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 COURT OF APPEALS OF TEXAS,*
*THIRTEENTH DISTRICT*

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

Texas does not dispute that the Constitution vests responsibility for determining how best to protect the national security of the United States exclusively in the federal government and affirmatively divests the states of the power to interfere. It does not dispute that the war powers must be construed to confer sufficient power to handle any threat to the security of the Nation. And it does not dispute that the war powers may be effectuated by the creation of private causes of action, including USERRA's cause of action. Yet Texas claims the war powers cannot be used to authorize a suit by a soldier against a state unless the state consents. If a state refuses to consent, the national government is powerless, even if such a suit is necessary for the United States to raise an army or win a war.

The immunity Texas asserts has no basis in the text, structure, or history of the Constitution. The United States' vigorous defense of USERRA's cause of action confirms that it is a valid and important exercise of federal military powers. The structural limits the Constitution

places on ordinary domestic Article I powers like commerce and copyright are fundamentally different than the limits it places on the ability of the United States to ensure the nation's security. When it comes to war, the Constitution entrusts Congress and the President, not the states, with the sole authority to determine how best to wage it.

That the states surrendered their sovereign immunity under the war powers in the plan of the Convention can come as no surprise to Texas. The war powers exist to protect unique and significant federal interests in a field where the states were affirmatively divested of any role.[1] When Texas and other states entered the union and read the Constitution, saw the federal structure it created, and read the scope of the federal war powers, they had to realize—and accept—that they were surrendering their sovereign immunity to suits under those powers. They could not have believed they would retain the ability to assert sovereign immunity when doing so would interfere with the ability of the United States to raise an army and protect the nation.

USERRA's cause of action against the states is important to the United States' ability to provide a strong national defense and to tens of thousands of veterans and servicemembers who serve the public in civilian life. *See* ROA Amicus Br. 17-18; NVLSP Amicus Br. 11-13; Bipartisan Mem. Cong. Amicus Br. 4-9; Fmr. Mem. Cong. Amicus Br. 11-15. Texas alone is home to over 1.5 million veterans. Texas Workforce Investment Council, *Veterans in Texas: A Demographic Study* 11 (2021 update) https://bit.ly/3JurXe4. Nearly forty percent served in

[1] In that sense, the war powers are more akin to the powers in the Fourteenth Amendment than the other Article I powers. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The war powers embody express and "significant limitations on state authority." *Id.*

Iraq or Afghanistan. *Id.* at 13. Nearly one in three have a service-connected disability. *Id.* at 17 (Table 12). Thousands are state employees. *Id.* at 19. Yet Texas proclaims it has "not opened its courthouse doors" to these veterans when they face discrimination on the basis of their service. Resp. Br. 8. The United States has the power to protect its soldiers from harm, and that power includes the power to require states to answer for mistreating them. The decision below should be reversed.

## ARGUMENT

### I. THE STATES SURRENDERED THEIR SOVEREIGN IMMUNITY TO SUITS AUTHORIZED BY THE WAR POWERS IN THE PLAN OF THE CONVENTION

The Constitution's text, structure, and history all show that the states surrendered their sovereign immunity to suits authorized under the war powers. *Contra* Resp. Br. 7; *see also id.* at 1, 9.[2] *First*, the text confers the war powers on the federal government unconditionally and without limitation or qualification. It confers them without an "if." Pet. Br. 9. *Second*, the structure of the Constitution embodies a basic assumption that the national government is a full international sovereign, with all of the powers necessary to make war, peace, and treaties. Pet. Br. 21-26. *Third*, history confirms what the text and structure show. Across two

[2] Petitioner has proven a plan of the Convention waiver by Texas's "compelling evidence" standard. Resp. Br. 7, 9, 11, 13, 19, 21, 30 (quoting *Alden v. Maine*, 527 U.S. 706, 781 (1999); *Blatchford v. Native Vill. Of Noatak & Circle Vill.*, 501 U.S. 775, 781 (1991)). But that is not the standard. The question is only whether "as a structural matter … suits were authorized" against the states under the war powers. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2261 (2021). *Blatchford* itself did not purport to impose a higher burden. *See* 501 U.S. at 781 & n.2.

centuries states have never raised sovereign immunity in this sphere until quite recently. *Id.* at 31-36.

In response, Texas makes no argument that any constitutional text confers the immunity it claims. *See* Resp. Br. 9-32. Nor does Texas point to any structural evidence showing that states would take part in warmaking or military policy beyond the state militias. *See id.* Nor does Texas point to any history of states asserting sovereign immunity against suits authorized under the war powers. *See id.* Instead, Texas argues that the Constitution contains a background assumption that states retained sovereign immunity even to suits under the war powers, *id.* at 9-11, and that petitioner's and *amici*'s textual, structural, and historical evidence does not displace this assumption, *see id.* at 9-32. Texas's arguments fail.[3]

**A. Text**

The Constitution's text confers war powers on the federal government, obligates the federal government to exercise those powers, and divests the states of the power to interfere with their exercise. Those powers, including the powers to raise and support armies and to declare war, are conferred without conditions or qualifications. When considered in the context of their objects—raising *armies*, declaring *wars*—the absence of limiting text is significant. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) (explaining that the Court "should hesitate long before limiting or embarrassing [these] powers"). The textual withholding of war powers from the States further shows that the Constitution explicitly and carefully specified the division of power in this area, and that it deliberately left the States with the limited militia role and nothing else.

[3] Texas has apparently abandoned the argument that USERRA's cause of action is invalid because it was enacted pursuant to the Necessary and Proper Clause and not the war powers.

*See* States' Br. 20 ("The States indeed relinquished the war powers.")

Texas argues that the text is implicitly limited because the Constitution contains a universal background assumption of sovereign immunity. Resp. Br. 9-10. But the Constitution does not reflect that assumption with respect to the war powers. Pet. Br. 9-11. The "presupposition[s]" applicable to the federal government's other Article I powers do not hold for the war powers. *Contra* Resp. Br. 9-11. The Articles of Confederation are the relevant source for determining the relationship the ratifiers assumed would exist between the states and the federal government with respect to war. *Contra id.* at 9-10. And in the Articles of Confederation the states had already ceded the sole and exclusive right and power of determining on peace and war to the national government. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-18 (1936); *see also* Prof. Hirsch Amicus Br. 4.

**B. Structure**

The Constitution's structure further establishes that the states surrendered their immunity in the plan of the Convention. The Constitution makes the national government the guardian of national security. The Constitution's delegation of that responsibility to the federal government required the states to surrender any role in dictating federal military policy, including the right to assert an immunity that would damage the ability of the United States to recruit and retain soldiers.

The manner in which the war powers are incorporated into the Constitution reflect that design. The Constitution requires the United States to exercise the war powers on behalf of the states, and divests the states of the power to interfere with their exercise. Pet. Br. 22-23. Many of the Constitution's other precepts depend on exclusive federal warmaking authority,

without which the supremacy of federal law and peace between the states could not be assured. *See* Pet. Br. 25-26.

Texas is incorrect that that background principles of federalism overcome these structural precepts. *Contra* Resp. Br. 30-32. The Constitution embodies different federalism principles in the context of the war powers. *See* U.S. Br. 23-26; *see also Case v. Bowles*, 327 U.S. 92, 95-96, 101-02 (1946); *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315, 319 (different principles apply in foreign and domestic affairs). Unlike power over domestic matters, powers over war and foreign relations cannot be shared with the states without substantially impairing their effective exercise. Pet. Br. 25-26; U.S. Br. 21-27. Thus, "power over internal affairs is distributed between the national government and the several states" but "power over external affairs is not distributed, but is vested exclusively in the national government." *United States v. Belmont*, 301 U.S. 324, 330 (1937).

The enumeration of the war powers did not limit those powers in the manner Texas suggests. Resp. Br. 32; *id.* at 1-3. Texas argues that "the Constitution did not vest Congress with 'plenary and exclusive . . . war powers,'" *id.* at 32, but the Court has said almost precisely that. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872) (United States' "control over the subject is plenary and exclusive"); *see Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006) (Congress's powers to raise and support Armies and provide and maintain a Navy are "broad and sweeping"); *Lichter v. United States*, 334 U.S. 742, 755-758 & n.4, 767 n.9 (1948). The war and foreign affairs powers are not impliedly limited by their enumeration in the way the ordinary domestic regulatory powers are. *See Curtiss-Wright*, 299 U.S. at 315-16; *see also* Bradford R. Clark, *Federal Common*

*Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1295-96 (1996).[4]

Congress has used the war powers to create causes of action, to create crimes, and to modify rules of state court procedure and jurisdiction. Pet. Br. 8-10. The power to raise and support armies includes the power to authorize lawsuits that protect the ability of the United States to raise and support those armies. *See* Profs. Bobbitt, Dorf, Powell Amicus Br. 13-14.

Recognition that federalism operates differently in the context of war threatens neither the special role of the states within the federal system nor their sovereign immunity in other contexts. Recognition that USERRA's cause of action is constitutional does not require the recognition of a limitless federal power to authorize suits against states. *Contra* Resp. Br. 35-36. A suit Congress authorizes under its war powers must actually be an exercise of its war powers; upholding USERRA will not mean suits against states in fields traditionally occupied by the states like intestacy. *Nat'l Fed'n of Indep. Bus. v.*

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[4] Texas cites *Principality of Monaco v. Mississippi* for the proposition that the war powers are limited. Resp. Br. 32 (citing 292 U.S. 313, 331 (1934)). But *Monaco* did not involve an exercise of the war powers. *See* 292 U.S. at 317-19, 330-32. *Monaco* recognized that the Constitution itself does not generally empower a foreign state to sue a state without its consent and absent any congressional authorization. *See id.* at 330-31; *PennEast*, 141 S. Ct. at 2262 (explaining that *Monaco* held that "[a] grant of judicial power does not imply an abrogation of sovereign immunity").

In fact, *Monaco's* logic supports petitioner. *Monaco* states that, where "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative," "[t]he National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement, of arbitration, or otherwise." 292 U.S. at 331.

*Sebelius*, 567 U.S. 519, 573 (2012) (plurality op.) ("It remains true … that the 'power to tax is not the power to destroy while this Court sits.'" (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)). It is inherent in the very nature of war that soldiers will need to leave their employment for a time to perform their duties and that some will be injured. Whatever the outer limits of Congress's power to authorize suits under its war powers might be, suits by soldiers for discrimination on the basis of war injuries are at the core.

The United States' decision to waive its own sovereign immunity to suits by servicemembers through a different means does not make USERRA's cause of action a "particularly acute" intrusion on state sovereignty. Resp. Br. 31-32. The United States has authorized servicemembers to bring USERRA claims against it through the MSPB, with judicial review in the Federal Circuit. *See* 38 U.S.C. §§ 4314, 4324. The states would have objected if the United States had sought to subject them to claims for USERRA violations in the MSPB. Instead, the United States vested state courts with exclusive jurisdiction over USERRA claims against states. Placing claims against states in their own courts rather than a federal agency is more solicitous to the states.

Texas argues that the appropriate way to hold it accountable would be suits against Texas by the United States. Resp. Br. 32. But *PennEast Pipeline Co., LLC v. New Jersey* found a surrender of sovereign immunity notwithstanding the prospect of a suit by the United States. 141 S. Ct. 2244, 2260 n.* (2021). And more broadly, the argument Texas advances—that the same suits, for the same damages, inuring to the benefit of the same real parties in interest, would be constitutional if only they were formally denominated suits by "the United

States"—makes no sense. A constitutional scheme that turns on empty formalisms would be "counterintuitive." *Id.*

Texas suggests at various points in its brief that Congress can still raise an army and defend the Nation without USERRA's remedy. Resp. Br. 1-2. But the Constitution leaves that determination to the federal government, not Texas. USERRA's cause of action is critically important, as the United States' forceful defense of the statute here demonstrates. *See* U.S. Br. 15.

**C. History**

History confirms that the states surrendered their sovereign immunity to suits authorized under the war powers in the plan of the Convention.

**1.** Texas argues that the Constitution's ratifiers did not believe Congress would have the power to subject states to suit without their consent under any circumstances. Resp. Br. 9-11. Texas's arguments cannot be squared with the original understanding of the magnitude of the war powers. The ratifiers shared the sentiments expressed in *The Federalist* No. 23, that the war powers "ought to exist without limitation" free of "constitutional shackles." *The Federalist* No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). They shared the sentiments expressed in *The Federalist* No. 41, that Congress would have the "*indefinite power* of raising *troops*." *The Federalist* No. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961). These words mean what they plainly say. *Contra* Resp. Br. 23-24. The ratifiers knew that if suits against the states were necessary to effectuate the war powers, Congress could authorize those suits.

**2.** Texas argues that the debates at the Constitutional Convention and ratifying conventions do not mention suits against states under various powers.

Resp. Br. 13. Texas contends that this shows the states did not "agree[] to subject themselves to private-party suits by servicemembers in their own courts." *Id.* Texas then purports to prove this by canvassing debates over the Army and Navy Clause, *id.* at 13-16, the Militia Clauses, *id.* at 16-18, and the Declare War Clause, *id.* at 18-19.

Texas miscomprehends this Court's inquiry. A "plan of the Convention" waiver exists where "the structure of the original Constitution itself" demonstrates that the states relinquished their immunity. *PennEast*, 141 S. Ct. at 2258. The inquiry is not whether specific topics were discussed, but whether the allocation of powers between the states and the national government in a particular area means that the states must have understood they were surrendering their sovereign immunity in that area. *See id.* Debates over the Army and Navy Clause, the Militia Clauses, and the Declare War Clause focused on other issues and did not discuss sovereign immunity, but debates over bankruptcies likewise did not discuss sovereign immunity. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006).

**3.** Moreover, with respect to an issue directly relevant to the war powers—the scope of the ability of the United States to authorize suits under peace treaties—sovereign immunity was hotly debated. *See* Pet. Br. 27-31; Resp. Br. 19-23; CAC Amicus Br. 13-18. Ultimately, the Constitution gave the federal government the power to authorize suits against states under peace treaties, in the interest of protecting the national security of the United States, and the Eleventh Amendment never divested the federal government of that power. *See* Pet. Br. 27-31.

Texas argues, relying on the work of Professor David P. Currie, that the Eleventh Amendment was meant to withdraw any ability of the federal government to

authorize suits against states under any circumstances. Resp. Br. 20 (citing David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 196-97 (1997)). Professor Currie overreads the significance of unenacted amendments to the Eleventh Amendment, and omits from his analysis the fact that Congress knew exactly how to write the Eleventh Amendment to clearly eliminate the possibility of suits against states under any circumstances but chose not to. *See* Pet. Br. 30 (quoting Thomas Sedgewick's unenacted proposal).

Texas cites the rejection of the Gallatin Amendment concerning treaties as proof of the Eleventh Amendment's breadth, but it proves little. "[M]ute intermediate legislative maneuvers are not reliable indicators of congressional intent," *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); "unenacted approvals, beliefs, and desires are not laws," *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). There are many reasons that Gallatin may have introduced the amendment and the Senate may have rejected it. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1935-36 & n.253 (1983) (discussing the amendment and its rejection). Professor Currie cannot be right that "[t]he fate of Gallatin's modest request" shows that the ratifiers of the Eleventh Amendment decided to "leave our foreign relations at the mercy of individual states." Currie, *supra* at 197. The Eleventh Amendment's text shows it did not reach that far. *See* Scholars Con. Law Amicus Br. 5-7.[5]

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[5] Texas argues that suits against states under the peace treaty were made unnecessary by the Funding Act of 1790. Resp. Br. 20-21. But not every suit. *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261, 1273 (1989) (discussing *Vassall v Massachusetts*).

Texas claims suits against states without their consent under the war powers would have been "anomalous and unheard-of." Resp. Br. 21. But suits against states for money damages were not unheard of in 1787.[6] The notion of a suit against a state authorized by a higher sovereign was new because the very concept of dual sovereignty was new for states. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (the Constitution "establish[ed]" dual sovereignty). But by that measure, federal preemption is anomalous. Texas argues novelty is heightened where the suits against states are in state courts, Resp. Br. 21, but suits in state courts under federal law were anticipated in 1787 and are a corollary of federal supremacy, *see Printz v. United States*, 521 U.S. 898, 907 (1997), and federal supremacy is not anomalous, *see Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990).

**4.** Texas is wrong that Congress lacks the power to authorize damages suits against the states under its war powers because a long period elapsed before Congress first needed to use it. Resp. Br. 1-2, 25-26. The states cannot acquire a constitutional immunity by passage of time. As this Court has said "[i]n the application of a constitution … our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power." *Weems v. United States*, 217 U.S. 349, 373 (1910). If Texas is right, the draft, first used seven decades after the founding in

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[6] Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 89-90 (1989) (discussing colonial and early state sovereign immunity waivers); Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1239 (2009) ("[A] complete study of sovereign immunity in the American colonies has never been undertaken" but "a number of the colonies" could "be sued").

the Civil War, would be unconstitutional. The Court rejected this argument in *PennEast*, noting that the proposition that the United States could sue the states "was not established until 1892." 141 S. Ct. at 2261. The lack of "examples from the founding era of federal suits against States" was not dispositive because "[s]tructural considerations" showed "that States consented to the federal eminent domain power." *Id.*

**5.** Texas fails to identify a single historical example of a state asserting sovereign immunity in a suit against a state authorized under the war powers. *See* Resp. Br. 26-30. Texas claims only that petitioner's examples of states not asserting sovereign immunity are inapposite. *See id.* That argument fails.

The relevance of the provisional federal court system in Louisiana arises not from its existence during the time when Louisiana was in rebellion, *contra* Resp. Br. 27, but from the fact that the courts of the readmitted Louisiana (readmitted 1868) were required to accept all "judgments, orders, and decrees" of the provisional courts as their own. Pet. Br. 31-32. Louisiana reentered the Union with its "sovereignty intact." *Blatchford*, 501 U.S. at 779; *see* War Powers Scholars Amicus Br. 4. But that sovereignty was not offended by the requirement that its state courts treat all "judgments, orders, and decrees" of a provisional federal court system as their own where necessary to effectuate the nation's war powers.

The relevance of federal tolling of state statutes of limitations in suits against states is clear: such tolling raises significant constitutional doubt in other contexts; Texas does not disagree. Resp. Br. 28. Yet Texas does not point to a single instance of a state arguing that sovereign immunity bars such tolling when done as an exercise of the war powers. *See id.* at 28-29. Texas claims petitioner located too few cases and that the states may have declined to raise sovereign immunity in those cases

for other reasons. *See id.* But states do not typically forego viable defenses in adversarial suits. Texas also misses that these suits do not stand in isolation; placed in the context of all the evidence, they reinforce the conclusion that the states surrendered their sovereign immunity to suits under the war powers.

Texas is wrong that habeas corpus suits are irrelevant to determining whether states retained sovereign immunity. Resp. Br. 28-30. *Katz* found habeas suits relevant. 546 U.S. at 374-75. As late as 1954, forty-one states joined a brief arguing that a post-conviction habeas "proceeding [is] a suit against a state and so [is] prohibited by the eleventh amendment." Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 18 (1956); *see U.S. ex rel. Elliott v. Hendricks*, 213 F.2d 922, 924 (3d Cir. 1954) (en banc). Blackstone's discussion of the nature of habeas corpus, Resp. Br. 29, is not illuminating: habeas actions in England were "confined to the King's dominions," *Boumediene v. Bush*, 553 U.S. 723, 844 (2008) (Scalia, J., dissenting)—i.e. akin to a suit authorized under a sovereign immunity waiver. If Texas were right that suits against officials implicate no sovereign interests, Resp. Br. 29, the holdings that state courts have no power to issue writs of habeas corpus against federal officials would be incorrect. *But see Tarble's Case*, 80 U.S. (13 Wall.) at 410-11; *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514 (1859).

## II. THE COURT'S PRECEDENTS SUPPORT FINDING A PLAN OF THE CONVENTION WAIVER

Texas's argument from the Court's sovereign immunity precedents fares no better than its argument from text, structure, and history. Those precedents do not "foreclose" USERRA's cause of action against states. Resp. Br. 33. And ruling for petitioner would not "repudiate almost all" of them. Resp. Br. 8. The Court

has never considered or even discussed whether Congress has the power to authorize suits against nonconsenting states pursuant to its war powers. The war powers are *sui generis* and fundamentally different from any of the federal government's other powers. It would not be strange to hold that the war powers may be used in ways other powers cannot be. What would be strange is if the Court's precedents allowed suits under the eminent domain and bankruptcy powers but not the war powers.

**A.** Both *Katz* and *PennEast* confirm the plan of the convention waiver here, and both refute Texas's theory, Resp. Br. 34, that no person can sue a state under any legislation enacted pursuant to Article I, *see* Pet. Br. 37-40.

**1.** Like the bankruptcy power in *Katz*, the war powers require complete federal exclusivity and uniformity, and their full vindication requires authorizing "ancillary" suits against states. Pet. Br. 37-38. Just like bankruptcy would be ineffectual if judgments lacked global effect, the war powers, including the power to raise an army, would be ineffectual if states could thwart Congress's efforts by firing servicemembers.

Texas reads *Katz* as addressing only "judicial control over certain *property*," but that is plainly wrong. Resp. Br. 36. As Virginia argued, "the basis for jurisdiction in this case is *in personam*, not *in rem*." *Katz* Pet. Br. 31 n.36. Texas, as an *amicus*, agreed: "this case is an action *in personam*, and not *in rem*." *Katz* States' Br. 18. The "*in personam* process" was why the Court found it necessary to address immunity at all; if the case were solely about a *res*, the suit would not have "interfere[d] with state sovereignty" under this Court's precedent. *Katz*, 546 U.S. at 370, 372; *see United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647) (finding no need to evaluate immunity because case involved only "the property in dispute"); *see also*

*Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004) (similar). Just as *in personam* actions are ancillary to *in rem* actions in bankruptcy, USERRA suits are ancillary to warmaking. Pet. Br. 38; *see also* Bipartisan Members of Congress Amicus Br. 5.

**2.** *PennEast*, like *Katz*, confirms that for certain federal powers where complete exclusivity over the entire field is crucial, states ceded their sovereign immunity "in the 'plan of the Convention,'" even in suits filed by "private parties." 141 S. Ct. at 2258, 2260; *see* Pet. Br. 38-40. With the war powers, as with eminent domain, a "postulate of the Constitution [is] that the government of the United States is invested with full and complete power to execute and carry out its purposes." *Id.* at 2259; *see id.* at 2263 (power is "complete in itself").[7] That is true even if there is "historical absence of private [war-powers] suits." *Id.* at 2261.

*PennEast* also disproves Texas's theory that plan-of-the-convention waivers are possible only for "inherently judicial" powers. Resp. Br. 40. This Court explained that eminent domain "can be exercised either through the initiation of legal proceedings or simply by taking possession up front." *PennEast*, 141 S. Ct. at 2251. It

[7] Texas is incorrect that the provision of Article I, Section 8 dealing with jurisdiction over acquired property "forbids Congress from building a military base by condemning a State's land without the 'Consent of [its] Legislature.'" Resp. Br. 41. State consent is not a prerequisite to condemnation of state land or construction of military bases (or any other federal building) on that land; consent has significance only in deciding whether a state may enforce its own generally applicable laws on that federal property. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 371-73 (1973) ("the tracts of land upon which Keesler Air Force Base and the Naval Construction Battalion Center" were "acquired … by condemnation between 1941 and 1950"; question of Mississippi's consent was relevant only to its "application of [a] [liquor] markup regulation to the two bases").

recognized that litigation is more "peacabl[e]" than invasion, Resp. Br. 40, but that only supports the analogy to the war powers. Allowing servicemembers to redress discrimination in court can avoid the need for more drastic measures involving direct federal control that could become necessary if a state were to systematically discriminate against servicemembers.

Nor did *PennEast* rest on the need for "resolution of all claims against the same property," Resp. Br. 40; its categorical holding that "[s]tates consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegates," applies equally to suits against a single state party as it does to suits involving many stakeholders. 141 S. Ct. at 2263.

Finally, Texas's notion, Resp. Br. 41, that eminent domain's "incursion on State sovereignty" is unusually "limited" appears nowhere in this Court's decisions, and certainly was not shared by New Jersey, which, like Texas here, argued that eminent-domain suits "subject[] a State to the coercive process of judicial tribunals at the instance of private parties." *PennEast* NJ Br. 23; *compare* Resp. Br. 43 ("Congress has subjected an unwilling State to a coercive judicial process" (cleaned up)); *see also PennEast*, 141 S. Ct. at 2270 (Barrett, J., dissenting) ("PennEast has haled a State into court to defend itself in an adversary proceeding about a forced sale of property."). The Court allowed the suit not because it disagreed about the *degree* of incursion, but rather because "the States consented at the founding" to *any* incursion within the sphere of federal eminent domain. *Id.* at 2263 (majority opinion).

**B.** Nor do *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666 (1999), or *Allen v. Cooper*, 140 S. Ct. 994 (2020) preclude a plan of the

convention waiver. Each held that a particular Article I legislative power (over Indian commerce, patents, and copyrights, respectively) did not also provide Congress a corresponding power of "abrogation," i.e., the power to enact laws "to remove the States' immunity." *Allen*, 140 S. Ct. at 1001 (describing *Florida Prepaid*). None dealt with the war powers, and *Katz* rejected Texas's understanding of these cases as covering all of Article I, explaining that any "assumption" that the holding in *Seminole Tribe* would apply equally to all Article I powers was "dicta" that courts are "not bound" to follow. 546 U.S. at 363. Indeed, none of these cases even dealt with the plan of the convention test at all. Pet. Br. 40. *Allen* specifically distinguished situations where "no congressional abrogation [i]s needed because the States had already 'agreed in the plan of the Convention not to assert any sovereign immunity defense.'" 140 S. Ct. at 1003 (describing *Katz*); *see PennEast*, 141 S. Ct. at 2259 ("congressional abrogation is not the only means of subjecting States to suit"). The premise of this case is that states ceded sovereign immunity in the plan of the convention with respect to the war powers. *See* U.S. Br. 11.

And as petitioner's opening brief made clear, what differentiates the war powers from other Article I powers is not "exclusiv[ity]" in the narrow sense Texas suggests. Resp. Br. 34-35. The war powers, unlike the commerce powers, do not merely "displace contrary state laws" (*id.* at 35), but instead explicitly and categorically divest states of power to act in the realm of war powers at all. Pet. Br. 22-23. And they do so not out of a general "policy of uniformity" like that animating the commerce powers, Resp. Br. 35, but because any exercise of any warmaking power by a state government inherently threatens the existence of a federal sovereign. Pet. Br. 23-26. Texas cannot go to war or make peace or raise armies or

maintain a Navy because, if it could, "the union could never be secure of peace." 1 William Blackstone, Commentaries 271 (St. George Tucker ed. 1803). Even residual or intrastate warmaking authority would "utterly destroy" the federal powers. *Tarble's Case*, 80 U.S. (13 Wall.) at 408. Other Article I powers are fundamentally different—like the Intellectual Property Clause, which authorizes states to regulate "writings" and "discoveries" unless Congress preempts their efforts (a point to which Texas does not respond). Pet. Br. 23. Or the Commerce Clause, which has spawned complex doctrines used to assess discriminatory effects and economic burdens in order to balance state and federal power over commerce, which is undisputedly "concurrent." *Id.* There is no balancing when it comes to declaring war or raising armies; the constitution completely divests states of power in this sphere.

Finally, Texas is incorrect that a plan of the convention waiver here would mean a waiver for *all* Article I powers whenever "used to further national-security ends." Resp. Br. 36. Texas does not dispute that USERRA is a valid exercise of the legislative powers that this Court repeatedly has referred to as the war powers, *see* Art. I, § 8, cls. 1, 10-16, 18, including its power "[t]o raise and support Armies," *id.* cl. 12. Unlike other Article I powers, *every* valid exercise of these specific powers implicates the unique field of warmaking.

## III. TEXAS'S "STATE LAW IMMUNITY" ARGUMENT FAILS

Texas's "state-law immunity" argument fails. Resp. Br. 8. Texas affirmatively conceded this argument below, arguing that even though Texas had not "waive[d] its [purported state-law] sovereign immunity," a "valid abrogation by Congress of the State's sovereign immunity for a USERRA claim would permit Torres's lawsuit against DPS for damages." Texas C.A. Br. 2-3, 9, 2018 WL 561781. Moreover, Texas's state-law immunity does not

apply to federal causes of action as a matter of Texas law, and it would be preempted if it did.

The immunity Texas asserts does not apply to federal causes of action. Texas's state-law immunity precludes nonconsensual suits against Texas under Texas law. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 431-33 (Tex. 2016). But this immunity has never been recognized to apply to a federal cause of action and Texas still has not identified a case where it has been. *See* Cert. Reply Br. 10 (also noting Texas's failure to cite such a case).

Even if it applied, Texas's state-law immunity would be preempted. A state cannot assert a state-law sovereign immunity rule that acts as a state-law defense to a federal law. *Haywood v. Drown*, 556 U.S. 729, 735-36 n.5 (2009); *id.* at 763 (Thomas, J., dissenting); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 375-77 (1990); *Martinez v. California*, 444 U.S. 277, 284 (1980). Texas claims that its immunity defense is valid under the Court's cases holding that neutral state rules about where and how to bring suits do not offend the Supremacy Clause. Resp. Br. 45. But this asserted immunity is not a rule about where and how to sue. Texas seeks to assert state law immunity against petitioner's claim not to channel it, but to defeat it. That violates the Supremacy Clause. *See Howlett*, 496 U.S. at 372, 375-77.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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