No. 20-603

IN THE
Supreme Court of the United States

LE ROY TORRES,

Petitioner,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Writ of Certiorari to the Court of Appeals of Texas, Thirteenth District

BRIEF OF SEPARATION OF POWERS CLINIC AT ANTONIN SCALIA LAW SCHOOL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is the Separation of Powers Clinic within The C. Boyden Gray Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. *Amicus* has an interest in studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

SUMMARY OF THE ARGUMENT

Over decades this Court has recognized that States entered the Union with their sovereignty intact subject only to narrow exceptions, including those claims for which the States necessarily "surrendered" their immunity in the "plan of the convention," a standard derived from *The Federalist* No. 81 in which Alexander Hamilton assured States that upon joining the Union they would retain their immunity from private suits for debts. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890); *see also Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 789 (1991) (observing that for more than 100 years the Court had understood the Eleventh Amendment to stand for the presupposition that "the

---

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent letters.

States entered the federal system with their sovereignty intact").

Amicus takes no independent position on the plan of the convention test as the proper framework for identifying the contours of the States' implied surrender of sovereign immunity or on the degree to which this Court's precedents have accurately applied that test. Rather, this brief aims to identify and catalogue the core principles from this Court's precedents that the Court has used to resolve assertions like Petitioner's that a particular claim falls within the plan of the convention standard. These principles underlie the Court's decisions in this area and help shed light on the Court's historical approach to resolving State sovereign immunity claims consistent with understandings from the time period of the drafting and ratification of the U.S. Constitution. *See Alden v. Maine*, 527 U.S. 706, 713 (1999).

The general structural principle underlying the "plan of the convention" standard related to State sovereign immunity is the understanding that consistent with "the general practice of mankind" and "the attributes of sovereignty," the "government of every state in the union" is free from private suits without its consent. *Hans*, 134 U.S. at 12–13. And, therefore, absent State consent to surrendering aspects of their immunity in exchange for joining the Union and ratifying the U.S. Constitution, States retain their inherent sovereignty even within the federal system. *See id.* at 12–20; *see also id.* at 21 (Harlan, J., concurring) ("[A] suit directly against a state by one of its own citizens is not one to which the

judicial power of the United States extends ….”). This Court’s precedents have fleshed out the contours of the remainders of State sovereign immunity according to the following principles.

First, upon their ratification of the Constitution, States necessarily surrendered immunity from suits brought by the United States or by other States because providing a tribunal for resolution of such disputes is necessary for maintaining peace within the Union. *See* Part I.A, *infra*.

Second, although the Court has expressed skepticism that the United States can broadly delegate its freestanding power to sue States, the Court has authorized the United States to delegate its condemnation power to private actors, which the Court described as an inherent and traditional aspect of eminent domain. *See* Part I.B, *infra*. For immunity purposes, such a suit is essentially treated as one brought by the United States itself.

Third, Court precedent suggests there is a strong presumption that States did not surrender their immunity from purely private lawsuits. *See* Part I.C, *infra*. *The Federalist* No. 81, on which the Court relied in *Hans v. Louisiana* for its “plan of the convention” framework, itself singled out lawsuits by “individuals” as ones for which States would retain immunity.

Fourth, the Court has authorized private suits in the bankruptcy context, although the Court has stated that the Bankruptcy Clause is less an “exception” to the rule of immunity and more a *sui generis* scenario where the finding of a surrender of

immunity is "good-for-one-clause-only." *See* Part I.D, *infra*.

Fifth, when analyzing whether any other clause may have effected a surrender of immunity, the exclusively federal nature (*vel non*) of the constitutional provision at issue has not been relevant. The Court has distinguished States' surrender of their sovereign power to *regulate* a certain realm from a surrender of their sovereign *immunity* from private suits Congress authorizes in that same realm. *See* Part I.E, *infra*.

Applying these principles here demonstrates that Petitioner has not overcome the strong presumption that Texas retains its sovereign immunity. *See* Part II, *infra*. The case is brought by a private individual, not acting as a delegatee of the United States. The case therefore falls within the Court's strong presumption of sovereign immunity from purely private suits, which has thus far been overcome only by the "good-for-one-clause-only" scenario presented by bankruptcy claims, which Petitioner does not raise here. Petitioner contends that the war powers clauses should be recognized as another "unique" exception because they are exclusively and broadly federal, but the Court's decisions have rejected that basis for finding a surrender of immunity.

Petitioner's approach, whether viewed broadly or narrowly, would open the door to suits contrary to the Court's precedents and historical understanding, including suits involving debts owed by the States to private individuals and foreign nations. *See* Part III, *infra*. The Court has previously concluded, however,

that such a finding of implied surrender of sovereign immunity would upset the balance of power between the federal government and the States. As the Court has long recognized, there are other mechanisms available to hold States accountable, including a suit by the United States itself, an avenue expressly authorized here by the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See* Part IV, *infra*. There is no reason in this case for the Court to deviate from its "plan of the convention" framework for evaluating the contours of State sovereign immunity.

ARGUMENT

I. Principles that the Court Established in Its "Plan of the Convention" Decisions.

When "the States entered the federal system," they did so "with their sovereignty intact." *Blatchford*, 501 U.S. at 789. The Court has recognized, however, that "a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021).[2]

But the Court's decisions applying the "plan of the convention" test have not always followed a straight line. For almost a century after the controversy

---

[2] *Amicus* does not address other recognized mechanisms by which a State can be sued by a private party, such as: (1) by unequivocally consenting to suit or (2) via a federal statute properly authorized by the Fourteenth Amendment. *See PennEast*, 141 S. Ct. at 2258.

surrounding *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court did not find any "plan of the convention" surrenders for suits against non-consenting States. Then in the late nineteenth century, the Court recognized that States surrendered their immunity from suits by the United States or by other States, *see* Part I.A, *infra*, but the Court rejected claims that States inherently surrendered immunity from suits brought by any other parties, *see Hans*, 134 U.S. at 21 (citizen suing his own State for debts); *Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934) (foreign country suing State for debts).

In 1989, a plurality of this Court held that *Congress* could invoke the Commerce Clause to abrogate States' immunity, opening the door to widespread private suits against States. *See Pennsylvania v. Union Gas Co.*, 491 US. 1, 23 (1989). But this was short lived, as the Court soon overruled *Union Gas* and held that *no* Article I power was sufficient to abrogate States' immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66, 72–73 (1996); *Alden*, 527 U.S. at 712.

In 2006, the Court further added to its State sovereign immunity jurisprudence by determining that the Constitution's enumeration of congressional power to establish bankruptcy laws abrogated State sovereign immunity from private bankruptcy suits to the extent that Congress provides States should be subject to such suits. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006). Although the Court has subsequently declined to expand that reasoning to other categories of congressional Article I authority such as copyright law, *see Allen v. Cooper*, 140 S. Ct.

994, 1001–07 (2020), just last year the Court found that the States consented to the exercise of federal eminent domain power "in its entirety" in "the plan of the Convention" including the delegation of that power to private actors, *see PennEast*, 141 S. Ct. at 2263.

Taken together, the Court's "plan of the convention" decisions establish a framework of principles that can guide the Court's application of the relevant precedent in cases like this one. Here, application of that "plan of the convention" framework suggests that the States did not surrender their immunity from suits under the war powers clauses as a general matter. Therefore, the "plan of the convention" principles detailed below suggest that Petitioner's request for recovery from the State is barred by the State's inherent immunity from private suits.

A. States Necessarily Surrender Immunity from Suits Brought by the United States or by Other States.

Because the Court has viewed a "plan of the convention" surrender as an implied, rather than express, waiver of immunity, the Court has held that only "compelling evidence that the Founders thought such a surrender inherent in the constitutional compact" will satisfy the "plan of the convention" test. *Blatchford*, 501 U.S. at 781.

This Court has recognized such a "surrender" for (1) "suits by other States" and (2) suits "by the Federal Government." *PennEast*, 141 S. Ct. at 2258. The rationale is that such suits "play an indispensable role

in maintaining the structural integrity of the constitutional design" by providing a forum for "the peaceful resolution of disputes between the States" and also those by "the United States against States." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997).

"The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union." *Monaco*, 292 U.S. at 328. Without such a forum, there would be "a trial of physical strength between the government of the Union" and the non-consenting State, or between two States—a scenario that "has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern." *United States v. Texas*, 143 U.S. 621, 641 (1892).

For nearly a century now, majority and dissenting opinions of this Court have agreed that States inherently surrendered their immunity in the "plan of the convention" for suits by the United States and by other States. *See, e.g.*, *PennEast*, 141 S. Ct. at 2258 (majority op.); *id.* at 2267 (Barrett, J., dissenting); *Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1495 (2019); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999); *Coeur d'Alene*, 521 U.S. at 275; *Seminole*, 517 U.S. at 71 n.14 (majority op.); *id.* at 154 (Souter, J., dissenting); *Union Gas*, 491 U.S. at 33 (Scalia, J.,

concurring in part and dissenting in part); *Monaco*, 292 U.S. at 328–29.[3]

Notably, this surrender of State sovereign immunity inherent to the Constitution's federal structure does not apply to waive immunity from suits brought by every entity that might be labeled a "sovereign." For example, there is no inherent constitutional State waiver of immunity from suits brought by foreign nations because such governments are "outside the structure" of the Constitution and thus are unlike "other States who have … accepted that plan" or "the United States as the sovereign which the Constitution creates." *Monaco*, 292 U.S. at 330; *see also Hyatt*, 139 S. Ct. at 1497 ("[T]he Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns.")

B. On Rare Occasions, a Private Party Suit May Be Treated As a Suit by the United States.

In *Blatchford*, this Court expressed "doubt" that the United States's "sovereign exemption can be delegated" to private parties, as the States' consent to suit "inherent in the convention" meant suits "by the

---

[3] Although it was not until 1904 that this Court expressly addressed the propriety of States suing non-consenting States, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), such suits were common and uncontroversial dating back to the earliest days of the Republic, *see, e.g.*, *New York v. Connecticut*, 4 U.S. (4 Dall.) 1 (1799); *New Jersey v. New York*, 30 U.S. (5 Pet.) 284 (1831); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

United States," not "by anyone whom the United States might select." 501 U.S. at 785 (emphasis omitted). The Court did not, however, entirely foreclose the idea and assumed that it was "theoretically possible" Congress could transfer to private actors the United States's power to sue non-consenting States. *Id.* at 785–86.

This issue arose again in this Court's recent *PennEast* decision, where a private plaintiff invoked the United States's power to condemn property in which New Jersey had an interest, pursuant to a federal statute authorizing condemnation for purposes of building a pipeline. 141 S. Ct. at 2252, 2260. The parties agreed that the United States itself could sue New Jersey to condemn the property, but New Jersey claimed that the United States had improperly delegated that power to a private party. *Id.* at 2259–60.

This Court rejected New Jersey's objection, reasoning that "[f]or as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties," *id.* at 2255, and the "eminent domain power is inextricably intertwined with … the power to bring condemnation proceedings," *id.* at 2260. Taken together, this meant that there was a longstanding recognition that the federal government's own eminent domain power (from which States surrendered their immunity) *includes* the power to let private parties bring condemnation suits as the "delegatee" of the federal government.

Thus, the question before the Court in *PennEast* was not "whether the United States can delegate its ability to sue States" in a standalone sense "divorced" from the underlying federal power at issue. *Id.* at 2262. Rather, *PennEast* was about whether the United States's power to sue a State *inherently included* the power to authorize a private party to bring suit as the federal government's delegatee.

For immunity purposes, such "federal delegatee" suits are best understood as brought by the United States itself, given that the private party's authority to sue derives directly from the federal government's own power to sue a non-consenting State.[4]

C. The Court Has Concluded There Is a Strong Presumption That States Did Not Surrender Immunity from Purely Private Suits.

Setting aside the rare category of *PennEast* "delegatee" suits against States, the Court has established an especially strong presumption that

---

[4] A seemingly analogous scenario might be *qui tam* suits, but this Court has declined to answer "whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment." *Vt. Agency Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774–75, 787 (2000). Circuit courts are divided on the matter, although none has addressed it post-*PennEast*. *Compare United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48, 50 (4th Cir. 1992) (rejecting State's sovereign immunity because "the United States is the real party in interest"), *with United States ex rel. Foulds v. Tex. Tech. Univ.,* 171 F.3d 279, 295 (5th Cir. 1999) (holding that sovereign immunity barred the *qui tam* action); *and Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011) (same).

non-consenting States did not surrender immunity from *private* suits.

The Court's 1989 *Union Gas* plurality opinion opined that the Commerce Clause gave Congress broad power to authorize private suits against States. 491 U.S. at 19–20. Because that determination was reversed only seven years later, the case's most memorable portion derives primarily from Justice Scalia's partial dissent in which he posited that there is no "authority to entertain a suit brought by *private parties* against a State without consent." *Id.* at 38 (Scalia, J., concurring in part and dissenting in part) (emphasis added). Invoking the "plan of the convention" framework, Justice Scalia explained that the "inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual States, and between the individual States themselves, is incomparably greater … than the need for a tribunal to resolve disputes on federal questions between individuals and the States." *Id.* at 33. In Justice Scalia's view, suits brought by private persons could never have been so important to the peace of the Union that States could be said to have inherently surrendered immunity from such suits.

The Federalist No. 81 made the same distinction by assuring States that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of *an individual* without its consent." *The Federalist* No. 81 (A. Hamilton) (emphasis added). John Marshall similarly explained during the constitutional debates: "'With respect to disputes between a state and the citizens of another state, … I hope no gentleman will think that a state will be called at the bar of the

federal court.'" *Hyatt*, 139 S. Ct. at 1495 (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed. 1876)).

When *Seminole* addressed the *Union Gas* plurality opinion, the new majority adopted Justice Scalia's *Union Gas* framework, holding that Congress lacks power under Article I to "authorize[] … suits by private parties against unconsenting States." 517 U.S. at 72. Three years later in *Alden*, the Court reaffirmed that "the powers delegated to Congress … do not include the power to subject nonconsenting States to private suits for damages." 527 U.S. at 712. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity," and the Court indicated that the State ratifying conventions had "made clear" that they "understood the Constitution as drafted to preserve the States' immunity from private suits." *Id.* at 715, 718. The Eleventh Amendment, *Alden* explained, "acted … to restore" this "original" understanding of the "constitutional design" post-*Chisholm*. *Id.* at 722; *see also id.* at 724 ("The … natural inference is that the Constitution was understood … to preserve the States' traditional immunity from private suits.").

The Court has subsequently rejected additional private suits against non-consenting States premised on other Article I powers. *See Allen*, 140 S. Ct. at 1002 (holding that Congress's "power" granted "under Article I stops when it runs into sovereign immunity"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999). These cases

make clear that there is a strong presumption that States did not surrender their immunity from private lawsuits in the plan of the convention.

D. The Court Found that Bankruptcy Suits Present a Unique Circumstance.

In *Katz*, this Court held that the Bankruptcy Clause authorized Congress to subject non-consenting States to private bankruptcy suits. 546 U.S. at 379. Rather than characterize this as an "exception" to the rule of immunity, the Court instead held that bankruptcy is different in kind from all other powers granted in Article I.

"[E]verything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism." *Allen*, 140 S. Ct. at 1002. That exceptionalism is based on several aspects that the Court held are not present in any other Article I power.

First, there is the "singular nature" of bankruptcy jurisdiction, *Katz*, 546 U.S. at 369 n.9, which "is, and was at the Founding, 'principally *in rem*'—meaning that it is 'premised on the debtor and his estate, and not on the creditors' (including a State)," *Allen*, 140 S. Ct. at 1002 (quoting *Katz*, 546 U.S. at 369–70). For that reason, "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction" over private lawsuits. *Katz*, 546 U.S. at 362.

Second, there was the Bankruptcy Clause's "unique history," *id.* at 369 n.9, which involved

concerns about "competing sovereigns[] interfer[ing] with [a] debtor's discharge." *Id.* at 373. *Allen* held that the Framers *intended* to waive the States' sovereign immunity against bankruptcy suits, for the purpose of achieving a uniform national bankruptcy practice. *Allen*, 140 S. Ct. at 1002. This made it "*sui generis*—again, 'unique'—among Article I's grants of authority." *Id.*

Third, "the Bankruptcy Clause had a yet more striking aspect, which further separates it from any other," which is that the Court concluded that "the Bankruptcy Clause itself did the abrogating" of immunity, without the need for subsequent implementation by Congress. *Id.* at 1003 (emphasis omitted) (quoting *Katz*, 546 U.S. at 379). This bolstered the view that States had concretely surrendered their immunity from such suits in the "plan of the convention" based on the language of the Constitution's Bankruptcy Clause itself. *Id.* In short, the Court has "viewed bankruptcy as on a different plane, governed by principles all its own," and thus is "good-for-one-clause-only." *Id.*

E. States' Surrender of Sovereign Policymaking Power Does Not Equate to a Surrender of Sovereign Immunity.

The Court's pronouncement that bankruptcy is unique has not stopped litigants and scholars from arguing that other constitutional clauses likewise effected a surrender of States' immunity. These arguments typically rest on the premise that the exclusive and broad federal policymaking power over

a certain realm implies the States surrendered their sovereign immunity in that realm, as well.[5]

But that logic was expressly rejected in *Seminole*: "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72. And the Court reaffirmed that principle in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which involved maritime law: "'[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area … that is under the exclusive control of the Federal Government.'" *Id.* at 767 (second alteration in original).

Subsequent cases have followed suit. For example, the Court has held that the Indian Commerce Clause gives Congress "plenary and exclusive" power to legislate regarding the Indian tribes, *United States v. Lara*, 541 U.S. 193, 200 (2004), but the Court has held that the very same Indian Commerce Clause does *not* provide Congress with the power to abrogate State sovereign immunity, *see Seminole*, 517 U.S. at 57–66. Similarly, the Patent Clause has been interpreted as providing Congress with exclusive power over

---

[5] *See, e.g.*, Jeffrey M. Hirsch, *War Powers Abrogation*, 89 GEO. WASH. L. REV. 593, 624–25 (2021) (war powers clauses); Alexander Schultz, *Sovereign Immunity and the Two Tiers of Article III*, 29 GEO. MASON L. REV. 287, 363–66 (2021) (Ambassador and Admiralty Clauses).

patents,[6] but the Court has held that Congress cannot abrogate States' sovereign immunity protections via that same clause, *see Fla. Prepaid*, 527 U.S. at 636.

The Court has thus been careful to avoid "conflat[ing] two distinct attributes of sovereignty: the authority of a sovereign to enact legislation regulating its own citizens, and sovereign immunity against suit by private citizens. … These two attributes of sovereignty often do not run together." *Katz*, 546 U.S. at 384 & n.2 (Thomas, J., dissenting); *see also Seminole*, 517 U.S. at 72.

* * *

These principles explain the outcomes of each of the Court's still-binding decisions on "plan of the convention" surrenders of immunity.

II. Under This Current Doctrine, Texas Retains Its Immunity from Petitioner's Suit.

These principles demonstrate that Texas retains immunity from Petitioner's suit. The suit is clearly not brought by the United States or another State. *See* Part I.A, *supra*. And Petitioner never claims he is suing as any type of delegatee of the United States, let

---

[6] *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 156 (1989); *The Federalist* No. 43 (J. Madison) ("The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases….").

alone one with historic roots dating to the Founding. *See* Part I.B, *supra*.

Petitioner's suit thus falls within the category of those private lawsuits against which there is a strong presumption that Texas did not surrender its sovereign immunity. *See* Part I.C, *supra*. As noted above, with the exception of the overtaken *Union Gas* plurality, the Court has concluded that private suits brought against non-consenting States under a statute passed pursuant to Congress's Article 1, Section 8 powers do not fall within the scope of abrogated State sovereign immunity.

In *Katz* the Court did hold that the Bankruptcy Clause itself—without any implementing statute from Congress—worked a surrender of States' immunity. 546 U.S. at 379. But, as noted above, the Court has described that decision as "good-for-one-clause-only." *Allen*, 140 S. Ct. at 1003. Recognizing another clause (or clauses) as likewise working a surrender of immunity would contradict *Allen*.

Moreover, the bases for labeling the Bankruptcy Clause unique do not map directly onto the war powers clauses. The Court held that bankruptcy is unique primarily because of its *in rem* nature, which does not apply to this suit seeking standard employment-law remedies from Texas. *Katz*, 546 U.S. at 369 n.9. The Court also held that a "striking aspect" of the Bankruptcy Clause, "which further separates it from any other," is that "the Bankruptcy Clause itself did the abrogating," without the need for subsequent statutory implementation. *Allen*, 140 S. Ct. at 1002–03 (emphasis omitted). But none of the war powers

clauses appears to contain language that would indicate a direct abrogation of sovereign immunity, nor do any of those clauses envision litigation in the way that the Bankruptcy Clause does.

Petitioner's argument seems to rest primarily on the "exclusive" and "broad" nature of the war powers, Cert.Pet.22, 23, 25; Pet.Br.3, 18, 23–25, and Petitioner invokes *The Federalist* No. 32, which describes three categories where the federal government has exclusive regulatory authority.[7]

But as noted above, the Court has held that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole*, 517 U.S. at 72; *see also* Part I.E, *supra*. Sovereignty is a divisible construct, and sovereign *regulatory* power "is a distinct attribute of sovereignty" that "is discussed, for example, in a completely separate portion of the Federalist than immunity from suit." *Katz*, 546 U.S.

---

[7] Those categories are: (1) "where the Constitution in express terms granted an exclusive authority to the Union" (Hamilton cites Congress's exclusive power to regulate the District of Columbia as an example); (2) "where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority" (he cites imposts and duties as an example); and (3) "where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant" (he cited Congress's power to establish a uniform rule of naturalization as an example). *The Federalist* No. 32 (A. Hamilton).

at 384 n.2 (Thomas, J., dissenting) (contrasting *The Federalist* Nos. 32 and 81).

The Court has also refuted Petitioner's argument that the *breadth* of the federal government's regulatory powers is relevant. *See* Cert.Pet.25; Pet.Br.3. For example, the Court has interpreted the Commerce Clause as authorizing an exceedingly wide range of laws but held in *Seminole* that the Clause does not grant Congress the power to authorize suits against States.

Petitioner seems to argue that if States cannot be sued in this context, it would mean that Congress's war powers would not be "'complete[].'" Pet.Br.39. But that tracks the now-rejected rationale from the *Union Gas* plurality: "Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because congressional power thus conferred would be incomplete without the authority to render States liable in damages," then it "must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary." 491 U.S. at 19–20.[8] As noted

---

[8] Justice Brennan, who authored the *Union Gas* plurality, had argued in prior separate opinions that States lack immunity from suits authorized by *any* of Congress's Article I powers. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 279 (1985) (Brennan, J., dissenting); *Quern v. Jordan*, 440 U.S. 332, 349 n.1 (1979) (Brennan, J., concurring); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457–58 (1976) (Brennan, J., concurring); *Yoemans v. Kentucky*, 423 U.S. 983, 984–85 (1975) (Brennan, J., dissenting from denial of certiorari); *Edelman v. Jordan*, 415 U.S. 651, 687–88 (1974) (Brennan, J., dissenting).

above, the Court expressly rejected that view in numerous subsequent decisions. *See* Part I.E, *supra*.

Thus, although it is certainly true that States cannot "make war," Pet.Br.24, or "raise and support Armies," SG.Br.20, Petitioner's arguments about the war powers are not ones the Court has previously accepted as "compelling evidence" that States "inherent[ly]" surrendered their sovereign immunity. *Blatchford*, 501 U.S. at 781.

III. Petitioner's Arguments Raise Significant Federalism Concerns.

Finding an implied surrender of sovereign immunity has significant ramifications for the separation of powers and federalism. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Fed. Mar. Comm'n*, 535 U.S. at 769. Thus, by "guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'" *Id.*; *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

Adopting Petitioner's arguments—whether viewed broadly or narrowly—would upset this important balance. As noted above, the Court has long rejected the broadest view of Petitioner's argument—*i.e.*, that Congress's powers are not "'complete[]'" unless it can abrogate States' immunity, Pet.Br.39—because

Congress could make that claim for all of its Article I, § 8 powers and thereby effect a dramatic shift in power from States to the federal government. Even if Petitioner's position were narrowed only to those areas listed as exclusively federal in *The Federalist* No. 32—like immigration law or regulating the District of Columbia—Congress could authorize suits against States that would be contrary to the Court's historic understanding. For example, Congress could authorize any resident of the District of Columbia to sue any State for debts owed, even though *The Federalist* No. 81 relied upon in *Hans v. Louisiana* assured States they would not face suits for debts.

Even if Petitioner's views were limited just to statutes passed by Congress pursuant to its war powers, there would still be serious federalism concerns. Petitioner's description of the breadth of powers with respect to which he believes Congress could abrogate immunity pursuant to its war powers is far-reaching. *See* Pet.Br.9–10. For example, Petitioner contends that Congress's war powers "necessarily include[] the authority to provide for proceedings to definitively resolve any legal entanglements between states and foreign sovereigns, foreign citizens, American citizens, and American soldiers." Cert.Pet.23. Petitioner points to "British creditors" suing States as an example. Cert.Pet.24. But permitting British creditors to sue States would appear to directly contradict the text of the Eleventh Amendment itself (which extends to "any suit … by Citizens or Subjects of any Foreign State"), as well as *The Federalist* No. 81, whose purpose was to convince States they would not face suits for debts owed. And

allowing foreign sovereigns to sue States would contradict *Monaco*. *See* 292 U.S. at 330. In none of the Court's prior decisions finding immunity has it suggested that Congress nonetheless could have eliminated immunity for a wide range of suits if only Congress had cited its war or foreign-relations powers.

The availability of such a wide range of suits would substantially alter the federal-State balance and expose States to crippling financial consequences. Slightly altering the Court's rhetorical question in *Hans*: "Suppose that [C]ongress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued" by foreign citizens and nations seeking damages pursuant to any statute authorized by any of Congress's broad war powers, "can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face." *Hans*, 134 U.S. at 15.

Even a further-narrowed interpretation of Petitioner's theory—focusing only on raising and supporting troops—would provide Congress with powers contrary to the Court's historical understanding. If Congress can eliminate States' immunity for anything that causes individuals to be less likely to join or stay in the military, *see* Pet.Br.42 ("If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces"), or causes soldiers to be distracted, *see* Pet.Br.43 (citing morale concerns), then Congress could abrogate States' immunity for almost any cause

of action brought by past, present, or potential soldiers, *see* Pet.Br.26–27. For example, Congress could authorize all current and former members of the military to sue States for debts owed, on the premise that these debts distract soldiers from their military duties. But like the example of English creditors above, this would contradict *The Federalist* No. 81.

Finally, Petitioner's position taken to its logical end would suggest that the President himself could directly abrogate States' immunity because the "war powers … include powers vested in the President" under Article II. Pet.Br.5. But *Blatchford* held that "*Congress*" would need to speak "clearly" to subject a State to liability, even assuming there had been a plan of the convention surrender of immunity in the first place. 501 U.S. at 786 (emphasis added).

IV. The Court Has Identified Appropriate Mechanisms for Holding States Accountable.

The Court has recognized that there are "other methods of ensuring the States' compliance with federal law." *Seminole*, 517 U.S. at 71 n.14. For example, the "Federal Government can bring suit in federal court against a State." *Id.*; *see also* Part I.A, *supra*. Indeed, the USERRA expressly authorizes such a suit. 38 U.S.C. § 4323. The federal government's brief acknowledges this statute without contending that the Act would provide inadequate relief. SG.Br.6. And a suit by the United States would perhaps be even more likely to result in consequential change than any suit by a private individual. *See*

Union Gas, 491 U.S. at 33 (Scalia, J., concurring in part and dissenting in part).

More, where a State official's action is still ongoing, an individual may be able to "bring suit against [the] state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole*, 517 U.S. at 71 n.14 (citing *Ex Parte Young*, 209 U.S. 123 (1908)); *see also Alden*, 527 U.S. at 757. And for completed violations of certain rights, the individual could seek damages under 42 U.S.C. § 1983. *See Union Gas*, 491 U.S. at 34 (Scalia, J., concurring in part and dissenting in part). Further, there are often State-law remedies available even in the absence of any federal-law remedy. *See, e.g.*, Resp.Br.5.

Finally, sovereign immunity is inherently cabined. It is a privilege only of States and arms of States, not municipalities or cities. *Alden*, 527 U.S. at 756. This substantially narrows the scope of individuals whose claims would be foreclosed by sovereign immunity.

CONCLUSION

For the foregoing reasons, *amicus* concludes that the Court should affirm the judgment of the Texas Court of Appeals for the Thirteenth Judicial District.

Respectfully submitted,

JENNIFER L. MASCOTT
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR.
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

March 9, 2022