost all of this Court's sovereign-immunity precedents since *Seminole Tribe*. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), and *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021), do not change that result because they reflect unique contexts that demand judicial administration of specific property. Employment-discrimination disputes do not inherently involve the administration of property, let alone the judicial administration of specific property.

III. Even if the Court were to conclude that the States surrendered federal-law immunity from suit, Torres cannot prevail because DPS retains its state-law immunity from suit in Texas's courts. Nothing in the Constitution authorizes the federal government to dictate the jurisdiction of state courts. And Texas has not opened its courthouse doors to claims against the State under USERRA or any parallel state cause of action. Because Texas courts lack jurisdiction over such claims against the State, there is an independent state-law basis for affirming the judgment below.

ARGUMENT

I. States Did Not Assent to Private-Party Employment-Discrimination Suits by Conferring War Powers on the Federal Government.

A "State may be subject to suit only in limited circumstances." *PennEast*, 141 S. Ct. at 2258. Aside from express consent or congressional abrogation under the Fourteenth Amendment—neither of which applies here—"a State may be sued if it has 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). "The 'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding." *Id.* This Court requires "compelling evidence" from the Nation's "history, practice, precedent, and the structure of the Constitution," *Alden*, 527 U.S. at 741, before it will find "a surrender inherent in the constitutional compact," *Blatchford*, 501 U.S. at 781.

Torres offers nothing that approaches that high bar. Even Torres does not contend that the Constitution's text suggests a surrender inherent in the war powers, and his scant offerings regarding history, early congressional practice, and the Constitution's structure fall far short of compelling evidence of such a surrender.

A. States retain their immunity absent compelling evidence they surrendered it.

"After independence, the States considered themselves fully sovereign nations." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *Blatchford*, 501 U.S. at 779. At common law, the sovereign possessed an absolute immunity from suit without his consent: as Blackstone put it, "no suit or action can be brought

against the king, even in civil matters, because no court can have jurisdiction over him." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *242. During the Founding era, the States were "vitally interested in the question whether the creation of a new federal sovereign" could strip them of that fundamental aspect of sovereignty. *Alden*, 527 U.S. at 716. Potential intrusions into sovereign immunity raised "[g]rave concerns," most particularly Article III's extension of "federal judicial power to controversies between States and citizens of other States or foreign nations." *Id.*

"The leading advocates of the Constitution assured the" States that they did not forfeit their sovereign immunity by ratifying that document. *Id.* Alexander Hamilton, for example, explained that States could not be compelled in court to pay their debts—instead, their financial obligations were backed by their "good faith" and "conscience." THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison agreed that it was "not in the power of individuals to call any state into court" unless the State should "condescend" to allow it. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1891) (ELLIOT). John Marshall, who attended Virginia's ratifying convention, similarly "hope[d] [that] no gentleman will think that a state will be called at the bar of the federal court," and explained it would "not [be] rational to suppose that" the States could be "dragged before" *any* court. *Alden*, 527 U.S. at 718.

When this Court in *Chisholm* allowed a private party to sue a State in federal court, the Founding generation responded with "profound shock" and "outrage." *Id.* at 720. Congress introduced a constitutional amendment

immediately. *Id.* at 721. That proposal, which became the Eleventh Amendment, reaffirmed the "broader 'presupposition of our constitutional structure,'" *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (quoting *Blatchford*, 501 U.S. at 779), and "established in effective operation the principle asserted by Madison, Hamilton, and Marshall" about absolute immunity from suit discussed during the ratification debates, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). "The Annals [of Congress] report no debate on the amendment," and "[e]ach House discussed and endorsed it in a single day, almost without dissent." DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 196 (1997). "It is plain that just about everybody in Congress agreed the Supreme Court [in *Chisholm*] had misread the Constitution." *Id.*

B. Constitutional history, congressional practice, and constitutional structure confirm that the States did not surrender their immunity.

Torres insists (at 24-26) that States surrendered all aspects of their sovereignty, including sovereign immunity, relating to any action Congress may take that is remotely connected to warmaking or treaties. Torres can only establish such a surrender by demonstrating that constitutional text, history, or structure, or early congressional practice provide compelling evidence that as of the Founding the States understood that they were abandoning their sovereign immunity across this broad swath of circumstances.

This Court has recognized that States surrendered their immunity by ratifying the Constitution in only four narrow areas: (1) "in the context of bankruptcy proceedings," *PennEast*, 141 S. Ct. at 2258 (citing *Katz*, 546 U.S.

at 379); (2) "suits by other States," *id.* (citing *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904)); (3) "suits by the Federal Government," *id.* (citing *Texas*, 143 U.S. at 646); and (4) suits involving "the exercise of federal eminent domain power," *id.* at 2259. Torres points to no constitutional text suggesting a surrender of immunity related to Congress's war powers, and nothing he identifies in the history, usage, or structure of the war powers justifies recognizing a fifth such surrender, let alone one of the enormity he proposes. *See Blatchford*, 501 U.S. at 781.

1. History reveals no plan-of-the-Convention waiver.

In determining whether the States impliedly surrendered their immunity as part of the plan of the Convention, this Court "look[s] first to evidence of the original understanding of the Constitution," including the "ratification debates and the events surrounding the adoption of the Eleventh Amendment." *Alden*, 527 U.S. at 741. As this Court recognized over twenty years ago, the "historical record" is "silen[t]" about subjecting States to private-party suits in their own courts. *Id.* "[T]he Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of th[at] immunity." *Id.* And "[i]t suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution." *Id.*

Twenty-three years after *Alden*, the history of the Convention remains the same, and this Court's assessment of that history remains sound. Nothing offered by Torres or the United States justifies revisiting that assessment.

a. The record from the Constitution's drafting and ratification is devoid of any indication—much less "compelling evidence," *Blatchford*, 501 U.S. at 781—that the States agreed to subject themselves to private-party suits by servicemembers in their own courts. Instead, the Founders authorized Congress to exercise specific powers, some of which bore directly on warmaking. The Founders debated the contours of those clauses vigorously, focusing on issues including Congress's ability to raise and fund a standing army, the role of the state militias, and which branch in the federal government could declare war. *E.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 312-33 (Max Farrand ed., rev. ed. 1966) (FARRAND). None of these debates—in either the Philadelphia Convention or the state ratifying conventions—reflects *any* discussion of subjecting States to private-party suits in their own courts pursuant to Congress's proposed war powers.

While Torres insists that States surrendered all sovereignty on any subject even tangentially related to war, history proves the opposite. Torres veers between stating (at 6) and implying (at 18) that had the Constitution not conferred such powers on the federal government, they would arise from the creation of a federal sovereign nonetheless due to the sovereign's obligation to defend the Nation from attack. But the Framers' careful deliberations regarding each clause of Article I—particularly those touching on warmaking—reveal that the States provided the federal government with only specific, meticulously defined powers.

i. Consider the Army Clause. The Convention's debate centered not on Congress's need to be able to authorize private-party lawsuits against the States to "raise and support" an Army, but on whether Congress

should be able to maintain a standing army. *See* 2 FARRAND, *supra* at 329-30. Opponents of a standing army expressed concerns that permitting Congress to maintain "standing armies in times of peace" would be "dangerous to liberty." *Id.*; *id.* at 509. Conversely, supporters insisted that it was impractical to wait "until[] an attack should be made" to muster troops. *Id.* at 330. Ultimately, the delegates compromised, allowing Congress to maintain a standing army, but limiting any appropriations to fund that army to two years. *Id.*; *id.* at 509. The "appropriation of revenue" was seen as the "best guard" against threats to liberty posed by a standing army. *Id.* at 330.

The same issue remained hotly contested throughout the state ratifying conventions. For example, Maryland's Attorney General wrote to the Speaker of the Maryland House of Delegates to oppose Congress's proposed ability to raise and support an army even "in time of peace," which he saw as an "engine of arbitrary power" that has "so often and so successfully been used for the subversion of freedom." 1 ELLIOT, *supra* at 370-71. The Anti-Federalist Brutus expounded those same sentiments, stating that "[t]he liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power," but because "there is a great hazard, that an army will subvert the forms of the government, under whose authority, they are raised." Letter X by Brutus (Jan. 24, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 302 (Herbert Storing ed., 1981).

Contrariwise, James Wilson defended the Army Clause in the Pennsylvania Convention, opining that "the power of raising and keeping up an army, in time of peace, is essential to every government" and that "[n]o government can secure its citizens against dangers,

internal and external, without possessing it, and sometimes carrying it into execution." 2 ELLIOT, *supra* at 521. Hamilton penned two essays supporting a peacetime standing army—albeit with respect to an army of modest size constrained by the biennial appropriation limitation. *See* THE FEDERALIST NOS. 24-25, at 153-63 (Alexander Hamilton).

But neither supporters nor opponents of the Army Clause suggested that Congress could authorize private-party lawsuits against States to facilitate "rais[ing] and support[ing] an Army." This is unsurprising, as the Framers were concerned with a first-order question: whether Congress should be empowered to raise an army during peacetime. But this silence on whether States were subject to private-party suits forecloses the argument that the States relinquished their immunity through the Army Clause. *Cf. Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002).

ii. The Founding-era debates over Congress's power "[t]o provide and maintain a Navy," U.S. CONST. art. I, § 8, cl.13, were less acrimonious than those over the Army Clause, but they too provide no support for Torres's theory that the States assented to private-party lawsuits.

At the Philadelphia Convention, the language of the Navy Clause was adopted without dissent. *See* 2 FARRAND, *supra* at 330. But the Navy Clause provoked more debate during the state ratifying conventions. Opponents feared that maintenance of a navy would thrust the country into economic competition with Europe and lead to war. 3 ELLIOT, *supra* at 428. They also fretted that a navy would be too expensive to maintain and that it would engender conflict between the Northern and Southern States. *Id.* at 429-30. Supporters, on the other

hand, viewed the power to provide and maintain a navy as crucial. Hamilton argued that a navy was essential to protect the country's commercial interests. THE FEDERALIST NO. 11, at 79-86 (Alexander Hamilton). And Madison extolled the navy's critical role in protecting the country from external danger. THE FEDERALIST NO. 41, at 256-57 (James Madison). These sentiments were widely shared. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1191 (1833).

As with the Army Clause, nothing in the debates over the Navy Clause touched on sovereign immunity, the States' amenability to suit, or anything else that would suggest that the States understood themselves as surrendering this aspect of sovereignty in ratifying the clause.

iii. The Founding-era debates over the Militia Clauses similarly lack any reference to authorizing servicemembers to sue States. Once again, the Framers' debates focused on more practical issues: here, how much control the federal government would exercise over state militias. 2 FARRAND, *supra* at 384-89. Supporters of the clauses advocated the "necessity of submitting the whole Militia to the general Authority, which had the care of the general defence." *Id.* at 331. Opponents, by contrast, doubted that the States would agree to such a proposal and noted that they "might want their Militia for defence ag[ain]st invasions and insurrections, and for enforcing obedience to their laws." *Id.* at 332.

As with the Army Clause, delegates reached a compromise: though the federal government would have the power to organize, arm, and discipline state militias when called into service of the federal government, the States would otherwise retain authority over their militias, including over the appointment of officers and

training troops. *Id.* at 387-88. This limited extent to which States ceded power over their militias to Congress underscores that the States did not understand themselves as surrendering their sovereignty fully on all subjects touching on "war powers."

The state ratifying conventions reflected a similarly spirited debate regarding the Militia Clauses. Opponents bristled at empowering the federal government to organize, arm, and discipline state militias, lest it deprive the States of the ability to defend themselves from "arbitrary encroachments" by the federal government to "oppress and enslave" the States. 1 ELLIOT, *supra* at 371-72; *see also* 3 ELLIOT, *supra* at 384-88 (Patrick Henry). Wilson responded at the Pennsylvania convention, praising the Constitution's dispersion of control over militias between the States and the federal government as "a bulwark of internal strength, as to prevent the attacks of foreign enemies." 2 ELLIOT, *supra* at 521-22. Wilson further explained that allowing Congress to create "general and uniform regulations" over militias while in federal service would improve on the "disjointed, weak, and inefficient" way militias had existed under the Articles of Confederation. *Id.* at 522. Contrary to Torres's assertion (at 25) that States ceded all sovereignty related to military affairs, even Hamilton observed that the Constitution allocated to the States the exclusive right to appoint state militia officers. THE FEDERALIST NO. 29, at 181-82 (Alexander Hamilton).

The Militia Clauses are of even less use to Torres than the Army and Navy Clauses. Those clauses plainly reflect a balance of authority between two sovereigns in conducting a national defense. That balancing between the States and the federal government undercuts Torres's assertion that the States impliedly surrendered

sovereign immunity to legislation under various Article I war powers as a wholesale surrender of sovereignty.

iv. Finally, Torres would search in vain for any support for his plan-of-the-Convention argument in the constitutional debates surrounding Congress's power to "declare war." U.S. CONST. art. I, § 8, cl. 11. Those debates concerned where in the federal government to vest that power. 2 FARRAND, *supra* at 318-19. Some favored vesting it in the Executive Branch due to its ability to act with dispatch. *Id.* Others feared that the Executive could not be trusted. *Id.* As a compromise, the Framers split the power, allowing Congress to "commence" a war via a "simple and overt declaration," and the President the residual power to "repel sudden attacks." *Id.* This compromise led to an alteration of the language of this clause, which originally granted Congress the power to "make" war but which was later submitted to the States as the power to "declare" war. *Id.* at 319. Such minute attention to detail is antithetical to the notion that an undifferentiated "war power" was so inherent to sovereignty that it need not even be listed—let alone that such a power dispensed with State sovereign immunity in any case that implicated its exercise.

Again, disputes over the scope of Congress's power to declare war were reflected in the state ratifying conventions. For example, Patrick Henry objected that lodging in Congress power to both declare and fund a war would lead that body to abuse those powers and "levy your money, as long as you have a shilling to pay." 3 ELLIOT, *supra* at 172. Henry instead favored the English system where the King could declare war, but the House of Commons had to finance it. *Id.* An Anti-Federalist writer similarly opined that "[i]t has been long thought to be a well founded position, that the purse and

sword ought not to be placed in the same hands in a free government." Letter XVII by the Federal Farmer (Jan. 23, 1788), *reprinted* in 2 THE COMPLETE ANTI-FEDERALIST, *supra* at 335. By contrast, Oliver Ellsworth challenged this view in his remarks to the Connecticut convention, expressing doubt that there was ever "a government without the power of the sword and the purse." 2 ELLIOT, *supra* at 195. He rejected Henry's example of the English because though it might be dangerous to vest both powers in "one man, who claims an authority independent of the people," the same could not be said of a group of individuals—Congress—"appointed by yourselves, and dependent upon yourselves." *Id.*

At no point in the debates over Congress's power to declare war did the Framers discuss subjecting States to suits by servicemembers or anyone else. Like their debates over the Army, Navy, and Militia Clauses, the Framers tussled over more basic issues: to what extent the States would grant the federal government the power to declare war, and how the federal government should be permitted to do so.

b. Unable to marshal any evidence—let alone compelling evidence—that the States surrendered their sovereign immunity by delegating the power to make war, Torres pivots to the delegation of power to make peace. Torres argues (at 28) that, in the plan of the Convention, "the [S]tates surrendered [sovereign] immunity to treaty-based suits." Pointing to efforts by state legislatures in the 1780s to obstruct British creditors' collection of revolutionary war debts—in contravention of the 1783 Treaty of Paris—Torres argues (at 27) that the Framers "specifically anticipated that treaty-based suits could be authorized *against [S]tates*" to facilitate the "collection of war debts." And he concludes (at 30) that these

debates "assumed that Article III would allow suits against [S]tates to enforce the" Treaty of Paris. But this argument suffers from at least four flaws.

First, relying almost exclusively on a revisionist law review article,[2] Torres asks this Court to ignore that the Eleventh Amendment was passed precisely because the Founding generation emphatically did *not* think that States could be sued to collect war debts. *Supra* at 10-11. Torres also ignores that the Third Congress flatly rejected all efforts to "water down" the draft Eleventh Amendment. CURRIE, *supra* at 196. Albert Gallatin specifically moved to carve out an "exception" which would have "permit[ed] [S]tates to be sued 'in cases arising under treaties made under the authority of the United States.'" *Id.* at 197 (quoting 4 ANNALS OF CONG. 30 (1794) (Joseph Gales ed., 1834)). That proposal was soundly rejected because "[o]nly a handful of members . . . thought the Constitution should provide a mechanism to ensure that the [S]tates paid their debts." *Id.* "Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties . . . suggests the States' sovereign immunity was understood to extend beyond state-law causes of action," *Alden*, 527 U.S. at 735, including to treaty-based claims.

Second, even if an analogy to treaty-based suits were apposite, Torres's assertion (at 27) that the Founders

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[2] The law review article on which Torres relies sought to "reinterpret" state sovereign immunity based on a view that this Court has since repudiated. *Compare* Pet. Br. 28-31 (repeatedly citing John J. Gibbons, *The Eleventh Amendment & State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983)) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *with infra* at 33-34 (discussing *Seminole Tribe* and *Alden*).

meant to authorize foreign-creditor suits to enforce war debts against the States is irreconcilable with the First Congress's passage of the Funding Act of 1790. Funding Act of 1790, ch. 34, §§ 17-21, 1 Stat. 138, 143-44. Through that Act, the federal government assumed the obligations of the States' outstanding war debts. Max M. Edling, *"So Immense a Power in the Affairs of War": Alexander Hamilton & the Restoration of Public Credit*, 64 WM. & MARY Q., No. 2, Apr. 2007, at 288. The federal assumption of war debts just two years after the Constitution's ratification made suits against States to enforce treaty obligations regarding war debts unnecessary.

Third, Torres's analogy to treaty-based suits is inapposite. Assuming Article III was intended to allow suits to enforce war debts owed by private individuals, Article III still would not abrogate state sovereign immunity. *Alden*, 527 U.S. at 718-27. After all, "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted,'" *Fed. Maritime Comm'n*, 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18), and the Founding generation surely viewed the result in *Chisholm* as anomalous and unheard-of. *Supra* at 10-11. Moreover, this lawsuit arose in *state court*, not a court created under Article III. And Torres's lawsuit does not purport to vindicate rights conferred by—or even adjacent to—any treaty, so his treaty-based theories are of no help.

Finally, the three pieces of historical evidence that Torres cobbles together (at 29-30) are taken out of context and are not compelling evidence of a plan-of-the-Convention waiver. *Alden*, 527 U.S. at 741-43; *Blatchford*, 501 U.S. at 781.

Torres first points (at 29) to Wilson's view that Article III's extension of the federal judicial power to "all cases arising under treaties . . . by the United States," would assure other nations of the government's adherence to treaties, which had sometimes been lacking under the Articles of Confederation. 2 ELLIOT, *supra* at 489-90. But a statute cannot enable a private individual to sue a State by creating a private cause of action. *Alden*, 527 U.S. at 727 ("sovereign immunity bar[s] a citizen from suing his own State under the federal-question head of jurisdiction") (citing *Hans*, 134 U.S. at 14-15)). That federal courts could enforce treaty obligations does not do so either. It certainly fails to show that States surrendered their immunity from private-party suits brought under those treaties in their own courts, by their own citizens, enabled by Article I legislation that has nothing to do with a treaty.

Torres next points (at 29) to Hamilton's statement in Federalist No. 80 that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," and that "[i]t will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries were concerned." THE FEDERALIST NO. 80, at 475 (Alexander Hamilton). But Hamilton was not discussing sovereign immunity; he was defending the proposal that Article III should empower federal courts to hear cases affecting foreign nations and their citizens rather than leaving this task exclusively to state courts. *Id.* at 474-75. As Hamilton reasoned, any "denial or perversion of justice by the sentences of courts . . . is with reason classed among the just causes of war," so "the peace of the WHOLE ought not to be left at the disposal of a PART." *Id.* at 475. Hamilton never even hinted that States could be brought into *federal* court to defend

themselves from private-party lawsuits, let alone *their own* courts.

Torres's final piece of historical evidence (at 29-30) is George Mason's concern that Article III would permit States to be haled before federal courts by foreign countries and their subjects. That is precisely the concern that the Eleventh Amendment addressed when it expressly prohibited suits against States by "Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI; *cf. Monaco*, 292 U.S. at 331. By enacting the Eleventh Amendment, "Congress acted not to change but to restore the original constitutional design." *Alden*, 527 U.S. at 722. If Mason's comments reveal that the Founders "shared [a] premise," Pet. Br. 29, it is that States *retained* immunity from suits by foreigners to enforce peace treaties—not that they surrendered it in the plan of the Convention.

c. Unlike Torres, the United States at least attempts (at 11-13) to locate a purported plan-of-the-Convention surrender of state sovereign immunity in the Army and Navy Clauses. But its historical excavation yields the same result as Torres's: there is no evidence that, by ratifying the Army and Navy Clauses, the States implicitly consented to private-party suits in their own courts. *See* U.S. Br. 12-13. To bridge this historical gap, the United States splices two out-of-context snippets from the Federalist: a rhetorical question posed by Madison in Federalist No. 41 and an unrelated comment by Hamilton in Federalist No. 23.

Madison's question arose in response to opposition to a federal standing army. In response to the potential inquiry as to whether "it was necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE as well as

in WAR," Madison rhetorically asked whether "the force necessary for defense [can] be limited by those who cannot limit the force of offense." *See* THE FEDERALIST NO. 41, at 253 (James Madison). Rather than defending an open-ended surrender of state sovereign immunity in pursuit of raising an army, as the United States suggests (at 12-13), Madison's answer to his rhetorical question focused expressly on the standing-army issue: "If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions." *Id.* Neither Madison's rhetorical question nor his answer had anything to do with authorizing suits by private parties against States in their own courts.

The federal government's invocation (at 13) of Federalist No. 23 fares no better. It seizes on Hamilton's statement that the powers necessary to provide for the "common defense"—which include the powers "to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operation; [and] to provide for their support"—should "exist without limitation" because it would be impossible to predict the nature of emergencies in the future or the means required to meet them. THE FEDERALIST NO. 23, at 149 (Alexander Hamilton). But this was a general statement regarding the necessity for broad federal discretion in forming, directing, or supporting the military. *Id.* at 150. It did not imply that the federal government may disregard other constitutional limitations—such as state sovereign immunity—in doing so any more than the federal power to regulate commerce implies the power to abrogate state sovereign immunity in the pursuit of regulating commerce.

2. Early congressional practice reveals no evidence that the States surrendered their immunity.

a. Early congressional practice, like constitutional history, is devoid of any indication that the States consented to private-party suits by servicemembers in the plan of the Convention. This Court considers "early congressional practice" to "provide[] 'contemporaneous and weighty evidence of the Constitution's meaning.'" *Alden*, 527 U.S. at 743-44 (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). In general, this evidence reveals that "[n]ot only were statutes purporting to authorize private suits against nonconsenting States in state courts not enacted by early Congresses; statutes purporting to authorize such suits in any forum [were] all but absent from our historical experience." *Id.* at 744. This evidence is entirely absent for employment-discrimination suits by servicemembers, leading to the inference that "early Congresses did not believe they had the power to authorize [such] suits against the States in their own courts." *Id.*

After ratification, Congress almost immediately authorized the creation of federal forces. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, 95-96. A few years later, Congress enacted standards to promote organizational uniformity within the state militias which might be called into federal service. Act of May 8, 1792, ch. 33, 1 Stat. 271, 271-74. But it would be 150 years before Congress first regulated servicemembers' post-service employment rights by passing the 1940 Act, and nearly 200 years before Congress first authorized private-party suits against state employers in the 1974 Act. *Supra* at 3-4. It did not assert the power to require States to submit to suit in their own courts in connection with raising a national

military until 1998—209 years after Congress first created the Army. And Congress still does not authorize the same remedy against a federal employer. 38 U.S.C. §§ 4324-25.

This history stands in sharp contrast to the "unique history" of bankruptcy legislation that formed the backbone of this Court's decision in *Katz*, 546 U.S. at 369 n.9, 373, and the long-established power of eminent domain, which "the Federal Government began exercising "[s]hortly after the founding" discussed in *PennEast*, 141 S. Ct. at 2255. Put differently, there could have been no plan-of-the-Convention waiver for private-party employment-discrimination suits against States in Congress's so-called war powers because "the Nation"—and the armed forces—"survived for nearly two centuries without" one. *Seminole Tribe*, 517 U.S. at 71; *accord Printz*, 521 U.S. at 905.

b. To counter the absence of early congressional practice authorizing servicemembers to sue States, Torres points (at 31-36) to three inapt examples, the earliest of which arrived half a century after the Founding. Evidence nearly half a century or more removed from the Founding hardly demonstrates a "fundamental postulate[] implicit in the constitutional design." *PennEast*, 141 S. Ct. at 2259. Moreover, none of these examples involved the authorization of private-party suits against States and thus cannot demonstrate that early Congresses believed that States surrendered their immunity from such suits.

i. Torres first observes (at 31) that, during and immediately after the Civil War, the federal government established a "provisional Louisiana court system" which had "jurisdiction to hear and decide all cases, civil and criminal, arising under federal and Louisiana law." He

reasons (at 32) that because this Court approved the displacement of a State's court system, it should find a lesser intrusion into sovereignty—authorization of private-party suits against a State—constitutionally permissible.

But this argument overlooks a critical fact: at the time these courts were set up, Louisiana had engaged in armed insurrection and was under military occupation by the Union Army. *The Grapeshot*, 76 U.S. (9 Wall.) 129, 130-33 (1869); *Mechs. & Traders' Bank v. Union Bank of La.*, 89 U.S. (22 Wall.) 276, 295-98 (1874). As occupied territory, Louisiana lost the traditional attributes of state sovereignty, *see, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 345 (1998), and it would not regain them until its readmission into the Union in 1868. Leaving aside the absence of evidence that these courts entertained private-party suits *against Louisiana*, comparing the States in peacetime to military-occupied Louisiana is like comparing apples to ammunition.

ii. Almost as off-point is Torres's argument (at 32-34) that States lack immunity from private-party suits in their own courts because Congress has occasionally tolled state statutes of limitations during wartime. Specifically, Torres identifies (at 33) three mid-20th century cases in which New York, New Jersey, and Arizona did not assert sovereign immunity against lawsuits brought against them in their own courts by servicemembers whose otherwise untimely state-law claims were tolled by federal law. From this, Torres deduces (at 34) that States broadly perceived "that they ha[d] no immunity to assert."

Torres's argument is a non-sequitur. By definition, sovereign immunity is a privilege of the sovereign, which

a sovereign State may choose not to assert for any number of reasons. *Alden*, 527 U.S. at 737. That three States in three cases chose not to invoke their sovereign immunity almost two centuries after the Founding scarcely proves that the Founders believed they lacked such immunity. *See Printz*, 521 U.S. at 905; c*f. Alden*, 527 U.S. at 737 (noting that at times "it may have appeared" that "Congress' power to abrogate its immunity from suit . . . was not limited by the Constitution at all").

The inference that Torres seeks to draw from these analogies is further weakened by the fact that this Court has never decided "whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). But it has noted that applying such tolling against state defendants "raises a serious constitutional doubt." *Id.* For good reason: federal tolling of state statutes of limitations has been justified only as an exercise of Congress's power under the Necessary and Proper Clause as an incident to some other power. *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 503-07 (1870) (examining question in suit between private parties during Reconstruction); *accord Jinks v. Richland Cty.*, 538 U.S. 456, 462 (2003) (discussing 28 U.S.C. § 1367(d)). But this Court has also held that the Necessary and Proper Clause does not grant the "authority to subject the States to private-party suits as a means of achieving" an otherwise permissible goal. *Alden*, 527 U.S. at 732; *cf. Artis v. Dist. of Columbia*, 138 S. Ct. 594, 616 (2018) (Gorsuch, J., dissenting).

iii. Finally, Torres finds it significant (at 34-36) that States did not assert sovereign immunity as a defense to habeas corpus petitions filed by federal officers in state

custody. But habeas corpus proceedings have never been thought to lie against the sovereign as such, so sovereign immunity would not have been at issue. That was true at common law in England: "[t]he discussion of habeas corpus in Blackstone shows clearly that author's conception of the writ is not a suit against the crown." *U.S. ex rel. Elliot v. Hendricks*, 213 F.2d 922, 926 (3d Cir. 1954) (en banc) (footnote omitted). "Rather[,] 'the king is at all times entitled to have an account why the liberty of any of his subjects is restrained' and 'the extraordinary power of the crown is called in to the party's assistance.'" *Id.* at 926 & n.7 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *129, *131-32). Thus, "by issuing the writ of habeas corpus[,] common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner." *Boumediene v. Bush*, 553 U.S. 723, 740-41 (2008).

This understanding has long been reflected in this Court's jurisprudence. As the Court stated in *Ex parte Young*, "[t]he right to . . . discharge" secured by the writ of habeas corpus "has not been doubted by this court, and it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state in whose custody the person was found." 209 U.S. 123, 168 (1908). The reason is straightforward: "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 690 (1949).

Habeas corpus proceedings are therefore a species of suit akin to the *Ex parte Young* exception to sovereign immunity. Torres suggests (at 34) that the *Ex parte Young* exception is irrelevant here because it was not recognized until 1908. But that exception is "grounded in

traditional equity practice." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). And Torres "does not purport to question the historical underpinnings of *Young*'s holding." *Katz*, 546 U.S. at 389 (Thomas, J., dissenting). Accordingly, a State's decision not to raise its immunity in habeas litigation is to be expected given the historical understanding that such suits are not brought against the State; it provides no support for the notion that States surrendered their immunity from private-party suits in the plan of the Convention.

c. The United States's effort (at 13-14) to identify favorable early congressional practice is similarly fruitless. The most it points to (at 14) is Congress's authorization of enlistment bonuses in 1791, its creation of the United States Military Academy at West Point in 1802, its offer of "military bounty" bonuses in 1816, and its provision of other types of benefits to veterans throughout the country's history, most notably following World War II. In the United States's view, these congressional acts are evidence of Congress "employ[ing] its army and navy powers to encourage military recruitment and retention." U.S. Br. 14.

Respondent does not dispute this irrelevant proposition. All these examples prove is that Congress understood that it had to tax, borrow, and spend money to raise a military. None of that legislation involved States, let alone purported to authorize suits against nonconsenting States. These inapposite examples are not compelling evidence that the States surrendered their immunity. *Alden*, 527 U.S. at 741.

3. Constitutional structure confirms that the States did not surrender their immunity.

Torres's claim is also foreclosed by examining the next consideration in a plan-of-the-Convention analysis:

"whether a congressional power to subject nonconsenting States to private-party suits in their own courts is consistent with the structure of the Constitution." *Id.* at 748. The Court "look[s] both to the essential principles of federalism and to the special role of the state courts in the constitutional design." *Id.* These principles foreclose Torres's arguments.

a. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). Thus, private-party suits against nonconsenting States "present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* at 749. Moreover, apart from "constitutional form," a "general federal power to authorize private-party suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51.

The "denigrat[ion] of the separate sovereignty of the States" is particularly acute here because the United States has purported to authorize relief against the States' treasuries for alleged employment discrimination against veterans, yet it "retains its own immunity from suit not only in state tribunals but also in its own courts." *Id.* at 749-50; 38 U.S.C. §§ 4324-25. Subjecting the States to the indignity of private-party suits to serve federal

ends while exempting the federal government from those same suits is antithetical to our federal system. *Alden*, 527 U.S. at 749-50.

b. Torres (at 22-24) and the United States (at 18-21) counter that the structural distribution of war powers in the Constitution establishes a surrender of immunity from private-party suits that *Alden* supposedly overlooked. *Alden* was not so careless.

As an initial matter, contrary to Torres's insistence (at 26), the Constitution did not vest Congress with "plenary and exclusive . . . war powers." *Supra* at 16-18. That the Constitution vested a subset of potential war powers in the federal government while divesting a smaller subset of *those* powers from the States does not suggest that Congress can expose States to private-party suits just because such suits may have some tangential relationship to Congress's ability to wage war. Indeed, this Court held in *Monaco* that "[i]t cannot be supposed" from Article I, section 10 "that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern," could be resolved by a suit against the State. 292 U.S. at 331. Instead, the United States retained full power to reach a resolution with a foreign power "through treaty, . . . arbitration, or otherwise." *Id.*

At most, the distribution of military and military-adjacent powers implies that sovereign immunity does not prevent the *United States* from suing a State that infringes upon the federal government's warmaking authority. But then again, sovereign immunity never bars the United States from suing a State. *Texas*, 143 U.S. at 646. That, too, is of no help to Torres.

II. This Court's Precedents Foreclose Abrogating State Sovereign Immunity Through Article I "War Powers."

This Court's precedents also block Torres's effort to disregard DPS's sovereign immunity. By framing his argument as a plan-of-the-Convention surrender of immunity, Torres repackages an argument that this Court has repeatedly rejected—that Congress can abrogate state sovereign immunity using its Article I powers. If taken seriously, Torres's argument would call into question almost all of this Court's sovereign-immunity precedents since *Seminole Tribe*. And it would mean that legislation passed pursuant to more than half of the clauses in Article I, section 8 could expose States to private-party suits. The Court should reject Torres's attempt to accomplish through plan-of-the-Convention rhetoric what he could not through a straightforward abrogation argument.

A. Congress cannot abrogate state sovereign immunity through the exercise of Article I powers.

1. In *Seminole Tribe*, this Court concluded that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" through sovereign immunity. 517 U.S. at 73. The Court explained that, outside the Fourteenth Amendment, it had only once concluded that the Constitution granted Congress the power to abrogate state sovereign immunity. That case was *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), where the Court held that Congress could abrogate state sovereign immunity under the Interstate Commerce Clause. But *Union Gas* was "deeply fractured," "based upon . . . a misreading of precedent," and Justice White's decisive fifth vote actually "indicate[d]

his disagreement with the plurality's rationale." *Seminole Tribe*, 517 U.S. at 64-65. The Court in *Seminole Tribe* accordingly overruled *Union Gas* and restored the traditional understanding that "article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73.

This Court has repeatedly reaffirmed *Seminole Tribe*, applying its holding in contexts beyond the Indian and Interstate Commerce Clauses. For example, in *Florida Prepaid Postsecondary Education v. College Savings Bank*, the Court held that "Congress may not abrogate state sovereign immunity pursuant to" its power to grant patents. 527 U.S. 627, 636 (1999). And in *Allen*, this Court said in no uncertain terms that Congress's "power" granted "under Article I stops when it runs into sovereign immunity." 140 S. Ct. at 1002.

2. Torres suggests (at 23) that the analysis should be different here because the powers at issue are "exclusively federal." But Torres concedes (at 3) that what he conceives of as the war powers make up at least "half of the enumerated powers in Article I, section 8." If Torres is right, then this Court emphatically, repeatedly erred when it held that "Article I stops when it runs into sovereign immunity." *Allen*, 140 S. Ct. at 1002; *see also Fla. Prepaid*, 527 U.S. at 636; *Alden*, 527 U.S. at 754; *Seminole Tribe*, 517 U.S. at 73.

This Court has also already rejected Torres's argument that an exclusive federal power over a subject demonstrates that the States waived sovereign immunity at the Founding: "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*, 517 U.S.

at 72. If that were wrong, then there would be little left of sovereign immunity. For example, DPS does not dispute Torres's contention (at 23) that States may regulate commerce. But there is a "policy of uniformity[] embodied in the Commerce Clause" that prevents the States from interfering with federal regulations of commerce. *See Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 8 (1986). Nevertheless, that "policy of uniformity" does not grant Congress the power to abrogate state sovereign immunity with regard to interstate or foreign commerce. *Seminole Tribe,* 517 U.S. at 71-72. Put another way, because all of Article I's powers displace contrary state laws (rendering federal laws exclusive) when exercised within their properly defined sphere, Torres provides no "principled distinction" that would permit Congress to abrogate immunity for war powers but not under its other Article I powers. *Id.* at 63.

3. Torres's theory is particularly troubling because Torres defines the "war powers" not just to include specific clauses in Article I, section 8, but also more broadly to include any powers "the federal government [uses] to protect the United States' national security." Pet. Br. 2. That includes almost any Article I power. Congress may "lay and collect . . . Duties, Imposts and Excises," U.S. CONST. art. I, § 8, cl. 1, to defend industries critical to national security, or may "coin Money," *id.* cl. 5, to pay for a war, or may regulate "Commerce with foreign Nations," *id.* cl. 3, to punish opposing belligerents through economic sanctions. In times of emergency and war, this Court has interpreted the Constitution to permit Congress wide latitude to legislate within its defined scope. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

If Torres is correct on both the scope of the "war powers" and on how they dispense with sovereign immunity, there is effectively no limit on Congress's ability to abrogate state sovereign immunity.

Torres recognizes this (at 8-9) with his examples about regulation of purely domestic conduct (such as with rent controls and price ceilings). Congress may even protect the United States's national security by ensuring that foreign adversaries are not offended by State laws, such as intestacy laws that bar inheritors from specific countries. *See Zschernig v. Miller*, 389 U.S. 429 (1968). Under Torres's theory, Congress would therefore have power to subject nonconsenting States to suit in intestacy matters. If any of Congress's powers may abrogate state sovereign immunity when used to further national-security ends, there is little left of sovereign immunity.

B. Neither *Katz* nor *PennEast* supports undermining sovereign immunity.

Torres cannot avoid this Court's precedents broadly foreclosing federal abrogation of state sovereign immunity through the exercise of Article I powers. Torres and the United States therefore rely heavily on *Katz* and *PennEast*, which rejected assertions of immunity in two limited contexts: bankruptcy and eminent domain. But these cases open no path around sovereign immunity for the "war powers." Rather, certain exercises of power *require* the involvement of courts and specifically the judicial administration of property. *Katz* and *PennEast* are of a piece because they contemplate judicial control over certain *property*, not the assertion of jurisdiction over a nonconsenting State.

1. *Katz* identified three reasons why uniform bankruptcy proceedings necessarily require the surrender of state sovereign immunity when judicially settling a

debtor's estate. *First*, as this Court has long recognized, it is through asserting exclusive judicial control of a *res* that a court exercising *in rem* jurisdiction adjudicates property rights that are binding against the world. This principle is inherent in bankruptcy proceedings. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446-48 (2004); *see also Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 97 (1795) (recognizing that the courts of the United States possess jurisdiction to "carry into effect the determination of the [C]ourt of Admiralty of" foreign admiralty courts because of this principle).

Second, the ability of that judicially managed process to resolve a State's claims against a debtor is necessary for a bankruptcy to serve one of its primary functions: to provide the bankrupt with a "fresh start." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). A debtor can obtain a fresh start only if a bankruptcy court's order binds everyone who might have an interest in the assets of the bankrupt estate, including sovereign entities with property interests in that estate. *Katz*, 546 U.S. at 363-64. Such orders are necessary "to facilitate the administration and distribution of the res." *Id.* at 362.

The Bankruptcy Clause's reference to "uniform Laws on the subject of Bankruptcies" necessarily contemplated judicial proceedings that would result in judgments with global effect—including by or against States. U.S. CONST. art. I, § 8, cl. 4. "An adjudication of bankruptcy, or a discharge therefrom, is a judgment in rem and is binding on, and res judicata as to, all the world." *Myers v. Int'l Tr. Co.*, 263 U.S. 64, 73 (1923). That necessarily includes claims of or against States because if sovereign entities could avoid the discharge of their claims by or against the bankrupt estate, a bankruptcy proceeding could not settle claims to the estate's property as

against all the world. *See New York v. Irving Tr. Co.*, 288 U.S. 329, 333 (1933). Just as at the time of the Convention, "the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders" with global effect. *Katz*, 546 U.S. at 362.

Third, in *Katz*, this Court explained that bankruptcy jurisdiction, "as understood today and at the time of the framing, is principally *in rem* jurisdiction." *Id.* at 369. Because an *in rem* judgment "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner," *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977), *in rem* jurisdiction "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction," *Katz*, 546 U.S. at 378. This Court recognized this principle in *Hood*, which held that *in rem* actions are "not an affront to the sovereignty of the State" because a debtor "does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process." 541 U.S. at 450, 451 n.5. In this way, an *in rem* action is far less "threatening to state sovereignty." *Id.* at 451.

Katz built on *Hood*'s foundation, explaining that "[i]n bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.' As such, its exercise does not, in the usual case, interfere with state sovereignty even when States' interests are affected." 546 U.S. at 370 (citation omitted). "The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377. But the "scope of this consent was limited," *id.* at

378, to claims that must be resolved to allocate property of the estate, *see, e.g.*, *Hood*, 541 U.S. at 448.

According to Torres (at 37-38), *Katz*'s holding can be explained not by the *in rem* nature of bankruptcy jurisdiction, but instead by three facts: (1) the word "uniform" in the Bankruptcy Clause; (2) the existence of habeas suits to discharge debtors prior to *Ex parte Young*; and (3) the ancillary nature of suits pursuant to the bankruptcy power.

None of these observations helps him here. *First*, unlike the Bankruptcy Clause—which actually contains the word "uniform"—none of the clauses Torres cites for Congress's war powers mentions uniformity. *Second*, the "history of habeas corpus actions to free debtors," Pet. Br. 38, is unhelpful to Torres because the common law long permitted habeas actions against officials without raising sovereign immunity concerns. *Supra* at 28-30. *Third*, Torres's suit is not "ancillary to" or "in furtherance of" warmaking in the sense that a claim against a State in bankruptcy may be ancillary to a judicial discharge order: it does not further any otherwise-globally applicable judicial process. *Katz*, 546 U.S. at 372. Nor is it ancillary in the sense of relating to a proceeding over which a bankruptcy court has jurisdiction. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 473-75 (2011). Torres's view of "ancillary" suits would permit the federal courts to extend their jurisdiction to any suit with an attenuated link to war, peace, or military readiness. Pet. Br. 38. *Katz* does not justify such a broad implicit waiver of immunity.

2. *PennEast* recognized similar principles for eminent domain actions. There, PennEast brought federal-court *in rem* actions under the Natural Gas Act to establish rights-of-way to effectuate a pipeline route. In rejecting a sovereign-immunity objection by New Jersey,

this Court explained that the Natural Gas Act "fits well within th[e] tradition" of upholding eminent domain power "whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land." *PennEast*, 141 S. Ct. at 2263. This holding shares the same three attributes with *Katz* that are not present in this case.

First, as with bankruptcy, the eminent domain power in *PennEast* could only be vindicated judicially. The State in *PennEast* disputed neither "that the Federal Government enjoys a power of eminent domain superior to that of the States" nor "that the Federal Government can delegate that power to private parties." 141 S. Ct. at 2259-60. The State could not extract "the eminent domain power from the power to bring condemnation actions" by private federal delegees with respect to state-owned lands because "the eminent domain power is inextricably intertwined with the ability to condemn." *Id.* at 2260. Without judicial intervention, private parties would be left with the "untenable" choice between "private or Government-supported invasions of state-owned lands," or no enforcement of their property interests at all. *Id.* Thus, by conceding that the federal government has a superior power that is inextricably intertwined with judicial process, the State also conceded that such a power must involve the forfeiture of State immunity to the extent it was necessary for that superior power to exist.

Second, eminent domain requires resolution of all claims against the same property. This mechanism is inherent in the "authorization to take property interests." *Id.* Otherwise, the government exercising its eminent domain power could not "peaceably" use the property taken. *Id.* And "[a]n eminent domain power that is

incapable of being exercised amounts to no eminent domain power at all." *Id.* at 2260-61.

Third, actions under the Natural Gas Act do not implicate sovereign immunity in the same way as ordinary civil claims because they do not "seek[] to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). If anything, actions under the Natural Gas Act avoid burdening a State's treasury by paying "fair market value" for any property interests being taken. *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984). Damages actions against nonconsenting States have the opposite effect. *Cf. Blatchford*, 501 U.S. at 783-86.

Torres's view of *PennEast* (at 38-39) repeats his refrain that the federal domain over war is "full and complete," but it ignores these unique aspects of eminent domain. Torres says (at 39) that "[t]he war powers, like the eminent domain power, also permit the federal government to use any effective means to carry out their purposes." Of course, the same would be true of nearly any exercise of an Article I power in conjunction with the Necessary and Proper Clause. But "Article I stops when it runs into sovereign immunity." *Allen*, 140 S. Ct. at 1002. Torres is likewise wrong as a textual matter: for example, the Constitution forbids Congress from building a military base by condemning a State's land without the "Consent of [its] Legislature." U.S. CONST. art. I, § 8, cl. 17. And unlike the eminent domain power in *PennEast*, nothing about waging war is inherently judicial or seeks the judicial resolution of rights over a known piece of property as against the world.

Nor is the incursion on State sovereignty limited as in *PennEast*. In eminent domain proceedings, a State could decline to appear in court and still retain its right

to fair compensation for any property taken. *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924). Such an action "is merely an inquisition to establish a particular fact," *i.e.*, "the value of the property," so that the State can be made whole. *United States v. Jones*, 109 U.S. 513, 519 (1883). A State has no such avenue for relief under USERRA.

3. At bottom, Torres cannot show that this Court's precedents support a finding of a plan-of-the-Convention surrender of immunity under the war powers. *Katz* and *PennEast* recognize the "singular nature" of judicial control over specific property. *Katz*, 546 U.S. at 369 n.9. Torres asserts a claim to establish liability and fix damages for alleged employment discrimination.

None of the key features distinguish this case from the sovereign-immunity assertions rejected in *Katz* and *PennEast*. *First*, nothing about declaring or waging war inherently requires judicial management.

Second, the "essential characteristic . . . of a proceeding *in rem*" is missing because there is not a "*res* or subject-matter upon which the court is to exercise its jurisdiction." *Overby v. Gordon*, 177 U.S. 214, 221 (1900). Property is "not the subject matter of this litigation." *Shaffer*, 433 U.S. at 213. A suit for payment of State funds is "quite different from a suit for the return of tangible property in which the debtor retained ownership." *Blatchford*, 503 U.S. at 39. Although Torres's claim "might eventually be reduced to judgment and that judgment might be executed upon," his suit "is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction." *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981). Indeed, when this Court addressed the Administrative Procedure Act's effect on federal sovereign immunity in

Bowen v. Massachusetts, 487 U.S. 879, 899-900 (1988), and *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999), it specifically distinguished claims for compensatory damages from claims for returning specific funds.

Third, USERRA is "threatening to state sovereignty." *Hood*, 541 U.S. at 451. Congress has "subject[ed] an unwilling State to a coercive judicial process," *id.* at 450, which requires a State "to defend itself" against charges of wrongdoing to avoid liability, *Fed. Maritime Comm'n*, 535 U.S. at 760. In *Hood*, the discharge of the debtor's debt did not implicate sovereign immunity because the bankruptcy court could "adjudicate the debtor's discharge claim" without asserting jurisdiction over the State. 541 U.S. at 453. Not so here.

An early decision by Justice Washington illustrates this distinction. Four American civilians captured a British ship during the Revolutionary War. *United States v. Bright*, 24 F. Cas. 1232, 1233 (C.C.D. Pa. 1809). Pennsylvania asserted a claim to the vessel and ordered the state militia to prevent execution of a federal court's order that proceeds from the ship's sale be paid to the civilians. *Id.* at 1234. In a subsequent prosecution, a state militiaman argued that the court's order was void because sovereign immunity barred that court from exercising jurisdiction over Pennsylvania. *Id.* at 1236. Justice Washington, sitting as Circuit Justice, rejected that theory. *In personam* jurisdiction, he noted, affronts sovereignty: "Suits at law and in equity cannot be prosecuted against a state without making her a party, and the judgment acts directly upon her." *Id.* But the federal court's admiralty "proceedings [were] in rem," and its judgment acted instead upon "the property in dispute." *Id.*

4. These distinctions are fatal to Torres's reliance on *Katz* and *PennEast*. As *Allen* reiterates, Congress's possession of a given Article I power is insufficient to demonstrate that Congress may use that power to overcome state sovereign immunity. 140 S. Ct. at 1003. Rather, a demonstration of constitutional text, history, or structure, or early congressional practice must show that the States surrendered their sovereign immunity regarding a particular kind of private-party suit in departure from the general rule. *Id.* *Katz* was governed by "unique" rules applicable to "bankruptcy jurisdiction." *Id.* at 1002. *PennEast* was governed by similarly unique eminent domain principles that required judicial settlement of property disputes. 141 S. Ct. at 2260-61.

Torres tries to dismiss (at 40) the Court's holdings that Congress may not use its Article I powers to dispense with sovereign immunity as dicta and, alternatively, inapplicable because a plan-of-the-Convention surrender of immunity is different than abrogation. But Torres's assertion (at 40) that the war powers are "not the kinds of 'Article I' powers to which" *Seminole Tribe* and *Alden* were referring, and his failure to show constitutional text, history, or structure or early congressional practice demonstrating a plan of the Convention waiver, reveals his argument for what it is: a request for a clause-by-clause abrogation analysis dressed in different clothes. This Court has repeatedly rejected such a "'clause-by-clause' reexamination of Article I." *Allen*, 140 S. Ct. at 1003. It should do so again.

III. DPS Retains Its State-Law Immunity in Texas Courts.

Even if Congress could abrogate DPS's sovereign immunity as a matter of federal law, the judgment below should be affirmed because nothing in the Constitution

grants Congress the power to alter the jurisdiction of Texas courts.

Sovereign immunity is "an amalgam of two quite different concepts." *Alden*, 527 U.S. at 738. One concept "appli[es] to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* A sovereign's immunity in its own courts is more absolute—no power of another sovereign can qualify it, and the only way to sue a sovereign in its own courts is if it consents. *Id.* This is an "established principle of jurisprudence in all civilized nations," *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857), which was long recognized under the laws of England, 2 FREDERIC POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 518 (2d ed. 1923).

This Court has recognized that the States may formulate their tribunals' state-law justiciability rules. *See Missouri v. Lewis*, 101 U.S. 22, 30 (1879); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see also PennEast*, 141 S. Ct. at 2264 n.1 (Gorsuch, J., dissenting). And the States are permitted to apply those rules to foreclose a federal claim, like USERRA, so long as they do so neutrally and do not discriminate against federal claims. *Haywood v. Drown*, 556 U.S. 729, 738 (2009); *Testa v. Katt*, 330 U.S. 386, 394 (1947).

Under Texas law, sovereign immunity is jurisdictional. *E.g.*, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Only the Texas Legislature may waive a state entity's state-law immunity. Tex. Gov't Code § 311.034; *Tooke v. City of Mexia*, 197 S.W.3d 325, 332-33 (Tex. 2006). And when the Legislature does so, any procedural requirements the Legislature attaches as conditions of that waiver are themselves jurisdictional.

Prairie View A&M Univ. v. Chatha, 381 S.W.3d 500, 511 (Tex. 2012); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

Torres unsuccessfully argued before the Texas courts that chapter 437 of the Texas Government Code waived DPS's state-law immunity. Pet. App. 16a-18a. But even if section 437's immunity waiver would extend to Torres's claim, he failed to comply with the state-law statutory requirement to exhaust his administrative remedies and to receive "a notice of the right to file a civil action," Tex. Gov't Code § 437.412; Pet. App. 17a n.8.[3] That failure leaves DPS's state-law immunity intact.

Finally, because Texas's courts do not have jurisdiction to entertain either state- or federal-law claims against the State for servicemember discrimination under these circumstances, there is no impermissible discrimination against a federal right. *See, e.g.*, *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4-5 (1950).[4] Texas may therefore decline to extend jurisdiction in its courts to USERRA claims, and DPS's state-law immunity independently supports the court of appeals' judgment.

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[3] In its most recent legislative session, the Texas Legislature authorized suits against state entities by certain servicemembers serving in Texas. Tex. Gov't Code § 437.213(1) (cross referencing 38 U.S.C. §§ 4301-13, 4316-19); *see also* 50 U.S.C. § 3901 *et seq.*; Tex. Gov't Code § 437.204(a). That amendment is not applicable here.

[4] Indeed, USERRA does not allow servicemembers to sue the federal government—so if there is any jurisdictional "discrimination" here it was by Congress, not Texas.

CONCLUSION

The judgment of the Texas court of appeals should be affirmed.

Respectfully submitted.

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