No. 21-1454

IN THE

Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEPARTMENT, ET AL.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF MISSISSIPPI, ALABAMA, ALASKA, ARKANSAS, LOUISIANA, MONTANA, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The decision below continues a damaging trend of eroding the constitutional design for checking and balancing national military power. That trend has profound ramifications for the amici curiae States and their citizens. Each amicus has a National Guard unit—the modern-day version of what the Constitution calls "Militia": armed, able-bodied citizens primarily led and trained by the States, ready to help the States meet emergencies and safeguard liberty. Over time, the States' power over the militia has been diminished, upending the constitutional design. This case gives the Court an opportunity to halt this trend.

The Framers carefully debated how the Constitution would assign military power. The founding generation knew the shortfalls of relying only on States for national defense. The Articles of Confederation relied on States. That failed. At the same time, oppression by the British Army, under control of the Crown, was still recent in memory. Debate thus centered on how to provide security for the nation while protecting the liberty that a standing army could trample.

The Constitution met those ends by (among other things) dividing power between the national and state governments. To provide security, the Constitution entrusts most military matters to the national government. Congress can raise and fund an army of professional soldiers. National defense is thus not left to States' willingness to cooperate. But to preserve liberty, the States retain control over the militia. States train the militia, appoint its officers, and (except when it is called into federal service) use it to address

their own emergencies. This system of federalism strikes a balance to provide both security and liberty.

Today that balance has been upended. The National Guard system has blurred the separation of the army and the militia. Membership in a state Guard requires dual enlistment in the National Guard of the United States, a nationalized body under national control. Guard members may be called into service and sent abroad as the President sees fit. Local control of the Guard has been curtailed. And the national military now outnumbers state militia—a reversal from the founding era—knocking out a key check on the national military. The erosion of the constitutional design has imperiled the liberty that federalism aims to protect, blurred the lines of political accountability, and left States without the means to handle perils to their citizens.

The decision below erodes the design further. It permits the national government to exert day-to-day control over a state Guard. It mandates how an Adjutant General works with labor unions, bargains, and promotes. It allows this intrusion into state functions on matters unconnected to national defense or the battlefield. Whatever may be said of the last century's changes to the constitutional design, this goes too far. This Court should halt the erosion of federalism by reversing the decision below.

SUMMARY OF ARGUMENT

In assigning military power, the Constitution established a system of federalism to provide security while preserving liberty. Military matters—including raising an army—are mainly entrusted to the national government, but States retain primary control

over the militia. In the last century, this design was eroded. Limits on national power vanished and state powers were hobbled. The decision below exacerbates this trend—threatening liberty, sapping political accountability, and endangering States' citizens. This Court should reverse the judgment below to stop further harm.

ARGUMENT

The Decision Below Continues A Damaging Erosion Of The Constitution's Careful Design For Military Power.

A. In Assigning Military Power, The Constitution Established A System Of Federalism To Provide Security While Preserving Liberty.

The Constitution primarily entrusts military matters to the national government, but it reserves powers to the States to check and balance national military power. That design recognizes that, to provide security, the national government needs the preeminent role in national defense, but that so empowering the national government risks tyranny—and the States need powers to preserve liberty.

The Constitution struck this balance by establishing a system of federalism. The Constitution grants war powers to a national government while recognizing the importance of a robust militia operating at the state level. The Constitution empowers Congress "To raise and support Armies." U.S. Const. art. I, § 8, cl. 12. Congress may "declare War." *Id.*, art. I, § 8, cl. 11. It has power "To provide and maintain a Navy." *Id.*, art. I, § 8, cl. 13. Congress may "make Rules for the

Government and Regulation of the land and naval Forces." *Id.*, art. I, § 8, cl. 14. The Constitution also limits States. A State may not, "without the Consent of Congress," "keep Troops, or Ships of War in time of Peace." *Id.*, art. I, § 10, cl. 3. Nor may a State, without Congress's consent, "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Ibid.*

The Constitution even assigns to the national government powers over the militia—the large number of able-bodied citizens, loyal to and largely led by the States, who were not professional soldiers but were to be armed, trained, and ready to fight. The Federalist No. 46 (James Madison) (describing "a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence"). Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. Congress has power "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." *Id.*, art. I, § 8, cl. 16. Congress prescribes "the discipline" by which the militia is trained. *Ibid.* The President is not just "Commander in Chief of the Army and Navy of the United States" but also Commander in Chief "of the Militia of the several States, when called into the actual Service of the United States." *Id.*, art. II, § 2, cl. 1.

But the Constitution limits and checks the national government's military power by retaining crucial powers for the States. It does so primarily by

"separat[ing] the 'Armies' from the 'Militia'" and establishing that the militia would be "attached to the states." Robert Leider, Federalism and the Military Power of the United States, 73 Vand. L. Rev. 989, 991 & n.6 (2020). Congress's ability to "provide for calling forth the Militia" is limited. U.S. Const. art. I, § 8, cl. 15. The power may be used only "to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Ibid.* Congress's authority to "govern[ ]" "the Militia" extends only to "such Part of" it that is then "employed in the Service of the United States." *Id.*, art. I, § 8, cl. 16. And the President is Commander in Chief of the militia only when it is "called into the actual Service of the United States." *Id.*, art. II, § 2, cl. 1. The States reserved the power to "govern[ ]" militia that is not in the service of the United States. *See id.*, art. I, § 8, cl. 16. When a State's militia is not in federal service, it is "available for all appropriate uses to which a militia may be put," such as "assisting state law enforcement when the civil authorities are inadequate." Leider 1005. Further, the people "reserv[ed]" to the States "the Appointment of the Officers" of the militia. U.S. Const. art. I, § 8, cl. 16. And although Congress "prescribe[s]" "the discipline" for militia, States retained "the Authority of training the Militia according to" that discipline. *Ibid.*

This framework arose from two competing considerations. The first was the recognized need to provide a more effective, reliable military system than the Articles of Confederation had. "The Articles combined the need for security with the desire for the militia in a formula that quickly proved unworkable." Jason Mazzone, The Security Constitution, 53 UCLA L. Rev. 29, 75 (2005). The limited Congress under the Articles could declare war and appoint a "Committee of the

States" that, in recesses, would "agree upon the number of land forces" and "make requisitions from each State for its quota [of soldiers]." Articles of Confederation art. IX, ¶¶ 1, 5. But Congress could not create an army. Mazzone 76. "The power of raising armies" was "merely a power of making requisitions upon the States for quotas of men." The Federalist No. 22 (Alexander Hamilton). So Congress depended on States' willingness to cooperate: it had no mechanism to force States to comply with their quotas. Mazzone 76. This led to "scanty levies of men in the most critical emergencies of our affairs," "short inlistments at an unparalleled expence," and "continual fluctuations in the troops." The Federalist No. 22. And while the Articles required States to "always keep up a well regulated and disciplined militia, sufficiently armed and accoutered," Articles of Confederation art. VI, ¶ 4, the States "neglected that duty." Leider 1001-02.

The Articles thus failed to protect the States against foreign and domestic threats. A reliable, national professional fighting force was needed to defend against external threats. As Alexander Hamilton put it, "War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25. Just as "the liberty of the[ ] country could not have been established by" the militia's "efforts alone," *ibid.*, it could not be maintained by those efforts alone. A professional, centralized army was also needed to counter internal threats. The Articles failed at that task, as shown by the 1787 rebellion led by Daniel Shays in Massachusetts. Mazzone 47-49; *see also id.* at 48 ("nothing in the Articles provided explicit authority to Congress to intervene to quell a rebellion within a state"). States needed protection "not only against

foreign hostility, but against ambitious or vindictive enterprizes" of "more powerful neighbours." The Federalist No. 43 (James Madison).

The second, competing consideration was the risk presented by a standing army. Convention delegates recognized that a standing army imperiled liberty. Bernard Donahoe & Marshall Smelser, The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788, 33(2) The Review of Politics 202, 202, 204 (1971). Delegates argued that such armies were "inevitably ... used to collect oppressive taxes, to enforce arbitrary decrees, and [to] erect military dictatorships." *Id.* at 208. The British army—under control of the Crown rather than the people—had arrived in Boston in 1768 to enforce the Townshend duties. Mazzone 73. Some thought that "[p]rofessional soldiers ... could not be trusted to preserve free government" since they were "removed from the freedoms enjoyed by the republican political community that they were defending." Leider 996. Opposition to a standing army was magnified by "fear that the Federal Government would disarm the people in order to impose rule" through such an army. *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).

The Constitution adopted a compromise that sought to address both considerations. This compromise balanced power between the army (full-time, professional soldiers) and the militia (able-bodied citizens subject to occasional military exercises). Leider 995-96, 1015-16, 1024. Power over the military, including the ability to raise a standing army, was largely centralized in the national government. Control of the militia—which would be armed and would far outnumber the national military, *see* Mazzone 67—was split, leaving lead control with the States.

Only in specified emergencies could the national government call the militia into federal service. U.S. Const. art. I, § 8, cl. 15; *id.*, art. II, § 2, cl. 1. Congress would set national policy for the militia, including training regimes, but it had to rely on States to implement those policies and train the militia. *Id.*, art. I, § 8, cl. 16. And States retained authority to select militia officers. *Ibid.*

Retaining for the militia its state character and some independence from the national government was crucial to the compromise. James Madison explained that, if the Army exceeded its authority and threatened oppression, it "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." The Federalist No. 46. Hamilton explained that a standing army "can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens." The Federalist No. 29; *see also Heller*, 554 U.S. at 599 (the Second Amendment right to keep and bear arms "helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down"). By ensuring local control, the Constitution enabled States, through their militia, to check the abuse of national military power.

B. In The Last Century, The Constitution's Design For Military Power Was Eroded—Imperiling Liberty, Accountability, And Safety.

Over time, the constitutional design was eroded. Although the original design retained its vitality for decades after ratification, its division between the "Armies" and the "Militia" has been degraded and the States' power to check and balance national power has been diminished. This has inflicted grave harm.

For the first century after ratification, the militia operated much as the Constitution provides. The Militia Act of 1792 established a "Uniform Militia throughout the United States" to "more effectually ... provide for the National Defence." Act of May 8, 1792, 1 Stat. 271. It called for able-bodied male citizens age 18 to 45 to be enrolled in the militia "by the captain or commanding officer ... within whose bounds such citizen shall reside." *Id.* at 271. Each member was required to furnish himself with weaponry and equipment. *Ibid.* The Act called for the militia to be organized "as the legislature of each state shall direct," *id.* at 272, and for the appointment in each state of an adjutant general, "whose duty it shall be to distribute all orders from the commander-in-chief of the state to the several corps," *id.* at 273. The same Congress also passed legislation permitting the President to "call[] forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions." Act of May 2, 1792, 1 Stat. 264.

In line with these provisions, in the nineteenth century the militia was called into federal service for conflicts within U.S. territory, including the War of 1812 and the Civil War. Frederick Bernays Wiener,

The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 188-91 (1940). By contrast, it played a small role in the Mexican War, which did not involve repelling an invasion or suppressing an insurrection. *Id.* at 190; Leider 1017-18. To address a need for troops to fight outside the country, Congress authorized the President to bring volunteers into the Army. Act of May 13, 1846, 9 Stat. 9. In the Spanish-American War, also fought outside U.S. territory, the President was again authorized to bring on volunteers. Act of April 22, 1898, 30 Stat. 361.

Early in the twentieth century, however, the original design for military power began to break down. This was largely because the decentralized militia was viewed to have performed poorly. Wiener 187 (describing militia in the nineteenth century and noting that "Mars was less in evidence than Bacchus"); Leider 1017-18. The duties imposed by the Militia Act of 1792 were "discharged by no one." Wiener 187. The militia was a "frontier police force," not a "respected and modern fighting machine." *Id.* at 193.

In 1903 Congress passed the Dick Act to address the disorder thought to be the militia's core failing. Act of January 21, 1903, 32 Stat. 775. The Act divided the class of able-bodied male citizens aged 18 to 45 into an "organized militia," known as the "National Guard of the State, Territory, or District of Columbia," and an unorganized or "Reserve Militia." *Id.* at 775. The Act imposed training requirements on the National Guard, established an Army-like organization for the Guard, and made federal funds and officers available to organize and train the Guard. *Id.* at 775-80; Wiener 195; *Perpich v. Dep't of Defense*, 496 U.S. 334, 342 (1990).

Under the Dick Act, the National Guard still could not be fully used overseas. Leider 1018. Congress met that challenge by passing the National Defense Act of 1916, which permitted the President to "draft into the military service of the United States ... any or all members of the National Guard." Act of June 3, 1916, 39 Stat. 166, 211. Each person drafted into the U.S. military was thereby "discharged from the militia" and "subject to such laws and regulations for the government of the Army of the United States." *Ibid.*

In 1933, Congress further nationalized the militia by establishing the National Guard of the United States. National Defense Act Amendments of 1933, Act of June 13, 1933, 48 Stat. 153. That entity comprises the officers and members "of the National Guard of the several States, Territories, and the District of Columbia." *Id.* at 155. So by enlisting in the National Guard of a State, one would also enlist in the National Guard of the United States. In line with the Constitution, the 1933 Act provided that members of the National Guard of the United States would not be in active service of the United States unless called into duty. *Id.* at 156. In peacetime they would operate at the state level. *Ibid.* This dual-enlistment framework is largely in place today. Leider 1019.

The dual-enlistment framework has helped create a robust national military force. But it has diminished the constitutional design for protecting against the abuse of national military power.

First, because the National Guard of the United States fully overlaps with the Guards of the States, the President can circumvent the limits of the Constitution's militia clauses. He may call the militia into federal service for purposes beyond the three listed in

the Constitution: to "execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. To avoid the constitutional barrier to militia members' serving overseas, "Congress simply changes the militia's 'hat.'" Leider 1020 (quoting *Perpich*, 496 U.S. at 348). When Guard units fight overseas (as in Iraq or Afghanistan) they do so as the National Guard of the United States. *Ibid.*; *see* Sgt. John Orrell, *The National Guard's contribution: 300,000-plus Iraq deployments*, National Guard (Jan. 4, 2012), https://www.nationalguard.mil/News/Article/576180/the-national-guards-contribution-300000-plus-iraq-deployments/. When not in federal service, they act as part of the Guard of their State. Leider 1020. This regime evades the Constitution's limits on using militia for national service: the Guard must discard its local nature when the President wishes—not just in the three circumstances set out in the Constitution. *See ibid.*

Second, the dual-enlistment structure eliminates the separation between the army and the militia. Leider 1029-35. Federalism—with a robust militia separate from the army—guards against tyranny. Faced with the danger of an oppressive national army, "the state governments with the people on their side would be able to repel the danger." The Federalist No. 46 (James Madison). "A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter." *Ibid.* Elbridge Gerry maintained that a militia's purpose "is to prevent the establishment of a standing army, the bane of liberty," adding that, "[w]henever government mean to invade the rights

and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Heller*, 554 U.S. at 660 n.25 (Stevens, J., dissenting) (quoting Creating the Bill of Rights 182 (H. Veit, K. Bowling, & C. Bickford eds., 1991)). It is critical that a state Guard retain its proper constitutional status as a *state* entity "under state authority and control," *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994), and that state Guards remain "distinct organizations" from the National Guard of the United States, *Perpich*, 496 U.S. at 345. Yet the dual-enlistment system negates the militia's partial independence from the national government, sapping its ability to check that government. When a state Guard unit can be ordered into active federal service at any time, it can hardly repel an overreaching national army: it is part of that army.

Third, the States' constitutional power to appoint militia officers has been drained of meaning. Appointment power implies the power to control appointees, but States have lost much of that control. While States formally retain the ability to appoint officers, the national government "has required the states to cede de facto control of their militia officer corps to the national government"—which can call "any militia officer" into national service "at any time for any reason by simply exercising the Army Power." Leider 1032. The national government also controls the removal of officers. States must discharge officers whose federal recognition is withdrawn, 32 U.S.C. § 324(a)(2), or risk losing federal funding, *id.* § 108. A State's power to appoint officers lacks vitality when the national government can remove those officers. Hamilton assured that "the circumstance of the [militia's] officers being in the appointment of the States" "will always

secure to them a preponderating influence over the militia." The Federalist No. 29. The modern system repudiates that assurance. Leider 1031-33.

The erosion of federalism in this area inflicts profound harms. First, the erosion diminishes a core structural safeguard of liberty. Today States no longer wield the constitutionally promised tools to check and balance national military power. The dual-enlistment system means that "the militia no longer serves as a check on the national army" and has instead "been consolidated into the army." Leider 1035.

Second, the erosion clouds political accountability for the militia's actions. As noted, although States still appoint Guard officers, those officers are largely subject to national control. When not in service of the United States, the Guard is subject to state control. *E.g.*, Miss. Const. art. V, § 119 ("The Governor shall be Commander-in-Chief of the army and navy of the State, and of the militia, except when they shall be called into the service of the United States."). Without the lines that the Constitution drew, however, citizens may not know which government to hold accountable for the militia's actions. *Cf. Printz v. United States*, 521 U.S. 898, 930 (1997) (considering anticommandeering doctrine and warning of Congress taking credit for solving a problem even though state governments must bear any burden of the solution).

Third, the erosion can make state Guards unavailable for state needs. In Mississippi, for example, the Governor may call the Guard into service "in case of invasion, disaster, insurrection, riot, breach of the peace, or combination to oppose the enforcement of the law by force or violence, or imminent danger thereof or other grave emergency." Miss. Code Ann.

§ 33-7-301(1). But the dual-enlistment system lets the national government readily call Guard members into federal service and send them overseas. These forces are then unavailable to a State. The consequences are profound. When Hurricane Katrina hit, 3,200 members of the Louisiana National Guard were deployed to Iraq—feeding a shortage that Guard commanders said "crippled" the Guard's early response to the disaster. Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. Times (Sept. 28, 2005). Similarly, the Kansas Guard's deployment to Iraq led to a shortage of personnel and heavy machinery for rescue and recovery efforts after a 2007 tornado disaster in Greensburg, Kansas. Carey Gillam, *Kansas Disaster Renews National Guard Debate*, Reuters (May 8, 2007). In 2020, helicopters operated by the Oregon Guard were unavailable to fight wildfires because they had been deployed to Afghanistan. Meghan Roos, *Some of Oregon's Helicopters That Would Be Used to Fight Wildfires Are Deployed to Afghanistan*, Newsweek (Sept. 10, 2020). And in 2021 the Alaska Guard was forced to alter its deployment of helicopter crews that monitor for flooding and conduct rescue missions because 8 of the Guard's 14 helicopters were operating in the Middle East. Dave Leval, *Alaska Army National Guard Continues Mission, Even With Resources Stretched Thin*, Alaska's News Source (June 2, 2021). The last century's erosion of federalism in military matters has harmed and will continue harming States and their citizens.

C. The Decision Below Further Erodes The Constitutional Design—And This Court Should Halt The Damage By Reversing The Judgment Below.

The decision below continues—and exacerbates—the erosion of the constitutional design. This Court should halt this dangerous course.

In this case the Sixth Circuit followed other circuits in ruling that a state Guard is a federal agency, App.11a-12a, and that the Federal Labor Relations Authority may control its labor relations, App.16a. The decision permits the FLRA to invade the day-to-day management of the state Guard, dictate how the Adjutant General engages with a labor union, invalidate the Adjutant General's actions, and override his promotion policies. App.19a-21a. The decision treats state constitutional militia—despite all the constitutional guarantees of state-level leadership and authority—like any full-blown federal agency.

The decision below (and appellate decisions that it joins) breaks from the constitutional design. Providing primary state control of the militia addressed founding-era concerns of tyranny. Only a locally controlled militia—that had independence from a standing army—could fight back against a national standing army. Diminishing petitioners' authority collapses the line between the "Armies" and the "Militia" that is central to the constitutional design.

This departure from the Constitution is different in kind—not merely in degree—from the erosion that occurred in the twentieth century. Changes to the militia in that period generally had some nexus to Congress's army powers and the President's need to call up the militia and deploy it overseas. The decision

below has no such nexus. Nor does it relate to the "discipline" standards that Congress has the authority to prescribe. U.S. Const. art. I, § 8, cl. 16. Rather, the decision restrains an Adjutant General from managing his Guard members. Controlling how the Adjutant General negotiates with unions or determines when to promote his members has no battlefield connection that might justify wresting control from the States.

The decision below compounds the harms that States and their citizens already suffer from federalism's decline. First, the decision further depletes the structural safeguards adopted in the Constitution. States' control of the militia allows them to oppose national tyranny. The Constitution thus retained for States the authority to appoint their militia officers, along with other powers. But the decision below goes beyond the existing damage to state power: it limits States and their appointed officers from even managing their own members on a day-to-day basis.

Second, the decision below further clouds political accountability for the Guard's actions. The decision reduces an Adjutant General's authority and lets the national government increasingly control a state Guard's actions. But the people of a State may not know this and so may not hold the national government accountable. *Cf. New York v. United States*, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

Third, the decision below heightens the risk that a state Guard will be unavailable for state needs. *See*

supra pp. 14-15. The decision blesses federal superintendence over day-to-day management of a state Guard—even when it is not in federal service. That superintendence may cover anything from merit promotion to decisions on what tasks each member must perform. If that is the reach of national oversight then States' power over their Guards is now small indeed.

These harms—to liberty, to political accountability, to the people of the amici States who could be left undefended against danger—make this case exceptionally important to the amici States and their citizens. This Court should halt these harms and the continuing erosion of the constitutional design by reversing the judgment below.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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