No. 20-603

# In the Supreme Court of the United States

LE ROY TORRES, PETITIONER,

*v.*

TEXAS DEPARTMENT OF PUBLIC SAFETY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH JUDICIAL DISTRICT, CORPUS CHRISTI, TEXAS*

## REPLY BRIEF FOR THE PETITIONER


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## REPLY BRIEF FOR THE PETITIONER

The Court should grant certiorari. The court below invalidated an important act of Congress, a fact Texas does not dispute. That alone warrants certiorari. Moreover, the decision below is egregiously wrong, leaves thousands of servicemembers vulnerable to discrimination by their state employers, and leaves the extent of Congress's most important constitutional powers uncertain. This Court's most important role is to decide cases like this one, involving the states' failure to enforce federal law.

Texas's arguments against certiorari all fail.

1. Texas is wrong that invalidating USERRA's cause of action is inconsequential. Opp. 25-27. It is the most grave act a court can undertake, *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J.), and it interferes with the federal government's ability to provide for the national defense. The Reserve Organization of America has supported certiorari because this case is so consequential for servicemembers.

2. Texas is wrong that Congress lacks the power to authorize suits against the states under its War Powers because a long period elapsed before Congress first needed to use it. Opp. 18-19. The states cannot acquire a constitutional immunity they never had by passage of time. As this Court has said many times, in many ways, "[i]n the application of a constitution … our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power." *Weems v. United States*, 217 U.S. 349, 373 (1910). If Texas is right, the draft, first used seven decades after the founding in the Civil War, would be unconstitutional.

3. Texas is wrong that *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *Alden v. Maine*, 527 U.S. 706 (1999), or *Allen v. Cooper*, 140 S. Ct. 994 (2020) foreclose,

or even speak at all, to Congress's power to authorize suits against nonconsenting states under its War Powers. Opp. 8-12. Those cases do not mention the War Powers, and *Katz*'s very existence refutes *Seminole Tribe* and *Alden*'s dictum that "no" Article I powers may be used to authorize suits against nonconsenting states.

4. It is irrelevant that Texas believes petitioner could have pursued other state or federal remedies in other courts under different laws. Opp. 4-7. The availability of USERRA's remedy "is a matter of policy that rests entirely with the Congress not with the courts." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). "It is not for [this Court] to say whether the means chosen by Congress represent the wisest choice." *FERC v. Mississippi*, 456 U.S. 742, 758 (1982). Congress wanted to afford servicemembers a remedy under USERRA, and the invalidation of that remedy is significant.

5. Texas's vehicle arguments are waived, wrong, and not even vehicle arguments. Its "state law immunity" argument, Opp. 21-23, was neither pressed nor passed upon below, has no basis in Texas law (and would be preempted if it did), and does not affect this Court's ability to reach and decide the merits. Texas's commandeering argument, Opp. 23-25, is the same: waived, wrong, and not a vehicle argument. Whether Texas might raise this meritless argument later in this litigation is no barrier to this Court's review of the question presented here now.

Texas offers no persuasive reason to deny review. Texas is not the first state that has refused to honor its USERRA obligations to a servicemember and, unless this Court intervenes, it will not be the last.

The Court should grant the petition.

## I. The Invalidation of an Important Federal Statute Warrants the Court's Review

The court below "exercise[d] … the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965). That is sufficient in its own right to warrant this Court's review. *See Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (invalidation of a federal statute is a matter of "obvious importance" to this Court); *see also* Pet. 11-12 (citing cases).

This issue is no longer percolating in the lower courts. Texas admits that "every … court to have considered the issue since *Alden v. Maine*, 527 U.S. 706 (1999)," has held USERRA's cause of action unconstitutional. Opp. 1, 8, 25. There are few states left who have not either consented to suits under USERRA or had their courts hold USERRA unconstitutional. "No court, including this Court, has adequately examined whether USERRA's enforcement provision permitting private suits against state government employers in state courts is a valid exercise of Congress' plenary and exclusive War Powers." ROA Br. 5.

The Court granted certiorari in *Allen*, "[b]ecause the Court of Appeals held a federal statute invalid." 140 S. Ct. at 1000. It should do so again here.

## II. The Question Presented Is Exceptionally Important

The invalidation of USERRA's cause of action against states as employers nullifies a duly-enacted statute that Congress deemed necessary to carry into execution its War Powers and casts considerable doubt on the scope and extent of Congress's powers to authorize suits against the states incident to the preparation for and prosecution and termination of war. This uncertainty around a power so vital to the nation's survival is perilous and unjustifiable.

The invalidation of USERRA's cause of action will harm thousands of veterans and reservists, many of

whom, like petitioner, have sacrificed their bodies and their health for their country. *See* Pet. 14-18. As the Reserve Organization of America explains, "alleged and proven discrimination by state and local governments is wide ranging, and impacts Reservists [and veterans] in *all* employment sectors." ROA Br.20; *see also id.* at 21-22 (citing examples). Even Texas admits that, unless this Court intervenes, no fewer than "800,000 people" may be "left without a remedy." Opp. 27. That's not only bad for the many thousands of veterans and reservists who face discrimination; it's bad for the United States military. By ensuring that servicemembers "can retain their jobs and participate in the military without fear of reprisal by their civilian employers, USERRA is an indispensable element to [the military's] recruiting and retention efforts." ROA Br.18. By hollowing out USERRA's protections, states like Texas are "threaten[ing] the nation's combat readiness." *Id.* at 22.

Texas tries to sidestep the very real consequences of casting aside USERRA's protections by claiming that states never violate USERRA. Opp. 26. That is false. Numerous state courts have ruled (wrongly) that USERRA claims are barred by sovereign immunity. These states' hostility to USERRA claims results in many thousands of claims never brought and thousands more funneled to the Department of Labor's utterly broken administrative process, *see* Pet. 17-18; ROA Br. 22-26, a fact that Texas does not dispute.

At bottom, Texas asks the Court to take its word that it never discriminates against veterans. In the face of numerous cases of discrimination against veterans by states, *see* Pet. 7 (collecting cases); ROA Br. 20-22, and findings that spurred Congress to amend the statute specifically to permit suits against them, *see* Pet. 6-7, Texas cites the presumption of regularity for the preposterous conclusion that *every single one* of the many claims against states is

meritless. Opp. 26. As the Reserve Organization of America confirms, discrimination by state employers against servicemembers is all-too-prevalent; it harms servicemembers and the federal government alike; and the elimination of Congress's cause of action to deter it merits this Court's intervention.

**III. The Decision Below Is Wrong**

The War Powers give Congress the power to authorize suits against nonconsenting states. This Court's review is necessary to confirm that fact. Pet. 19-28.

1. Texas largely does not dispute the overwhelming textual, structural, and historical evidence showing that the Framers gave Congress unfettered, exclusive congressional control over all facets of warmaking, Pet. 22-27; Bobbitt Br. 4-7, and did so because they believed that only *complete* supremacy could fix glaring problems that had hobbled the national defense under the Articles of Confederation, Bobbitt Br. 7-8; Hirsch Br. 17-21. The Framers' concerns about federal exclusivity—and specifically their fears that states would disrupt post–Revolution peacemaking—drove calls for a constitutional convention; and the Framers when ratifying the Constitution and Bill of Rights specifically contemplated that states would be subjected to suits to enforce peace treaties. Pet. 23-25.

Texas also ignores subsequent events that confirmed the Framers' view. Pet. 25-27; Bobbitt Br. 11-15; Hirsch Br. 24-25. Congress has used its War Powers to accomplish singular ends that would not and could not be authorized by any constitutional power other than the War Powers, including its powers to raise and support armies; to apprehend and remove noncombatant foreign nationals; to conscript soldiers; to impose criminal sanctions on draft dodgers; to override state lawmaking authority and impose martial law; to suspend the writ of habeas corpus; and to displace an entire state court system. Pet. 25-27;

Bobbitt Br. 11, 13-15. This Court endorsed many of these actions. *Id.* Sovereignty is not "an all-or-nothing concept," Opp. 9, but these dramatic, transformative federal actions demonstrate a deep-rooted historical understanding that in the sphere of warmaking, states have closer to "nothing." Pet. 27. That USERRA's abrogation of state sovereign immunity came about only recently shows only that the need came about recently, not that the states throughout this period "accumulate[d] power through adverse possession." *NLRB v. Noel Canning*, 573 U.S. 513, 613-14 (2014) (Scalia, J., concurring).

2. Texas deems all of this history irrelevant on the theory that "Article I does not authorize Congress to abrogate state sovereign immunity." Opp. 12. That categorical argument misunderstands *Allen* and *Katz*. Pet. 19-21.

Far from "reject[ing]" the relevance of history, Opp. 13, *Allen* addressed a narrow question about abrogation under the Intellectual Property Clause, which this Court found fully dictated by its prior decision interpreting the very same clause. 140 S. Ct. at 1001 (citing *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999)). "*Florida Prepaid* all but prewrote [the] decision." *Id.* at 1007. In reaffirming *Florida Prepaid*, *Allen* recognized that notwithstanding dictum in certain of this Court's cases, some Article I powers do, in fact, permit Congress to authorize suits against the states. 140 S. Ct. at 1002. And it confirmed that the test for whether a power permits Congress to subject states to suit is whether the states "agreed in the plan of the Convention not to assert any sovereign immunity defense" against suits brought pursuant to a particular power. *Id.* at 1003. This "plan of the convention" test predates *Katz*, Pet. 20; and both the *Katz* majority and the dissent believed it controlled, Pet. 21.

Texas cannot deny that, under the "plan of the convention" test, the War Powers resemble the Bankruptcy

Clause in ways that place them, at minimum, "on the plane recognized by *Katz*." Opp. 13. The Framers knew that effective warmaking, like the conclusive discharge of debts, required occasionally subjecting states to suit: states could frustrate peace treaties, Pet. 24-25, just like they could refuse "to respect one another's discharge orders," Opp. 13. And though bankruptcy is "estate-focused," Opp. 13, the sole circumstances in which the Bankruptcy Clause implicates sovereign immunity is precisely when it is *not* directly governing the estate: *Katz* endorsed "ancillary" suits against states that "involve *in personam* process." 546 U.S. at 372. Likewise, Congress must have the ancillary power to protect its ability to raise and support armies, including, if necessary, by permitting soldiers to sue states for preventing them from serving. Just as the Bankruptcy Clause would be ineffective if bankruptcy judgments lacked global effect, the War Powers—including the power to raise an army—would be equally ineffective if states could thwart Congress's efforts by announcing that anyone who joined the army would lose their job when they returned from serving their country.

3. Indeed, on the metrics of text, structure, and history that all Justices in *Katz* identified as relevant, Pet. 21, the War Powers stand apart from all other powers in Article I. The War Powers are the only powers Congress "*shall*" exercise. U.S. Const. art. IV, § 4 (emphasis added). And they are uniquely "tremendous," "plenary," and "exclusive." Pet. 2. Whereas Congress shares concurrent regulatory power with the states under nearly all of its Article I powers, Pet. 22, the maximum authority states can be said to possess in the warmaking sphere, Opp. 14, is partial control over in-state members of the National Guard, which the federal government can "call forth" at any time, U.S. Const. art. I, § 8, cl. 15.

Even if the War Powers did not otherwise satisfy the "plan of the Convention" test, petitioner has consistently argued that those Powers by their very nature authorize Congress to abrogate state sovereign immunity when necessary. Pet. 23. This Court has never decided whether that is so, or even discussed the question—not in *Katz*, not in *Allen*, not ever.

3. Texas describes suits under USERRA as implicating only the specific powers to raise and maintain an army and navy, U.S. Const. art. I, § 8, cls. 12-13, and not the War Powers altogether. Opp. 14-15. This Court's cases treat the War Powers not as a jumble of discrete clauses but as a collective whole. Pet. 2; *see United States v. Macintosh*, 283 U.S. 605, 622 (1931), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). That approach reflects not that the War Powers are "vague" or "undefined," but that they are closely interrelated and collectively represent Congress's complete power over war. *Contra* Opp. 14. Texas highlights the President's power as Commander in Chief, Opp. 14, but that only undermines Texas's position. When Congress and the President act jointly, as they have in USERRA, federal "authority is at its maximum [and] includes all that [the President] possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Regardless, the Army and Navy clauses, no less than the others, carry with them the power to subject nonconsenting states to suit. A functioning Army and Navy are essential to the successful prosecution of war—certainly the Framers thought so. Bobbitt Br. 5-6. Ratification debates over the Army and Navy clauses focused on other issues and did not discuss whether Congress would have the power to abrogate state sovereign immunity, Opp. 16-18, but debates over the subject of bankruptcies did not discuss the narrow topic of state sovereign immunity

either, *Katz*, 546 U.S. at 369. The absence of concern by the Framers with the War Powers' impact on state sovereign immunity only highlights the extent to which "there was general agreement" about their importance and their scope. *Id.*

Texas is wrong that USERRA must specify which of Congress's War Powers authorize it. Opp. 14-15. Texas has it backwards: "[e]very statute is presumed to be constitutional," *Munn v. Illinois*, 94 U.S. 113, 123 (1876), and may be invalidated "only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). "[M]agic words or labels" do not "disable an otherwise constitutional levy." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565 (2012) (plurality opinion); *Heart of Atlanta*, 379 U.S. at 257-58 (similar).

**IV. This Case Is the Right Vehicle**

This case is a good vehicle to decide the question presented. Pet. 28-30.

Texas's two "vehicle" arguments are not vehicle arguments: They identify no barrier to this Court's review and will not affect consideration of the question presented. They are also waived. It is not just that Texas failed to press these arguments before the Court of Appeals, *see* Appellant Brief, *Texas Dep't of Public Safety v. Torres*, No. 13-17-00659-CV (13th Ct. App. Tex.), 2018 WL 561781, and that no court has passed on them. Rather, Texas affirmatively conceded in the Court of Appeals that the state law immunity argument it now presses is wrong. Texas explained below that petitioner's suit could proceed if USERRA validly abrogated immunity "or" if the state waived its immunity, *id.* at 6, and that a valid federal abrogation would authorize the suit even if the state had *not* waived its own immunity, *id.* at 9.

What Texas told the court of appeals was correct. Texas's "state law immunity" does not apply to federal law claims. *Contra* Opp. 21-23. Texas's state-law immunity precludes nonconsensual suits against Texas under Texas law. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 431-33 (Tex. 2016). Texas does not and cannot cite a single case applying it to a federal claim, ever. *See* Opp. 21-23. Numerous Title VII, ADA, and FMLA suits have been brought in Texas courts against Texas; it has never raised "state law immunity" as a defense. In any event, USERRA would preempt any state-law immunity. *Haywood v. Drown*, 556 U.S. 729, 735-36 (2009); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 375-77 (1990).

Commandeering doctrine does not apply here either. *Contra* Opp. 23-25. The "Constitution … permit[s] imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions relate[ ] to matters appropriate for the judicial power." *Printz v. United States*, 521 U.S. 898, 907 (1997); *see Alden*, 527 U.S. at 752. Texas's theory is obviously wrong: it would mean few federal claims could be brought in Texas's courts at all, whether under USERRA, Title VII, the ADA, or FMLA, and even against private defendants. *Contra Haywood*, 556 U.S. at 740.

* * * * *

This case is not about USERRA's propriety as an exercise of Congress's War Powers, but rather whether the War Powers can ever authorize suits against nonconsenting states. To embrace the view of the court below, and the many other state courts that have invalidated USERRA under *Seminole Tribe* and *Alden*, is to embrace the view that Congress *may not ever* provide a cause of action against the states for flagrant interference with the recruitment or retention of its soldiers. It is to embrace the view that, even to conclude a war, Congress cannot authorize suits against the states to secure the peace.

Those are extraordinary limits on the federal government's powers, limits that the Framers never would have embraced.

## CONCLUSION

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

Respectfully submitted.

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