No. 21-1454

In the Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEP'T 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 MILITARY LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR MILITARY LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are scholars of military law. They are deeply concerned about the implications of the interpretive approach advocated by petitioners and certain of their *amici*. That approach calls into question Congress's constitutional authority to regulate the National Guard in a manner that best serves the national interest; if embraced by this Court, petitioners' approach would undermine national security and military readiness. The Framers of the Constitution drafted the Militia Clauses to forestall just such a result. Accordingly, *amici* submit this brief to assist the Court in the resolution of this case.

Amici include:

- Eugene R. Fidell is a scholar of military law who has taught the subject at Yale, NYU, Harvard, and American University. He is a Senior Research Scholar at Yale Law School, an Adjunct Professor at NYU Law School, the editor of Global Military Justice Reform (globalmjreform.blogspot.com), and President Emeritus of the National Institute of Military Justice.
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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

the leading military-law casebook in the United States.

- Franklin Rosenblatt is assistant professor of law at Mississippi College and a retired lieutenant colonel in the Army JAG Corps.
- Rachel VanLandingham is the Irwin R. Buchalter Professor of Law at Southwestern Law School and a retired lieutenant colonel in the Air Force JAG Corps.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Respondents show the Federal Service Labor-Management Relations Statute applies to civilian National Guard technicians; *amici* fully endorse respondents' arguments on that point and do not repeat them here. Instead, we address the interpretive *approach* embraced by petitioners and certain of their *amici*, who assert that the Constitution confers principal authority over militias on the States—and that federal laws regulating the National Guard either should be construed narrowly or held unconstitutional. Petitioners thus contend that there is a "centuries-old *status quo*" that "treats state militias as state entities," "with respect to which Congress must speak clearly if it wishes to interfere." Pet. Br. 32. Petitioners' *amici* go even further, maintaining that "States retain primary control over the militia" (Mississippi Br. 2-3) and that federalization of the National Guard "erodes the [constitutional] design." *Id.* at 2.

This understanding is both wrong and dangerous. The Constitution's Framers thought it essential that militias principally be subject to federal authority and regulation—with limited and closely defined excep-

tions regarding the appointment of officers and training, which was left to the States. They regarded federal control as necessary for the development of an effective national military force. The wisdom of that judgment was demonstrated repeatedly over the following century, when control of militias was left to the States in practice; the result, during the War of 1812, the Civil War, and other military conflicts, was often disastrous. Congress responded to the failures of a state-centered militia system with the greatly increased federalization of the militias, now called the National Guard, a process that has proceeded since the beginning of the twentieth century.

The National Guard is now a central and essential component of the nation's military, as anticipated by the Framers. The approach advocated by petitioners and their *amici* would cause a radical change in this long-standing integration of the National Guard into a coherent, uniformly regulated, modernized, and effective force. That result would greatly undermine the nation's ability to respond to international and domestic threats. The Court should reject it.

B. The Framers drafted the Constitution's Militia Clauses as a response to the state-centered militia system created by the Articles of Confederation, which was widely regarded as ineffective. The drafters of the Militia Clauses called for greater federal control over militias to promote uniformity and ensure a more effective national defense; proponents and opponents of the Constitution agreed that the Clauses *do* give the federal government principal control over militias. The point was confirmed by adoption of the Second Amendment, which responded to concerns about a possibly overbearing federal military, not by limiting federal or increasing state authority over militias, but

by confirming the right of the populace to bear arms. Similarly, members of early Congresses uniformly agreed that the federal government had the authority to pervasively regulate militias; Congress's failure to take that step in the first Militia Act was the result of political compromise, not of concern about a lack of federal authority.

C. Continued state control over militias during the nineteenth century led to catastrophic failures by the nation's military. Consequently, beginning with the presidency of Theodore Roosevelt, the federal government has taken continuing steps to federalize the militias into a National Guard that is an effective and integral element of the United States' military force. As thus constituted, the Guard now plays a key role in responding to international and domestic threats of every nature. Stepping away from that approach, and diminishing the uniform exercise of federal regulatory control over the militias, would greatly undermine national security.

D. Even if the constitutional history is disregarded and militias are regarded as principally state entities, civilian technicians—the subject of this litigation—are federal employees. Accordingly, if there is any doubt about the constitutional status of the National Guard as a general matter, that doubt does not infect *this* case, which concerns federal authority over the federal government's own employees.

ARGUMENT

I. Founding-era history reveals that the Framers expected the Federal Government to play a central role in regulating militias.

In maintaining that the Court should strain to limit federal authority over the National Guard, petitioners and their *amici* suggest that the Framers intended militias to be state-centered entities. But that is not so; in fact, the Framers thought it essential that the regulation of militias be primarily federal in nature. If there is to be a thumb on the scale in the interpretation of federal laws that relate the National Guard, it should be placed on the federal side of the balance.

Having witnessed the failures of a true state-based militia system under the Articles of Confederation, the Framers recognized that an effective national defense demanded the kind of "uniformity [that could] only be accomplished by confiding the regulation of the militia to the direction of the national authority." The Federalist No. 29, at 182 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, the Militia Clauses, U.S. Const. Art. I, § 8, Cls. 15, 16, "transformed the * * * militia system into a primarily national military auxiliary to the professional forces." Robert Leider, *Federalism and the Military Power of the United States*, 73 Vand. L. Rev. 989, 1001 (2020).

Indeed, there was broad consensus at the time of the Founding not only that there needed to be greater federal power over the militias, but also that the Constitution *did* increase that power. The Constitution's opponents even feared that it vested Congress with "unlimited" authority over militias. Debate before the Convention of the Commonwealth of Virginia (June 5,

1788), in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 52 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) (*Elliot's Debates*) (statement of Patrick Henry). For this reason, early limits that Congress imposed on federal regulation of the militia system expressed not the full extent of federal constitutional power, but rather political compromises that in practice reproduced the worst ills of the Articles of Confederation and hobbled our national defense for over a century. The Framers manifestly did not intend that such defects be constitutionally required.

A. At the Constitutional Convention, the Framers rejected the debilitating weaknesses of the decentralized military structure under the Articles of Confederation.

The Framers recognized that the Articles of Confederation had set up a decentralized military system that impeded the national defense. Although the Articles empowered Congress to wage war, they relied upon the States to contribute the necessary money and soldiers. Articles of Confederation of 1781, Art. IX, paras. 1, 5; *id.* Art. VI, para. 4. And because Congress had no mechanism for enforcing national guidelines regarding militias or for securing state compliance, the United States' war-making power was at the mercy of often-uncooperative States. Jason Mazzone, *The Security Constitution*, 53 UCLA L. Rev. 29, 75-77 (2005).

From the *Federalist Papers* to the State ratifying conventions, the Framers accordingly criticized the Articles' failure to provide for collective security. Denouncing their "ruinous" impact on military readiness and how it resulted in unequal burdens for the States,

Alexander Hamilton characterized the Articles' war-making system as one "of imbecility in the Union, and of inequality and injustice among the members." The Federalist No. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similarly, at the Constitutional Convention, Charles Pinckney recalled the "serious mischiefs" that ensued under the Articles due to "dissimilarity" among State militias. James Madison, *Notes of Debates in the Federal Convention of 1787*, at 483 (Adrienne Koch ed. 1984) (*Madison's Notes*). And in North Carolina, William Davie declared that the Articles' inability to ensure "effectual protection" was "universally acknowledged" as "one of [their] greatest defects." *Elliot's Debates* 17 (statement of William Davie).

Prominent Founding Fathers therefore called for greater federal control over militias to promote uniformity and ensure a more effective national defense. Pinckney, for example, was convinced that "[t]he States would never keep up a proper discipline of their militia," *Madison's Notes* 483, and argued that the militia system "should be as far as possible national." 3 *The Records of the Federal Convention of 1787*, at 118 (Max Farrand ed., 1911) (statement of Charles Pinckney). George Mason shared a similar sentiment: Because "[t]hirteen States will never concur in any one system," he reasoned that the power of regulating the militia was "necessary to be given to the Gen Government." *Madison's Notes* 478. And James Madison stressed the risks of repeating the mistakes of the past: "Without uniformity of discipline," he cautioned, "military bodies would be incapable of action: without a general controlling power to call forth the strength of the union, * * * the country might be overrun and conquered by foreign enemies * * * [or] our liberties * * * destroyed by domestic faction." *Debates and*

Other Proceedings of the Convention of Virginia, Convened at Richmond, on Monday the Second Day of June, 1788, at 73 (Richmond, Ritchie & Worsley 2d ed. 1805).

At the same time, the Framers recognized concerns that concentrating too much power in the federal government could lead to expansion of a standing army, which was seen as an enabler of tyranny. As Edmund Randolph recounted during Virginia's ratifying convention, "there was not a member in the federal Convention, who did not feel indignation" at the prospect of a national standing army. 3 *Elliot's Debates* 401; see also *Perpich* v. *Dep't of Defense*, 496 U.S. 334, 340 (1990) ("[T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.").

The Framers viewed the militias as a solution to this threat, as bodies that could oppose encroachments by the federal government. Noah Webster remarked that "[t]he supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Noah Webster, *A Citizen of America* (Oct. 17, 1787), reprinted in 1 Harry L. Wilson, *Gun Politics in America: Historical and Modern Documents in Context* 24, 25 (2016). Madison similarly emphasized the size of State militias, * * * which were likely to "amount[] to near half a million citizens" and would therefore outnumber any national army, which would not likely exceed "more than twenty-five or thirty thousand men." The Federalist No. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

Nevertheless, even if the militias could serve as a check on the tyranny of a standing army, this left open the question of who would regulate the militias. States worried that vesting full control over the militias in the federal government would pose the same risk of tyranny as a standing army. See Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 937 (1988). Framers also raised concerns that granting full power to the federal government would allow it to deploy militiamen far away from their home States and families, leaving militias unavailable for important state uses. *Ibid.*

The Framers thus arrived at a compromise. The federal government would have the authority for "organizing, arming, and disciplining, the Militia," as well as "governing" it when in federal service. U.S. Const., Art. I, § 8, Cl. 16. The States would be reserved power only over "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Ibid.* This compromise resulted in "the transformation of the separate state militias into a national defense force," leaving the States with largely "ministerial duties" over them. Leider, 73 Vand. L. Rev. at 1004. In regulating the militias, "[t]he federal government would set the floor and states could augment." Benjamin Daus, Note, *The Militia Clauses and the Original War Powers*, 11 J. Nat'l Sec. L & Pol'y 489, 508 (2021).

To be sure, the Constitution did grant the two specified "modest concessions" to the States by giving them authority to appoint officers and conduct training. Leider 73 Vand. L. Rev. at 1006. This would ensure that the state militias would be led by men loyal

to the States who would oppose any attempts at tyranny by the federal government. Daus, 11 J. Nat'l Sec. L. & Pol'y at 510-511. But the power to regulate resided firmly in the federal government. The history leading to creation of the Militia Clauses, as well as the ultimate compromise reached at the Constitutional Convention, therefore directly contradict the claim that "States retain primary control over the militia." Mississippi Br. 2-3.

B. The Framers uniformly agreed that the Militia Clauses grant extensive authority to the federal government to regulate militias.

The words of the Framers themselves further undermine the ahistorical reading of the Constitution advanced by petitioners' *amici*. Leading Federalists praised the Militia Clauses for bringing the militias under federal control. John Jay extolled the Clauses as "plac[ing] the militia under one plan of discipline, and * * * putting their officers in proper line of subordination to the Chief Magistrate." The Federalist No. 4, at 48 (John Jay) (Clinton Rossiter ed., 1961). Likewise, Alexander Hamilton discussed the "power in the Union to prescribe regulations for the militia." The Federalist No. 29, at 186 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Tellingly, when responding to concerns that the Constitution gave the federal government too much power over the militias, the Framers never suggested that the States would in fact have "primary control." Instead, the Framers pointed only to the limited authority that States would have over the appointment of officers and the conduct of training. For example, Hamilton argued:

> If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

The Federalist No. 29 at 186.

Even opponents of the Constitution agreed that the Militia Clauses granted sweeping regulatory power to the federal government. At Virginia's ratifying convention, Patrick Henry declared that Congress's "control over our last and best defence [the militia] is unlimited." Debate before the Convention of the Commonwealth of Virginia (June 5, 1788), in 3 *Elliot's Debates* 52 (statement of Patrick Henry).

Similarly, Luther Martin, who was the Attorney General of Maryland, a delegate to the Constitutional Convention, and a leading Anti-Federalist, decried

> this *extraordinary* provision, by which the *militia* * * * is taken entirely *out of the power* of their *respective States*, and placed under the *power of Congress*. * * * They said the States ought to be at the mercy of the general government, and, therefore, that the militia ought to be put under its power, and not suffered to remain under the power of the respective States.

Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland (1788), in 2 *The Complete Anti-Federalist* 58-59 (Herbert J. Storing ed., 1981).

Elbridge Gerry, another delegate to the Constitutional Convention, "strenuously opposed that provision by which the *power* and *authority* over the *militia* is *taken away* from the *states* and *given* to the *general government*," describing the Militia Clauses as the "last *coup de grace*" of state power. Luther Martin, *Letter to the Printer*, in 15 *The Documentary History of the Ratification of the Constitution* 414, 415 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (recounting Gerry's remarks in the debate over the Militia Clause). Likewise, the minority of the Pennsylvania ratifying convention raised similar concerns that "[t]he absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty." The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, in *The Complete Anti-Federalist* 220 (Herbert J. Storing ed., 1985).

The contemporaneous evidence therefore is clear: There was consensus at the Founding that the Militia Clauses greatly augmented the federal government's authority over the militias by transferring power from the States to Congress. The contrary argument of petitioners' *amici* is incorrect.

C. The Second Amendment reflects the Framers' understanding that the Militia Clauses give the federal government principal authority over militias.

The drafting of the Second Amendment further demonstrates that the constitutional contentions of petitioners' *amici* have no basis. The Second Amendment was largely a response to the belief that the Constitution in fact greatly enlarged the power of the federal government over the militias, stripping the States of much control over their traditional source of

self-defense. As the Court has noted, under the Militia Clauses, "Congress retain[ed] plenary authority to organize the militia." *District of Columbia* v. *Heller*, 554 U.S. 570, 600 (2008). As a result, there were "pervasive" fears that Congress could use this power to disarm the populace or even "abolish the institution of the state militia." *Id.* at 598, 603. The Framers responded by drafting the Second Amendment to prevent the federal government from disarming the populace and destroying any possibility of self-defense for the States. *Id.* at 599.

This solution, however, did nothing to otherwise alter the balance of control over the militia as enshrined in the Militia Clauses. It took no power away from the federal government, nor did it grant any additional authority to the States. As Justice Scalia noted for the Court, "[t]he Second Amendment right, protecting only individuals' liberty to keep and carry arms, did *nothing* to assuage Antifederalists' concerns about federal control of the militia." *Heller*, 554 U.S. at 604 (emphasis added). This observation is supported by contemporaneous writings at the time of the ratification of the Second Amendment. Thus, in a revival of the Anti-Federalist Papers, Centinel argued, "[t]he absolute command vested by other sections in Congress over the militia, are not in the least abridged by [the Second] amendment." Centinel, Revived, No. XXIX, September 9, 1789, in *The Origin of the Second Amendment: A Documentary History of the Bill of Rights* 711, 712 (David E. Young ed., 2d ed. 1995).

The Second Amendment therefore was adopted as a response to the recognition that the Constitution's Militia Clauses *do* significantly erode state power. It is telling that this response did not attempt to reallocate authority to regulate the militias between the

federal and state governments, leaving the federal government with primary control over the militias.

D. Early members of Congress similarly recognized the broad scope of federal power over the militias and arrived at the Militia Act of 1792 as a political compromise.

1. Early congressional debates over how to regulate the militia system cast further doubt on *amici*'s efforts to characterize States as retaining primary control over the militias. Like the Framers, early members of Congress viewed the Militia Clauses as a general grant of authority to the federal government that should be interpreted broadly. Indeed, during the debates over the Militia Act of 1792, Rep. Sumpter observed that "the United States have power * * * to say how the militia shall be organized, but it must be left to the several States to carry that plan into execution." 3 *Annals of Cong.* 423 (1792). Similar views were espoused in the debates over the Militia Act of 1795. Representative Sedgwick, for example, commented that the constitutional terms granting Congress authority over the militias were "as full and comprehensive, perhaps, as any in our language," observing that "when a general power was granted, all the usual and known means necessary and proper to carry it into effect were granted also." 4 *Annals of Cong.* 1068 (1795). He concluded that "[i]t would have seemed incongruous to have denied to Congress a complete control over the militia." *Ibid.*

Members of Congress also shared the Framers' understanding of the limited nature of state control over the militias. That authority was confined to appointing officers and training members, and should "receive a strict construction." 4 *Annals of Cong.* 1068.

In fact, members argued that the Constitution precluded States from enacting legislation that would defeat an act of Congress in this area or undermine the uniformity of militia regulations. In this respect, Representative Tracy remarked:

> [A]ll the power was vested in Congress by the first part of the sentence, and a specified portion reserved to the States, which ought to be strictly construed, so as to give the several States no constructive power to defeat any thing Congress should do upon the subject; or, prevent uniform and general laws from operating by the interference of local and State regulations.

Id. at 1070.

Drawing on this broad constitutional mandate, early Congresses sought to transform the "poorly coordinated, badly disciplined, and casually armed" militias into a force capable of securing the new republic. Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802,* at 137 (1975).

Although the need to establish a more centralized and uniform militia system therefore was clear, efforts actually to implement that goal ran into serious political obstacles. The prospect of reform "tread severely on local interests and raised several potentially explosive issues," which included not only concerns over the appropriate balance between national and state power, but also more specific questions involving such matters as the burden imposed by fines for noncompliance with federal rules, the schedule of exemptions, and the costs of a national system. Kohn 132. As Rhode Island's senators explained, any national law

regulating the militias "would touch the 'Interest' and 'Feelings of every Individual.'" *Ibid.* (citing Letter from Joseph Stanton, Sen., & Theodore Foster, Sen., to the Governor of R.I. (Feb 17, 1791) (on file with the Rhode Island State Archives)). This morass of bitter political disagreement, competing interests, and pet theories about how the militias should work for years bogged down the bill that would become the Militia Act of 1792. Debates were so fierce that members of Congress described them as "puerile" and "too much into the minutiae of the business." *Id.* at 133. Only the defeat of the U.S. Army under General St. Clair by a Native American force, which "literally decimated the United States' tiny standing army," finally forced Congress to act. Daus, 11 J. Nat'l Sec. L. & Pol'y at 518.

2. Even so, with members of Congress quarreling over every detail, the Militia Act was rendered so insubstantial that it reproduced the worst ills of the Articles of Confederation. The Act did little more than "la[y] out the organizational form of the nation's militia, * * * and left to the states the problem of compelling citizens to fill out these units." H. Richard Uviller & William G. Merkel, *The Militia and the Right to Arms or How the Second Amendment Fell Silent* 113 (2003). "Nothing in the law * * * guaranteed training or even uniformity of structure and equipment." Kohn 187. The Act afforded Congress no authority to enforce national standards, ensure state compliance, or penalize militia that failed to arm and equip themselves as the Act required. And, as before, the Act essentially left the States to fund the national defense, making no appropriations for the militia. Leider, 73 Vand. L. Rev. at 1064-1065. In the end, the bill that became the Act was "stripped of its strongest provisions in order to satisfy the chorus of conflicting views," Kohn 133,

and the law passed with its "heart cut out," Wiener, 54 Harv. L. Rev. at 187.

Given these deficiencies, the Framers had little praise for the Militia Act. On the contrary, although political divisions stymied serious reform, leading political figures were cognizant of how the Act's deficiencies crippled the national defense. For many Federalists, the Act was a disappointment from the beginning. President Washington, for instance, "signed the [1792] bill, but continued to recommend militia legislation, as though none had been passed." Wiener, 54 Harv. L. Rev. at 187. Ultimately, "[n]early everyone agreed that the 1792 law was a failure" and "attempts were made to change the law in virtually every session for the next three decades." Kohn 136.

The inevitable result was a widespread lack of uniformity and non-compliance with the Act's standards, which produced poorly disciplined and ill-equipped militias that undermined the nation's military effectiveness throughout the nineteenth century. State legislation implementing the Act evinced "tremendous variations on every subject, from unit structures * * * to number of musters." Kohn 136. State governors used the appointment power as spoils, naming as officers "militarily incompetent" political appointees that undercut battle readiness. James T. Lang, *Should I Stay or Should I Go: The National Guard Dances to the Tune Called by Two Masters*, 39 Case W. Rsrv. L. Rev. 165, 181 n.91 (1989) (quoting Omar N. Bradley, *A General's Life* 108 (1983)). Training was deficient and arms were often lacking. When militias were called forth to suppress the Whiskey Rebellion in 1794, Secretary of War Henry Knox esti-

mated that "less than one quarter of some half-million militiamen in the nation possessed arms as required by the 1792 law." Kohn 135.

From the War of 1812 to the Spanish-American War, U.S. war efforts suffered due to the ineffectiveness of the militia system. States denied requests for assistance from militias. Militias refused to follow orders and even abandoned the battlefield. Their inadequate and incompatible training not only hindered the performance of army regulars but also contributed to key military losses and unnecessary bloodshed. See Lang, 39 Case W. Rsrv. L. Rev. at 183 nn.93-94, 189; Jeff Bovarnick, Perpich v. United States Department of Defense: *Who's in Charge of the National Guard*, 26 New Eng. L. Rev. 453, 460 (1991). The "crowning disgrace" of the War of 1812 occurred, for example, when the militia left the nation's capital to be burned by the British. Lang, 39 Case W. Rsrv. L. Rev. at 183 n.93 (quoting William A. Ganoe, *The History of the United States Army* 139 (1942)). And during the Civil War, "masses of northern militia fled from the enemy" at the First Battle of Bull Run. *Id.* at 183 n.94.

Thus, although petitioners' *amici* contend that "the militia operated much as the Constitution provides" under the Militia Act of 1792, Mississippi Br. 9, this law was not an affirmative reflection of the extent of federal authority, but rather an anemic and backward-looking political compromise. The deep discontent with the Militia Act even at the time refutes efforts to cast the Act as the proper scope of federal constitutional power over the militia system.

Against this background, petitioners and their *amici* are wrong to contend that federal direction re-

garding management of the militia touches on "matters traditionally left to the States" or "intrudes on state sovereignty," such that the Tenth Amendment should be understood to reserve substantial control over operation of militias to the States. Pet. Br. 29, 31. In fact, the whole purpose of the Militia Clauses—and the Framers' unambiguously expansive understanding of the authority that the Clauses confer on the federal government—establish that the Constitution *itself* leaves the States with no prerogatives in this area, beyond their limited and closely defined role in the conduct of training and appointment of officers. National Guard units simply are not state entities over which the States retain presumptive control.

II. The National Guard's development reflects increasing federalization to meet pressing national security needs.

The political compromises that handicapped the Militia Act of 1792 had become intolerable by the end of the nineteenth century. In critiquing the system created by the first Militia Act as "unworkable," "obsolete," and "really almost absurd," Elihu Root, Secretary of War from 1899 to 1909, reminded Congress: "[F]or more than one hundred years nearly every President of the United States has urged Congress to take some action to improve our militia system." *Efficiency of the Militia: Hearings on H.R. 15345 Before the Comm. on Mil. Affs.*, 57th Cong. 1-2 (1902); see S. Rep. No. 57-2129, at 1-2 (1902) (quoting criticism by Presidents Washington, Jefferson, Madison, and Monroe).

Echoing comments of his predecessors, President Theodore Roosevelt therefore bluntly urged Congress to increase national control over the militia: "Our militia law is obsolete and worthless. The organization

and armament of the National Guard of the several States, which are treated as militia in the appropriations by the Congress, should be made identical with those provided for the regular forces." Theodore Roosevelt, *First Annual Message to Congress, Dec. 3, 1901*, *in* 15 *A Compilation of the Messages and Papers of the Presidents* 6396, 6672 (James D. Richardson ed., 1917).

Root's and Roosevelt's efforts led to the passage of the Dick Act of 1903—the first major congressional act to reform the militia system since 1792. Pub. L. No. 57-33, 32 Stat. 775; see William M. Donnelly, *The Root Reforms and the National Guard*, Center of Military History (May 3, 2001), perma.cc/TF9F-NLZD. These bold reforms set the stage for the many subsequent legislative acts that sought to improve U.S. military readiness through federal control.

The twentieth century, marked by world wars and rapid shifts in global conditions, necessitated substantial changes in the country's reliance upon the National Guard. Contrary to the claims of petitioners' *amici* that the Constitution's "design for military power was eroded" by the exercise of enhanced federal authority over the militias, Mississippi Br. 9, the Guard's arc toward federalization has been an indispensable guarantor of U.S. national security in today's unpredictable global landscape—just as the Framers anticipated and intended. Petitioners are incorrect to ask for an interpretive presumption that would preclude an effective federal response to national and global problems.

A. Throughout the twentieth century, states increasingly ceded control over militias to Congress in exchange for federal funding.

Starting with the Dick Act of 1903, which "provided for an Organized Militia, to be known as the National Guard, which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors," Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 188, 195 (1940), Congress passed a series of laws that increasingly integrated the Guard into the nation's military apparatus. That structure is essential to U.S. national security.

Five years after the passage of the Dick Act, Congress amended it to further increase federal involvement. The amendment allowed the President to set the length of federal service, dropped the ban on Guard units serving outside the territories of the United States, established the Guard's role as the Army's primary reserve force, increased the annual subsidy of the Guard, and established the Division of Militia Affairs to serve as the link between the federal government and the state adjutants general. See Donnelly, *supra*.

World War I saw an acceleration of these efforts. Hoping to realize the nation's full military strength, Congress passed the National Defense Act of 1916, which, among other things, required members of the Guard to take oaths of allegiance to obey both the President and their state governors; allowed the President to draft Guardsmen into the Army during wartime; provided the National Guard with federal pay for select activities; empowered federal authorities to remove state-appointed officers based on statutorily

prescribed qualifications; and organized the Guard into tactical units in conformity to regular Army standards. National Defense Act of 1916, ch. 134, §§ 60, 64, 70, 73, 74, 77, 79, 109, 110, 112, 39 Stat. 166. In doing so, Congress explicitly stated its intention to move toward the "federalization of the National Guard." H.R. Rep. No. 64-695, at 62 (1916) (Conf. Rep.).

This response to World War I "demonstrated the triumph of federal control over the Guard that the Root reforms had brought." See Donnelly, *supra*. These laws evince how the "National Guard received federal funds and in return surrendered much of the autonomy that States' righters had jealously protected since the ratification of the Constitution. * * * [T]he National Guard's acceptance of federal controls in return for funding and legal recognition of its status as the Army's combat reserve constitute an historic change in the relationship between State soldiers and the federal government." Michael D. Doubler, *Civilian in Peace, Soldier in War: The Army National Guard, 1636-2000* 326 (2003).

These moves toward federalization continued up to the Second World War. The start of the Great Depression in 1929 prompted the "General Staff to place emphasis on the role of the reserve components—particularly the National Guard," as Congress looked for ways to reduce expenditures. Lloyd E. Krase, *The 1933 National Guard Bill*, U.S. Army War Coll. 7 (March 14, 1988), perma.cc/T6ZE-S2U6. Congress passed the 1933 amendments to the National Defense Acts of 1916 and 1920, termed "the child of the National Guard Association," against this backdrop. *Id.* at 20-21 (quoting Rep. Lister Hill).

These amendments further increased federal control of the National Guard. Notably, Congress designated the National Guard as an official reserve component of the U.S. Army and introduced the dual-enlistment system, under which Guard members serve in both the state national guard and the National Guard of the United States. Act of June 15, 1933, ch. 87, § 5, 48 Stat. 153, 155-156; see also *Perpich*, 496 U.S. at 345. This dual enlistment system lives on today and has enabled the federal government to use the Guard to respond to domestic and international emergencies.

B. The beginning of the Cold War marked a substantial change in the National Guard's role in U.S. military strategy—emphasizing unified preparedness and high-end technological capabilities.

The role of the National Guard in maintaining national security further expanded after World War II. Because focus on military preparedness and high-tech weaponry had also increased, the National Guard upgraded its equipment, drawing heavily from excess federal World War II stocks. See Doubler 229. By 1948, the Guard "experienced its greatest increases ever in personnel and units. * * * In the summer of that year, units conducted large-scale field training for the first time since the mobilization of 1940." *Ibid.*

Recognizing the need to train a Guard in use of modern weaponry, Congress enacted legislation in 1950 to contribute 75% of total costs to construct armories for all reserve components. National Defense Facilities Act of 1950, ch. 941, § 4, 64 Stat. 830-831. "The new armories were a radical departure from previous experience * * * . The postwar Guard was no longer primarily an infantry force, and new training

regimes addressed the increasingly complex training requirements of mechanized and support forces." Doubler 230.

The Cold War's lasting influence can be seen through the subsequent decades. The need for near-constant preparedness and an ability to efficiently mobilize high-tech weaponry was the cornerstone of postwar military strategy. It was against this backdrop that Congress enacted the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755, which "converted civilian technicians from federally subsidized state employees to full-fledged federal employees" and advanced "important federal objectives: uniformity of personnel training, equipment, and readiness." Br. of Intervenor-Resp't. 12.

Over time, the U.S. military became increasingly reliant upon and integrated with the Guard. As one representative for civilian technicians testified fifty years ago: "[Our] forces are not designed to fight a war by themselves. * * * They rely on the National Guard. * * * From fiscal year 1971 through fiscal year 1973, over $2.5 billion of equipment will be furnished to strengthen the Reserve components. * * * But this modern weaponry will be of little value without the well-trained civilian technicians to man it and train the guardsmen." *National Guard Technician Reclassification: Hearing Before the Subcomm. on Emp. Benefits of the H. Comm. on Post Off. & Civ. Serv.*, 92d Cong. 5-6 (1972) (statement of John Hunter, Executive Vice President, Association of Civilian Technicians). By 1986, the Army National Guard provided 46% of the combat units and 28% of the support forces for the U.S. Army. *Perpich*, 496 U.S. at 346 & n.18.

By the late 1980s, Congress acknowledged that this increased integration meant an increased need

for National Guard preparedness. Passing the Montgomery Amendment, which eliminated the need for the President to secure gubernatorial consent before sending Guard units abroad for training, Congress observed that heightened security demands required lengthier and specialized training for all reserve personnel, including the Guard. See S. Rep. No. 331, 99th Cong., 2d Sess. 213-214 (1986).

As the then-Chief of the National Guard Bureau expressed to Congress in 2004, "[a]t no time since World War II has America depended more on its Citizen-Soldiers and Airmen." *Transforming the National Guard: Resourcing for Readiness: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 82 (2004) (statement of Steven Blum, Chief, National Guard Bureau). Efforts to consolidate and create "a single joint force headquarters in each state for all Army and Air Guard activities" at that time comprised part of a broader effort to "become seamless with the other five services—the Army, Navy, Air Force, Marine Corps, and the Coast Guard—and their reserve components as well." *Id.* at 88-89. The same federal interests in maintaining a unified national-security apparatus—capable of responding to both domestic and international emergencies—are critical today.

C. Congress has an interest in maintaining a National Guard that is coherent, well-trained, and ready to take on the needs of an increasingly interconnected and unpredictable world.

Even the most cursory look at domestic and international events reveals the imperative need for a National Guard that is available to respond effectively to federal needs.

Domestically, within the past few decades the Guard repeatedly has been called upon to support law-enforcement responses to civil unrest and to respond to natural disasters. Most recently, it has been used extensively to assist with COVID-19 related needs. Jonathon Berlin & Kori Rumore, *12 Times the President Called in the Military Domestically*, Chi. Trib. (June 1, 2020, 5:49 PM), perma.cc/P9MD-KJ9X; Admin. for Strategic Preparedness & Response, *The National Guard's Response to COVID-19*, U.S. Dep't of Health & Hum. Servs., perma.cc/QE8S-9EV4.

And the National Guard has had a central role in preserving national security. Guard members have been deployed time and again in missions around the world. See *Supporting the Reserve Components as an Operational Reserve and Key Reserve Personnel Legislative Initiatives: Hearing Before the Mil. Pers. Subcomm. of the H. Comm. on Armed Servs.*, 111th Cong. 136 (2010) (statement of Harry M. Wyatt III, Lieutenant General & Director, Air National Guard). In fact, nearly one-third of all of the U.S. soldiers serving in Iraq were National Guard troops. *The Critical Role of the National Guard at Home and Abroad: Hearing Before the H. Comm. on Gov't Reform*, 109th Congress 1 (2005) (statement of Rep. Tom Davis, Chairman, H. Comm. on Gov't Reform); see also *National Guard Fact Sheet Army National Guard (FY2005)*, Army Nat'l Guard (May 3, 2006), perma.cc/9NY6-GU9V (*National Guard Fact Sheet*). The Guard likewise has been a key component in the fight against terrorism, patrolling U.S. airspace after the attacks of September 11, 2001; assisting with security and recovery efforts at the World Trade Center and the Pentagon; augmenting security along U.S. national borders; and conducting peacekeeping and stabilization actions in

the Balkans and elsewhere. *Transforming the National Guard: Resourcing for Readiness: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 71-72 (2004) (statement of Thomas F. Hall, Assistant Secretary of Defense for Reserve Affairs, U.S. Department of Defense); see *National Guard Fact Sheet*.

In a world marked by pandemic, insurrection, and military conflict, there is no reason to imagine that these needs will abate. It therefore is imperative that the National Guard is positioned to address national priorities. But the constitutional theory and understanding of the Guard's status that is advanced by petitioners and their *amici* would make such an effective and coherent Guard impossible.

Those *amici* maintain that, in the last century, expanding federal use of the Guard has eroded the Constitution's design for military power, "imperiling liberty, accountability, and safety." Mississippi Br. 9. They posit that the federalization of the Guard over that time has been unconstitutional, an understanding that would return the Guard to its status prior to the enactment of the Dick Act (or, perhaps, even further back, to its operation prior to enactment of the Militia Act of 1792)—a period when the ineffectiveness of state militias had disastrous consequences for U.S. military readiness and security. The Framers anticipated and rejected such a result, which should be intolerable in an era when there is a compelling need for hundreds or thousands of well-trained Guard members to be ready for national service at a moment's notice.

To the extent that petitioners and their *amici* mean to argue not that *all* congressional acts that increased federalization of the National Guard are unconstitutional, but rather that Congress has simply

gone too far in its nationalization of the Guard, their contention remains insupportable. Both sides of the debate over the Militia Clauses recognized that, as drafted, the Constitution gave *Congress* the authority to determine the appropriate extent of federalization of the militia. In departing from the approach of the Articles of Confederation, the Militia Clauses do not establish vague gradations of appropriate federal control—aside from their express textual commitment to the States of the authority to appoint officers and conduct training. Indeed, the imprecision of petitioners' approach, and the confusion it would foster, would be especially destructive of national military readiness, making uniformity impossible and leaving uncertain the lines of authority. Framers who were concerned about hobbling the nation's defense capabilities could not have favored such a result.

III. Even if the National Guard is a dual state and federal venture, civilian technicians within the Guard are overwhelmingly federal in nature.

Petitioners' argument is wrong for another reason, as well. The Technicians Act converted civilian National Guard technicians to federal-employee status so as to provide them a uniform system of federal benefits. Although this legislation recognized state administrative authority, civilian technicians hold a status that is overwhelmingly federal in nature. Accordingly, even if there is some doubt about the constitutional status of the National Guard as a general matter, that doubt does not infect *this* case, which concerns federal authority over federal employees.

A. Congress federalized civilian National Guard technicians to ensure mission readiness.

Because the National Guard is not a full-time active force, technicians are employed to meet the Guard's day-to-day administrative, training, and logistical needs. See *Simpson* v. *United States*, 467 F. Supp. 1122, 1128 (S.D.N.Y. 1979). The Technicians Act provides for the employment by local National Guard units of civilian "technicians" who perform a variety of administrative, clerical, and technical tasks. This is a change in status from that prevailing prior to 1968, when all technicians, except those in the District of Columbia, were state employees paid with federal funds. *Walch* v. *Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 295-296 (5th Cir. 2008).

The history and text of the Technicians Act leave little doubt that civilian technicians are federal employees. Against the backdrop of inadequate state retirement systems, Congress converted civilian technicians to federal-employee status to provide them a uniform system of federal salaries, retirement, and fringe benefits, and to clarify their status under the Federal Tort Claims Act. *Walch*, 533 F.3d at 295. An overwhelming majority of civilian technicians occupy dual status under 32 U.S.C. § 709(a), meaning that their employment is conditioned on concurrent military membership in the National Guard. Critically, this statute unambiguously provides that "[a] technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, an employee of the United States." 32 U.S.C. § 709(e). Even non-dual status technicians who are not required to maintain military membership are considered "civilian employee[s]

of the Department of Defense" and occupy federal status. See 32 U.S.C. § 709(c)(1); 10 U.S.C. § 10217(a).

Although state adjutant generals supervise civilian technicians, that has no bearing on the technicians' status as federal employees. See Br. of Intervenor-Resp. 15-17. And that status cannot be reconciled with petitioners' and their *amici*'s characterization of this case as principally concerned with state sovereignty. See Br. of Federal Resp. 38-39.

B. The funding and regulatory regime behind the National Guard confirms that civilian technicians are federal employees.

The conclusion that the treatment of National Guard technicians is predominantly the concern of the federal government is confirmed by the practicalities. The Guard and its technicians are significantly funded by the United States. Every year, the Department of Defense (DoD) requests billions of dollars from Congress on behalf of the Guard, ensuring that its components are adequately funded and supported so as to maintain crucial operations. In their actual function, National Guard units and technicians are substantially federal in character.

Indeed, approximately ten percent of total United States Army and Air Force funding goes toward the National Guard. In 2022, the Army requested a budget of over $69 billion, of which $7.6 billion was allocated for the Army National Guard. See Office of the Under Secretary of Defense, *Operation and Maintenance Overview United States Department of Defense Fiscal Year 2022 Budget Request*, U.S. Dep't of Def. 1 (Aug. 2021), perma.cc/755K-HAK4 (*Budget Request*). Similarly, $67 billion was requested for the

Air Force, of which $6.6 billion was allocated to the Air Force National Guard. *Ibid.*

Nearly one in ten National Guard employees is hired as a civilian technician, constituting a notable source of manpower and budgetary commitment. As of 2021, there were approximately 336,500 Army National Guard members, of which 21,031 are civilian technicians, while roughly 9,681 of the 108,100 Air National Guard members are civilian technicians. *Budget Request* 168. These figures illuminate just how integrated with and dependent on long-standing Army, Air Force, and military budgetary appropriations the National Guard and its technicians are. State contributions to the National Guard pale in comparison to the significant funding requested by DoD and supplied by Congress every year. The federal interest predominates here, and the Court should construe federal legislation governing the National Guard with that reality in mind.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted.

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