No. 20-603

IN THE
Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

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

BRIEF OF PROFESSOR JEFFREY M. HIRSCH AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599
(919) 962-4332

RICHARD A. SIMPSON*
COUNSEL OF RECORD
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7314
rsimpson@wiley.law

DECEMBER 23, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae is a law professor and scholar at the University of North Carolina School of Law who teaches, researches, and writes about constitutional law, including state sovereign immunity. His scholarship makes clear that sovereign immunity is not a bar to private actions against States brought under legislation enacted pursuant to Congress's war powers.

[1] The parties were given timely notice of the filing of this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant review because the lower court erred in concluding that sovereign immunity bars private suits against States brought under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Congress validly exercised its authority under the War Powers Clauses to authorize private suits against the States under USERRA.

Although nonconsenting States ordinarily enjoy sovereign immunity against private suits, the States surrendered that immunity in some areas by ratifying the Constitution. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1495 (2019). Whether a constitutional provision strips the States of immunity depends on "history, practice, precedent, and the structure of the Constitution." *Alden v. Maine*, 527 U.S. 706, 741 (1999).

These considerations establish that the War Powers Clauses divest the States of sovereign immunity in war-related matters. The Constitution confers on the federal government a wide array of war powers, ranging from authorizing Congress to declare war and regulate the armies to making the President Commander in Chief. At the same time, the Constitution explicitly restricts States from exercising war powers. Although States may maintain militias, the Constitution confers on the federal government

ultimate control over them. Together, these provisions establish that the federal government has absolute power over the military.

History confirms that the States have no sovereignty in matters related to war. After the colonies declared independence, they ceded their sovereignty over war-related matters to the federal government in the Articles of Confederation, which placed significant war powers in the hands of Congress and explicitly excluded the States from exercising the same. To the extent that the States retained any residual sovereignty in matters of war under the Articles, they surrendered it when they ratified the Constitution. The history surrounding the drafting and ratification of the Constitution illustrates that the Framers recognized the unique importance of subordinating state sovereignty in war-related matters, despite establishing a government of dual sovereigns in most areas. The Constitution was thus drafted intentionally with an eye towards effecting that subordination, as evidenced by its ratified text and structure.

Consistent with this history and the text of the Constitution, this Court's precedents also demonstrate that there is no role for the States in matters of war.

Accordingly, States cannot assert sovereign immunity in suits alleging violations of federal statutes enacted pursuant to the war powers.

Even if the war powers did not strip the States of sovereign immunity by their own force, Congress would still have the authority under the War Powers Clauses to abrogate state sovereign immunity by statute.

This Court has long recognized that constitutional provisions can empower Congress to abrogate state sovereign immunity through legislative enactments. In particular, this Court has held that Congress may abrogate immunity under Section 5 of the Fourteenth Amendment, explaining that the Amendment altered the balance of power between the state and federal governments by subordinating States to Congress.

The Constitution's war-related provisions similarly empower Congress to abrogate state sovereign immunity. Those provisions confer sweeping power on Congress to maintain armies and make war. At the same time, the Constitution significantly restricts the States' authority in matters of war, leaving them only with limited authority over militias, and even subjecting that limited power to federal control.

Together, these provisions alter the typical arrangement of concurrent authority in the state and federal governments. They plainly subordinate States

to the federal government in war-related matters. Accordingly, even if the States retained some aspects of sovereignty in matters related to war, Congress validly abrogated that immunity through USERRA.

ARGUMENT

Exercising its war powers, Congress enacted USERRA, which prohibits employers from taking adverse employment actions against military servicemembers because of their military service and creates a cause of action against State employers that violate its provisions. 38 U.S.C. §§ 4311, 4323(a)(3).[2] The lower court erred in holding that sovereign immunity bars these private suits against States. This Court should grant review to correct the lower court's erroneous decision.

I. The Constitution limits the States' sovereign immunity from suit.

The dual sovereignty of the States and the federal government is a fundamental feature of our constitutional design: the Constitution "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996).

Immunity from suit is an important aspect of the States' sovereignty. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890). Where it applies, that immunity bars courts from hearing a private suit against a State absent the State's consent, *Allen v. Cooper*, 140 S. Ct.

---

[2] Amicus adopts petitioner's argument that USERRA was implemented pursuant to Congress's war powers. *See* Pet. for Writ of Cert. at 6.

994, (2020), both in state and federal court. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

Sovereign immunity does not derive from the Constitution. *See Alden*, 527 U.S. at 741. Instead, it rests on the "inherent . . . nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent." *Seminole Tribe*, 517 U.S. at 54 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)). Accordingly, although reflected in part in the Eleventh Amendment, U.S. CONST. amend. XI, the States' immunity is not derived from or limited to the text of that amendment. *Hans*, 134 U.S. at 15; *Alden*, 527 U.S. at 713.

This Court has long recognized, however, that sovereign immunity does not preclude all suits against a State. As Justice Story explained, a State's sovereignty may be limited by bounds which a State "chooses to impose upon itself." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 194 (1833). For this reason, States may waive their immunity in specific cases or as to entire categories of lawsuits. *See Hans*, 134 U.S. at 17.

A. The States have surrendered their sovereignty through several constitutional provisions.

One way in which the States have relinquished immunity is by agreeing in the Constitution to "surrender" their sovereignty in some respects. *See*

Hans, 134 U.S. at 13 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)); *Alden*, 527 U.S. at 716–17 (same); THE FEDERALIST NO. 32 (Alexander Hamilton). Accordingly, States do not have sovereignty where it has been "altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713. "[H]istory, practice, precedent, and the structure of the Constitution" demonstrate where these wholesale waivers occurred. *Id.* at 741.

The Founders understood that the States surrendered their sovereignty in several areas under the Constitution. For instance, Hamilton explained that States would "alienate" their sovereignty "where [the Constitution] granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority." THE FEDERALIST NO. 32 (Alexander Hamilton).

For an example, Hamilton pointed to the power to impose taxes and duties on imports and exports. He explained that, although States had general authority to tax and impose duties, they relinquished that power in the Constitution. He noted that Article I, section 8 gives Congress the power to lay and collect taxes, duties, and imposts. U.S. CONST. art. I, § 8. At the same time, Article I, section 10 prohibits the States from laying imposts or duties on imports or exports. U.S. CONST. art. I, § 10. Together, these provisions established that the States surrendered

their taxing power over imports or exports, leaving exclusive power in the federal government. THE FEDERALIST NO. 32 (Alexander Hamilton).

Although the focus of *Federalist No. 32* was the States' ability to enact legislation, Hamilton expressly extended his reasoning to sovereign immunity. THE FEDERALIST NO. 81 (Alexander Hamilton) ("The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation.").

According to Hamilton, in addition to instances expressly limiting state power, the Constitution would strip States of sovereignty "where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasis in original). To illustrate, Hamilton pointed to Congress's power "to establish a uniform rule of naturalization." U.S. CONST. art. I, § 8, cl. 4. He explained that power "must necessarily be exclusive; because if each State had power to prescribe a distinct rule, there could not be a uniform rule." THE FEDERALIST NO. 32 (Alexander Hamilton). It was not the "mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty." *Id.*

Following this view that States do not retain sovereign immunity when it would be contradictory and repugnant to the Constitution, this Court has held that the provision in Article III extending the federal judicial power to suits in which "the United States shall be a party," U.S. CONST. art. III, § 2, abrogates state sovereign immunity. *See United States v. Texas*, 143 U.S. 621, 644–45 (1892); *Hyatt*, 139 S. Ct. at 1495. Although the provision does not expressly authorize the United States to sue States, this Court reasoned that the broad extension of federal judicial power to all suits in which the United States is a party meant that relinquishment of state sovereign immunity was "inherent in the constitutional plan." *Hyatt*, 139 S. Ct. at 1495. This Court stressed that permitting the United States to bring suits against States was necessary to "the permanence of the Union." *United States v. Texas*, 143 U.S. at 644–45. Accordingly, by ratifying this provision, the States agreed to be subject to lawsuits brought against them by the United States in federal court. *See Hyatt*, 139 S. Ct. at 1495.

Likewise, this Court has held that the provision of Article III authorizing federal court jurisdiction over disputes between States abrogates sovereign immunity. *See id.* This Court reasoned that recognizing federal jurisdiction over these matters provided a "substitute for the diplomatic settlement of controversies between sovereigns" that would have otherwise been necessary, and protected each State

from "a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372–73 (1923). The agreement was "essential to the peace of the Union." *Hyatt*, 139 S. Ct. at 1495 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328 (1934)).

This Court relied on a similar analysis to conclude that the Bankruptcy Clause in Article I abrogates state sovereign immunity. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, at 362–69, 374–77 (2006). The Court based its conclusion not only on the text of Article I, which authorizes Congress to establish "uniform" bankruptcy laws, U.S. CONST. art. I, § 8, cl. 4, but also on the history and practice leading to adoption of that clause. As this Court explained, one of the "intractable problems" facing the new union was the practice of "one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State." *Katz*, 546 U.S. at 363. To address that problem, the Bankruptcy Clause not only authorized Congress to enact a bankruptcy code, but also created a "limited subordination of state sovereign immunity." *Id.* That subordination was necessary to "harmoniz[e]" bankruptcy law in the United States. *Id.* at 362.

To be sure, this Court suggested that *Katz* is a "good-for-one-clause-only holding" because "bankruptcy [is] on a different plane." *Allen*, 140 S. Ct. at 1003. In context, however, that statement signifies only that the unique considerations

indicating that the Bankruptcy Clause abrogates state sovereign immunity do not extend to other Article I powers. It does not preclude the possibility that other Article I clauses raise different concerns that separately abrogate state immunity. This Court's precedents teach that whether other Article I clauses strip States of immunity depends on whether history, practice, and the constitutional design establish that retaining state immunity in the areas covered by those clauses would be contradictory and repugnant to the constitutional design. *See Alden*, 527 U.S. at 741.

B. Congress has the power to abrogate state sovereign immunity through particular legislative acts.

In addition to concluding that some constitutional provisions abrogate state sovereign immunity by their own force, this Court has held that some constitutional provisions empower Congress to abrogate state sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).[3] To do so, Congress must enact "unequivocal statutory language"

[3] This Court recognized the distinction between wholesale waiver in the constitutional design and the delegation of power to Congress to abrogate the States' immunity in *Allen*, 140 S. Ct. at 1003.

abrogating the States' immunity from suit. *Allen*, 140 S. Ct. at 1000.

For example, Congress can abrogate state sovereign immunity through Section 5 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5; *Fitzpatrick*, 427 U.S. at 456. As this Court has explained, the Fourteenth Amendment "fundamentally altered the balance of state and federal power." *Allen*, 140 S. Ct. at 1003. It did so by imposing various prohibitions on the States and authorizing Congress to enforce those prohibitions through legislation passed under Section 5. By granting Congress authority "to enforce . . . the substantive provisions of the Fourteenth Amendment," Section 5 "necessarily limited" the States' sovereignty. *Fitzpatrick*, 427 U.S. at 456 (internal quotation marks omitted). Accordingly, Congress has the power under Section 5 to abrogate state sovereign immunity, so long as it does so explicitly. *Allen*, 140 S. Ct. at 1000.

Of course, not every delegation of power to the federal government implies an abrogation of the States' immunity from suit. *Seminole Tribe*, 517 U.S. at 72. For example, the Commerce Clauses do not strip States of immunity, nor do they authorize Congress to abrogate state sovereign immunity. *Id.* at 66; *Alden*, 527 U.S. at 712. The same is true of the Intellectual Property Clause. *Allen*, 140 S. Ct. at 1007.

Whether the Constitution strips a State of immunity or authorizes Congress to abrogate immunity, depends on "history, practice, precedent and the structure of the Constitution." *See Alden*, 527 U.S. at 741. Where States traditionally did not have immunity in a particular area, or where maintaining state immunity would threaten the stability of the Union or undermine the ability of the federal government to exercise its powers, this Court has concluded that a State does not enjoy sovereign immunity. *See, e.g.*, *United States v. Texas*, 143 U.S. at 644–45; *North Dakota v. Minnesota*, 263 U.S. at 372–73; *Katz*, 546 U.S. at 362; *Fitzpatrick*, 427 U.S. at 456.

II. State sovereign immunity does not bar actions brought under federal war powers legislation.

The Constitution's structure demonstrates that States do not have sovereignty in war-related matters. History, practice and precedent confirm that conclusion. Accordingly, state sovereignty does not bar actions brought against States under USERRA.

Moreover, even if the States did not surrender their sovereign immunity wholesale as to matters of war by ratifying the Constitution, Congress may abrogate that immunity when it relies on its war powers to enact legislation providing for private suits against a State. The Constitution confers on the federal government plenary power in matters of war,

including the power to subject States to suit when they interfere in that arena.

A. States have no sovereign immunity in matters of war.

i. The structure and text of the Constitution establish that the States have no sovereign immunity in matters of war.

Article I, section 8 empowers Congress to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water"; "raise and support armies"; "provide and maintain a Navy"; "make rules for the government and regulation of the land and naval forces"; "provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions"; and "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." U.S. CONST. art. I, § 8. Article II, section 2 makes the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2.

At the same time that it grants sweeping war powers to the federal government, the Constitution explicitly prohibits the States' authority in war-related matters. States are permitted to appoint

officers and train militias, for instance, but only "according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16. Congress can also call up the States' militias "to execute the laws of the union, suppress insurrections and repel invasions." *Id*. art. I, § 8, cl. 15. Further, Article I, section 10 expressly prohibits the States from exercising war powers by forbidding them from granting letters of marque or reprisal, keeping troops or ships during peacetime, or engaging in war unless actually invaded or invasion is imminent. *Id*. art. I, § 10, cls. 1, 3.

Article 1, section 8 thus grants Congress a comprehensive, broad array of powers over military matters, and Article II expands those powers further to the Executive. The States, meanwhile, are explicitly restricted from acting independently in war-related matters. *See id*. art. I, § 10, cls. 1, 3. Where the States are permitted some power, it is subject to the ultimate control and direction of the federal government. *See id*. art. I, § 8, cls. 15–16.

These provisions granting Congress war powers and restricting the States of those powers "alienate" the States' sovereignty in precisely the way identified by Hamilton in *Federalist No. 32*: they grant authority to the federal government and expressly prohibit the States from exercising like authority. THE FEDERALIST NO. 32 (Alexander Hamilton).

They also demonstrate an instance where permitting the States to exercise concurrent war

powers would be "*contradictory* and *repugnant*" to the conferral of war powers on the federal government. *Id.* Unlike with other constitutional powers, the Constitution grants the federal government an array of war powers across multiple clauses. The sheer number of those clauses demonstrates both the breadth of the power and the goal of consolidating that power in the federal government. The multiple clauses restricting state power over military matters confirm the point. Those restrictions emphasize that permitting States to make decisions relating to war would interfere with the federal war powers. Thus, as with Article III's provisions abrogating state immunity in suits by the United States or other States, the abrogation of state sovereignty in matters relating to war is "inherent in the constitutional plan." *Hyatt*, 139 S. Ct. at 1495 (quoting *Monaco*, 292 U.S. at 328). It is also "essential to the peace of the Union." *Id.* (quoting *Monaco*, 292 U.S. at 328). And as with the Bankruptcy Clause, abrogation of the States' sovereignty in matters of war was necessary to "harmoniz[e]" military action across the States. *Katz,* 546 U.S. at 362.

ii. History shows the States have no sovereign immunity in matters of war.

The States never had sovereign immunity in war-related matters because they surrendered their sovereign war powers under the Articles of Confederation. *See, e.g.*, Charles Lofgren, *War*

Powers, Treaties, and the Constitution, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 242, 242 (Leonard Levy & Dennis Mahoney, eds., 1987) (observing that the Articles "granted Congress a near-monopoly of overtly war-related and foreign relations powers").

Similar to the Constitution, the Articles vested war powers directly in the national government. They gave Congress the "sole and exclusive right and power" to determine peace and war and conduct other foreign affairs. ARTICLES OF CONFEDERATION art. 9. They prevented the States from keeping vessels of war or bodies of forces in peacetime. *Id.* art. 6. Although the States were required to "keep up a well regulated and disciplined militia," *id.*, that militia was largely for the benefit of the nation as a whole. The States were prohibited from engaging in war "without the consent of the United States in Congress assembled," though States could protect themselves if invaded or the danger of invasion was imminent. *Id.* This arrangement, much like the structure of the Constitution, shows that the States had no sovereignty in war-related matters.

The balance of war powers between the national and state governments under the Articles of Confederation is striking. Before the Articles were adopted, the newly independent States had their greatest claims to sovereignty. *See, e.g.*, *Hyatt*, 139 S. Ct. at 1493 ("After independence, the States

considered themselves fully sovereign nations. . . . with 'full Power to levy War, conclude Peace, . . . and to do all other Acts and Things which Independent States may of right do.'" (quoting Declaration of Independence ¶ 4)). But by ratifying the Articles, the States agreed the national government would control matters related to war, thereby relinquishing whatever sovereignty they may have had in that area. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936) ("[T]he powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity.").

Even if the States retained any residual sovereignty over war-related matters, they relinquished that sovereignty by ratifying the Constitution. As explained in the preceding part, the text and structure of the Constitution establish that the federal government has sole sovereignty over military matters.

The Framers had many reasons to consolidate control over the war powers in this way. As the Framers recognized, leaving the States with any authority over war-related matters would directly interfere with the federal government's war powers and imperil the nation. *See* Jeffrey M. Hirsch, *War Powers Abrogation*, 89 GEO. WASH. L. REV. (forthcoming 2021) (manuscript at 48–53, 61–84) (reviewing Constitutional Convention and State

Ratification debates), https://ssrn.com/abstract=3557653.

For example, making war powers solely a federal power prevented the States from warring against the national government or other States and from undermining the federal government's relationships with other countries. *See, e.g.*, THE FEDERALIST NO. 3 (John Jay) (explaining causes of war that are more easily avoided under "one national government than [under] thirteen separate States or by three or four distinct confederacies"); THE FEDERALIST NO. 6 (Alexander Hamilton) (stating that "dissensions between the States" could lead to "a state of disunion"). Likewise, centralizing war powers prevented the inefficient expenditure of United States' resources in wars that do not serve the nation's interests as a whole. Placing the war powers solely with the national government reduced these risks. *See* THE FEDERALIST NO. 3 (John Jay) (explaining that States may be "excite[d] [into] war with [bordering] nations; and nothing can so effectually obviate that danger as a national government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested").

Conferring military powers solely on the federal government also ensured that the United States would operate as a single body in war instead of as an alliance of confederates. The Framers repeatedly stressed the critical importance of avoiding the

inefficiencies of a confederacy of States with different interests to secure the safety of the nation. *See, e.g.*, THE FEDERALIST NO. 23 (Alexander Hamilton) ("The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed . . . . [T]here can be no limitation of that authority . . . in any matter essential to the formation, direction, or support of the National Forces."); THE FEDERALIST NO. 41 (James Madison) ("America united, with a handful of troops, or without a single solider, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat."); 1 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 419 (1827) (Hamilton explaining the weaknesses of foreign confederations); *id.* at 424 (Madison same); 2 *id.* at 214 (Robert Livingston same); *id.* at 187–88 (Oliver Ellsworth same).

The Constitutional Convention proceedings confirm that the Constitution divests the States of sovereignty in matters of war. Most of the federal war powers and explicit restrictions on States were already included in early drafts of the Constitution. *See* 1 *id.* at 226, 228, 229. Later drafts further restricted state power in military matters. For example, a provision was inserted that confirmed the States' authority to appoint officers and train the militia, but also restricted that power by requiring it

to be exercised "according to the discipline prescribed by Congress." *Id.* at 254. The final version of the Constitution thus added congressional control over the state militias, further centralizing the federal government's war powers to the exclusion of the States.

The debates of the Convention reinforce the conclusion that the States would have little to no role in war-related matters. Hamilton noted that the "sole direction of all military operations" should be placed in the hands of the federal government. *Id.* at 423. In his view, it was the exclusive object of the federal government to provide protection against foreign invasion; maintain military bodies; and procure alliances and treaties with foreign nations. 2 *id.* at 350. By contrast, Hamilton explained, the objects of the state governments are "merely civil and domestic." *Id.*; *cf. also Curtiss-Wright*, 299 U.S. at 316 (noting that the States possessed sovereign powers over "internal affairs" but not "international powers").

Others echoed this understanding. For example, Robert Livingston explained that the States were ill-suited to defend the nation and should not claim war powers from the government. 2 Elliot, *supra*, at 386; *see also, e.g.*, 1 *id.* at 426 (Rufus King: "None of the states, individually or collectively, but in Congress, have the rights or peace or war."); *id.* at 427 (James Wilson: "The power of war, peace, alliances, and trade, are declared to be vested in Congress.").

Even opponents of the Constitution understood that there was no role for the States in matters related to war. In ratification debates, John Williams argued that the power over the militia is "wrested from [the States'] hands by [the] Constitution, and bestowed upon the general government." 2 *id.* at 338. Likewise, Patrick Henry lamented that the Constitution places the militia "into the hands of Congress" and argued that the States were powerless to protect themselves if Congress failed to discipline or arm the militia, because that power is "exclusively given to Congress." 3 *id.* at 48.

Thus, there was broad agreement that the Constitution stripped States of all sovereignty with respect to war and conferred all war power solely to the federal government. *See* Hirsch, *supra*, at 116 ("[T]he history of the War Powers Clauses reveals that one of the central goals of the plan of the Convention was for the nation's war powers to lie with a centralized, federal government."). This was done intentionally to ensure a unitary source of authority on all matters of war. *Cf. Katz*, 546 U.S. at 369 (relying on "general agreement" among the Founders "on the importance of authorizing a uniform federal response to the problems presented in cases [addressing the effects of debtor's discharges]" to hold that the Bankruptcy Clause abrogates state immunity).

iii. Precedent and practice also show the States have no sovereign immunity in military matters.

Although this Court has never considered whether the States surrendered sovereign immunity related to war powers in the plan of the Convention, many opinions of this Court support the conclusion that States have no sovereign immunity in matters related to war. For example, in *Chisholm v. Georgia*, Chief Justice Jay explained that "the power of declaring war, making peace, raising and supporting armies for public defence . . . are lodged in Congress; and *are a most essential abridgement of State sovereignty*." 2 U.S. 419, 468 (1793) (emphasis added).

Similarly, in *Tarble's Case*, this Court held that state courts lack the power to issue writs of *habeas corpus* to discharge individuals held by the U.S. military. 80 U.S. 397, 412 (1871). Noting the federal government's "plenary and exclusive" control over matters of war, this Court proclaimed that allowing state officials to interfere with this power would "greatly impair[] the efficiency, if it did not utterly destroy," the military. *Id.* at 408.

More recently, this Court explained in *Hyatt* that the Constitution "divests the States of the traditional diplomatic and military tools that foreign sovereigns possess," including "the independent power . . . to wage war." 139 S. Ct. at 1497. The States accordingly

lack significant aspects of sovereignty that would ordinarily belong to foreign nations. *Id.*

Along with the structure of the Constitution and the history of its drafting and ratification, practice and precedent thus support the view that the States have no sovereign immunity in matters of war. The States agreed to surrender that immunity in the plan of the Convention, and so have no sovereign immunity defense against private actions brought under legislation enacted pursuant to Congress's war powers. *See* Hirsch, *supra*, at 84 ("[T]he plan of the Convention leads to only one reasonable conclusion: states do not have the power to assert immunity against private rights of action created pursuant to the federal government's war powers."). Even if the federal statute contains no provision abrogating the States' immunity in this area, the war power provisions themselves abrogate that immunity. *Cf. Allen*, 140 S. Ct. at 1003 (noting that the Constitution "*itself*" can abrogate).[4]

---

[4] Justice Thomas's concern in *Katz* that the Bankruptcy Clause implicates only the States' authority to enact legislation is not present here. *See Katz*, 546 U.S. at 384 (Thomas, J., dissenting). The war powers allow Congress to intrude upon state sovereignty in ways that do not simply prevent the States from enacting legislation. They prevent the States from interfering with the federal government's war powers even in the state judiciary. *See Tarble's Case*, 80 U.S. at 412. Moreover, the States are permitted to keep militias only under the direct control of Congress.

B. Even if the States retained sovereign immunity in matters of war, Congress may validly abrogate that immunity when it enacts legislation pursuant to its war powers.

Even if the War Powers Clauses in Article I do not by their own force strip the States of sovereign immunity, those clauses empower Congress to abrogate state sovereign immunity through legislation. The provisions relating to war powers confer broad authority on the federal government to operate, regulate, and control the military. At the same time, other provisions of the Constitution significantly restrict the powers of the States, preventing state interference with the federal operation of the military.

Just like Section 5 of the Fourteenth Amendment, these provisions together establish that the federal government has the power to abrogate state sovereign immunity when necessary to regulate and control the military.[5] The expanse of the federal war power is

---

Accordingly, the war powers implicate many attributes of sovereignty, including immunity against suit.

[5] Lower courts have disagreed whether the war powers provide a basis to abrogate state sovereign immunity. Some have held that the war powers do provide a basis for abrogation. *See, e.g.*, *Reopell v. Massachusetts*, 936 F.2d 12, 16 (1st. Cir. 1991) (holding that Congress may abrogate state sovereign immunity under its war powers); *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996) (same). Others, including the Texas Court of

apparent from the numerous provisions in Article I conferring war powers on Congress. It is also reflected in Article II's provisions establishing the President as Commander in Chief with the power to call up state militias. At the same time, as noted earlier, the Constitution significantly restricts the State's war powers.

Moreover, even in those areas in which the Constitution affords the States some small role in military matters, it confers ultimate control on the federal government. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 16; *id*. art. II, § 2. Thus, the federal government's overarching control of all things related to war and the military, not just Congress's authority to regulate war-related matters, establishes Congress's authority to abrogate state sovereign immunity pursuant to its war powers.

In this way, the powers conferred under the war-related provisions are significantly different from the powers conferred by the Commerce Clauses or the

---

Appeals below, have rejected that conclusion, reasoning that sovereign immunity "cannot be abrogated by Article I" to hold that the war powers do not abrogate state sovereign immunity. Pet'r's App. 11a–12a; *see also Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 964 (N.D. Ohio 2008) ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction"); *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998) (similar). This Court rejected that reasoning by holding that the Bankruptcy Clause strips States of sovereign immunity. *See Katz*, 546 U.S. at 359.

Intellectual Property Clause. The Commerce Clauses and the Intellectual Property Clause simply authorize Congress to enact legislation in those areas, and Congress's power in those areas is not exclusive. By contrast, the war powers, together with the limitations on States in Article I, section 10, confer exclusive authority on Congress over matters relating to war, and they empower the federal government to regulate and take control of state militias when it deems necessary. Thus, much like the Fourteenth Amendment, which "fundamentally altered the balance of state and federal power," *Allen*, 140 S. Ct. at 1003, the war power provisions significantly depart from the typical arrangement of shared power in the Constitution. Instead of dividing authority over war-related matters between the States and federal government, they allocate all power in that area to the federal government.

In sum, contrary to the lower court's decision, Congress validly abrogated state sovereign immunity by exercising its war powers to enact USERRA's provisions explicitly authorizing veterans to bring private actions against States who discriminate against those veterans.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

F. ANDREW HESSICK
160 RIDGE ROAD
CHAPEL HILL, NC 27599
(919) 962-4332

RICHARD A. SIMPSON*
COUNSEL OF RECORD
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7314
rsimpson@wiley.law

DECEMBER 23, 2020