No. 20-603

In The Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Texas Court of Appeals for the Thirteenth Judicial District, Corpus Christi, Texas

BRIEF OF PROFESSOR PHILIP A. PUCILLO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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SUMMARY OF ARGUMENT

State sovereign immunity is woven into the fabric of the Constitution as one of the "fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 729 (1999). Accordingly, it is "a settled doctrinal understanding … that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Id.* at 728. To safeguard the viability of the dual sovereign system, "the States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). This dual sovereignty was a necessary part of the "double security" created to protect "the rights of the people." The Federalist Papers, Federalist No. 51, at 323 (Madison) (Rossiter ed. 1961). And as this Court has long-recognized, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). In fact, "a suit by an

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[1] Each party consented to the filing of this *amicus* brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999).

Unsurprisingly, then, "a State may be subject to suit only in limited circumstances." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2258 (2021). To date, this Court has found only three such circumstances: where (1) a State "unequivocally expressed" its consent to suit, *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (internal punctuation omitted); (2) Congress's intent to abrogate state sovereign immunity under section 5 of the Fourteenth Amendment was "unmistakably clear," *Nevada Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003); and (3) States implicitly agreed to suit in the "plan of the Convention." *Alden*, 527 U.S. at 728. Historically, the first two categories were the "only two circumstances in which an *individual* may sue a State." *Florida Prepaid*, 527 U.S. at 670 (emphasis added). Until 2006, waiver of sovereign immunity as part of the "plan of the Convention" was restricted to suits between sovereigns. In adopting the Constitution, States consented to suits by other States, *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), and by the federal government. *United States v. Texas*, 143 U.S. 621, 646 (1892). Neither situation implicated the general rule that individuals cannot sue a sovereign without its consent because "[t]he question as to the suability of one government by another government rests upon wholly different grounds." *Id*.

More recently, though, this Court has recognized two additional situations where States consented to property-related suits by a narrow subset of individuals—bankruptcy trustees and eminent domain delegatees—as part of the plan of the Convention. Both contexts involve distinctive features that are inherently different from the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), which allows private individuals to sue States for monetary damages. In *Cent. Virginia Cmty. Coll. v. Katz*, "the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' [*in rem*] jurisdiction," 546 U.S. 356, 369 n.9 (2006), gave rise to "bankruptcy exceptionalism." *Allen v. Cooper*, 140 S.Ct. 994, 1002 (2020). In *PennEast*, this Court concluded that delegatees could bring condemnation actions against States but only because the delegatees "exercis[e Congress's] federal eminent domain power." 141 S.Ct. at 2260. Given the unique nature and history of federal eminent domain power, delegatees stand in the shoes of the federal government, wielding the federal power on its behalf. *See id*. at 2263 ("Such condemnation actions do not offend state sovereignty, because the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegatees.").

Petitioner now asserts that States, when agreeing to Congress's war powers in Article I, engaged in an expansive waiver of sovereign immunity. Given that this Court has repeatedly "held that 'Article I cannot be used to circumvent' the limits sovereign immunity 'place[s] upon federal jurisdiction,' " Petitioner seeks to recast his Article I

claim as a plan-of-the-Convention waiver. *Allen*, 140 S.Ct. at 1002 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996)); *PennEast*, 141 S.Ct. at 2259 (confirming that "it is undoubtedly true under our precedents that—with the exception of the Bankruptcy Clause—'Article I cannot justify haling a State into federal court.' ") (citations omitted). Moreover, Petitioner conflates two distinct features of sovereignty—the authority to transfer broad powers to the federal government and the right to retain one's sovereign immunity. While States consented to Congress's having specific war powers, they did not relinquish their immunity from suit by individuals without their consent. Given the breadth of Congress's war powers, such a waiver would "eviscerate[]" the "States' inherent immunity from suit." *PennEast*, 141 S.Ct. at 2259.

ARGUMENT

I. State sovereign immunity inheres in the structure of the Constitution to protect the dual sovereign system, which, in turn, safeguards individual liberties.

In "split[ting] the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), the Founders adopted a novel and perhaps counterintuitive idea—that two sovereigns better promote and protect the rights of the people, who are "the only proper objects of Government." Federalist No. 15, at 110 (Hamilton). Among other things, the separation of state and federal power:

> assures a decentralized government that will be more sensitive to the diverse needs of a

> heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). The vertical separation of powers also preserves the "double security" for rights about which the Founders were so concerned: "The 'constitutionally mandated balance of power' between the States and the federal Government was adopted … to ensure the protection of 'our fundamental liberties.' " *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (citation omitted). Having two sovereigns "reduce[s] the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

For the federalist system to work, then, there must be "a proper balance between the States and the Federal Government." *Id*. at 459. The dual governments can serve "as mutual restraints only if both are credible," *i.e.*, only if each retains a robust sovereignty. *Id*. Accordingly, "the States entered the federal system with their sovereignty intact." *Blatchford*, 501 U.S. at 779. "Although the States surrendered many of their powers to the new Federal Government, they retained a 'residuary and inviolable sovereignty.' " *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (citation omitted).

While the Supremacy Clause provides the federal government with "a decided advantage in this delicate balance," *Gregory*, 501 U.S. at 460, "the Framers rejected the concept of a central government that would act upon and through the

States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Printz*, 521 U.S. at 919-20; *New York v. United States*, 505 U.S. 144, 166 (1993) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."). As Madison expounded, "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." Federalist No. 39, at 245; *Texas v. White*, 7 U.S. 700, 725 (1869) ("[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.").

Sovereign immunity is a hallmark of state sovereignty. In fact, its "central purpose is to 'accord the States the respect owed them as' joint sovereigns." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 765 (2002) (citation omitted). As a result, "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans*, 134 U.S. at 16. As Hamilton explained, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." Federalist No. 81, at 487; *In re Ayers*, 123 U.S. 443, 505 (1887)

("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private individuals.").

That individuals cannot sue States without their consent flows directly from the fact that States are sovereigns and that the federal government cannot act directly on or through the States. While Congress can waive *its* sovereign immunity as to individuals subject to its authority, Congress generally cannot waive the *States'* sovereign immunity against those same individuals. In particular, Congress cannot require a State's courts to hear a case against that State, *Alden*, 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."), or directly compel States to do the central government's bidding: "A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.*

Accordingly, sovereign immunity protects States from both federal overreach and control by individual litigants: "The reasons for this immunity … partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants." *United States v. Shaw*, 309 U.S. 495, 501 (1940); 1 Records of the Federal

Convention of 1787 at 9 (Farrand ed. 1911) (Madison) ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands."); *New York*, 505 U.S. at 166 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). Congress, therefore, generally cannot require state courts to hear cases involving contract or employment disputes between a State and individuals within its realm of sovereign action:

> It is different with contracts between individuals and a state. In respect to these, by virtue of the eleventh amendment to the constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion.

In re Ayers, 123 U.S. at 505; *Florida Prepaid*, 527 U.S. at 685. Hamilton made the same point at the founding:

> [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force.

> They confer no right of action independent of the sovereign will.

Federalist No. 81, at 488. This is why "[t]he 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.' " *Alden*, 527 U.S. at 748 (citation omitted). To permit Congress to authorize individuals to sue States through its Article I powers would effect an end run around these foundational principles and "eviscerate[]" the "States' inherent immunity from suit." *PennEast*, 141 S.Ct. at 2259 (citation omitted).

This Court has identified only three exceptions to States' broad sovereign immunity—where States expressly consent to suit, Congress properly exercises its authority under section 5 of the Fourteenth Amendment, and States relinquish their sovereign immunity when adopting specific provisions of the Constitution. *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) ("There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' ") (citation omitted).

The first two exceptions have no application here. Texas neither consented to Petitioner's suit nor waived its sovereign immunity under USERRA generally. Furthermore, Congress passed USERRA pursuant to its Article I war powers, not section 5 of the Fourteenth Amendment. Thus, Petitioner is

relegated to arguing for a plan-of-the-Convention waiver regarding Congress's war powers.

Prior to *Katz*, this Court had recognized only two situations where States relinquished their sovereign immunity at the founding—(1) suits between States and (2) suits between the United States and a State. *See United States v. Minnesota*, 270 U.S. 181, 195 (1926) ("[T]he immunity of the state is subject to the constitutional qualification that she may be sued in this Court by the United States[and] a sister state…."). Because both situations involve relations between sovereigns, neither violates the general rule that an individual cannot sue a State without its consent; rather, a surrender of sovereign immunity between dual sovereigns was deemed necessary for the Nation to function properly and to avoid the problems that rendered the Articles of Confederation ineffective.

The Founders recognized that disagreements between and among States would arise. *See* Federalist No. 80, at 477 (Hamilton) ("[T]here are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union."). It was, therefore, an "essential principle of the constitutional plan" to "provide[] means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State." *Monaco*, 292 U.S. at 328; *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838) ("The states waived their exemption from judicial power as sovereigns by original and inherent right, by their

own grant of its exercise over themselves in such cases.").

The same necessity—preserving the Union—also required States to relinquish their sovereign immunity as to "a suit by the United States against a State, albeit without the consent of the latter." *Monaco*, 292 U.S. at 329; *id*. ("Without such a[n implied consent] provision, … 'the permanence of the Union might be endangered.' "). This Court could not "assume that the framers of the constitution … intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law." *Texas*, 143 U.S. at 644-45.

As *Hans* acknowledged, though, the relationship between sister sovereigns contrasts starkly with the relationship between a particular sovereign and the individuals subject to its power. Because States are sovereigns, this Court's "sovereign immunity precedents establish that suits against nonconsenting States are not 'properly susceptible of litigation in courts,' and as a result, that '[t]he "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent.' " *Alden*, 527 U.S. at 754 (citations omitted).

This general prohibition on suits against States preserves public treasuries and respects the dignity of States qua sovereigns. For the Framers, private

actions against States were neither necessary to preserve the peace and stability of the Nation nor consistent with state sovereignty. While individuals have the right to vote for elected state officials and lobby for policy changes, they have no right to control state decisionmaking through coercive suits: "When the States' immunity from private suit is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by mandates of judicial tribunals without their consent, and in favor of individual interests.' " *Alden*, 527 U.S. at 750 (citation omitted); *Gregory*, 501 U.S. at 460 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."). Permitting private individuals to sue nonconsenting States produces "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. at 505. This creates the dual threat of forcing "a State [to] defend or default" and to "face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf." *Alden*, 527 U.S. at 749; *Id.* at 750 ("It is indisputable that, at the time of the founding, many of the Sates could have been forced into insolvency but for their immunity from private suits for money damages."). Thus, any exception to the general rule of state sovereign immunity imposes "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States," *id.*, which is why

this Court has found only two limited situations where States consented to plan-of-the-Convention waivers related to private actions.

II. Neither *Katz* nor *PennEast* supports a plan-of-the-Convention waiver as to Congress's war powers, which, if granted, would have enabled the federal government to undermine state sovereignty.

To date, this Court has concluded that States engaged in plan-of-the-Convention waivers as to only two powers (bankruptcy and eminent domain) and then only in favor of two narrow categories of individuals (bankruptcy trustees and eminent domain delegatees), who cannot seek monetary damages from States. Petitioner now seeks recognition of a third waiver concerning an array of war powers that runs in favor of a broad class of individuals (military personnel and veterans), who may hale States into state courts to recover monetary damages. *Allen* and *PennEast* confirm that, other than the Bankruptcy Clause, no other Article I powers qualify for a plan-of-the-Convention waiver. Congress's distinct war powers lack any of the unique features that this Court considered dispositive in *Katz* and *PennEast*. Moreover, given the potentially sweeping scope of Congress's war powers, finding such a waiver here would throw open the public fisc to individual suits, jeopardizing both the States' treasuries and their sovereignty.

A. *Katz* and *PennEast* identify two narrow classes of individuals, who can sue States in certain bankruptcy and condemnation

actions, based on unique features that Congress's war powers do not share.

Katz marked the first time this Court determined that States waived their sovereign immunity from suit by certain individuals as part of the plan of the Convention. The *sui generis* nature and history of bankruptcy supported a departure from the default rule in favor of specific persons—bankruptcy trustees—in particular bankruptcy proceedings: "Indeed, the Bankruptcy Clause's unique history, combined with the singular nature of bankruptcy courts' [*in rem*] jurisdiction … have persuaded us that the ratification of the Bankruptcy Clause does represent a surrender by the States of their sovereign immunity in certain federal proceedings." *Katz*, 546 U.S. at 369 n.9.

This Court emphasized the "singular nature" of bankruptcy jurisdiction. *Id.* Under the Bankruptcy Clause, Congress may establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8, cl. 4. A bankruptcy court's jurisdiction is "principally *in rem*," *id.*, being "premised on the debtor and his estate, and not on the creditors," whether States, individuals, or other entities. *Hood*, 541 U.S. at 447; *Gardner*, 329 U.S. at 574 ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*."). And its jurisdiction "over a debtor's property, wherever located, and over the estate" is "exclusive," enabling the court to resolve " 'all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is "one against the world." ' " *Tennessee Student Assistance Corp. v.*

Hood, 541 U.S. 440, 447-48 (2004) (citation omitted). A bankruptcy discharge affords debtors a "fresh start" by binding all creditors, including States.

Because bankruptcy jurisdiction is predicated on the debtor's estate, "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Katz*, 546 U.S. at 362. States are treated like all other creditors. If a State wants to participate in the debtor's assets, it must file a proof of claim and submit to the bankruptcy court's jurisdiction. *See Gardner*, 329 U.S. at 574 ("When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim."). In this way, a bankruptcy action differs markedly from "an adversary proceeding against a state[, which] depends on court jurisdiction over the state" instead of "jurisdiction over debtors and their estates." *Maryland v. Antonelli Creditors' Liquidating Tr.*, 123 F.3d 777, 787 (4th Cir. 1997). As a creditor, "[t]he State is seeking from the debtor. No judgment is sought against the State." *Gardner*, 329 U.S. at 574. In its capacity as a creditor, "bankruptcy law modifies the state's collection rights with respect to its claims against the debtor," but at the same time benefits the State by "afford[ing] the state an opportunity to share in the collective recovery." *Texas v. Walker*, 142 F.3d 813, 822 (5th Cir. 1998).

Of course, a State need not submit a proof of claim and, therefore, can avoid a bankruptcy court's jurisdiction altogether: "a nonparticipating creditor cannot be subjected to personal liability." *Hood*, 541 U.S. at 448. The State simply loses its ability to

collect on unsecured loans once the debts are discharged because all creditors "are bound by a bankruptcy court's discharge order." *Id.*

The Bankruptcy Clause also authorizes Congress to pass "laws providing, *in certain limited respects*, for more than simple adjudications of rights in the res." *Katz*, 546 U.S. at 370 (emphasis added). Bankruptcy courts may "issue ancillary orders enforcing [their] *in rem* adjudications." *Id.*; *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14 (1938) (taking "bankruptcy" to include the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief"). For example, as *Katz* noted, if a trustee seeks recovery of property as a voidable preference, a bankruptcy court's order requiring transfer of that property would be "ancillary to and in furtherance of the court's *in rem* jurisdiction" even though it "might itself involve *in personam* process." 546 U.S. at 372. In agreeing to the Bankruptcy Clause, States "authorize[d] courts to avoid preferential transfers and to recover the transferred property," *id.*, and generally "to subordinate state sovereignty, albeit within a limited sphere." *Id.* at 377.

The critical point for present purposes is this Court's repeated recognition in *Katz* that "[t]he scope of this consent was *limited*." *Id.* at 378 (emphasis added). States relinquished their sovereign immunity only insofar as such waiver was "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts," which jurisdiction infringed state sovereignty to a much lesser degree than private suits that force States into "the disfavored

status of a debtor, subject to the power of private citizens to levy on its treasury." *Alden*, 527 U.S. at 749; *Cooper v. Reynolds*, 77 U.S. 308, 318 (1870) (explaining how in "a proceeding *in rem* … [t]he judgment of the court … has no effect beyond the property attached in the suit"); *Hood*, 541 U.S. at 450 ("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. He seeks only a discharge of his debts.").

Things are different, though, if the bankruptcy court renders judgment against a State's property or treasury. In that situation, sovereign immunity *is* infringed because "[a] suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership." *Id.* at 39; *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992) (noting that this Court has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and ha[s] suggested that no such exception exists"); *Hoffman v. Conn. Dept. of Income Maint.*, 492 U.S. 96, 102 (1989) (plurality opinion) (engaging in a sovereign immunity analysis where a bankruptcy court sought to issue a monetary judgment against a State that filed no proof of claim). When a trustee tries "to recover a sum of money, not 'particular dollars,' " from a State, the Bankruptcy Court is no longer exercising jurisdiction over the estate's property; the trustee is seeking recovery from the State's treasury, thereby triggering sovereign immunity protection. *Nordic Vill.*, 503 U.S. at 38 (quoting *Begier v. IRS*, 496 U.S. 53, 62 (1990)).

Katz also highlighted the "intractable problems" and "injustice" created by allowing States to imprison "debtors who had been discharged (from prison and of their debts) in and by another State." 546 U.S. at 363. The independent sovereignty of the States exacerbated the problems because of their divergent systems for discharging debtors and debts, creating a "patchwork of insolvency and bankruptcy laws … peculiar to the American experience." *Id*. at 366. Unlike in England, where a single sovereign issued a single order protecting the debtor, American debtors faced multiple sovereigns—confronting subsequent insolvency proceedings (and imprisonments) without assets to satisfy States or creditors who had not participated in an initial state bankruptcy proceeding. *See Millar v. Hall*, 1 U.S. 229, 232 (Pa. 1788) ("[T]o permit the taking [of] his person here, would be to attempt to compel him to perform an impossibility, that is, to pay a debt after he has been deprived of every means of payment, an attempt which would, at least, amount to perpetual imprisonment, unless the benevolence of his friends should interfere to discharge [his] account."). These concerns led to the inclusion of the Bankruptcy Clause without much debate or discussion, showing the States' agreement as to the necessity of a uniform federal response. *Katz*, 546 U.S. at 369; *Gardner*, 329 U.S. at 574 (confirming that "a fundamental purpose of" Bankruptcy is to ensure "orderly and expeditious proceedings"). Congress, therefore, was given authority over the whole "subject of Bankruptcies," instead of "an amalgam of discrete segments." *Katz*, 546 U.S. at 370.

The contrast with the war powers is pronounced. First, and most obviously, the jurisdiction under

USERRA is *in personam*, not *in rem*. Petitioner seeks to recover monetary damages from Texas; no *res* of an estate is at issue. Second, there never was a patchwork of state "war powers" that imposed multiple burdens on individuals, who then needed specialized federal courts to resolve competing state claims against them. The authority over external affairs transferred directly from England to the colonial government and then the federal government. *Curtiss-Wright*, 299 U.S. at 316. If a State ignored or interfered with Congress's war powers, the federal government could act directly against the offending State to protect national interests. There was no need at the founding—nor is there a need today—for individuals to bring *in personam* actions against States to recover for alleged statutory injuries. Third, the war powers do not comprise a "unitary concept;" they are an amalgam of eight clauses in Article I, § 8 coupled with the express and inherent power vested in the executive branch. Consistent with the Framers' desire to diffuse power to better protect individual liberties, the war powers were separated between Congress and the President, while States retained their sovereign immunity to protect against federal overreach.

Drawing on *Katz*, Petitioner contends that, because Article I imbues Congress with so much power related to war and the military, States must have waived their sovereign immunity as part of the plan of the Convention regarding Congress's exercise of that power. This claim conflates two distinct facets of sovereignty: "the authority of a sovereign to enact legislation regulating its own citizens, and sovereign immunity against suit by private citizens."

Katz, 546 U.S. at 384 (Thomas, J., dissenting). Although Congress's power to raise and support armies is "broad and sweeping," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), States also ceded expansive authority to Congress regarding, *inter alia*, interstate commerce, copyrights, and patents. Yet outside the bankruptcy context, this Court has never held that such grants of power entailed the waiver of sovereign immunity. In fact, this Court has repeatedly and unequivocally stated that Congress cannot invoke any other Article I powers to supplant the States' sovereign immunity. *See Seminole Tribe*, 517 U.S. at 73 (explaining that "Article I cannot be used to circumvent the constitutional limitations" that sovereign immunity "place[s] upon federal jurisdiction"); *Allen*, 140 S.Ct. at 1002 ("Because Congress could not 'abrogate state sovereign immunity [under] Article I,' *Florida Prepaid* explained, the Intellectual Property Clause could not support the Patent Remedy Act.") (citation omitted). This is true whether Congress invokes Article I powers to support abrogation or a plan-of-the-Convention waiver. After all, as *Allen* detailed, *Katz* "found that *the Bankruptcy Clause itself* did the abrogating," that "no congressional abrogation was needed because the States had already 'agreed in the plan of the Convention not to assert any sovereign immunity defense' in bankruptcy proceedings." 140 S.Ct. at 1003 (quoting *Katz*, 546 U.S. at 377).

The unique nature and history of the Bankruptcy Clause warranted treating bankruptcy as if it is "on a different plane, governed by principles all its own." *Id*. at 1002-03. *Allen* expressly acknowledged that *Katz* was rooted in a plan-of-the-Convention waiver and denied that any other Article I power involved

such a waiver: "Nothing in that understanding invites the kind of general, 'clause-by-clause' reexamination of Article I that [Petitioner] proposes." *Id.* at 1003. Rather than establish a clause-by-clause review of Article I powers, *Katz* "points to a good-for-one-clause-only holding." *Id.* The Bankruptcy Clause, therefore, is the *only* Article I provision that includes a waiver of sovereign immunity—at the time of ratification or otherwise. That is what gives rise to "bankruptcy exceptionalism." *Id.* Consequently, Petitioner cannot extend the plan-of-the-Convention analysis to any of the specific war powers listed in Article I, including the power "[t]o raise and support Armies," which undergirds Petitioner's USERRA argument. U.S. Const., Art. I. § 8, cl. 12.

Moreover, the *sui generis* nature of the bankruptcy power explains why Petitioner's invocation of *PennEast* is unavailing. In *PennEast*, every Justice agreed that, outside of the bankruptcy context, Congress lacks authority under Article I to circumvent state sovereign immunity: "[I]t is undoubtedly true under our precedents that—with the exception of the Bankruptcy Clause—'Article I cannot justify haling a State into federal court.' " 141 S.Ct. at 2259 (quoting *Allen*, 140 S.Ct. at 1002); *Id.* at 2265 (Barrett, J., dissenting) ("Congress cannot circumvent state sovereign immunity's limitations on the judicial power through its Article I powers."). The main fault line between the majority and principal dissent, therefore, was the source of Congress's eminent domain power. Because *Seminole Tribe* and *Allen* foreclosed a clause-by-clause review of Article I powers, the Court could not trace the federal government's condemnation power

back to the Commerce Clause. Instead, the Court found a distinct eminent domain power in the Fifth Amendment: "The Takings Clause of the Fifth Amendment … nevertheless recognized the existence of such a power." *PennEast*, 141 S.Ct. at 2255. For their part, the dissenters concluded that States had not waived their sovereign immunity regarding condemnation actions by private individuals because federal eminent domain authority is *not* a separate and distinct power: "Any taking of property provided by Congress is thus an exercise of another constitutional power—in the case of the Natural Gas Act, the Commerce Clause—augmented by the Necessary and Proper Clause." *Id*. at 2267 (Barrett, J., dissenting). Consequently, given that Article I powers do not support abrogation or a plan-of-the-Convention waiver, the dissenters would have precluded private delegatees from maintaining condemnation proceedings against a State even though the federal government could do so directly. *Id*. at 2269 ("The flaw in [the Court's] logic is glaring: The eminent domain power belongs to the United States, not to PennEast, and the United States is free to take New Jersey's property through a condemnation suit or some other mechanism.").

Petitioner relies on Congress's generic war powers, focusing primarily on the power to raise and support military forces. Petitioner's Brief at 3 ("A key aspect of the war powers is the power to raise and support an army and navy."); *Id*. at 14. Unlike the *PennEast* Court, Petitioner invokes no separate constitutional provision to support waiver at the founding. But even if Petitioner could do so, *PennEast* does not consider a non-Article I source of power as sufficient to establish a plan-of-the-

Convention waiver. The Court's analysis is limited to the unique context of eminent domain, where a delegatee stands in for the federal government and exercises Fifth Amendment power on its behalf: "Eminent domain … can be exercised either by public officials or by private parties to whom *the power* has been delegated…. *That power* carries with it the ability to condemn property in court." 141 S.Ct. at 2251-52 (emphasis added). History and past practice established that, at the founding, States agreed their "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)). Thus, given that Congress (1) may file condemnation actions against States and (2) "may, at its discretion, use its sovereign powers, directly or through a corporation created for that object," *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 530 (1894), private delegatees can institute condemnation actions against States "to give effect to the federal eminent domain power." *PennEast*, 141 S.Ct. at 2259. This is so because "the eminent domain power is inextricably intertwined with the ability to condemn." *Id*. at 2260. They are two sides of the same Fifth Amendment coin. *See Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980) ("Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property."), *abrogated on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). To deny a delegatee, who is exercising the federal government's eminent domain power, the right to bring a condemnation action "would violate the basic

principle that a State may not diminish the eminent domain authority of the federal sovereign." *PennEast*, 141 S.Ct. at 2260. Since delegatees act with Congress's full eminent domain power, a condemnation action by a delegatee is effectively the same as an action by the federal government itself. "[B]ecause it 'does no violence to the inherent nature of sovereignty' for a State to be sued by the 'government established for the common and equal benefit of the people of all the States," *id*. at 2261 (quoting *Texas*, 143 U.S. at 646), a delegatee exercising the same power for the same public benefit also can file a condemnation action against a State: "The structural considerations discussed above likewise show that States consented to the federal eminent domain power, whether that power is exercised by the Government or its delegatees." *Id*.

A private action for damages against a State under USERRA differs fundamentally from a delegatee's condemnation proceeding against the same State. For starters, Congress's power to enact USERRA is rooted in Article I, not a separate constitutional provision containing a distinct grant of authority. *Allen* precludes a clause-by-clause review of each war power to find an Article I waiver. Second, in suing under USERRA, a private individual, like Petitioner, is not exercising Congress's war powers. Rather than attempt to raise and support an army or navy for the public benefit, Petitioner seeks monetary damages from Texas's treasury to remedy his alleged injury. Additionally, it is unclear whether Congress could delegate such powers to private individuals even if it desired. *See Curtiss-Wright*, 299 U.S. at 318 ("The

powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereigns, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.").

Third, the power to raise and support military forces is not "inextricably intertwined" with the right of an individual to sue a State for employment discrimination. Even if Congress authorized such actions under Article I against private employers (who are among the proper objects of government), *Allen* and *PennEast* confirm that Congress cannot invoke those powers to authorize individuals to haul States into court without their consent. *See Beers v. Arkansas*, 20 U.S. 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."). Finally, a private suit under USERRA directly undermines the twin aims of sovereign immunity—to "shield[] state treasuries" and "accord the States the respect owed them as joint sovereigns." *Fed. Mar. Comm'n*, 535 U.S. at 765. Unlike a condemnation action filed pursuant to Congress's Fifth Amendment eminent domain power, "a suit by an individual against an unconsenting States is the very evil at which the Eleventh Amendment is directed." *Florida Prepaid*, 527 U.S. at 687. Consequently, neither *Katz* nor *PennEast* supports a plan-of-the-Convention waiver here.

B. States retained their sovereign immunity as a check on the sweeping scope of Congress's war powers.

Congress's war powers are indisputably broad and essential to the safety of the Nation. *See* Federalist No. 41, at 256 (Madison) ("Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils."); Federalist No. 23, at 153 (Hamilton) ("The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances."). But the war powers, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *Curtiss-Wright*, 299 U.S. at 320; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("But even the war power does not remove constitutional limitations safeguarding essential liberties."); *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 58 (2006) (explaining that, although Congress's war powers are "broad and sweeping," Congress still cannot "exceed[] constitutional limitations on its power in enacting such legislation").

While the States conferred (or perhaps never had, *see Curtiss-Wright*, 299 U.S. at 316-17) authority to regulate citizens pursuant to the war powers, they retained their sovereign immunity for good reasons. According to Petitioner, the war powers "are broader

and reach farther than the federal government's other powers." Petitioner's Brief at 2; *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (explaining how the war power "extends to every matter and activity so related to war as substantially to affect its conduct and progress"); *Lichter v. United States*, 334 U.S. 742, 756 (1948) (describing how, given that the power to conscript "is beyond question," "[t]he constitutional power of Congress to support armed forces with equipment and supplies is no less clear and sweeping"). Congress has used these powers to, *inter alia*, take over and operate railroads and communications systems, regulate maximum prices, impose rent controls, criminalize speech materially supporting terrorists, toll state statute of limitations, take and destroy property without compensation, try enemy combatants by military commission, raise and regulate armed forces, criminalize the alteration of draft cards, ban political speeches on military bases, criminalize prostitution in military areas, and prohibit the sale of liquor. Petitioner's Brief at 8-10 (listing cases upholding these uses of Congress's war powers). In addition, the federal war power is not confined to periods of actual military conflict; it "includes the power 'to remedy the evils which have arisen from its rise and progress' … [and] does not necessarily end with the cessation of hostilities." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948). As a result, while critically important for the successful prosecution of military actions, the war power is also extremely dangerous:

> No one will question that this power is the most dangerous one to free government in the whole catalogue of powers…. Always, as in this case, the Government urges hasty

> decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Id. at 146 (Jackson, J., concurring). As John Quincy Adams observed, "[t]his power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (quoting John Quincy Adams).

In all but one situation that Petitioner cites, Congress regulated individuals—the proper objects of government—and neither commanded nor commandeered States. *See Lichter*, 334 U.S. at 766-67 ("The nation previously had experienced different, but fundamentally comparable, federal regulation of *civilian liberty and property* in proportion to the increasing demands of modern warfare.") (emphasis added). Cf. *Stewart v. Kahn*, 78 U.S. 493, 506 (1870) (upholding Congress's tolling of the statute of limitations in States that seceded during the Civil War under its authority "to suppress insurrections"). This is because the federal government must exercise its power subject to constitutional limits, including the "fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729. State sovereign immunity is such a postulate. *In re New York*, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given."); *Blatchford*, 501 U.S. at 779 ("[T]he States entered the federal system with their sovereignty intact.").

As Justice Jackson famously explained, the Constitution "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This is true for the war powers as well as all other Article I powers. Consistent with *Allen* and *PennEast*, this Court has preserved the vertical separation of powers by, *inter alia*, safeguarding the sovereign immunity that States retained when ratifying the Constitution. This past practice has "integrate[d] the dispersed powers into a workable government," balancing state and federal sovereignty so as to promote individual liberty. *Id.* Congress has exercised its war powers to meet the exigencies and challenges created by all too many conflicts through our Nation's history. And it has done so without authorizing individual suits against sovereign States. Simultaneously, the President, as Commander-in-Chief and imbued with broad power over foreign affairs, has exercised authority to prosecute (and avoid) military conflicts. Throughout it all, though, States have retained their "residuary and inviolable sovereignty," Federalist No. 39, at 245 (Madison), as a bulwark against such expansive federal powers and intrusions on individual rights.

Contrary to Petitioner's claim, then, the breadth of Congress's war powers actually cuts in the opposite direction, providing compelling reasons why States did not waive their sovereign immunity as part of the plan of the Convention. Such expansive authority to raise and support troops could be invoked to curb any state activities or policies affecting veterans or military preparedness, authorizing individual suits against States that violate congressional directives. In *Woods*, this

Court recognized the slippery slope on which Petitioner's argument rests: "if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." 333 U.S. at 144. There was no such threat concerning rent control legislation in *Woods* because the housing shortage was "a current condition of which the war was a direct and immediate cause," *id.*, and the Housing and Rent Act applied only to individuals, not States. Denying Congress the authority to address such problems directly connected to the war effort through legislation directed at individuals "would be paralyzing," "would render Congress powerless to remedy conditions" that the war caused, and would "read the Constitution … to make it self-defeating." *Id.* at 143.

Such is not the case with USERRA, which, being directed at States, undermines the rule that States cannot be sued by individuals without their consent. Petitioner "pleads that paralysis will result if [his] claims to power are denied," *id.* at 146 (Jackson, J., concurring), but Congress retains substantial power to raise and support our military.[2] USERRA already applies to private employers, who hire the vast majority of the dedicated veterans, reservists, and National Guard members who protect our Nation. Moreover, given the breadth of Congress's war powers, it has alternative ways to address the

[2] As of 2021, 45 States had legislation affording comparable or even greater protection than the floor established under USERRA. *See* Reserve Organization of America's website at https://www.roa.org/page/StateLawIndex (collecting links to relevant state laws) (last visited March 8, 2022).

concerns Petitioner raises. Congress could "compel the armed service of any citizen in the land," *Macintosh*, 283 U.S. at 624, offer financial incentives to States to employ veterans and military personnel, *New York*, 505 U.S. at 167, increase the pay of those called to service, or fund reemployment training programs for service members. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 (2014) (noting that the federal government sometimes may have to expend money to achieve its important goals). What Congress cannot do is require state courts to hear claims for monetary damages against States under USERRA. To interpret the war powers as providing "an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the Sates for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design." *Alden*, 527 U.S. at 750.

CONCLUSION

This Court should affirm the judgment below because *Allen* and *PennEast* decry "the kind of general, 'clause-by-clause' reexamination of Article I that [Petitioner] proposes," *Allen*, 140 S. Ct. at 1003, and because USERRA authorizes the specific evil that sovereign immunity was meant to avoid—private actions for monetary damages against States without their consent. *Florida Prepaid*, 527 U.S. at 687.

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