No. 20-603

In the Supreme Court of the United States

LE ROY TORRES, PETITIONER

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
THIRTEENTH DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Congress, in exercising its powers to raise and support Armies and provide and maintain a Navy, may authorize private damages suits against state employers based on violations of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*

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INTEREST OF THE UNITED STATES

This case presents the question whether Congress may authorize private damages suits against state employers based on violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* The United States has a substantial interest in defending the constitutionality of the challenged provision. The Departments of Labor and Justice also have administrative and enforcement responsibilities under USERRA. 38 U.S.C. 4321-4334. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

A. Legal Background

1. "When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation." *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244, 2263 (2021). Chief among those failings was "the want of power in Congress to raise an army," which had produced crippling "dependence upon the States" to supply military forces. *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918); see 1 *Records of the Federal Convention of 1787*, at 18-19 (Max Farrand ed., rev. ed. 1966) (Farrand) (Edmund Randolph opening the Convention by describing those "defects").

The delegates at the Convention responded by making "an entire change in the first principles of the system." *The Federalist No. 23*, at 148 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Constitution vests in Congress an array of powers to "provide for the common Defence," including to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 1, 12-13; see *id.* Cls. 11, 14-16. At the same time, the Constitution withholds from States any power to "keep Troops, or Ships of War in time of Peace" without Congress's consent or to "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* § 10, Cl. 3. States retain power over "Appointment of the Officers" in the Militia "and the Authority of training the Militia," but must adhere to "the discipline prescribed by Congress." *Id.* § 8, Cl. 16. The President serves as "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." *Id.* Art. II, § 2, Cl. 1.

2. "The constitutional power of Congress to raise and support armies," to provide and maintain a Navy, "and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Those powers authorize Congress to conscript soldiers and sailors, see *Selective Draft Law Cases*, 245 U.S. at 387-388, and to encourage military service in a wide range of ways, see, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006) (campus recruiting); *Johnson* v. *Robison*, 415 U.S. 361, 376 (1974) (educational benefits).

As centrally relevant here, Congress has over the past 80 years relied on its army and navy powers to enact a series of statutes reflecting a "national policy to encourage service in the United States Armed Forces" by giving service members "the right to return to civilian employment without adverse effect on their career progress." H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998) (House Report). The first such statute, enacted before America's entry into World War II, required that individuals register for the draft and be restored to their previous federal or private employment upon completion of their service. Selective Training and Service Act of 1940, ch. 720, § 8(b)(A)-(B), 54 Stat. 890. The statute provided a right of action against private employers and declared "the sense of the Congress that" draftees previously employed by States should be treated likewise. § 8(b)(C) and (e), 54 Stat. 890-891. The next year, Congress extended the same protections to volunteers. Service Extension Act of 1941, ch. 362, § 7, 55 Stat. 627.

Congress retained those reemployment protections after the war and later granted them to members of the National Guard and Reserves. House Report 2. Near the end of the Vietnam War, Congress revisited the pro-

vision that exhorted rather than bound state employers. The Senate Veterans' Affairs Committee explained that, while some "States ha[d] enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably." S. Rep. No. 907, 93d Cong., 2d Sess. 110 (1974). In addition, "some State and local jurisdictions ha[d] demonstrated a reluctance, and even an unwillingness, to reemploy" Vietnam War veterans. *Ibid.* Because "veterans who previously held jobs as school teachers, policemen, firemen, and other State, county, and city employees," should be treated the same as veterans previously employed in the private or federal sectors, the Committee reported—and Congress enacted—legislation providing a private damages remedy against state employers. *Ibid.*; see Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, § 404, 88 Stat. 1595-1596.

When veterans pursued that remedy, several States invoked sovereign immunity. Every federal court of appeals that addressed that defense rejected it, explaining that Congress could enact the challenged provision "under the war powers contained in Article I, Section 8." *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937 (7th Cir.), cert. denied, 441 U.S. 967 (1979); see House Report 4 (collecting cases).

3. a. In 1994, after the Gulf War, Congress enacted USERRA, Pub. L. No. 103-353, 108 Stat. 3149, which largely carried forward the prior reemployment protections while aiming to "clarify, simplify, and, where necessary, strengthen" them. H.R. Rep. No. 65, 103d Cong., 1st Sess. Pt. 1, at 18 (1993). In the statutory text, Congress restated "the same purposes that were the basis of the enactment of the initial provisions in 1940 and

have been the basis for all subsequent amendments," *id.* at 20: "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," 38 U.S.C. 4301(a)(1).

USERRA preserved the right of service members and veterans to file suits in federal court seeking monetary relief from state employers for statutory violations. 38 U.S.C. 4323(a)(2) and (b) (1994). Congress also created a new administrative mechanism through which the Department of Labor (DOL) assists service members and veterans who assert USERRA violations, including by attempting to resolve complaints with their employers. 38 U.S.C. 4321-4322 (1994). And Congress authorized the Department of Justice to appear on behalf of USERRA plaintiffs in federal court under certain conditions. 38 U.S.C. 4323(a)(1) (1994).

b. In 1996, this Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44, that principles of sovereign immunity barred Congress from relying on its Indian Commerce Clause power to authorize private damages suits against States in federal court. *Id.* at 72-73. The Court reasoned that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by the "background principle of state sovereign immunity." *Ibid.* Relying on that reasoning, States successfully invoked sovereign immunity as a defense to several private USERRA suits. See House Report 5.

Congress responded by amending USERRA in the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 211, 112 Stat. 3329. Under the amended provisions, which remain in force, USERRA plaintiffs may sue private employers for monetary relief in federal court, 38 U.S.C. 4323(b)(3), and may sue state em-

ployers for monetary relief in state court "in accordance with the laws of the State," 38 U.S.C. 4323(b)(2). In addition, when a plaintiff uses the prescribed DOL administrative process, the United States may sue state or private employers on behalf of the plaintiff in federal court. 38 U.S.C. 4323(a)(1) and (b)(1). A committee report explained that the lower-court decisions allowing States to assert sovereign immunity against USERRA suits "raise serious questions about the United States[']ability to provide for a strong national defense," and that the amendments were adopted to ensure "that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them." House Report 5.[1]

c. In 1999, the Court decided *Alden* v. *Maine*, 527 U.S. 706, holding that sovereign-immunity principles barred Congress from subjecting States to private damages suits in state court under the Fair Labor Standards Act of 1938, 29 U.S.C. 203, which was enacted pursuant to Congress's authority to regulate interstate commerce. 527 U.S. at 712. The Court reasoned that, for many of the same reasons identified in *Seminole Tribe*, "the powers delegated to Congress under Article I * * * do not include the power to subject nonconsenting States to private suits for damages in state courts." *Ibid.* Relying on that reasoning, States successfully invoked sovereign immunity as a defense to private USERRA suits in state courts. See, *e.g.*, *Lar-*

[1] Like its statutory predecessors, USERRA includes employment protections for most service members and veterans employed in a civilian capacity by the federal government. 38 U.S.C. 4314. Those protections are enforceable before the Merit Systems Protection Board, with a right to review in the Federal Circuit. 38 U.S.C. 4324.

kins v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-363 (Ala. 2001).

d. In 2006, this Court held in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, that a state entity could not assert sovereign immunity in a federal "proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies." *Id.* at 359. The Court acknowledged that statements in *Seminole Tribe* might have "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause." *Id.* at 363. But the Court concluded that such an "assumption was erroneous," because "the States agreed in the plan of the Convention not to assert [sovereign] immunity" to suits authorized by Congress under the Bankruptcy Clause. *Id.* at 363, 373.

USERRA plaintiffs then invoked *Katz* to argue that States surrendered their sovereign immunity to suits under statutes enacted pursuant to Congress's war powers. State courts, however, have relied on *Seminole Tribe* and *Alden* to conclude that USERRA's private-damages provision is unconstitutional. See, *e.g.*, *Clark* v. *Virginia Dep't of State Police*, 793 S.E.2d 1, 6 & n.6 (Va. 2016) (collecting cases), cert. denied, 138 S. Ct. 500 (2017).

B. Proceedings Below

1. Petitioner volunteered for the United States Army Reserve in 1989. Pet. App. 2a. In 2007, he was called up to active duty and deployed to Iraq, where he suffered injuries. *Ibid.* After an honorable discharge, he returned to Texas, where he had been employed as a state trooper by respondent. *Ibid.* Petitioner alleges that he asked respondent to reemploy him in a different position because his injuries prevented him from serving as a state trooper. *Ibid.* Respondent refused to do

so, and petitioner sued in state court, alleging that respondent had violated USERRA by refusing to reemploy him in a position that would accommodate his disability. *Ibid.*; see 38 U.S.C. 4313(a)(3). Respondent moved to dismiss on sovereign-immunity grounds. Pet. App. 3a. The state trial court denied that motion. *Ibid.*

2. A divided state intermediate appellate court reversed. Pet. App. 1a-28a. The court read *Seminole Tribe* and *Alden* as "support[ing] the broad principle that * * * state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation." *Id.* at 12a. The court acknowledged that "*Katz* recognized a limited exception to this rule for actions to enforce certain bankruptcy statutes," but the court understood that exception to be "derived from the particular attributes of *in rem* bankruptcy jurisdiction which are not present in this case." *Ibid.* The court also questioned whether USERRA was "enacted pursuant to Congress's War Powers," as opposed to "the Necessary and Proper Clause," which it viewed as "indisputably" insufficient to authorize a private damages suit against the State. *Id.* at 11a-12a.

One justice dissented. Pet. App. 21a-28a. The court of appeals denied rehearing en banc over the dissent of two justices. *Id.* at 47a-48a. The Supreme Court of Texas denied discretionary review. *Id.* at 32a-33a.

C. Subsequent Developments

After the state court of appeals issued the decision below, this Court decided *PennEast*, which held that the States "consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates." 141 S. Ct. at 2259.

SUMMARY OF ARGUMENT

Petitioner's USERRA suit should be allowed to proceed. Congress authorized the suit pursuant to its express powers to raise and support Armies and provide and maintain a Navy. And implicit principles of sovereign immunity do not bar the suit because the constitutional structure divested States of any basis to assert sovereign immunity in response to an action authorized by the federal war powers.

A. USERRA reflects a straightforward exercise of Congress's powers to "raise and support Armies" and "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12-13. The Framers included those powers in the Constitution in response to the nearly catastrophic failure of the States to provide troops and military supplies during the Revolutionary War. The records of the Constitutional Convention and of the ratification make clear that the war powers were understood as exceptionally broad, exclusive to the federal government, and critical to the Nation's preservation. Congress has exercised them in that way since the beginning, and this Court has long emphasized their sweeping scope.

Like predecessor statutes dating back more than 80 years, USERRA facilitates the raising and supporting of armies and the providing and maintaining of a navy by "eliminating or minimizing the disadvantages to civilian careers and employment which can result from" military service. 38 U.S.C. 4301(a)(1). That objective is supported by multiple aspects of the statutory scheme, including the private-enforcement provision at issue here. And that objective is especially pressing in the modern era of an all-volunteer military in which National Guard and Reserve members play a critical operational role while also maintaining civilian jobs. By di-

rectly advancing military recruitment and retention, USERRA falls squarely within Congress's express army and navy powers.

B. Implicit principles of sovereign immunity do not bar USERRA suits against state employers. Although the States generally retained their immunity when they entered the Union, it is undisputed that they consented to certain categories of suits as part of the constitutional structure. Suits brought pursuant to Congress's war powers are such a category for two related reasons.

First, the Constitution was adopted to divest the States of sovereignty in the military field. The Constitution's careful and specific allocation of military powers —vesting them in Congress, subject to one narrow reservation, while expressly withholding them from the States—demonstrates that there is a single sovereign in the sphere of national defense. The sword rests with the United States, not the individual States. By surrendering sovereignty over national defense, the States relinquished any basis for asserting sovereign immunity to suits authorized under the federal war powers.

Second, even if the States retain some sovereignty in this context, the structure of the Constitution makes clear that they cannot wield sovereign immunity to obstruct Congress's exercise of its military powers. The Framers were clear that the war powers—the powers of national survival—were not subject to implied constitutional constraints. This Court has reaffirmed that principle by repeatedly refusing to impose state-sovereignty-based limitations on the federal war powers. The Court should again refuse to do so here. Allowing States to thwart the federal government's military powers would reintroduce the very problem the Constitution was adopted to solve.

C. Neither the state court of appeals' decision nor respondent's defense of it at the petition stage engages with the principal arguments supporting the challenged provision's constitutionality. The court suggested that the provision was enacted under the Necessary and Proper Clause rather than the army and navy powers. As described above, that is mistaken. And even if the provision were supported in part by the Necessary and Proper Clause, that would be because it is necessary and proper for carrying into execution the army and navy powers. Either way, the critical inquiry is whether the structure of the Constitution includes a surrender of state sovereign immunity to suits under statutes enacted pursuant to those powers. It does. The court of appeals' reliance on abrogation precedents was therefore beside the point; because States retained no relevant sovereign immunity, no abrogation was needed. The decision below should be reversed.

ARGUMENT

CONGRESS VALIDLY AUTHORIZED PRIVATE DAMAGES SUITS AGAINST STATE EMPLOYERS UNDER USERRA

A. USERRA Is An Exercise Of Congress's Powers To Raise And Support Armies And Provide And Maintain A Navy

Congress's powers to raise and support Armies and provide and maintain a Navy are "broad and sweeping." *Rumsfeld* v. *Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006) (citation omitted) (*FAIR*). By providing civilian-employment protections "to encourage noncareer service in the uniformed services," 38 U.S.C. 4301(a)(1), USERRA fits squarely within those powers.

1. During the Revolutionary War and its immediate aftermath, "congress possessed no power whatsoever to raise armies, but only 'to agree upon the number of land forces, and to make requisitions from each state for its

quota.'" 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1174, at 64-65 (1833) (Story). States routinely failed to meet their quotas, "subjecting the public safety frequently to the perilous crisis of a disbanded army." *Id.* at 65. In a letter from the battlefield, George Washington warned that, unless Congress were "vested with powers by the several States, competent to the great purposes of the war, * * * our cause is lost." Letter to Joseph Jones (May 31, 1780), in 8 *Writings of George Washington* 304 (Worthington Chauncey Ford ed., 1890). When the United States ultimately prevailed over the British, Washington remarked that it was "little short of a standing miracle." Farewell Orders to the Armies of the United States (Nov. 2, 1783), in 10 *id.* at 330 (1891).

Fixing the failed requisition system was among the "recognized necessities" for calling the Constitutional Convention. *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918). The first reported draft of the Constitution would have vested Congress with powers to "raise armies" and to "build and equip fleets." 2 Farrand 182. The delegates expanded both authorities, empowering Congress to "raise and support armies" and to "provide & maintain a navy." *Id.* at 323, 330. When some delegates objected that Congress could develop a "dangerous" peacetime army, a proviso was added to the army clause stating that "no appropriation of money to that use shall be for a longer term than two years." *Id.* at 329, 508-509. All other proposed restrictions on the powers were rejected. See *id.* at 329-330, 341, 616-617.

The army and navy powers were debated intensely during ratification. James Madison explained that the powers could not logically "be limited," because the Nation had no power to "limit the force" that may be di-

rected against it. *The Federalist No. 41*, at 270. Alexander Hamilton added that "there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter * * * essential to the *formation*, *direction* or *support* of the NATIONAL FORCES." *The Federalist No. 23*, at 148.

Critics "assailed" the army and navy powers "with incredible zeal and pertinacity." 3 Story §§ 1176-1177, at 67. Prominent Anti-Federalists decried the vesting of an "unlimited power to raise armies" in Congress without any "check" from state legislatures. Federal Farmer No. III (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* 241, 242 (Herbert J. Storing ed., 1981). Brutus complained that Congress would "be empowered to raise and maintain standing armies at [its] discretion" and that "it is difficult to conceive how the state legislatures can, in any case, hold a check over the general legislature." Brutus No. X (Jan. 24, 1788), in *id.* at 415, 417. In some state ratifying conventions, an amendment limiting Congress's powers was proposed. 3 Story § 1186, at 74. But it "die[d] away." *Ibid.*

2. Post-ratification practice and precedent have reinforced the breadth of the army and navy powers. Congress has relied on those powers to, *inter alia*, conscript soldiers and sailors, command private entities to produce military supplies, take over railroads and communications lines, and seize profits. See *Lichter* v. *United States*, 334 U.S. 742, 755-758, 767 n.9 (1948) (citing examples). This Court has upheld those actions, emphasizing that the "language of the Constitution authorizing" them is "clear and sweeping," "broad rather than restrictive," and "'given fully, completely, [and] unconditionally.'" *Id.* at 755-756 & n.4 (citation omitted).

Of particular relevance here, Congress has long employed its army and navy powers to encourage military recruitment and retention. In one of the first statutes authorizing an expansion of the army, Congress provided for enlistment bonuses, Act of Mar. 3, 1791, ch. 28, §§ 4, 12, 1 Stat. 222, 224—a practice it continued, eventually offering bonuses in the form of "military bounty lands," Act of Apr. 16, 1816, ch. 55, § 4, 3 Stat. 287. Congress created the United States Military Academy at West Point to attract and train future officers. Act of Mar. 16, 1802, ch. 9, § 27, 2 Stat. 137. Congress later encouraged service by providing educational benefits, insurance coverage, retirement plans, and other means "to compensate for the disruption that military service causes to civilian lives." *Johnson* v. *Robison*, 415 U.S. 361, 377 (1974). This Court has upheld those measures, explaining that "[l]egislation to further these objectives is plainly within Congress' Art. I, § 8 power to 'raise and support Armies.'" *Id.* at 376.

3. USERRA fits comfortably within that authority. As stated in the statutory text, civilian-employment protections "encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1); see *Robison*, 415 U.S. at 376 (relying on statute's enumeration of objectives). The link between civilian-employment protection and military recruitment has supported similar statutes for decades. See pp. 3-5, *supra*. As a sponsor of one such statute explained, "if we guarantee their jobs when their military service is completed, we have taken a long step in providing the Army and Navy with patriotic men who are willing and anxious to serve their country." 86 Cong. Rec. 10,573 (1940)

(statement of Sen. Thomas of Utah); see *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (explaining that the legislation ensures that one "called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job").

Those objectives are even more pressing in the era of an all-volunteer military in which members of the National Guard and Reserves play "an essential part [in] the military's operational force" while maintaining their civilian jobs. S. Rep. No. 449, 110th Cong., 2d Sess. 24 (2008). Congress understandably sought to give those service members "confidence that their USERRA rights will be respected or enforced," recognizing that they might otherwise be "less likely to join or continue to serve in the Armed Forces." *Ibid.* Even small effects on recruiting and retention matter. Since September 11, 2001, more than one million Guard members have been mobilized and deployed overseas for military missions. See *2021 National Guard Bureau Posture Statement* 5, 18, https://go.usa.gov/xtdAw.

USERRA's protections thus directly facilitate the raising and supporting of armies and the providing and maintaining of a navy. And Congress has, since the end of the Vietnam War nearly a half-century ago, determined that those protections should include a private damages remedy against state employers, so that service members experiencing discrimination can seek relief. That judgment is well within Congress's "broad discretion as to methods to be employed," in exercising its army and navy powers. *Lichter*, 334 U.S. at 779; see *FAIR*, 547 U.S. at 59; cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (discussing the "role of 'private attorneys general'" in civil-rights statutes). Courts interpreting USERRA and its predeces-

sors thus have agreed that the statutes embody an exercise of those powers. See, *e.g.*, *Clark* v. *Virginia Dep't of State Police*, 793 S.E.2d 1, 5 & n.5 (Va. 2016) (collecting cases), cert. denied, 138 S. Ct. 500 (2017).

B. Principles Of State Sovereign Immunity Do Not Bar Suits Against State Employers Under USERRA

Principles of state sovereign immunity do not bar petitioner's USERRA suit. Although States generally retained their sovereign immunity when they entered the Union, the constitutional structure divested them of that immunity in certain areas. Congress's exercise of its war powers is one of those areas.

1. After declaring independence in 1776, "the States considered themselves fully sovereign nations." *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1493 (2019). One aspect of "the States' sovereignty" during that period "was 'their immunity from private suits.'" *Ibid.* (citation omitted). The States' ratification of the Constitution and entry into the Union, however, "fundamentally adjust[ed]" their status. *Ibid.* With the exception of the Eleventh Amendment, which all agree does not directly apply here, the text of the Constitution does not address state sovereign immunity.[2] Instead, a State's entitlement to sovereign immunity is governed principally by "fundamental postulates implicit in the constitutional design." *Alden* v. *Maine*, 527 U.S. 706, 729 (1999).

The "essential postulate" here, this Court has long explained, is that States "shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'"

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[2] Because this suit was not filed against respondent by a citizen "of another State," U.S. Const. Amend. XI, it does not fall within the literal terms of the Eleventh Amendment.

Alden, 527 U.S. at 729 (citation omitted); see *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244, 2258 (2021) (outlining the same test); *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020) (same); *Hyatt*, 139 S. Ct. at 1495 (same); *Central Va. Cmty. College* v. *Katz*, 546 U.S. 356, 373 (2006) (same); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 68 (1996) (same); *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890) (same).

The "plan of the Convention" is "shorthand for 'the structure of the original Constitution itself.'" *PennEast*, 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 728). While that structure generally preserved States' sovereign immunity, it also divested States of that immunity in several significant ways. See *ibid.* This Court has held, for instance, that the Constitution divested States of their immunity to suits brought by the federal government, to suits brought by other States, to suits "in the context of bankruptcy proceedings," and to suits pursuant to the federal eminent-domain power. *Ibid.*; see *id.* at 2259. In addition, when States ratified the Fourteenth Amendment, they surrendered their right to invoke sovereign immunity in response to suits under statutes enacted pursuant to that Amendment, provided that Congress abrogates immunity "with the requisite clarity." *Id.* at 2258.[3]

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[3] States can also "consent to suit" in any given case or category of cases, provided that "such consent" is "'unequivocally expressed.'" *PennEast*, 141 S. Ct. at 2258 (citation omitted). States are deemed to consent to suit when they remove a case from state court to federal court. *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613, 616 (2002). State sovereign immunity generally does not apply to "suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. State sovereign immunity also "does not bar certain actions against state officers for injunctive or declaratory relief." *Id.* at 757.

2. As in those other areas, the constitutional structure divested States of sovereign immunity to suits authorized by Congress's war powers, particularly its powers to raise and support Armies and provide and maintain a Navy. That is so for two related reasons. First, divesting the States of sovereignty over those fields was a central aspect of the plan of the Convention. Second, even if the States retain some aspect of sovereignty over the military field, the structure of the Constitution prevents them from wielding sovereign immunity to obstruct Congress's exercise of its war powers, which would reproduce the very problem the Constitution was supposed to solve.

a. Divesting the States of sovereignty over military matters was a central aspect of the plan of the Convention; indeed, it was a principal basis for the Convention itself. As explained above, the Convention was called in "response to the failings of the Articles of Confederation," *PennEast*, 141 S. Ct. at 2263, the most imperative of which was that Congress was unable "to prevent a war nor to support it by [its] own authority," 1 Farrand 19 (Randolph). Critically, the problem was not only a lack of power in Congress, but also "dependence upon the States," *Selective Draft Law Cases*, 245 U.S. at 381.

The plan adopted at the Convention directly addressed that problem by "divest[ing] the States of the traditional diplomatic and military tools" that "sovereigns possess." *Hyatt*, 139 S. Ct. at 1497. The Preamble proclaims that a central purpose of the Constitution is to "provide for the common defence." To that end, Article I, Section 8 vests multiple critical war powers exclusively in the federal government (Cls. 1, 12-16); Article I, Section 10 withholds key war powers from the States (Cl. 3); and in the one area where States retain

some military power, the Constitution "reserv[es] to the States" only a limited power over "Appointment of the Officers, and the Authority of training the Militia, *according to the discipline prescribed by Congress*" (Art. I, § 8, Cl. 16 (emphasis added)).

Thus, aside from the narrow militia exception, the delegates at the Convention "manifestly intended to give * * * all" responsibility for national defense to the federal government "and leave none to the states." *Selective Draft Law Cases*, 245 U.S. at 381; see *Perpich* v. *Department of Defense*, 496 U.S. 334, 353 (1990) (similarly describing the Constitution's "plan for providing for the common defense"). As President Lincoln would later explain, the Constitution does not confer "a power to raise armies if State authorities consent; * * * it is a power to raise and support armies given to Congress by the Constitution, without an 'if.'" *Lichter*, 334 U.S. at 756 n.4 (citation omitted). When it comes to raising and supporting armies and providing and maintaining a navy, therefore, there is but "one government entrusted with the common defence." *Id.* at 780 (citation omitted). "As to such purposes the state * * * does not exist." *United States* v. *Belmont*, 301 U.S. 324, 331 (1937).

Supporters and opponents of the Constitution recognized as much. In a letter transmitting the Constitution, Washington explained that certain "rights of independent sovereignty" had to be "sacrifice[d]" to "provide for the interest and safety of all." 2 Farrand 666. In particular, others noted, "a certain Portion or Deg[ree] of Dominion as to * * * War & Armies[] was necess[ar]y to be ceded by individual States." 3 Farrand 169. Critics also denounced the Constitution's allocation of war powers as "subversive of the state governments," 3 Story § 1176, at 67, and a step toward de-

struction of the States themselves, see, *e.g.*, 3 *Debates in the Several State Conventions* 395 (Jonathan Elliot ed., 2d ed. 1891) (Patrick Henry: "Where are the purse and sword of Virginia? They must go to Congress. * * * The Virginian government is but a name.").

Yet the States ratified the Constitution, thereby investing the federal government with responsibility for the common defense at the expense of "the sovereignty of the separate States." *Perpich*, 496 U.S. at 340. "Put another way, when the States entered the federal system, they renounced their right to" any role in determining how to raise and support Armies and provide and maintain a Navy. *PennEast*, 141 S. Ct. at 2259. Particularly because the Constitution's provisions allocating responsibility for the common defense—like those in other areas in which States surrendered sovereign immunity—"emerged from a felt need to curb the States' authority," *Allen*, 140 S. Ct. at 1002, they operate "not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign[ty]" in that arena, *Katz*, 546 U.S. at 363. Without any sovereignty in the military arena, States have no basis to assert sovereign immunity to suits authorized under Congress's military powers. See *ibid.*; see also *PennEast*, 141 S. Ct. at 2259.

Hamilton's account of sovereign immunity—which has been central to this Court's approach to the doctrine for more than a century, see, *e.g.*, *PennEast*, 141 S. Ct. at 2258; *Hyatt*, 139 S. Ct. at 1493; *Alden*, 527 U.S. at 716-717; *Seminole Tribe*, 517 U.S. at 68; *Hans*, 134 U.S. at 13—strongly buttresses that understanding. In an oft-quoted passage, Hamilton explained that nonconsenting States retain immunity from suit unless "there is a surrender of this immunity in the plan of the con-

vention." *The Federalist No. 81*, at 549. He then wrote that the "circumstances which are necessary to produce an alienation of state sovereignty" were "discussed in" an earlier article and "need not be repeated." *Ibid.* In that earlier article, Hamilton explained that, under "the plan of the Convention," an "alienation of State sovereignty" would exist where, *inter alia*, 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*, at 200.

The powers at issue here match Hamilton's description. The Constitution grants "authority to the Union" over certain military matters in Article I, Section 8, and "prohibit[s] the States from exercising the like authority" in Article I, Section 10. *The Federalist No. 32*, at 200. Hamilton's analysis thus indicates that the war powers are among the cases in which the "plan of the convention" involves an "alienation of state sovereignty"—and therefore prevents States from invoking sovereign immunity to suits under statutes enacted pursuant to those powers. *The Federalist No. 81*, at 549; see *Katz*, 546 U.S. at 377 n.13 (relying on Hamilton's reasoning in finding a surrender of sovereign immunity); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) (holding that States surrendered their sovereign immunity to suits authorized by Congress under the Fourteenth Amendment because that Amendment both "expressly granted authority to" Congress and imposed "significant limitations on state authority").

b. Even if States retained some measure of sovereignty in the war-powers context, that would not permit them to invoke sovereign immunity to obstruct Congress's exercise of its powers to raise and support Armies or provide and maintain a Navy. As explained

above, state sovereign immunity does not (outside the Eleventh Amendment context) arise from textual guarantees but rather from inferences about the constitutional structure. See p. 16, *supra*. Here, the evidence is overwhelming that the Framers intended that there would be "no constitutional shackles" on the "authorities essential to the care of the common defense." *The Federalist No. 23*, at 147 (Hamilton); see *The Federalist No. 41*, at 270 (Madison) ("It is in vain to oppose constitutional barriers to the impulse of self-preservation."); see also *Lichter*, 334 U.S. at 780 ("In equipping the National Government with the needed authority in war, [the Framers] tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake[.]") (citation omitted).

The genesis of the powers at issue here makes that especially clear. The Constitution expressly conferred on Congress—and withheld from States—the powers to raise and support Armies and provide and maintain a Navy precisely because "obstructions" from the States had nearly cost the Nation its independence. *The Federalist No. 22*, at 137 (Hamilton). Where the Framers determined that restrictions on Congress's powers in those areas were warranted, they imposed restrictions expressly: limiting army appropriations to two years, U.S. Const. Art. I, § 8, Cl. 12; giving the President rather than Congress command of active military forces, *id.* Art. II, § 2, Cl. 1; and reserving to the States certain militia authority, *id.* Art. I, § 8, Cl. 16; cf. U.S. Const. Amend. III (restricting the quartering of soldiers). Allowing a State to invoke implicit principles of sovereign immunity to block a suit authorized by Congress pursuant to its army and navy powers would result in an "inversion" of the plan of the Convention, enabling a part

of the Nation to defeat measures adopted for the security of the whole, and "transferr[ing] the care of the common defence from the fœderal head to the individual members." *The Federalist No. 25*, at 158 (Hamilton).

It is not difficult to imagine, for example, a State expressing opposition to a particular military policy or mission by refusing to rehire or similarly discriminating against service members. See p. 4, *supra* (discussing Vietnam War veterans). But if the State's "claim of sovereign immunity were to be honored" against a resulting USERRA suit, the State "would be impairing part of 'the mechanism for manning the Armed Forces of the United States,'" in direct contravention of the Framers' plan. *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 938 (7th Cir.) (citation omitted), cert. denied, 441 U.S. 967 (1979).

In keeping with that understanding, the Court has consistently repudiated attempts to impose implicit constitutional limitations on Congress's war powers—including limitations arising from assertions of state sovereignty or similar federalism principles. In *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), for example, the Court rejected a State's attempt to retrieve, through a writ of habeas corpus, an individual "held in the custody of a recruiting officer of the United States as an enlisted soldier" who had deserted the Army. *Id.* at 398-399. Relying on Congress's express power, the Court explained that the federal government can "determine, without question from any State authority, how the armies shall be raised," and that "[n]o interference with the execution of this power of the National government * * * by any State officials could be permitted without greatly impairing the efficiency" of the military. *Id.* at 408. Similarly, in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.)

493 (1871), the Court rejected a constitutional challenge to a federal statute that tolled, *inter alia*, state statutes of limitations in state courts for civil suits against defendants who were beyond the reach of legal process because of the Civil War. *Id.* at 503-504. The Court explained that the statute fell within Congress's war powers and that the federalism-based objections were "untenable." *Id.* at 507.

The Court also rejected a state-sovereignty-based claim in the *Selective Draft Law Cases*. There, individuals challenging the World War I draft contended (among other things) that Congress lacked constitutional authority to conscript members of state National Guards into the army. 245 U.S. at 381-382; see U.S. Br. at 47, *Selective Draft Law Cases*, *supra* (Nos. 656 et al.) (discussing the "argument from State sovereignty"). The Court explained that the conscription law fell squarely within Congress's power to raise and support Armies, and that the Constitution's limited reservation of authority to the States under the Militia Clause did not restrict Congress's "complete" power to raise an army. 245 U.S. at 382-383. The Court added that President Madison and Secretary of War James Monroe during the War of 1812, along with Lincoln during the Civil War, had likewise read the army power as unrestricted by States' militia authority. *Id.* at 384-387. This Court has consistently maintained the same position, rejecting (for example) a challenge by a State and its governor to the President's deployment of the National Guard, in federal service, to a training exercise in Central America. *Perpich*, 496 U.S. at 340-354; see *id.* at 354 (relying on "structural inferences" from the Constitution's "allocation of [defense] powers").

Similarly, the Court rejected a State's challenge to the application of a federal price-control law to the State's sale of timber on state-owned land during World War II. *Case* v. *Bowles*, 327 U.S. 92, 95-96 (1946). The Court noted that the price-control statute had been "sustained as a Congressional exercise of the war power" and held that it could be applied to the State even if it interfered with an "essential [state] governmental function." *Id.* at 101. The state-sovereignty principles in the Tenth Amendment, the Court explained, do not limit Congress's war powers. *Id.* at 102. Otherwise, "the constitutional grant of the power to make war would be inadequate to accomplish its full purpose." *Ibid.*

The Court reiterated that principle in *United States* v. *Oregon*, 366 U.S. 643 (1961), rejecting a State's Tenth Amendment challenge to a federal statute providing that, when veterans die without legal heirs in veterans' homes, their property is distributed to fund other veterans' facilities rather than escheating to the State. *Id.* at 644-649. The Court reasoned that "Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals and homes for veterans," and "[a]lthough it is true that [the devolution of property] is an area normally left to the States, [a State] is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power." *Id.* at 648-649.

Notably, when the Court adopted a broader interpretation of the state-sovereignty protections conferred by the Tenth Amendment in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v.

San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court specifically cautioned that "[n]othing we say in this opinion addresses the scope of Congress' authority under its war power." 426 at 855 n.18.; see, *e.g.*, *United States* v. *Onslow Cnty. Bd. of Educ.*, 728 F.2d 628, 640 (4th Cir. 1984) ("[W]e believe that the doctrine of *National League of Cities* has no applicability where Congress has acted under the War Powers."); *Jennings*, 589 F.2d at 938 (same).

In short, the Court has repeatedly refused to read the Constitution "as a self-defeating charter," by which implicit principles of state sovereignty would be permitted to override the express textual grants of military power that were a "prime purpose of the Federal Government's establishment." *Case*, 327 U.S. at 102; cf. *Lichter*, 334 U.S. at 781 ("[The war] power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments.") (citation omitted). Even when applying the express limitations contained in the Bill of Rights, this Court has repeatedly explained that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *FAIR*, 547 U.S. at 58 (citation omitted); see, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 767 (1996).

Those structural principles dictate the result here. Last Term, the Court held that the "plan of the Convention contemplated that States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'" *PennEast*, 141 S. Ct. at 2259 (citation omitted); see *ibid.* (explaining that "'the government of the United States is invested with full

and complete power to execute and carry out its'" eminent-domain authority) (citation omitted). The same logic applies in this case. If it is a "basic principle that a State may not diminish the eminent domain authority of the federal sovereign," *id.* at 2260, it is at least equally basic that the federal government can "determine, without question from any State authority, how the armies shall be raised," *Tarble's Case*, 80 U.S. (13 Wall.) at 408.

If anything, the case against state sovereign immunity is stronger here. The plan of the Convention is even clearer that the military powers were designed to prevent disruption from States, thereby promoting the security and survival of the Nation as a whole. Regardless of whether "eminent domain occupies a unique place in the constitutional structure," *PennEast*, 141 S. Ct. at 2267 (Barrett, J., dissenting); cf. *Katz*, 546 U.S. at 382 (Thomas, J., dissenting) (similarly discussing bankruptcy), the war powers surely do.

C. The Decision Below And Respondent's Supporting Arguments Are Incorrect

The state court of appeals did not address many of the textual, structural, or historical arguments above. And the reasoning it did adopt lacks merit, as does respondent's defense of the decision at the petition stage.

1. The state court of appeals suggested that USERRA was "not, strictly speaking, enacted pursuant to Congress's War Powers," but instead was adopted under the Necessary and Proper Clause. Pet. App. 11a. As explained above, however, USERRA contains a textually stated purpose to "encourage noncareer service in the uniformed services," 38 U.S.C. 4301(a)(1), which is a direct invocation of Congress's powers to "raise and support Armies" and "provide and maintain a Navy,"

U.S. Const. Art. I, § 8, Cls. 12-13. That suffices to support the statute without any reliance on the Necessary and Proper Clause. Cf. *FAIR*, 547 U.S. at 58 (explaining that a statute facilitating access for military recruiters would fall within the army and navy powers without separate resort to the Necessary and Proper Clause); *Robison*, 415 U.S. at 376 (similar for statute providing educational benefits for service members).

In any event, congressional reliance on the Necessary and Proper Clause in enacting USERRA would not change the outcome here. To the extent the provision at issue relies on that Clause, it is because the provision is "necessary and proper for carrying into Execution" the war powers. U.S. Const. Art. I, § 8, Cl. 18; see Pet. App. 11a-12a. And because the constitutional structure precludes States from invoking sovereign immunity against suits authorized under those powers, States cannot invoke sovereign immunity in cases like this one.

This Court's analysis in *PennEast* reinforces that understanding. The Court there upheld a statutory provision that authorized private condemnation suits against States pursuant to the "federal eminent domain power." 141 S. Ct. at 2259. Because Congress does not have a free-standing eminent-domain power (much less an additional power to authorize its exercise by private parties), the statute had to rest on other Article I powers. See *id.* at 2266-2267 (Barrett, J., dissenting) (indicating that the statute was supported by the Interstate "Commerce Clause—augmented by the Necessary and Proper Clause"). The Court allowed the suit to proceed not based on fine parsing of which Article I clauses were implicated, but because the States surrendered in the plan of the Convention their immunity to suits brought under the federal eminent-domain power. *Id.* at 2259.

The same reasoning applies to the powers at issue here. The state court of appeals did not take the counterintuitive position that States *relinquished* sovereign immunity with respect to suits authorized by the war powers yet somehow *retained* it with respect to suits that are necessary and proper for carrying into execution the war powers. It instead relied on this Court's holding in *Alden* that the Necessary and Proper Clause does not give Congress power to *abrogate* sovereign immunity where such immunity otherwise exists. See Pet. App. 12a. Here, however, no such abrogation was needed, because the States had already surrendered their immunity to suits in the relevant field.

2. The state court of appeals' other principal ground of decision is similarly mistaken. The court relied on "the broad principle that, under *Seminole Tribe* and *Alden*, state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation." Pet. App. 12a. But as noted, the contention in this case is not that USERRA *abrogated* state sovereign immunity; it is that, in the plan of the Convention, States *surrendered* their immunity to suits under statutes enacted pursuant to the war powers. See *PennEast*, 141 S. Ct. at 2259 ("[C]ongressional abrogation is not the only means of subjecting States to suit.").

The state court of appeals did not grapple with that argument. And while it acknowledged this Court's holding in *Katz* that States surrendered their sovereign immunity to bankruptcy suits in the plan of the Convention, the state court of appeals erroneously viewed that decision as turning on "particular attributes of *in rem* bankruptcy jurisdiction which are not present in this case." Pet. App. 12a. As an initial matter, proceedings to recover preferential transfers—the kind of action at

issue in *Katz*—are not necessarily "*in rem*" proceedings. 546 U.S. at 372 & n.10; see *id.* at 378. More significantly, as reiterated just last Term, *in rem* jurisdiction is not the only basis for concluding that the plan of the Convention involves a surrender of state sovereign immunity. See *PennEast*, 141 S. Ct. at 2258-2259.

For similar reasons, respondent errs (Br. in Opp. 8-13) in relying heavily on *Allen*. There, this Court held that Congress cannot use its Article I "authority to abrogate sovereign immunity from copyright suits" for the same reasons the Court had already held that Congress cannot use the same Article I authority to abrogate sovereign immunity from patent suits. 140 S. Ct. at 1001. That reasoning has no bearing on this case for two reasons: (1) the claim here is not that Congress used Article I authority to abrogate state sovereign immunity; and (2) no precedent of this Court has addressed the application of state sovereign immunity to statutes enacted pursuant to the war powers. Moreover, in discussing the plan-of-the-Convention analysis, the Court in *Allen* noted that the Bankruptcy Clause met that test in part because it "emerged from a felt need to curb the States' authority." *Id.* at 1002. The same is emphatically true of the war powers.

Respondent observes that, under *Seminole Tribe* and its progeny, the fact that a congressional power is "plenary and *exclusive*" does not mean that it entails a surrender of state sovereign immunity. Br. in Opp. 19 (citation omitted). But none of the powers that this Court considered in those cases (*e.g.*, the Indian Commerce Clause, the Interstate Commerce Clause, or the Intellectual Property Clause) give rise to anything resembling the structural inferences that support the argument against state sovereign immunity here. None

of those powers, for example, is expressly denied to the States; none necessarily operates for the benefit of the Nation as a whole; and none is essential to the survival and defense of the Union, a basic purpose for which the Constitution was adopted.

Respondent notes (Br. in Opp. 15-19) the absence of early federal statutes directly contemplating money-damages suits against States pursuant to the war powers. That provides little support for respondent's position. Although *Katz* relied in part on early legislation, the statutes the Court cited did not authorize the particular kind of bankruptcy suits at issue in *Katz*; they instead authorized federal courts to issue writs of habeas corpus directed at state officials to release debtors from prison, which the Court viewed as confirmation of the more general principle that States had surrendered their sovereignty in the bankruptcy field. 546 U.S. at 371, 374. As explained above, nineteenth-century habeas practice provides similar confirmation with respect to the war powers, see *Tarble's Case*, 80 U.S. (13 Wall.) at 408-409, as does longstanding legislation permitting the federal government to conscript members of state militias into the army, see *Selective Draft Law Cases*, 245 U.S. at 382-383.

In *PennEast*, moreover, the Court squarely rejected the argument that a lack of founding-era evidence of eminent-domain suits against States meant that States retained their sovereign immunity from such suits. 141 S. Ct. at 2261. The Court explained that in other cases where it held that States had surrendered sovereign immunity, it had "not insist[ed] upon examples from the founding era of federal suits against States." *Ibid.* Rather, it had "reasoned as a structural matter that such suits were authorized" based on States' surrender of

sovereignty in the relevant fields. *Ibid.* As explained above, the structure of the Constitution amply demonstrates such a surrender here.

3. At the petition stage, respondent advanced (Br. in Opp. 21-25) two other potential defenses, which it framed as reasons to deny review. The Court granted certiorari without adding questions presented. In any event, neither argument has merit.

Respondent first contended (Br. in Opp. 21-23) that state-law sovereign immunity independently bars petitioner's suit. Respondent appears not to have made that argument in the state court of appeals, Cert. Reply Br. 9-10, but it is, in any event, wrong. Whatever effect state-law immunity might have on state-law claims, it cannot bar the federal claim here. The constitutional structure divested States of their immunity to suits under federal statutes enacted pursuant to Congress's war powers, see pp. 18-27, *supra*, and Congress clearly exercised those powers to authorize state-court suits against States in USERRA, see 38 U.S.C. 4323(b)(2). Under a straightforward application of the Supremacy Clause, state courts cannot enforce a contrary state law. Cf. *Testa* v. *Katt*, 330 U.S. 386, 390-394 (1947).

Second, respondent contended (Br. in Opp. 23-25) that the provision of USERRA permitting suit in state court embodies unconstitutional commandeering. That is also mistaken. The "Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz* v. *United States*, 521 U.S. 898, 907 (1997) (emphasis omitted). Indeed, the Constitution "made the creation of lower federal courts optional," and thus necessarily contemplated that state courts

would hear suits under federal law. *Ibid.* Accordingly, while USERRA and other "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," such "federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York* v. *United States*, 505 U.S. 144, 178-179 (1992).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Preamble provides:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

2. U.S. Const. Art. I, § 8 provides:

[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow Money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the

Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. U.S. Const. Art. I, § 10 provides:

[1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact

with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

4. U.S. Const. Art. II, § 2, Cl. 1 provides:

The President shall be 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; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

5. 38 U.S.C. 4313 provides:

Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer

had not been interrupted by such service, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such

disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported

for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

6. 38 U.S.C. 4323 provides:

Enforcement of rights with respect to a State or private employer

(a) ACTION FOR RELIEF.—(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall—

(A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision.

(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) JURISDICTION.—(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) VENUE.—(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) REMEDIES.—(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) EQUITY POWERS.—The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

(f) STANDING.—An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) RESPONDENT.—In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) FEES, COURT COSTS.—(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) DEFINITION.—In this section, the term "private employer" includes a political subdivision of a State.