



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LE ROY TORRES, )

4 Petitioner, )

5 v. ) No. 20-603

6 TEXAS DEPARTMENT OF PUBLIC SAFETY, )

7 Respondent. )

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10 Washington, D.C.

11 Tuesday, March 29, 2022

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13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 10:00 a.m.

16

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is participating remotely this morning.

We'll hear argument this morning in Case 20-603, Torres versus Texas Department of Public Safety.

Mr. Tutt.

ORAL ARGUMENT OF ANDREW T. TUTT

ON BEHALF OF THE PETITIONER

MR. TUTT: Thank you, Mr. Chief Justice, and may it please the Court:

The Constitution gave Congress the power to raise and support Armies, and the reason for that grant was to ensure the survival of the nation. The Constitution provided Congress with the tools necessary to fulfill its preeminent national defense function, and the ability to authorize lawsuits, including suits against the states themselves, are among those vital tools.

I'd like to make two additional points this morning. First, the war powers, including the Army and Navy clauses, are unique and fundamentally different from the Constitution's

1 other grants of power, unique textually, unique  
2 structurally, and unique historically. The  
3 states could not have read the Constitution  
4 seeing the federal structure it created and  
5 believed they would retain sovereign authority  
6 to interfere with the federal government's  
7 preeminent national defense function.

8           Second, USERRA's protections are  
9 crucial in light of the structure of the modern  
10 military. At the turn of the 20th Century, it  
11 became apparent the United States would be --  
12 would be required to wage war on a global scale  
13 and at a moment's notice and that this would  
14 require an immense fighting force. Rather than  
15 create a massive peacetime standing army, the  
16 United States instead created a reserve  
17 component, trained soldiers who would keep their  
18 civilian jobs but would be ready to respond at a  
19 moment's notice to unpredictable global threats.

20           To convince soldiers to join that  
21 force and to ensure that soldiers in it would be  
22 willing to risk significant injury without  
23 hesitation, Congress promised these soldiers  
24 that they would not be discriminated against on  
25 the basis of their military service or

1 service-connected injuries. USERRA and the  
2 cause of action that makes its rights real is  
3 not a tangential or peripheral exercise of the  
4 war powers but a core exercise of the United  
5 States' power to raise and support its Army to  
6 fulfill its indispensable first task, protecting  
7 the national security.

8 I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: Counsel, what  
10 do you do about our decision in Allen, which  
11 seemed to suggest that Katz, on which you rely,  
12 was quite specific and limited to that context?

13 MR. TUTT: Your Honor, Allen does say  
14 that, typically, the -- this is a limited --  
15 that sovereign immunity is limited, but, as  
16 Allen pointed out, Allen is about abrogation,  
17 not a Plan of the Convention waiver.

18 I would also point out that Allen  
19 acknowledged that --

20 JUSTICE KAGAN: I don't quite  
21 understand the distinction that you're making  
22 between those two things. Could you -- could  
23 you explain that, why you think that these are  
24 in two separate buckets?

25 MR. TUTT: Well, the Court has -- the

1 Court has explicitly treated them as -- as  
2 separate buckets, Your Honor. In PennEast, the  
3 Court made clear that abrogation, the taking  
4 away of sovereign immunity, is something  
5 distinct from a waiver in the Plan of the  
6 Convention. And so -- and I could -- and I -- I  
7 could speak more to that, but that -- I think  
8 that it is a distinction in this Court's  
9 precedents and it's -- and it's an important  
10 distinction.

11 The Fourteenth Amendment permits  
12 abrogation. None of the Article I powers have  
13 been found to permit abrogation. But the  
14 eminent domain power and the bankruptcy power  
15 were both -- have both been found to be Plan of  
16 the Convention waivers because the federal --  
17 yes, Your Honor.

18 JUSTICE BARRETT: Well, Mr. Tutt, both  
19 the eminent domain power and the bankruptcy  
20 power are inextricably intertwined, to use  
21 PennEast's language, with judicial proceedings.  
22 I mean, the eminent domain power, there was  
23 evidence that the United States had delegated  
24 this power to private parties since the  
25 beginning, and the way to accomplish eminent

1 domain is through a condemnation action.  
2 Similarly, with bankruptcy, bankruptcy  
3 proceedings are tied to litigation, and that is  
4 obviously not true of the war power. Litigation  
5 is not its central office. So why isn't that a  
6 distinction here?

7 MR. TUTT: First, I would say that I  
8 think eminent domain is not necessarily  
9 inextricably intertwined with judicial  
10 proceedings. I think, in PennEast, the Court  
11 pointed out that eminent domain has long been  
12 exercised without condemnation actions but  
13 simply by making a taking.

14 But even accepting that it is --

15 JUSTICE BARRETT: Well, you rely  
16 pretty heavily on condemnation actions.

17 MR. TUTT: Yes, Your Honor. So even  
18 accepting that those two powers have a -- a  
19 unique relationship with judicial proceedings,  
20 the -- that is not what actually motivated the  
21 decisions in those cases. I think the -- I  
22 think the better way to think about those two  
23 cases and the war powers is that those powers  
24 are not complete unless, in a very ancillary  
25 way, suits against the states are authorized.



1 JUSTICE GORSUCH: Well --

2 MR. TUTT: So it's not --

3 JUSTICE GORSUCH: -- what do we do  
4 about the fact that in, like, the bankruptcy  
5 context, there is a long history, and, here, by  
6 contrast, it appears that the first time  
7 Congress purported to authorize suits against  
8 states was, I believe, 1974?

9 MR. TUTT: Your Honor, the -- the --  
10 we have suits that are -- that go back much  
11 further. We -- we -- we point to the category  
12 of suits that were thought to be contemplated by  
13 the Constitution itself for the peace treaty,  
14 the Treaty of Paris. We also have the suits  
15 against states that were authorized in 1833 in  
16 habeas corpus. Those were official capacity  
17 actions against state officers.

18 JUSTICE GORSUCH: I understand habeas  
19 corpus, but this is a little bit different than  
20 --

21 MR. TUTT: It --

22 JUSTICE GORSUCH: -- than habeas  
23 corpus, right?

24 MR. TUTT: -- it is. It is, Your  
25 Honor.

1 JUSTICE GORSUCH: So outside of habeas  
2 corpus and things like -- 1974, is that about  
3 right?

4 MR. TUTT: That's the first time that  
5 private damages actions were deemed by the  
6 political branches of the United States to be  
7 necessary to the effectual exercise of the war  
8 powers. But --

9 JUSTICE GORSUCH: Not exactly the most  
10 contemporaneous evidence of the original meaning  
11 of the Constitution and the Plan of Convention,  
12 is it, counsel?

13 MR. TUTT: It is not, and we are  
14 not -- and we are not relying on -- on that.  
15 What we're relying on is ultimately primarily  
16 the text and structure of the Constitution and  
17 the original understanding that the states must  
18 have had at the time that the Constitution was  
19 ratified. That is our primary submission.

20 But even --

21 JUSTICE KAGAN: Can you give a little  
22 content on that? I mean, just complete the  
23 sentence for me. The war powers are different  
24 because what?

25 MR. TUTT: The war powers are

1 different because they are conferred  
2 unconditionally and without qualification. The  
3 states are divested, textually divested of the  
4 power to interfere or en- -- engage in actions  
5 that are -- that are at variance with the war  
6 powers, that endanger --

7 JUSTICE KAGAN: So, in Seminole Tribe,  
8 of course, which was the case that started all  
9 of this off, we dealt with the Indian commerce  
10 clause, and the Indian commerce clause is  
11 similarly an entirely federal power. It doesn't  
12 have the explicit divestment of the states, but  
13 it has everything else.

14 And the Court was very clear about  
15 this. It said the Indian commerce clause  
16 represented -- I'm going to quote some language  
17 here because I think it just applies perfectly  
18 to this case -- a virtual total cessation of  
19 authority by the states, that relations with the  
20 Indian tribes were the exclusive province of  
21 federal law, and that the Constitution had  
22 divested the states of virtually all authority  
23 over Indian commerce and the Indian tribes. And  
24 yet we said none of that mattered.

25 So why should it matter here?

1                   MR. TUTT: Let me give you -- let me  
2 give you three reasons that it doesn't matter  
3 here.

4                   The first is that Seminole Tribe is an  
5 abrogation case. It was considering this in the  
6 context of do these powers allow for the taking  
7 away of power in the same way as Bitzer. So  
8 it's not a Plan of Convention waiver case.

9                   Now --

10                  JUSTICE KAGAN: Yeah, I -- I don't  
11 know. I mean, I asked you about this before,  
12 and I'm -- I'm -- I'm still trying to figure out  
13 the response a little bit. Maybe I'm just  
14 having a block here. But it seems to me that  
15 both are essentially asking the same question,  
16 which is that they're looking at the founding  
17 period and they're saying what would the states  
18 have expected. And you -- you know, I don't  
19 really see the difference.

20                  MR. TUTT: Let me give you -- let me  
21 give you two more distinctions. One is that in  
22 PennEast, the Court made very clear that it was  
23 the exclusivity of eminent domain and the need  
24 for a complete eminent domain power in the  
25 federal sovereign that was what would have made

1 the states understand that federal eminent  
2 domain permitted suits against the states.

3 So this Court has decided cases that  
4 are -- that -- whose reasoning is somewhat in  
5 tension with Seminole Tribe's reasoning about  
6 exclusivity.

7 JUSTICE KAVANAUGH: What's your third?

8 MR. TUTT: My third is that Indian  
9 commerce is exclusive, but it's really exclusive  
10 with respect to the tribes. And something  
11 unusual was being done in Seminole Tribe, which  
12 it was trying to use the Indian commerce power  
13 to regulate the states, which is not the sense  
14 in which this Court has thought of that power as  
15 exclusive.

16 And the state -- the Court has said  
17 that the United States has plenary authority to  
18 divest the tribes of any attributes of  
19 sovereignty. So, when actually regulating the  
20 Indian tribes, exclusivity does permit suits to  
21 be brought.

22 JUSTICE GORSUCH: Counsel, I --

23 JUSTICE KAVANAUGH: How important is  
24 --

25 JUSTICE GORSUCH: Oh, please, go

1 ahead.

2 JUSTICE KAVANAUGH: No.

3 JUSTICE GORSUCH: All right. I --  
4 I -- I'm not sure I followed that answer, and --  
5 and maybe this is what Justice Kavanaugh was  
6 going to say and probably should be saying  
7 rather than me.

8 The -- the -- I had understood the  
9 Indian commerce clause -- and you can correct me  
10 if I'm wrong -- to -- to give Congress a lot of  
11 authority with respect to tribes in lieu of what  
12 normally might be local authority, state  
13 authority. So it does speak to state authority,  
14 but -- but perhaps you -- you have a different  
15 view may -- maybe. I'm just a little confused.

16 MR. TUTT: The -- the -- Congress  
17 could permit the states to actually exercise  
18 local control over the Indian tribes in a way  
19 that it would never authorize the states to  
20 participate in war-making.

21 So the exclusivity over the tribes  
22 themselves is really the exclusivity that the  
23 Court has been talking about versus interactions  
24 or intercourse with the states.

25 Now it's true that Congress has

1 exercised that power and taken the -- the tribes  
2 into a trust relationship, but there is a  
3 textual divestment of any ability of the states  
4 to participate in war-making in any similar way.

5 JUSTICE GORSUCH: I guess --

6 MR. TUTT: They cannot --

7 JUSTICE GORSUCH: -- I guess I'm still  
8 stuck, and I'm not sure I understand that.

9 Normally, the states would have  
10 considerable authority over people within their  
11 geographic bounds. That is divested by the  
12 Constitution in large measure by the -- by the  
13 Indian commerce clause in the same way  
14 war-making is. I -- I -- I think that's the  
15 parallel I see, and -- and I'm struggling to --  
16 to -- to see your distinction between the two.

17 MR. TUTT: Your Honor, my distinction  
18 is that though the tribes exist within the  
19 states and though the power to regulate the  
20 tribes is granted in the Constitution, that  
21 exclusivity is not something that the federal  
22 government is required to exercise.

23 And it's something that if the  
24 Congress had not exercised its power to regulate  
25 the tribes, I think it's unclear how the

1 Constitution would have dealt with that.

2 Congress did move into that domain and  
3 took full control, but, if you think about it,  
4 it's granted in the same clause as the  
5 interstate commerce clause. It's granted in the  
6 same clause as the other powers that this Court  
7 has long held are concurrent. So that -- that's  
8 all that I'm saying.

9 And if you look at war powers and you  
10 look at the way -- the very nature of the war  
11 powers, 50 separate sovereigns cannot  
12 participate in war-making.

13 JUSTICE BARRETT: But no one --

14 JUSTICE KAVANAUGH: How -- how  
15 important is the text of Article I, Section 10,  
16 which explicitly divests the states of anything  
17 on the war powers?

18 MR. TUTT: I think it's -- I think  
19 it's extremely important, Your Honor. I think  
20 that the textual divestment is powerful evidence  
21 that the states knew that they were giving up  
22 any power to interfere in this realm.

23 The ultimate inquiry for the Court in  
24 this case is do the states believe that they  
25 would retain a sovereign immunity that they



1 could assert that would interfere with  
2 war-making, but they gave up even more sovereign  
3 powers in Article I, Section 10.

4 They gave up the ability to conduct  
5 diplomacy. They gave up their ambassadors and  
6 foreign ministers. They gave up the very things  
7 that almost define sovereignty.

8 JUSTICE BARRETT: But no one is --

9 JUSTICE ALITO: Can I ask you --

10 JUSTICE BARRETT: -- saying that they  
11 would have the power to do any of those things  
12 now. There's no dispute that the states could  
13 not engage in diplomacy or exercise any kind of  
14 war-making authority.

15 The question is whether they  
16 relinquished their protection from private  
17 discrimination suits, which is a quite different  
18 thing. No one disputes that in this very case,  
19 the United States could come in and sue Texas  
20 and -- and tell Texas that it had to reinstate  
21 Mr. Torres on, you know, terms consistent with  
22 USERRA.

23 MR. TUTT: Let me give two answers to  
24 that question and -- and I appreciate the  
25 opportunity to.

1           One is the political branches of the  
2 government determined that the best way to  
3 protect the rights that USEERRA guarantees is to  
4 give those whose rights it protects the ability  
5 to protect them themselves. It did not want the  
6 executive branch to be able to exercise  
7 discretion. It did not want to require soldiers  
8 to go to a bureaucrat in Washington and persuade  
9 them that their case was worthwhile.

10           My co-counsel, Mr. Lawler, has brought  
11 in one USEERRA case where the Department of Labor  
12 has said there is no merit. And I think this  
13 was a wise decision. The Department of Labor  
14 keeps statistics. They submit a report to  
15 Congress. I encourage the Court to -- to look  
16 at this.

17           In the last five years, they've  
18 brought nine USEERRA suits total against any  
19 employer in the United States. They get about a  
20 thousand complaints at the Department of Labor a  
21 year, and it's resulted in -- in nine suits.

22           So I think that Congress understood  
23 that, in fact, if you try to put this through  
24 the United States, it's not going to be  
25 effective.

1 JUSTICE ALITO: Isn't your --

2 MR. TUTT: But --

3 JUSTICE ALITO: -- argument that the  
4 states can't assert sovereign immunity in any  
5 lawsuit that Congress authorizes under the war  
6 powers?

7 MR. TUTT: Your Honor, I don't think  
8 the Court has to reach that today because I  
9 think, in this case, it is central to raising  
10 and supporting Armies. And the Court need not  
11 go further than say that this is a proper  
12 exercise of the Raise and Support Army clause.

13 But --

14 JUSTICE ALITO: I mean, I -- I don't  
15 quite understand that answer. So you were  
16 emphasizing the exclusivity of the war power,  
17 but now you seem to say that there's some things  
18 that Congress could not do with respect to the  
19 -- under the war -- to authorize a suit against  
20 a state under the war powers?

21 MR. TUTT: No, Your Honor. And, in  
22 fact, I think, in the entire history of the  
23 United States, no state has ever successfully  
24 asserted a sovereignty limitation on the war  
25 powers in -- in any context. So -- but what I

1 am saying is that in this case, I -- in this  
2 Court --

3 JUSTICE ALITO: Well, let me give you  
4 an example. I -- I think one of the -- one of  
5 the things that Congress asserted when it  
6 established the interstate highway system was  
7 the need for those highways for defense  
8 purposes.

9 So would that mean that Congress could  
10 authorize individuals to sue states for failing  
11 to maintain highways properly or failing to  
12 patrol them properly?

13 MR. TUTT: Well, I think that if there  
14 was a limit, it would be a limitation on the war  
15 powers themselves. It would be an internal  
16 limitation, not a sovereign prerogative of the  
17 states to say that that was a limitation on the  
18 war powers. And that -- that's ultimately what  
19 -- what I'm saying.

20 JUSTICE ALITO: Are -- are you saying  
21 that the establishment of the interstate highway  
22 system couldn't be justified under the war  
23 powers?

24 MR. TUTT: No, Your Honor, I'm not.  
25 I'm not saying that. But all -- all I am saying

1 is that to the degree that that would be a  
2 boundary case or a difficult case, it would be  
3 because it's a difficult case of the ultimate  
4 scope or extent or tie of the war powers to --

5 JUSTICE GORSUCH: I guess I'm -- I'm  
6 -- I'm confused. Why wouldn't that be  
7 heartland? Why aren't you defending that --  
8 that -- that position?

9 MR. TUTT: Well, Your Honor, I want to  
10 make clear that -- that wherever you draw the  
11 line on the war -- scope or extent of the war  
12 powers, the question in this case is whether, if  
13 the states saw the Constitution, read its text,  
14 read the Federalist Number 23, read the  
15 Federalist Number 41 -- and I encourage reading  
16 the whole -- reading those essays --

17 JUSTICE GORSUCH: I -- I think you can  
18 safely assume this bench will and has read a lot  
19 of things --

20 MR. TUTT: Yes, Your Honor.

21 JUSTICE GORSUCH: -- about this case.

22 MR. TUTT: Yes, Your Honor.

23 JUSTICE GORSUCH: And I -- I think the  
24 question is, if -- if it's essential to the war  
25 powers, if Congress, which -- apparently, the

1 United States hasn't made enough war, right --  
2 it's essential to the war powers that -- that an  
3 individual be able to sue the state, in this  
4 case for forms of discrimination, whatever, why  
5 wouldn't it be equally essential to allow  
6 veterans to sue for making sure our highways are  
7 in good order so that we can deal with invasions  
8 on the West Coast? I mean, that was -- that was  
9 the whole point of the interstate highway  
10 system, I think, Justice Alito's alluded to.

11 MR. TUTT: Well, this Court -- and  
12 this goes back to -- to Justice Alito's --

13 JUSTICE GORSUCH: Yeah.

14 MR. TUTT: -- original question. In  
15 war powers cases, the Court has typically said  
16 that the war powers are broad, authorize a great  
17 many things, but then limited the holding to the  
18 facts before the Court. And I think it's done  
19 that in -- in recognition of the potential  
20 breadth of the war powers.

21 And so answering that hypothetical  
22 is -- is just difficult and -- and we know it's  
23 difficult, and this case is a core exercise of  
24 the war powers because recruitment and retention  
25 of soldiers direct -- it's directly related to

1 the recruitment and retention of soldiers.

2 JUSTICE BARRETT: But your answer has  
3 to be that if it's within the war powers, then,  
4 yes, Congress could authorize suit. Is that  
5 correct? You're -- you're fighting whether  
6 Congress could rely on its war powers to --

7 MR. TUTT: I --

8 JUSTICE BARRETT: -- build an  
9 interstate system.

10 MR. TUTT: Yes, and --

11 JUSTICE BARRETT: Let's -- let's  
12 assume that it can.

13 MR. TUTT: I --

14 JUSTICE BARRETT: Then your answer is  
15 yes, right?

16 MR. TUTT: Yes, Your Honor. I think  
17 that if -- that a -- any -- I mean, our  
18 submission is any appropriate exercise of the  
19 war powers, emphasis on "appropriate exercise"  
20 --

21 JUSTICE BARRETT: Yes or no?

22 MR. TUTT: -- but, if it's within --

23 JUSTICE BARRETT: Just yes or no.

24 MR. TUTT: Yes. Yes, Your Honor.

25 JUSTICE BARRETT: Okay.

1 MR. TUTT: Yes, Your Honor.

2 CHIEF JUSTICE ROBERTS: I'm sorry, yes  
3 -- yes to -- I've lost track of the question.

4 (Laughter.)

5 MR. TUTT: I apologize --

6 CHIEF JUSTICE ROBERTS: Yes --

7 MR. TUTT: -- Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: -- yes to  
9 what?

10 MR. TUTT: Yes, a proper exercise --  
11 it is a proper exercise of the war powers or if  
12 it is a proper exercise of the war powers to --

13 JUSTICE KAVANAUGH: But the "if" is  
14 big, right?

15 MR. TUTT: Yes, Your Honor.

16 JUSTICE KAVANAUGH: So you're not  
17 giving -- yeah.

18 MR. TUTT: Yes.

19 JUSTICE KAVANAUGH: Don't give away  
20 the "if."

21 MR. TUTT: No. The -- the "if" is --  
22 is -- is all in this particular situation.

23 JUSTICE KAVANAUGH: Yeah.

24 MR. TUTT: If it is -- if it is  
25 necessary to raise and support armies to permit



1 individuals to sue because otherwise they will  
2 hesitate to take a bullet on a battlefield  
3 because they don't know if they're going to have  
4 their job as a plumber's apprentice when they  
5 come home because their employer can fire them  
6 if they're injured, that is central because  
7 recruitment and retention of the Armed Forces,  
8 this Court has held -- even recently in Rumsfeld  
9 versus FAIR has held is a core exercise of the  
10 raise and support armies power.

11 And so -- and let me say Texas does  
12 not dispute --

13 JUSTICE BARRETT: Are you limiting  
14 your argument to the raise and support armies  
15 power? I understood that to be the SG's  
16 position, but I thought your position was  
17 broader than just raise and support armies and  
18 navy.

19 MR. TUTT: Well, I -- our position is  
20 that in view of what is at stake, which is the  
21 survival of the nation, the federal government's  
22 indispensable first task of protecting the  
23 national security, the war power is the proper  
24 unit of analysis, but --

25 JUSTICE BARRETT: So you're broadly

1 speaking beyond just the raise and support  
2 armies?

3 MR. TUTT: Yes, Your Honor.

4 JUSTICE BARRETT: Yeah.

5 MR. TUTT: Because -- and this Court,  
6 you know, in -- in the Hamilton versus Kentucky  
7 Distilleries case, the 1980 case about a  
8 prohibition on the sale of alcoholic beverages  
9 nationwide, Justice -- just -- Judge Learned  
10 Hand was the district judge, and he -- he said  
11 that, ultimately, whatever the source of  
12 authority in his district opinion -- court  
13 opinion, whatever the source of authority is, a  
14 rather barren question, the real question is,  
15 what are the limits? And that ultimately is  
16 what decides the case. Whether -- whether it's  
17 located in the power to declare war or it's  
18 located in the additional text of raise and  
19 support armies, what is at stake is so vital and  
20 so unique and essential to the nation that that  
21 ultimately is -- is what's important and -- and  
22 --

23 JUSTICE SOTOMAYOR: Counsel, I know  
24 you're relying -- or I guess the government's  
25 relying on the Army Clause. You're relying on

1 all of them.

2 I take something from the Militia  
3 Clause, and I take what it views as raising and  
4 supporting and providing and maintaining a  
5 militia. It uses the words "to provide for  
6 organizing, arming, and disciplining" the  
7 militia. So, if I take that that is just a  
8 specification of a part of what that power is,  
9 to raise and support an army or to provide and  
10 maintain a navy, disciplining seems to me as  
11 purely a federal right. I assume that  
12 retaliation for service is a form of discipline  
13 to the employee.

14 And I assume that your argument is  
15 that it is by its nature a power that requires a  
16 waiver of a state's immunity because it's giving  
17 over absolute control in a way that the others  
18 are not. There's concurrent. Is that the basis  
19 of your argument? That in most of these,  
20 including commerce with Indians, we have  
21 concurrent state jurisdiction. We have none  
22 with respect to armies, correct?

23 MR. TUTT: Correct, Your Honor. Yes.  
24 The -- the states do not participate in raising  
25 and supporting the Army. That is an exclusively

1 federal power. And they do not discipline the  
2 militia. The federal government disciplines the  
3 militia. And so that -- that is absolutely part  
4 of our argument.

5 I -- I want to make clear Texas does  
6 not dispute that the obligations of USERRA are a  
7 constitutional exercise of the war powers,  
8 including as to Texas. Texas does not dispute  
9 that the cause of action in USERRA is  
10 constitutional, and not just against all  
11 employers other than Texas but even against  
12 Texas, just as long as Texas consents.

13 The only question that Texas raises is  
14 it says that if it wants to assert a sovereign  
15 -- an implicit immunity, even when it interferes  
16 with war-making and is acknowledged to interfere  
17 with the ability to raise and support an army,  
18 that it should have the power to do so and that  
19 the Constitution contemplated that.

20 And our submission is the Constitution  
21 does not contemplate that and that given the  
22 sovereign authorities that the states gave up  
23 textually, given the -- the fundamental  
24 structure of the Constitution, they gave up the  
25 ability to assert sovereign immunity in that

1 precise context when it would interfere with the  
2 ability of the federal government to wage war --

3 JUSTICE KAGAN: Mr. --

4 CHIEF JUSTICE ROBERTS: Thank -- thank  
5 you.

6 MR. TUTT: Oh, I apologize.

7 CHIEF JUSTICE ROBERTS: No, I was just  
8 going to move us on to the next phase of  
9 questioning.

10 And, Justice Thomas, do you have  
11 anything to -- to ask?

12 JUSTICE THOMAS: Just a couple of  
13 questions, Mr. Chief Justice. Thank you.

14 Counsel, the -- does it make a  
15 difference here that USERRA authorizes suits  
16 against Texas in its own courts?

17 MR. TUTT: This Court has said that --  
18 that whether it was in a state court or a  
19 federal court is not relevant for the analysis  
20 of whether there was a -- a waiver in the Plan  
21 of the Convention. We don't think that -- that  
22 it is relevant, although Texas getting its own  
23 judges is pretty -- is pretty good, we think.

24 JUSTICE THOMAS: Why isn't that  
25 commandeering their court system?

1           MR. TUTT: Your Honor, in -- in Printz  
2 and other cases, the Court has said that the --  
3 the states were contemplated to have been the  
4 court system of the United States and that it  
5 was -- creating federal courts was optional, and  
6 in which case all suits, in bankruptcy, in  
7 eminent domain, everything would have been  
8 ultimately vested in -- in federal -- in state  
9 courts even though they would involve suits  
10 against states.

11           JUSTICE THOMAS: I think some of the  
12 early states would have disagreed with that, but  
13 let's move on.

14           You seem to put a lot of weight on the  
15 fact that Congress has -- the national  
16 government has the war power that's  
17 unconditional and without qualification. I  
18 think those were your words.

19           If that's the basis for such broad  
20 authority, why couldn't Congress do the exact  
21 same thing under another provision that is  
22 unconditional and without qualification, such  
23 as, for example, the Coinage Clause?

24           MR. TUTT: Your Honor, I think what's  
25 important is that they're provided without

1 qualification or condition, but the objects to  
2 which they are directed are fundamental  
3 incidents of international sovereignty.

4 And so, when you view them in nature  
5 of their -- in -- in view of their objects and  
6 subjects, you understand that the unconditional  
7 grant carries with it a much more significant  
8 grant of federal authority than with respect to  
9 the concurrent regulatory powers.

10 These are --

11 JUSTICE THOMAS: Well, do you think  
12 that --

13 MR. TUTT: Yeah?

14 JUSTICE THOMAS: -- so you said it had  
15 the -- how -- you know, then the question  
16 becomes is how close this connection should --  
17 must be. I mean, the -- I think, when we had  
18 the -- and Justice Barrett alluded to it -- in  
19 the bank case, of bankruptcy, I think we said  
20 that -- the Court said that it was inextricably  
21 intertwined with judicial proceedings. The --  
22 this seems to be quite remote from being  
23 inextricably intertwined with war powers.

24 MR. TUTT: Your Honor, I would say  
25 that the war powers have, since the founding,

1 had a -- an important relationship with the  
2 adjudication of controversies.

3 The Constitution understands that  
4 soldiers will need to be tried and make special  
5 provision for that, and the -- the war powers  
6 have been exercised in ways that are uniquely  
7 judicial, and we canvassed this in our briefing  
8 for over 200 years, which always --

9 JUSTICE THOMAS: Yeah, but I don't  
10 think that -- that's one thing, to have court  
11 martial proceedings or proceedings involving  
12 military conduct. This is post-military.

13 But let's move on. I don't want to  
14 delay matters. The final question I have for  
15 you is, can you give me an example where  
16 sovereign immunity has been waived for private  
17 money damages suits against states?

18 MR. TUTT: I -- I think you're  
19 speaking about, for instance, in Katz, where it  
20 was a preferential transfer suit. Is that in  
21 the nature --

22 JUSTICE THOMAS: No, I'm just -- money  
23 damages. Aren't we -- aren't money damages  
24 involved here?

25 MR. TUTT: Yes, Your Honor.



1 JUSTICE THOMAS: Give me an example of  
2 a suit in which money damages, not just  
3 compensation for property, that sort of thing,  
4 but money damages.

5 MR. TUTT: Your Honor, I would -- I  
6 would point to both suits by the United States  
7 against a state and suits by --

8 JUSTICE THOMAS: Well, the United  
9 States doesn't really count since that --  
10 that's -- that's -- that's conceded.

11 MR. TUTT: Well, Your Honor, it is  
12 important because Texas says that it would be  
13 willing to entertain these suits, the exact same  
14 suits for the exact same damages that inure to  
15 the exact same beneficiary as long as this was  
16 captioned United States against Texas.

17 And so, you know, if that's all that  
18 it's -- that's at stake, it -- it seems like a  
19 pretty low-stakes question for Texas, so the --  
20 so -- because these suits are -- are authorized  
21 for money damages by the United States on behalf  
22 of the veteran.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer, any questions?

1 JUSTICE BREYER: Do you know, in an  
2 eminent domain suit brought by an individual  
3 under delegation, if something valuable has been  
4 destroyed by the present owner, is that person  
5 who is suing for eminent domain entitled to  
6 money damages and compensation?

7 MR. TUTT: Yes, Your Honor.

8 JUSTICE BREYER: And do you know of  
9 any case which says they wouldn't get that as  
10 part of the eminent domain suit?

11 MR. TUTT: I -- I'm aware of no case,  
12 Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice Alito?  
14 Justice Sotomayor?  
15 Justice Kagan?

16 JUSTICE KAGAN: Mr. Tutt, way back  
17 when, when you were giving three reasons for why  
18 Seminole Tribe doesn't apply here, I think the  
19 second -- and I don't want to mischaracterize  
20 you, it was a while ago, so tell me if I've  
21 gotten this wrong -- but you basically says --  
22 said, you know, a lot has happened since  
23 Seminole Tribe, a lot of water under the dam,  
24 and we don't have to take some of Seminole  
25 Tribe's statements for quite all their worth.

1                   And I'll just say speaking personally  
2                   now I doubt I would have been in the majority in  
3                   Seminole Tribe, so if you have reasons for why  
4                   you think Seminole Tribe should not be read for  
5                   every -- for all it's worth, you know, have at  
6                   it.

7                   MR. TUTT: Well, Your Honor, I  
8                   think -- I think the biggest reason is that it  
9                   would be extraordinary for Seminole Tribe to  
10                  have placed a limitation on the war powers  
11                  without any discussion at all of the war powers,  
12                  without any discussion at all of the incidental  
13                  impact of that provision.

14                  JUSTICE KAGAN: Well, I guess what I'm  
15                  saying, I know that --

16                  MR. TUTT: Yeah.

17                  JUSTICE KAGAN: -- Seminole Tribe was  
18                  not about the war powers, but Seminole Tribe  
19                  seemed to take an extremely strong view that the  
20                  exclusivity of a federal power really didn't  
21                  matter.

22                  And I took you to be saying that our  
23                  cases since Seminole Tribe have suggested that  
24                  Seminole Tribe wasn't right. Is that what  
25                  you're saying?

1           MR. TUTT: I think that the reasoning  
2 of PennEast puts a -- puts a focus on the  
3 exclusivity and the importance to the complete  
4 exercise of the eminent domain power in the  
5 federal government.

6           I don't -- I -- I don't want to say  
7 that this Court has to overrule a single  
8 precedent to rule for us. The -- the reasoning  
9 of Seminole Tribe is not the best for us, but  
10 it -- it just does not reach beyond the ordinary  
11 domestic Article I powers.

12           The Court could draw a distinction  
13 there and say that the -- that a complete but  
14 ordinary domestic regulatory power is different,  
15 fundamentally different, than an exclusive  
16 international incident of the sovereignty of the  
17 United States and that that is a perfectly sound  
18 reason to overrule nothing in Seminole Tribe but  
19 nonetheless reach the right result in this case.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22           Justice Kavanaugh?

23           JUSTICE KAVANAUGH: On that last  
24 question, I'll say the same thing, Article I,  
25 Section 10 is important too, right?

1                   MR. TUTT: Yes, absolutely, Your  
2 Honor. I think it's essential. And its  
3 divestiture --

4                   JUSTICE KAVANAUGH: And there's no --  
5 no equivalent of that in -- in the Indian  
6 commerce clause.

7                   MR. TUTT: There -- there is not,  
8 and -- and the development of the Indian  
9 commerce clause exclusivity jurisprudence  
10 followed a different trajectory. Here, it was  
11 written and enumerated in the Constitution  
12 itself they could never exercise those powers.  
13 They cannot enter into a treaty, period.

14                   JUSTICE KAVANAUGH: And then you  
15 mentioned earlier it came up in 1974. Why, and  
16 why does -- why is that relevant?

17                   MR. TUTT: Oh, yes, yes, Your Honor.  
18 It -- it came up because there was resistance  
19 to -- resistance among the states to reemploy  
20 the veteran in 1974, and the traditional respect  
21 that the federal government --

22                   JUSTICE KAVANAUGH: Because?

23                   MR. TUTT: Because of opposition to --  
24 to the -- the war at the time. And -- and the  
25 states were basically using their -- their

1 privilege as states to express in law a view  
2 about what the foreign policy of the United  
3 States should be and how the United States  
4 should wage war, which I think is exemplary of  
5 the issue that we think that the war powers  
6 never could -- could allow. The states do not  
7 have a role to play in this area.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10 JUSTICE BARRETT: I do have a  
11 question. I want to take you back to Justice  
12 Kagan's question to you about the buckets and  
13 how do I know what the difference is between the  
14 buckets.

15 Do you think they just made the wrong  
16 argument in Seminole Tribe? You know, you've  
17 said a couple times, well, that was an  
18 abrogation case, that was an Article I case, and  
19 we're not talking about abrogation here.

20 But why not? I mean, maybe -- maybe  
21 we just didn't consider the argument in Seminole  
22 Tribe. I mean, you point out in your briefs  
23 that, well, the national defense was one of the  
24 reasons that the Constitution was ratified.

25 Well, so is commerce and trying to get

1 rid of protectionism. And so I think we've said  
2 again and again in some of our commerce cases --  
3 clause cases, we said it in Wayfair, that this  
4 is the kind of thing, commerce, free commerce  
5 between the states and giving Congress the  
6 commerce clause, the commerce power was a  
7 reason.

8 So do you think that we just -- you  
9 know, that the right argument wasn't made and  
10 that Seminole Tribe should come out differently  
11 if we consider the Plan of Convention argument?

12 MR. TUTT: I -- I think that -- that  
13 Seminole Tribe is correct and that you do not  
14 have to overrule any of the --

15 JUSTICE BARRETT: No, I -- I  
16 understand you don't want to --

17 MR. TUTT: Yes.

18 JUSTICE BARRETT: -- overrule it, but  
19 what if the Plan of Convention argument has been  
20 made? Is the answer to Justice Kagan's bucket  
21 questions, well, maybe we should be thinking of  
22 all of this as Plan of the Convention and so  
23 maybe Seminole Tribe, they just made the wrong  
24 argument?

25 MR. TUTT: Your Honor, I -- I -- I

1 don't know. I have not read the briefs. I've  
2 read the relevant passages in Seminole Tribe  
3 many times to try to understand what was -- what  
4 was the reasoning of the case, and I just think  
5 that Seminole Tribe made some statements that  
6 were broader than its holding and made some  
7 assertions about --

8 JUSTICE BARRETT: No, no, no, no.  
9 Just, like, back -- back up. I'm not asking  
10 whether anyone actually made a Plan of the  
11 Convention argument in the case. I haven't gone  
12 back and looked at the briefs either, but I  
13 assume that they did not.

14 I'm saying that if today you were  
15 presented with those facts, could you make a  
16 successful Plan of the Convention argument on  
17 the facts of Seminole Tribe for some of the  
18 reasons I gave?

19 MR. TUTT: No. No, I do not -- I do  
20 not believe that you could make a Plan of the  
21 Convention argument for the Commerce Clause. I  
22 think that the powers of commerce, of copyright,  
23 of intellectual property, of coining money, of  
24 counterfeiting securities, of postal roads, all  
25 of the domestic powers that are conferred in



1 Article I, Section 8, sovereign immunity plays a  
2 fundamental role in preserving democratic  
3 accountability and the role of the states in our  
4 federal system.

5 But, here, we have a different matter.  
6 Here, we have the survival of the nation. And  
7 as to that, there's just a fundamental  
8 difference in how it was talked about at the --  
9 at the time of the ratification. There's a  
10 fundamental difference in the history of how  
11 these powers have been exercised -- exercised  
12 and understood by the states. There's just  
13 no -- I think no comparison.

14 So thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 MR. TUTT: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Mr. Michel.

19 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL  
20 FOR THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING THE PETITIONER

22 MR. MICHEL: Thank you, Mr. Chief  
23 Justice, and may it please the Court:

24 Raising and supporting military forces  
25 is among the United States' express

1 constitutional powers and most essential  
2 responsibilities. USERRA directly advances that  
3 mission. Its employment protections originated  
4 with the World War II draft. They were extended  
5 to permit suits against states to combat  
6 discrimination against the military during the  
7 Vietnam War. And they are especially important  
8 today to guard and reserve forces, who both  
9 serve the nation and work for employers,  
10 disproportionately including state employers.  
11 Those employers have sovereign immunity to most  
12 private suits, but this area is different.

13           The Constitution was adopted in large  
14 part to stop states from undermining federal  
15 efforts to raise a military. This Court has  
16 never imposed a state-sovereignty-based  
17 limitation on the federal powers to raise and  
18 support armies or provide and maintain a navy.  
19 In this distinctive area, we are one nation with  
20 one sovereign, and USERRA's cause of action can  
21 be fully enforced against all employers.

22           CHIEF JUSTICE ROBERTS: Mr. Michel,  
23 the Court in PennEast drew an express  
24 distinction between abrogation of sovereign  
25 immunity and immunity that was -- sovereignty

1 that was waived, given away, under the Plan of  
2 the Convention.

3 What is the consequence of that -- in  
4 -- in your view, what is the consequence of that  
5 distinction, or could you perhaps articulate  
6 perhaps more clearly than the Court did in  
7 PennEast exactly what that distinction is?

8 MR. MICHEL: So, Mr. Chief Justice,  
9 I'll do my best. I think the -- those two  
10 inquiries go to different sources of evidence.  
11 When you're talking about a surrender of  
12 immunity in the Plan of the Convention, the  
13 Court is looking at what the founders  
14 understood, what the text of the Constitution  
15 provides. When you're asking about abrogation,  
16 the Court has looked to whether a particular  
17 statute provides for suits against states with  
18 particular clarity, and that's the -- the  
19 Fourteenth Amendment inquiry that the Court  
20 has -- has undertaken.

21 Now I don't dispute too much with  
22 Justice Kagan's characterization earlier that  
23 there is some commonality in those -- in those  
24 analyses, but I think, ultimately, the Plan of  
25 the Convention test looks to, as it sounds, the

1 Plan of the Convention, and in this case, there  
2 really is overwhelming evidence that the states  
3 understood they were giving up a fundamental  
4 aspect of their sovereignty with respect to this  
5 particular power to raise and support armies and  
6 provide and maintain a navy.

7 JUSTICE KAGAN: I guess I would have  
8 thought that the abrogation cases are also in  
9 part not only about whether Congress has spoken  
10 clearly but whether, even if Congress did speak  
11 clearly, its word would govern. Isn't that what  
12 they're about? And -- and in order to answer  
13 that question, aren't we looking at the same  
14 kinds of things that we're looking at to  
15 determine whether there's an exception under the  
16 Plan of the Convention?

17 MR. MICHEL: I mean, I do think you  
18 might be looking at a lot of the same sources.  
19 I think they're -- they're somewhat analytically  
20 separate, and the Court has described them as  
21 somewhat analytically separate, but I don't want  
22 to resist too much the notion that in both  
23 cases, what the Court is analyzing is the  
24 constitutional power and its effect on the  
25 states, namely, whether the states were

1     relinquishing a fundamental attribute of  
2     sovereignty. And I do think there are some  
3     commonalities in the Court's abrogation and Plan  
4     of the Convention cases that confirm that --  
5     that there is overlap in that area.

6                   JUSTICE BARRETT: Mr. Michel, how do  
7     you answer the question that I asked Mr. Tutt  
8     about PennEast and Katz, bankruptcy and eminent  
9     domain, addressing power that was really  
10    uniquely tied to judicial proceedings?

11                   And I don't think anybody would  
12    dispute that in the Plan of the Convention,  
13    states relinquished their war power. But war  
14    power isn't inextricably intertwined with  
15    condemnation actions or -- or bankruptcy  
16    proceedings. I mean, it's -- it's -- it's  
17    separate from suit. How do you address that?

18                   MR. MICHEL: Sure. A couple of ways,  
19    Justice Barrett. I think I -- I agree with Mr.  
20    Tutt that although that is a common thread  
21    between Katz and PennEast, it doesn't seem to be  
22    reflected all that strongly in the Court's  
23    reasoning, but even if you think it is reflected  
24    more strongly than that, it's certainly not in,  
25    for example, the Court's Fourteenth Amendment

1 cases, where the Court has concluded in cases  
2 like Fitzpatrick versus Bitzer that there is an  
3 abrogation of sovereign immunity or that the  
4 Fourteenth Amendment divested states of  
5 attributes of sovereignty, even though there  
6 could, of course, be suits under all kinds of  
7 different causes of action there that aren't  
8 inherently bound up in litigation.

9 And I think you could say similar  
10 things about suits by the United States against  
11 states, suits by states against other states,  
12 which I take it everybody agrees, under the  
13 older cases like United States versus Texas, did  
14 give way to a surrender in the Plan of the  
15 Convention.

16 JUSTICE KAGAN: Why don't you bring  
17 these suits, Mr. Michel?

18 MR. MICHEL: So we do bring some  
19 suits. As we explained in our invitation brief,  
20 I think my friend for Petitioner maybe  
21 undersells how vigorous the United States has  
22 been in this area. We actually resolve a lot of  
23 cases consensually where the Department of  
24 Labor, for example, will call the employer and  
25 explain their USERRA responsibilities and the

1 cases can reach a successful conclusion for the  
2 servicemember in that way.

3 But I don't dispute Petitioner's point  
4 that the private enforcement remedy is very  
5 important here. It's Congress's judgment. This  
6 Court has said that Congress has broad judgment  
7 in the area of raising and supporting armies.  
8 This is a familiar enforcement mechanism. For  
9 example, Title VII authorizes private  
10 enforcement actions, and I think the Court has  
11 long recognized that those -- Congress is  
12 entitled to include those kind of mechanisms  
13 to --

14 JUSTICE KAGAN: Right. I guess I just  
15 -- I mean, there is a little bit of dissonance  
16 between the importance that you're saying this  
17 has to the federal war powers and, on the other  
18 hand, the actual practice of the federal  
19 government in prosecuting these suits.

20 MR. MICHEL: Well, I -- I respectfully  
21 disagree, Justice Kagan. I think, when the  
22 government has found violations, you know, we've  
23 brought cases, and as I said, sometimes we  
24 haven't had to bring litigation, but I think  
25 that's the process working, not the process

1 failing. And it may be --

2 JUSTICE ALITO: Well, there -- there's  
3 an amicus brief that has statistics about the  
4 number of cases that the Justice Department has  
5 brought. It says that in the 16 years from 2004  
6 to 2020, the court -- the Justice Department  
7 filed 109 lawsuits, which is a little more than  
8 six a year, and that only two were filed from  
9 2015 -- since 2015, only two have been filed.  
10 Are those statistics correct?

11 MR. MICHEL: I think they are correct,  
12 but, as we pointed out at our -- in our  
13 invitation brief, the numbers are much larger  
14 when you look at how many soldiers' claims have  
15 been successfully resolved. And I would  
16 respectfully submit that that's the more  
17 important number. I mean, if the government can  
18 resolve a claim without litigation, I think  
19 that's better for everyone, the soldier and the  
20 employer alike.

21 JUSTICE KAVANAUGH: What's the  
22 realistic problem that you foresee if you don't  
23 prevail in this case?

24 MR. MICHEL: Well, Justice Kavanaugh,  
25 I think it's the problem that led Congress to



1     adopt the statute in the first place and, in  
2     particular, to adopt the provision allowing  
3     suits against states, which is there could be  
4     serious problems of discrimination against the  
5     military.

6             Now, happily, I don't think we face  
7     that problem on a systematic basis today the way  
8     that we did during the Vietnam war, but, of  
9     course, that could change and a constitutional  
10    ruling by this Court would take this tool off  
11    the table forever.

12            I also think there are individual  
13    cases like this one where employers -- you know,  
14    there's a good-faith dispute about whether there  
15    was a violation in this case, but being able to  
16    bring these suits is an important remedy for the  
17    individuals and it's an important deterrent  
18    effect for the employers, including state  
19    employers, to know that they have to comply with  
20    the statute or -- or else they'll face, you  
21    know, real consequences.

22            JUSTICE KAVANAUGH: And you said the  
23    state employers -- or state employees are  
24    disproportionately part of the Guard and  
25    Reserves? I think you said that.

1           MR. MICHEL: I did, yeah, and I don't  
2           have an exact figure on that, but I think that's  
3           not a particularly surprising fact. I mean,  
4           there's people who are drawn to public service,  
5           people who are like Petitioner in the state  
6           police or, you know, state firefighting  
7           services. Those -- not only are those people  
8           more likely to join the military, but they also  
9           bring a set of skills that's particularly  
10          important to the military.

11          JUSTICE KAGAN: Has the federal  
12          government considered whether, if Texas wins  
13          this lawsuit, the federal government would bring  
14          suit on Mr. Torres's behalf?

15          MR. MICHEL: So there's an  
16          administrative mechanism in the statute by which  
17          a petitioner -- by which a plaintiff can ask the  
18          government to bring a suit. And the Petitioner,  
19          Torres, didn't invoke that in this case. But,  
20          if he were to invoke that, the federal  
21          government would -- would consider it. We don't  
22          have a -- we don't have a position on the merits  
23          of this case, but if that claim came to us or a  
24          similar claim came to us in a different case, we  
25          would -- we would consider that.

1                   But I do -- I want to make the point  
2                   that, you know, the federal government having to  
3                   litigate cases all over the country would be a  
4                   -- a real departure from what Congress in  
5                   exercising these broad powers determined was  
6                   necessary to raise and support a military, and I  
7                   think the Court owes particular judgment to  
8                   Congress's decisions in this -- in this area.

9                   JUSTICE BREYER: In 32 -- in  
10                  Federalist 32, Hamilton discusses this, and one  
11                  of the things he says, the issue here, is  
12                  whether the Convention in its plan was to  
13                  maintain those "rights of sovereignty which  
14                  states had before."

15                  And then he lists three criteria,  
16                  which I'll ask questions about later.

17                  All right. But what are those rights  
18                  of sovereignty? Are they just asserting  
19                  sovereign immunity in a lawsuit by a private  
20                  person, or are there others?

21                  MR. MICHEL: I think there are  
22                  probably other components.

23                  JUSTICE BREYER: And what are the  
24                  others? Do you -- do you have anything in your  
25                  mind about those others?

1 MR. MICHEL: Well, I mean, I --

2 JUSTICE BREYER: Because, of course,  
3 if you win or if you lose, rather, whatever  
4 those others are, they're not infringed either.  
5 And what I've been looking for is, what are  
6 those others?

7 MR. MICHEL: Sure. I mean, I -- I --  
8 I actually -- I don't have a list in mind. I  
9 think --

10 JUSTICE BREYER: Just any one or two.

11 MR. MICHEL: You know, the immunity --  
12 immunity against commandeering, immunity against  
13 coercion. I think this -- this Court has said  
14 that other attributes of sovereignty like that  
15 come up in the -- in the doctrine.

16 JUSTICE BREYER: So, if, in fact,  
17 California had been invaded in 1942 and, as  
18 frequently happened in the Philippines, the Army  
19 had to seize houses so they wouldn't fall into  
20 the hands of the Japanese, at that point, it  
21 couldn't be done if you lose?

22 MR. MICHEL: Well, I don't want to  
23 accept that, Justice Breyer. I think --

24 JUSTICE BREYER: Well, is it a right  
25 of sovereignty or not? You said they're

1       commandeering.  They're commandeering the  
2       sheriff's office.  I shouldn't have said a  
3       house.  I said they're -- they're commandeering  
4       the governor's palace, they're commandeering.  
5       All kinds of things happen in wars.

6                 MR. MICHEL:  So a couple of points.  I  
7       think we would say if we lost this case that the  
8       government could still do that.  The Court in  
9       cases like Case versus Bowles has said that the  
10      Tenth Amendment sovereignty power does not  
11      entitle a state to object to the -- to the  
12      government's exercise --

13                JUSTICE BREYER:  Very well.

14                MR. MICHEL:  -- of war powers.

15                JUSTICE BREYER:  Then you're saying  
16      that Hamilton, when he writes this, did not mean  
17      rights of sovereignty which the state had  
18      before.  He only meant some of the rights which  
19      the state had before.

20                MR. MICHEL:  Well, my response,  
21      Justice Breyer, would be that he did mean -- at  
22      least for this case, he meant sovereign immunity  
23      and --

24                JUSTICE BREYER:  Well, of course, for  
25      this, but what I'm thinking, if I expose my

1 thought, is that when you talk about the Indian  
2 commerce clause, you're talking about a power to  
3 regulate something that will exist no matter who  
4 wins, namely, commerce. It's going to go on  
5 there and it will be regulated in many ways.  
6 And the same is true of -- of -- of a lot of  
7 these other clauses in the First Amendment.

8 But, here, it's quite different  
9 because I don't know what is involved when you  
10 say states retain their sovereign rights to  
11 raise armies, to raise navies, to -- and then  
12 there were a list of six clauses. So I thought  
13 you might have thought that through better than  
14 me and I suspect you have, and I want to hear  
15 what you have to say.

16 MR. MICHEL: Well, I think the most  
17 important part of the Hamilton passage, and I  
18 hope this is at least partly responsive to your  
19 question, is that when you read that in  
20 conjunction with Hamilton's passage in  
21 Federalist 81, which this Court has relied on as  
22 the foundation of its sovereign immunity  
23 jurisprudence all the way back to Hans versus  
24 Louisiana, he directly links that list that  
25 you're talking about, Justice Breyer, in

1 Federalist 32 with the areas in which there was  
2 an alienation of sovereignty to produce a waiver  
3 of sovereign immunity in the Plan of the  
4 Convention.

5           So, if you take Hamilton's word on  
6 what sovereign immunity means, you have to read  
7 the whole paragraph, and he references back to  
8 this paragraph 32. And this is where Article I,  
9 Section 10, I think, is particularly important  
10 because one of the categories on the list, which  
11 you didn't read but were going to go on to read,  
12 is where a power is granted to the federal  
13 government on the one hand and withheld from the  
14 states on the other hand, that's exactly what's  
15 happening with the raise and support armies  
16 clause and --

17           JUSTICE BREYER: Now is it? Because,  
18 if you read the six clauses that have to do with  
19 the war power in Article VIII, they give to  
20 Congress all these powers, armies, navies, et  
21 cetera, but it ends by giving to the states the  
22 power of running the militia in two areas,  
23 reserving, it says, to the states.

24           Respectively, the appointment of  
25 officers in the militia and the authority of

1 training the militia according to discipline  
2 preserved by Congress. Hmm.

3 Now does that reserve mean that the  
4 other things listed in the six clauses are  
5 exclusively the business of the fed and  
6 prohibited to the states?

7 MR. MICHEL: Yes. I agree with that.

8 JUSTICE BREYER: And what's your  
9 evidence for that?

10 MR. MICHEL: I mean, I think that both  
11 the text itself once -- when the text is sort of  
12 fully distributing the powers, which I think it  
13 is here.

14 JUSTICE BREYER: Yeah.

15 MR. MICHEL: Now, of course, another  
16 very strong piece of textual evidence for that  
17 is Article I, Section 10, Clause 3, that  
18 expressly withholds the powers from the states.

19 I do want to make the point that --  
20 that differentiates the raise and support armies  
21 power from all of the other powers that this  
22 Court has considered in cases that have really  
23 gone both ways with a few exceptions.

24 One is the Fourteenth Amendment. In  
25 his opinion for the Court in Fitzpatrick versus



1 Bitzer, Justice Rehnquist relied on the fact  
2 that the Fourteenth Amendment both grants power  
3 to the federal government and expressly  
4 withholds power from the states. That was the  
5 same framework that Hamilton set up when he  
6 explained when there would be a surrender in the  
7 Plan of the Convention.

8           The Court in *Katz*, in Footnote 13,  
9 referred to the interaction between Federalist  
10 32 and Federalist 81 in explaining that the  
11 bankruptcy clause falls within another one of  
12 those categories that's in Hamilton's essay,  
13 Federalist 32.

14           So I think that is powerful support,  
15 assuming the Court is going to continue to rely  
16 on Hamilton's account of sovereign immunity, to  
17 understand where there was a surrender of  
18 sovereign immunity in the Plan of the Convention  
19 and to find that these particular powers are  
20 subject to that surrender.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Thomas, any questions?

23           JUSTICE THOMAS: Yes, Chief. I'm  
24 perhaps not as enamored of Hamilton as some are.

25           I -- I'm looking, counsel, at Article

1 I, Section 10, that it -- it also precludes  
2 states. It says no state shall enter into any  
3 treaty, on and on, but it also mentions the  
4 Coinage Clause.

5 So can -- can you have the exact same  
6 or similar exercise of authority under the  
7 Coinage Clause as you are now suggesting exists  
8 under war powers?

9 MR. MICHEL: So, Justice Thomas, we  
10 don't have a position on that, but I agree with  
11 you that that is one of the few other powers  
12 that fits within that Hamiltonian framework, and  
13 there would be an argument that Congress could  
14 breach sovereign immunity if it -- under that  
15 power, but I would be quick to note that there's  
16 a lot of other evidence with respect to the war  
17 powers, the -- all the tremendous evidence about  
18 the convention itself and that what states  
19 recognized they were giving up at the time of  
20 the convention in the area of the military that  
21 I -- although I haven't fully studied it, I -- I  
22 doubt that that's present for the Coinage  
23 Clause, so the argument would be somewhat weaker  
24 there. But the Hamilton point, I agree, would  
25 be the same.

1 JUSTICE THOMAS: So does it affect  
2 your argument that this -- that this authorizes  
3 suit in state court and that it authorizes money  
4 damages? And, you know, Justice -- there was  
5 some suggestion by Justice Breyer in his  
6 questioning that there wasn't much difference --  
7 appeared to be not much difference between just  
8 compensation and damages in these cases.

9 So does that -- is there -- does that  
10 affect your analysis at all, one, that it's in  
11 state court, two, that it involves money damage  
12 in what is more, I think, like a tort suit as  
13 opposed to just compensation for taking  
14 property?

15 MR. MICHEL: Sure, Justice Thomas,  
16 I'll take them one at a time.

17 I think, ultimately, the fact that  
18 Congress made the judgment to channel these  
19 suits into state court doesn't affect the  
20 analysis. Congress could always channel suits  
21 into state court. That's the Madisonian  
22 compromise that -- that this Court has  
23 recognized for -- for many years, and the fact  
24 that the Court -- the Congress decided to do  
25 that in this case I don't think changes the Plan

1 of the Convention surrender analysis.

2 As to your second question about  
3 damages, I agree that the damages at issue here  
4 are different than in a takings case, but  
5 they're not different than would be at issue in  
6 a Title VII case under the Fourteenth Amendment,  
7 where I think everybody agrees, including my  
8 friends from Texas, that they're suable,  
9 including in state court, for damages in a -- in  
10 a discrimination case that would look a lot like  
11 the suit in this case, although the basis for  
12 the discrimination obviously would be different.

13 It -- it -- there's nothing for and  
14 about the notion of damages and -- and a waiver  
15 of state sovereign immunity and the same is true  
16 about suits by states against other states.  
17 There are, as this Court is well aware, suits by  
18 states against each other for damages in  
19 water-related actions and other actions, where I  
20 think everyone agrees there is a waiver of  
21 sovereign immunity and the Plan of the  
22 Convention.

23 JUSTICE THOMAS: So the -- you -- you  
24 think that there is no difference between a  
25 grant of authority under the Fourteenth

1 Amendment and implying similar authority under  
2 war powers?

3 MR. MICHEL: Well, I -- I think it  
4 would depend, you know, on -- of course, each  
5 power, you know, comes with its own history and  
6 its own -- and its own analysis, but I do think  
7 there's a lot in common between the Fourteenth  
8 Amendment and the raise and support armies  
9 power. As I said earlier, both are granted and  
10 withheld by the text of the Constitution, and I  
11 think both indicate an unusual and particularly  
12 sort of superior relationship between the  
13 federal government and the states.

14 Obviously, the Fourteenth Amendment  
15 was adopted as a result of war and the  
16 understanding of the -- of the Raise and Support  
17 Armies Clause was similar -- similarly a  
18 response to the Revolutionary War and the  
19 failure of the states to provide for the  
20 military and, you know, the paramount purpose of  
21 ensuring that state obstruction of the federal  
22 military would not continue under the new  
23 Constitution.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer?

2 Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

6 JUSTICE GORSUCH: I'm just wondering  
7 what the limits are of the principle you're  
8 asking us to adopt. I understand the textual  
9 commitments in the Fourteenth Amendment, but,  
10 here, we're being asked to adopt a view  
11 of implicit penumbras emanating from the War  
12 Powers Act -- sorry, from the war powers that  
13 the president and the Congress have in Article I  
14 and Article II.

15 And you're giving us a very broad view  
16 of what those powers are, including to raise  
17 armies, going so far as to suits against the  
18 states for veterans coming home, and without any  
19 linkage to necessity of any current exigency or  
20 any need for troops today. There's no argument  
21 here, as I understand it, that this is actually  
22 necessary or that Congress couldn't and the  
23 federal government couldn't bring these suits  
24 themselves if they wanted to do so. There's no  
25 argument that this is necessary -- allowing

1 private suits against states is necessary to  
2 raise an army in the United States today.

3 And so I guess I'm just wondering,  
4 what are the limits? I mean, Justice -- Justice  
5 Alito posited a pretty interesting example about  
6 potholes on interstate highways. Would every  
7 state policy that could be subject to an  
8 argument that it would impair the ability of the  
9 federal government to raise an army or a navy or  
10 to conduct war be subject to suit, private suit,  
11 by private individuals with punitive damages and  
12 attorneys' fees?

13 Is -- the broader you argue for the  
14 war powers of the United States, the broader the  
15 consequences are for federalism, and -- and I  
16 just want you to have a chance to address that.

17 MR. MICHEL: Sure. A couple things,  
18 and I -- in answering the later part of the  
19 question, I -- I think I can address the earlier  
20 part too.

21 This -- I think there is an argument  
22 in this case that allowing these lawsuits is  
23 necessary to raising and supporting armies.  
24 That's obviously the judgment that Congress and  
25 the president, the two political branches of the

1 government, made when they enacted this statute.

2 JUSTICE GORSUCH: You're not arguing,  
3 though, that we -- we have other -- we don't  
4 have other mechanisms to raise and support  
5 armies? It's just it's the preferred one today.  
6 I get it. Conscription is not very popular, but  
7 it sure worked for about 200 years.

8 MR. MICHEL: Well, Justice Gorsuch, I  
9 don't think that's, with respect, how the Court  
10 normally addresses Congress's exercise of its  
11 enumerated powers. For example, the Court in  
12 *Rumsfeld versus FAIR* didn't say --

13 JUSTICE GORSUCH: I understand.

14 MR. MICHEL: -- is law school reading  
15 truly necessary.

16 JUSTICE GORSUCH: My -- my -- my  
17 question is, how broad does this go? The  
18 broader you reach -- the broader you create a  
19 war power and -- and you're -- you're extending  
20 it very broadly here, the greater the impact is  
21 for federalism, and -- and, at some point, they  
22 come to a head, and I'm just asking you where  
23 you think that balance lies.

24 MR. MICHEL: Right. I mean, I think  
25 it lies at the -- at least in this case, at the



1 perimeter of the Raise and Support Armies  
2 Clause. I don't think that just because  
3 Congress or some litigant asserts that something  
4 is within the Raise and Support Armies Clause --

5 JUSTICE GORSUCH: No, no. Congress  
6 says -- Congress says, you know, you can sue for  
7 potholes on interstate highways and you get  
8 punitive damages.

9 MR. MICHEL: Right. I think this  
10 Court would be very skeptical of a claim that  
11 that falls within the Raise and Support Armies  
12 Clause, but I don't think this Court should be  
13 skeptical --

14 JUSTICE GORSUCH: But what -- Congress  
15 said so. I mean, Congress said so. So you're  
16 asking us to -- to defer to Congress here  
17 because Congress said so and, I mean, what then?

18 MR. MICHEL: If Congress did say so in  
19 -- in a statute enacted by the representatives  
20 of the states, then we would have -- I think we  
21 would probably be here to --

22 JUSTICE GORSUCH: Defend it.

23 MR. MICHEL: -- defend that statute --

24 JUSTICE GORSUCH: Right.

25 MR. MICHEL: -- but it would be a

1 tougher argument than in --

2 JUSTICE GORSUCH: And what happens to  
3 the Tenth Amendment in that world? What -- what  
4 happens to federalism in that world?

5 MR. MICHEL: Well, Justice Gorsuch, I  
6 think it would -- first of all, I don't think  
7 that lawsuit probably would come out in the  
8 federal government's favor, although I think, in  
9 that hypothetical scenario, we would probably  
10 try to defend it.

11 But, to get to the heart of your  
12 question, I think that with respect to raising  
13 and supporting armies, the power of national  
14 survival, the federalism principles really do  
15 apply differently. And that's what the Court  
16 said in the Selective Draft Law Cases when it  
17 said the states' militia can be drafted into  
18 service by the United States and sent overseas.  
19 That's what the Court said in Case versus Bowles  
20 when it held that Washington's timber can be  
21 sold at a price dictated by the federal  
22 government even though the state constitution  
23 dictated otherwise. The Court said that to read  
24 the Constitution differently would be to render  
25 it a self-defeating charter.

1                   And so, in this particular area, where  
2 the survival of the nation is at stake, I think  
3 it's fair to say that federalism principles  
4 apply in a somewhat lesser way.

5                   CHIEF JUSTICE ROBERTS: Justice  
6 Kavanaugh?

7                   JUSTICE KAVANAUGH: When you say the  
8 survival of the nation's at stake, can you  
9 explain that?

10                  MR. MICHEL: Sure. When without a  
11 military, you know, the federal government can't  
12 defend itself. That was the exact purpose that  
13 motivated the adoption of these provisions in  
14 the Constitution in the first place.

15                  JUSTICE KAVANAUGH: Okay. And you're  
16 relying on the Raise and Support Armies Clause,  
17 the text. You're not relying on penumbra, I  
18 didn't think.

19                  MR. MICHEL: I -- I'm not. I mean, I  
20 think state sovereign immunity is itself  
21 something of a penumbra. It's not stated in the  
22 -- the text of the Constitution. But, no, we're  
23 relying on the text of the Raise and Support  
24 Armies Clause.

25                  JUSTICE KAVANAUGH: And just on the --

1 you -- you alluded to this, but why is it  
2 necessary today to have this kind of law? Or  
3 maybe looking ahead, I mean, a case like this,  
4 we should not be deciding it without thinking  
5 about 20 years from now, 40 years from now, 60  
6 years from now.

7 MR. MICHEL: Sure. I mean -- and just  
8 -- this, I hope, follows up on Justice Gorsuch's  
9 question too. I mean, the United States has a  
10 -- a military of 2 million people; 800,000 are  
11 National Guard members and Reservists. These  
12 are people who work for civilian employers at  
13 the same time they have jobs. They've never  
14 been more important to the military than they  
15 are right now.

16 And one of the first questions that  
17 people like that will ask when they're  
18 considering whether to join the military is,  
19 well, do I get to keep my job? You know, does  
20 my employer have to let me take leave for  
21 training exercises or be deployed?

22 And it really does matter in the real  
23 world for the Army to be able to tell them, yes,  
24 your employer does have to do that. In fact, as  
25 one of the amicus briefs in this case points

1 out, the brochure that the Army gives to its  
2 recruits lists the USERRA protections as part of  
3 the incentive package that they receive to join  
4 the military.

5 And it would matter a great deal in  
6 the real world if it was harder for the United  
7 States to recruit guardsmen and reservists for  
8 the military. Obviously, you know, the -- the  
9 national security needs are unpredictable and  
10 the government doesn't know when it's going to  
11 need to deploy troops overseas. And being able  
12 to have a supply of -- of forces to defend the  
13 nation is one of the most existential jobs of  
14 the federal government in the first place.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett?

18 Thank you, counsel.

19 General Stone.

20 ORAL ARGUMENT OF JUDD E. STONE, II  
21 ON BEHALF OF THE RESPONDENT

22 MR. STONE: Thank you, Mr. Chief  
23 Justice, and may it please the Court:

24 No one disputes the importance of the  
25 war powers or that USERRA advances

1 constitutional ends. Sovereign immunity never  
2 limits the ends that Congress may pursue, only  
3 the means that Congress may use in achieving  
4 them. Neither precedent nor history show that  
5 the states authorized Congress to use the means  
6 of subjecting states to private damages actions  
7 by delegating the ends of raising an army to  
8 Congress.

9 Torres's contrary argument rests on  
10 two premises: first, that the Constitution  
11 delegates a plenary and exclusive war power to  
12 Congress and, second, that the erection of state  
13 sovereign immunity impermissibly frustrates the  
14 exercise of those war powers.

15 That's the argument this Court  
16 embraced in *Union Gas* and rejected in *Seminole*  
17 *Tribe*. There, this Court affirmed that, even  
18 though it had described the Indian Commerce  
19 Clause as plenary, exclusive, Congress could not  
20 use that clause to expose nonconsenting suits to  
21 damages actions. This Court cannot agree with  
22 Torres without rejecting *Seminole Tribe* and the  
23 various cases relying on it.

24 But even if this Court wrote on a  
25 blank slate, Torres lacks compelling evidence of

1 a Plan of the Convention waiver. He cites  
2 nothing in founding-era debates that supports  
3 this incredible result, provides no examples of  
4 analogous founding-era suits against states, and  
5 he points to no attempt by Congress to expose  
6 states to such damages actions for over 200  
7 years following the founding.

8           There is no evidence that the founding  
9 generations saw the power to expose states to  
10 private lawsuits as inextricably intertwined  
11 with warfare or that the states intended to be  
12 sued without their consent by giving Congress  
13 the power to raise an army. Without such  
14 compelling evidence, Torres cannot prevail under  
15 the Plan of the Convention.

16           Now, unless the Court would like to  
17 direct me otherwise, I wanted to begin by  
18 speaking directly to one of Justice Alito's  
19 concerns regarding what my friend on the other  
20 side was seeking, essentially, sort of Torres's  
21 theory of relief.

22           CHIEF JUSTICE ROBERTS: Well, maybe --  
23 maybe, if you don't mind, I'd like to direct you  
24 to some of the statements you just made.

25           Nothing in the Plan of Convention that

1 is applicable here that supports the result on  
2 the other side? Yes, there was no law like  
3 USERRA with respect to the obligations that  
4 could be enforced against the state, but it does  
5 seem to me that their strongest argument is what  
6 they have in the Federalist Papers, in the very  
7 reason that the convention was -- was called.

8 MR. STONE: So --

9 CHIEF JUSTICE ROBERTS: Do you  
10 disagree with that?

11 MR. STONE: -- I agree that is their  
12 strongest point, Your Honor, although,  
13 obviously, I disagree about whether or not  
14 that's sufficient or anywhere near required for  
15 a plan of convention waiver, in part because of  
16 a couple of precepts this Court has recognized,  
17 and then I'll give you a historical example that  
18 I think explains it.

19 For one, this Court has described  
20 sovereignty as having many aspects, so, for  
21 example, the power to -- to enter into a treaty,  
22 to declare war, power to coin money, to pursue  
23 criminal charges against individuals. There are  
24 many aspects of sovereignty.

25 This Court has also described states



1 as residual sovereigns, which is to say they  
2 keep whatever they haven't given away. This was  
3 certainly the understanding of the founders in  
4 the Federalist papers and certainly a sort of  
5 basic precept of state sovereignty to begin  
6 with.

7 So the first and relevant question  
8 isn't whether or not states have specifically  
9 withheld an aspect of sovereignty but what  
10 they've given away.

11 Now this isn't the war powers exactly,  
12 but it's, I think, perhaps the next-door example  
13 is the Treaty Clause. Undeniable that in  
14 Article I, Section 10, the power to engage in  
15 treaties or in confederations is taken away from  
16 the states entirely. That is an important  
17 sovereign power that -- that plays in issues of  
18 war and piece.

19 Nonetheless, in *Alden v. Maine*, this  
20 Court looked at the Eleventh Amendment and  
21 specifically at the rejected Gallatin proposal  
22 for the Eleventh Amendment which would have  
23 exposed states to damages actions or to private  
24 suits arising under treaties, saw that rejection  
25 and understood that to mean that states as of

1 the founding retained their immunity for  
2 treaty-based actions.

3 So, to the extent that that's correct  
4 -- and I don't understand anyone here calling  
5 for overruling or undermining Alden -- then it  
6 must mean at a minimum that by exiling some  
7 sovereign power, such as the power to engage in  
8 treaties, the states have not necessarily exiled  
9 their sovereign prerogative not to be sued --

10 CHIEF JUSTICE ROBERTS: Well -- well,  
11 so you're --

12 MR. STONE: -- for exercises related  
13 to that power.

14 CHIEF JUSTICE ROBERTS: -- there are  
15 two parts to that sentence. I understand the  
16 first but perhaps not the second.

17 But are you saying that the states did  
18 retain some war powers --

19 MR. STONE: Your Honor, I'm saying --

20 CHIEF JUSTICE ROBERTS: -- that they  
21 could then rely on as opposed to those of the  
22 federal government?

23 MR. STONE: I'm saying that they --  
24 they gave away certain parts of sovereignty,  
25 including the ability to raise armies, to

1 declare war, et cetera, and that this Court  
2 should, consistent with those being vested in  
3 Congress and to the extent that they've been  
4 taken away in Article I, Section 10, should  
5 recognize those aspects of sovereignty have been  
6 taken away.

7 JUSTICE KAVANAUGH: That's not an  
8 answer to the question --

9 MR. STONE: Well, I -- I'm saying that  
10 --

11 JUSTICE KAVANAUGH: -- did states  
12 retain any war powers.

13 MR. STONE: -- at minimum, the states  
14 have retained their prerogative not to be sued,  
15 which isn't conventionally considered a war  
16 power in some sense, in part because there isn't  
17 this inextricable intertwining between the two,  
18 or --

19 CHIEF JUSTICE ROBERTS: Well, then  
20 that challenges Congress's judgment, I guess,  
21 that the law that is at issue here was  
22 essential, was the representation of the  
23 government's representative to the ability to  
24 raise armies, right?

25 MR. STONE: To some extent, but I

1 don't think so, Your Honor, precisely because  
2 the removal -- the fact that the states did not  
3 confer on Congress the -- the means of exposing  
4 states to private damages actions doesn't depend  
5 on a balancing test with Congress.

6 This Court's prior abrogation -- prior  
7 abrogation precedents and PennEast and Katz  
8 don't rely on a sort of balancing between  
9 Congress believed this is a very important  
10 exercise of power or very important clause and,  
11 therefore, that overrides state immunity.

12 So we don't -- our arguments don't  
13 rely on whether or not the war powers are  
14 important or even foundational to the United  
15 States. No doubt they do.

16 And no doubt that -- that the Congress  
17 believes that something like USERRA is, in fact,  
18 important to maintaining an army. It just turns  
19 out this Court doesn't balance away state  
20 sovereign immunity's sort of one constitutional  
21 value --

22 JUSTICE KAVANAUGH: Can --

23 MR. STONE: -- amongst many.

24 JUSTICE KAVANAUGH: -- can I ask a --  
25 go ahead.

1 CHIEF JUSTICE ROBERTS: No.

2 JUSTICE KAVANAUGH: No? A case -- a  
3 question about our precedent and maybe picking  
4 up on Justice Kagan's questions to your friends  
5 on the other side.

6 Looking at our precedent as a whole in  
7 this area, which points, arguably, in some  
8 different directions, but I think one of the  
9 strong arguments on the other side -- I want to  
10 give you a chance to respond -- is, well, if  
11 you're going to allow suits against the states  
12 in bankruptcy, if you're going to allow eminent  
13 domain suits, you're going to allow suits under  
14 the Family -- Family and Medical Leave Act,  
15 you're going to allow Title VII suits against  
16 the states, it would be bizarre not to allow  
17 suits in the war powers area, where the national  
18 interest is at its apex as compared to those  
19 other areas. So that to me is a strong argument  
20 for them given our precedent, and I want you to  
21 be able to respond to that.

22 MR. STONE: Certainly, Your Honor, and  
23 I understand the intuition behind it, of course,  
24 that war powers are big, important exercises or  
25 fundamental exercises of power.

1           I think the reason why that feels  
2 strange is precisely because you're having the  
3 intuition that more important things should be  
4 able to abrogate or dispense with sovereign  
5 immunity as opposed to less important ones.

6           JUSTICE KAVANAUGH: Well, I think  
7 they're all important, but they're more national  
8 so that the constitutional text itself makes  
9 very clear that these powers are given to  
10 Congress in Article I, Section 10, which is very  
11 important explicitly, in case there was any  
12 mistake, divest the states, and even Article II,  
13 where the Commander in Chief power, Commander in  
14 Chief of the Armed Forces, including of the  
15 militia when called into service, so that the  
16 Article II displaces the state control over the  
17 -- over the militia, which was -- you know, that  
18 -- talk about taking away sovereignty. So, you  
19 know -- so it's not just important. It's the  
20 national state balance there.

21           MR. STONE: Certainly, Your Honor. I  
22 want to speak specifically to the -- to the  
23 powers you -- you just cited and then to speak  
24 about the Indian Commerce Clause and the treaty  
25 power to sort of make the point.

1                   Regarding Katz and regarding there  
2                   being sort of a uniquely federal interest there,  
3                   there's a uniquely federal interest that this  
4                   Court described when it was recalling Katz and  
5                   Allen v. Cooper that sort of cited that there  
6                   were these disparate state discharge orders and  
7                   that, ultimately, individuals were being kept --  
8                   kept in debtors prisons as consequence.

9                   And it looked at the Bankruptcy Act of  
10                  1800 and the potential for habeas relief there  
11                  and sort of concluded by that ongoing history,  
12                  contemporaneous with Chisholm, that the states  
13                  had planned for federal courts to have a unique  
14                  role to solve this problem among states, so --  
15                  so unique that, in fact, that clause itself  
16                  disposed with any opportunity, any -- any  
17                  sovereign immunity defense.

18                  Of course, this Court also described  
19                  that as a "good for one clause only" holding, in  
20                  part because it was recognizing that this Court  
21                  had held, not just stated but held in Seminole  
22                  Tribe that all other Article I, Section 8 powers  
23                  wouldn't yield that result.

24                  JUSTICE KAGAN: But, since then, I  
25                  mean, since that statement that that's a "good

1 for one" holding, it -- it seems to have been  
2 proved wrong, right? Because PennEast comes  
3 along and says, no, it's not a "good for one"  
4 holding and PennEast -- I think the world after  
5 PennEast, you might think makes -- you know, it  
6 makes Seminole Tribe look like a very different  
7 decision.

8 MR. STONE: I understand that  
9 intuition as well, Justice Kagan. I think part  
10 of what's doing work here is clause, the "good  
11 for one clause only" holding. The eminent  
12 domain power as identified is not a clause, of  
13 course. It is a kind of sovereign power this  
14 Court identified in its precedents had been  
15 routinely assumed to belong to all sovereigns.

16 This Court turned to its precedents  
17 and saw that that not only belonged to all  
18 sovereigns, it clearly belonged to the United  
19 States and could be exercised against state  
20 land, and the sort of subsidiary questions for  
21 this Court to decide were based on the history  
22 of delegation.

23 JUSTICE KAGAN: Just taking a subset  
24 of Justice Kavanaugh's question and just  
25 focusing it on the eminent domain power, I mean,



1 in what world could it be a sensible result to  
2 say states can be sued on the basis of the  
3 eminent domain clause but not on the basis of  
4 war powers?

5 MR. STONE: I think it's a creature of  
6 the Plan of the Convention test which goes  
7 specifically granularly to whether or not the  
8 states understood that this kind of judicial  
9 process would be worked against them.

10 JUSTICE KAGAN: Well, weren't war  
11 powers kind of the Plan of the Convention? I  
12 mean, what was this all about except to ensure  
13 that war powers were held by the federal  
14 government and not by any states?

15 That was -- you know, I -- I -- I  
16 understand that you don't want to be ranking  
17 clauses in order of importance, but I think we  
18 can say that in terms of the foundational  
19 commitments of the Constitution that was pretty  
20 much the premiere one.

21 MR. STONE: And no doubt that's true,  
22 Your Honor, that at a minimum they're incredibly  
23 important and we can search the historical  
24 document and find as much about that.

25 But there are other powers that are,

1 of course, important to exercising war too, for  
2 example, the ability to borrow and spend money,  
3 the ability to regulate commerce. These are  
4 things that the founders had historical evidence  
5 and historical experience with, and,  
6 nonetheless, this Court has previously said that  
7 these sort of commercial sounding powers  
8 nonetheless leave the state sovereign meaning in  
9 tact.

10 So it might well be the case that if  
11 this Court wanted to say, well, powers being  
12 used towards war or towards the ends of war just  
13 have to be judged on some different model, then  
14 that would require this Court at least to sort  
15 of say, well, this isn't a Plan of the  
16 Convention question, at least not in the  
17 granularity that it looked to specifically in  
18 Katz and specifically in PennEast.

19 But there's something special about  
20 the sort of important nature of the war powers  
21 that must yield a different result.

22 JUSTICE BARRETT: Well, maybe there is  
23 and, you know, Justice Breyer was asking your  
24 friend on the other side -- asking Mr. Michel  
25 about what kinds of sovereignty may have been

1 retained.

2           And, you know, another way to think  
3 about the questions that Justice Kavanaugh and  
4 Justice Kagan have been asking you is, if the  
5 states gave up all of this, you know, with  
6 respect to war powers and such a crucial aspect  
7 of the convention, does it make sense to think,  
8 oh, but they retained sovereign immunity? I  
9 mean, that -- that seems kind of like small  
10 potatoes when you think about everything else  
11 they relinquished in this area.

12           MR. STONE: No, Your Honor, in part  
13 because I think, as this Court's recognized  
14 describing Chisolm time and again, the founding  
15 generation jealously guarded their sovereign  
16 immunity. They didn't think that was a sort of  
17 small potatoes afterthought aspect to  
18 sovereignty. And so, to talk about the Plan of  
19 the Convention dispensing with particular  
20 aspects of sovereignty, the treaty power, the  
21 power to declare war, et cetera, the fact that  
22 the states broadly believed they retained their  
23 sovereign immunity I think requires some showing  
24 that specifically, in a given context, the  
25 states had exposed themselves to -- to private

1 suits, essentially had agreed not to raise that.

2 This Court has found that in  
3 specific historical contexts like the Bankruptcy  
4 Clause and like eminent domain. It has said,  
5 even though dealing with the treaty power, which  
6 is something that's sort of on a first-order  
7 foreign relations issue, despite the treaty  
8 power being prohibited to states in Article I,  
9 Section 10, nonetheless state sovereign immunity  
10 remains intact to treaty-based claims.

11 So I don't think the sort of wholesale  
12 treatment of sovereign in gross is consistent  
13 with how the Court has looked at sovereign  
14 immunity or sovereignty vis-à-vis the states.

15 JUSTICE BREYER: Well --

16 JUSTICE BARRETT: What about thwarting  
17 power? I mean, I think one of the strong  
18 arguments on the other side is one that Justice  
19 Kavanaugh was pressing Mr. Michel about, which  
20 is that, you know, this -- post-Vietnam, states  
21 were expressing their policy disagreement with  
22 United States foreign policy and the United  
23 States' engagement in the Vietnam War by  
24 discriminating against veterans upon their  
25 return home.

1           One of the problems in PennEast was  
2           that New Jersey, by refusing -- by -- by -- by  
3           refusing to cooperate in the policy decision  
4           that the United States had made with respect to  
5           national gas pipelines, was thwarting federal  
6           policy.

7           And isn't it all the more serious here  
8           to have the states have the potential to  
9           thwart -- I mean, let's -- let's imagine that  
10          states decide -- let's say we get involved in  
11          Ukraine and states say that we shouldn't be, and  
12          so they use discrimination against veterans  
13          returning home to express their disapproval of  
14          our engagement.

15          MR. STONE: Your Honor, and -- and I  
16          don't want to generalize too much without  
17          speaking specifically to your example. It's, of  
18          course, the case that whenever states exert  
19          their -- their sovereign immunity against acts  
20          of Congress, it's going to frustrate them. It  
21          will sometimes frustrate them in little ways and  
22          sometimes in large ways. That's a consequence  
23          of immunity in any context.

24          Now, to your specific example,  
25          Congress has several tools remaining, the most

1 important of which that hasn't been really  
2 adequately discussed so far is that, of course,  
3 the United States is entitled to bring suit,  
4 Congress has specifically given them a cause of  
5 action against the states under USERRA to pursue  
6 remedies in -- in federal court against  
7 aggrieved servicemembers --

8 JUSTICE KAGAN: One of the things that  
9 PennEast said, the -- the -- the Court said  
10 there, that it would be counterintuitive to  
11 allow the United States to sue but not private  
12 parties. So why isn't the same true here?

13 MR. STONE: In part because that was  
14 discussing, I believe, the specific history of  
15 delegating -- the fact that there's a robust  
16 history of delegating the power to condemn,  
17 specifically, the power to exercise eminent  
18 domain. There was a robust history of that  
19 before and after the founding, and there was an  
20 agreement that the United States had the power  
21 to exercise eminent domain against state lands.  
22 And so the only question left was whether or not  
23 that power, as exercised and delegated by the  
24 United States, sort of lost some of its  
25 character when being put into individual hands.

1           This Court determined it wasn't, in  
2 part because the power of sovereign -- of  
3 eminent domain really was the power to condemn.  
4 It was a judicial power. It was a power that  
5 had an inextricably intertwined judicial  
6 characteristic with which there is no sort of  
7 war historical analogue where there's this  
8 robustly delegated power, this robustly  
9 delegated cause of action. And if it can be  
10 used and can be delegated, surely, it must be  
11 the same in the context of the United States and  
12 of individuals.

13           The United States, because it has a  
14 distinct Plan of the Convention waiver for its  
15 benefit when suing individual states, can  
16 always, up to and including on Mr. Torres's  
17 behalf, sue Texas and sort of pursue  
18 specifically the interests that they had.

19           This is a point that this Court made  
20 in Alden, that, of course, the United States  
21 will sometimes come to this Court and express on  
22 behalf of the Solicitor General a belief that  
23 state sovereign immunity has to be dispensed  
24 with and yet will not have a tradition of  
25 actually pursuing these actions themselves.

1                   This is something that could be easily  
2                   solved by the U.S. And, also, to the extent  
3                   that the DOJ doesn't want to make this a  
4                   priority, Congress, through Spending Clause  
5                   legislation or other mechanisms compliant with  
6                   other Spending Clause restrictions, can induce  
7                   the states simply to waive their immunity  
8                   because they -- Congress could absorb them  
9                   before --

10                   JUSTICE KAVANAUGH: You're -- you're  
11                   telling Congress how -- how to wage war  
12                   successfully. But, you know, Congress and the  
13                   president make that judgment about how to wage  
14                   war successfully.

15                   You agree that the power to wage war  
16                   is -- has to be the power to wage war  
17                   successfully, correct?

18                   MR. STONE: In one sense and not the  
19                   other, Your Honor. Of course --

20                   JUSTICE KAVANAUGH: In what -- in what  
21                   sense is it not the power to wage war  
22                   successfully?

23                   MR. STONE: It might be more  
24                   expedient, for example, for Congress to delegate  
25                   the power to make appropriations for the Armed



1 Services to a single individual in the Senate,  
2 but it wouldn't be allowed to do that consistent  
3 with Article I, Section 7.

4 JUSTICE KAVANAUGH: And -- and then  
5 you agree that the power to wage war  
6 successfully depends on personnel?

7 MR. STONE: No doubt.

8 JUSTICE KAVANAUGH: Okay. And  
9 personnel today is volunteer, and a significant  
10 percentage are Guard and Reserve.

11 MR. STONE: Of course.

12 JUSTICE KAVANAUGH: And those people  
13 need protection from their jobs -- for their  
14 jobs.

15 MR. STONE: Absolutely, Your Honor.

16 JUSTICE KAVANAUGH: And a lot of them  
17 are state employees.

18 MR. STONE: Yes, Your Honor, though I  
19 might point out that Texas, by my best numbers,  
20 has approximately 35,000 employees -- state  
21 employees who are veterans for the state. The  
22 United States Government, from what I  
23 understand, has about 950,000. And, of course,  
24 to the extent that the United States believes  
25 that this is a vital part of defending -- sort

1 of keeping a ready military, it doesn't expose  
2 itself to remotely the same kinds of actions.

3 JUSTICE KAVANAUGH: Right, but the  
4 concern underlying -- as Justice Barrett was  
5 saying and I mentioned earlier, the concern  
6 underlying this is state hostility to the United  
7 States' foreign policy or national security --  
8 security objectives and to carry that out by  
9 hampering the war effort or preparation for war.  
10 I mean, we have to be thinking about the next 50  
11 years. We don't know what's going to be  
12 happening over the next 50 years. We don't know  
13 what's going to be happening over the next 50  
14 days in terms of national security and  
15 personnel.

16 And so I think it's important to  
17 recognize that a significant component of the  
18 power to wage war successfully is having  
19 personnel who are willing to sign up, and  
20 they're not going to be willing to sign up.

21 I mean, that's a practical argument,  
22 and you can just say that's irrelevant if you  
23 want, but it's an important overlay of what's  
24 going on here. It's not -- the Plan of the  
25 Convention is relevant today, is what I'm

1 getting at.

2 MR. STONE: I -- I don't at all think  
3 that's irrelevant, Justice Kavanaugh. What I  
4 would point out, though, is to extent that  
5 you're drawing inferences about how core some of  
6 these remedies or actions are, you should look  
7 to the United States' actual practice, which is  
8 to say the United States over the course of the  
9 calendar year 2020 -- or 2020 and 2021, I  
10 believe, filed more briefs in this Court urging  
11 this Court to deny review than it took up cases  
12 under USERRA, which -- this is a very sparing  
13 occurrence for the federal government, who has  
14 orders of magnitude more individuals, more  
15 veterans employed before it. And that's not to  
16 say that the original delegation by Congress  
17 isn't important, but it's a little inconsistent  
18 to describe this as sort of ultimately vital to  
19 the national war effort, but then we see it very  
20 infrequently.

21 Also, you know, equally hard to  
22 explain is the fact that for the federal  
23 government, who, again, orders of magnitude more  
24 than even Texas, a very large state, to the  
25 extent that there's an aggrieved serviceman,

1 they have an administrative right of review  
2 which can be judicially reviewed in the Federal  
3 Circuit on sort of APA deferential grounds.

4 Texas, on the other hand, is treated  
5 like a private party. That's actually  
6 denominated in the statute, that Texas and all  
7 those states are private parties, to which Texas  
8 is exposed to not only explicitly the full suite  
9 of equitable and sort of other powers, including  
10 expressly the contempt power, but also Texas is  
11 exposed to punitive damages as such. And it is  
12 hard to imagine a conception of state sovereign  
13 immunity that can be more offended by anything  
14 than a private cause of action by Congress and  
15 designed to punish a state as a state.

16 JUSTICE BREYER: Well, I -- you've  
17 given a good answer, but I want you to answer  
18 more. And I'll focus it. I'll start with the  
19 assumption, which you don't have to answer.

20 This has the potential of being a  
21 pretty important case for the structure of the  
22 United States of America. The war power is not  
23 copyright, and it is not the Indian Commerce  
24 Clause. It is, and you know, as Lincoln said,  
25 will this nation long endure? We hope it is

1 never necessary, but maybe that question will  
2 come up, okay? Do you see why I think it's very  
3 important? Okay.

4 Now there are three arguments that  
5 have been brought up, and I'd like to hear if  
6 you have something to add. The first is the  
7 Plan of the Convention. As you've read  
8 biographies of Washington and the founders, you  
9 know perfectly well that they were terribly  
10 upset at the way the states were behaving in  
11 respect to the Continental Army and thought that  
12 that was causing the United States basically to  
13 lose almost. And they were at a convention --  
14 and if I put the matter in a comical way,  
15 because it's not meant totally comical -- in the  
16 play, they say -- George the Third says:  
17 They'll be back. Wait and see. They'll come  
18 crawling back to me.

19 And that was in the framers' mind,  
20 though not the music. And now we look at the  
21 text, and, my goodness, Article -- six sections  
22 in -- in -- in Article VIII, another in -- in  
23 Article X, another in -- in section -- you know,  
24 clause -- the second, the president's part. My  
25 goodness, that suggests that was their frame of

1 mind. If you want to say something about that,  
2 that's one.

3 Two, is this theoretical? I lived  
4 through Vietnam. I saw what was going on. I  
5 hope we never have it again. But, my goodness,  
6 the blue states might well have, although the  
7 President of the United States and the Congress  
8 thought the only way to deal with this is we get  
9 as few conscripts as possible, as many  
10 volunteers as possible, and the states, blue,  
11 would have said: No, we're going to do  
12 everything in our power to prevent you from  
13 getting those volunteers, including not giving  
14 them their jobs back. Could that have happened?  
15 Yeah. Did it happen? I'm not sure. Maybe.  
16 And we could have another. Okay?

17 And you say: Oh, bring the  
18 government, bring the lawsuit. Against how many  
19 people were there in Vietnam in the armies?  
20 They'd be suing until the next thousand years.  
21 And the third, you look at Federalist 32, and  
22 two of the three pieces of evidence that  
23 Hamilton says, "were it granted in one instance  
24 an authority to the union and in another  
25 prohibited the states from exercising the like

1 authority." I can't say it's explicit but those  
2 three parts of the Constitution I mentioned  
3 sounded -- and then the second thing, the third  
4 thing, where it granted an authority to the  
5 union to which a similar authority in the states  
6 would be absolutely and totally contradictory  
7 and republican -- and repugnant.

8 Well, that's Hamilton. And you've  
9 heard the evidence that that's what this case  
10 is. Okay?

11 Now, I've simply summarized the three  
12 arguments that you have been hearing this  
13 morning. And you've answered them pretty well.  
14 And I want to give you the chance to answer them  
15 further if you wish.

16 MR. STONE: Thank you, Justice Breyer.  
17 Let me start with the first. So as I understand  
18 the thrust of your first -- your first inquiry,  
19 you're pointing out that there are many, many  
20 powers vested in the federal Constitution that  
21 are -- that touch on war and clearly in the  
22 historical documents those are very important,  
23 historically speaking powers. That's no doubt  
24 the case.

25 Unfortunately, to the extent this

1 court were intending to give Mr. Torres sort of  
2 the full measure of what he was asking for, this  
3 Court has to think about its previous statements  
4 in cases like Alden then Seminole Tribe.

5 Of course stare decisis is a  
6 practical -- sort of a practical consideration  
7 and a practical doctrine, but this Court has  
8 said, and as recently as *Allen v. Cooper*  
9 repeated that no Article I, Section 8 powers  
10 dispenses with state sovereign immunity.

11 To say that all of the powers that are  
12 reasonably described as war powers suddenly  
13 actually had no immunity to resist in the first  
14 place would be to, at best, minimize Seminole  
15 Tribe to virtually nothing.

16 It surely occurred to this Court when  
17 it propounded that statement in *Seminole Tribe*  
18 and reconfirmed it in *Alden*, that all of the  
19 powers in Article I, Section 8, including a  
20 number of powers that had a direct basis on war,  
21 including the Army clause, Navy clause, the  
22 enclave clause and so on.

23 So at minimum, to the extent this  
24 Court were inclined to say something along the  
25 lines of this critical nature, this foundational



1 nature of these powers means they are treated  
2 differently, it has to be prepared to disregard  
3 decades of precedent in sovereign immunity.

4 Two, if I understood your next  
5 question, your next question correctly  
6 regarding --

7 JUSTICE BREYER: Vietnam.

8 MR. STONE: I'm sorry?

9 JUSTICE BREYER: Vietnam as an  
10 example.

11 MR. STONE: Right, regarding sort of  
12 the --

13 JUSTICE BREYER: What they might mean.

14 MR. STONE: -- the sort of practical  
15 possibility of states engaged in sort of  
16 deliberate political obstruction on ideological  
17 grounds.

18 That strikes me as the sort of thing  
19 that to which -- to the extent of to which a  
20 court is going to be effective at all, which of  
21 course we're all talking about a circumstance to  
22 which these must be problems amenable to a court  
23 or this is all sort of unnecessary because all  
24 sovereign immunity dispenses with is whether or  
25 not a court can sue.

1           One would think the United States  
2 would sue California or -- or any other sort of  
3 obstreperous state and that, in fact, they would  
4 sue in sort of -- in the nature of class relief  
5 or equitable relief prohibiting California  
6 and/or, you know, and/or any of its officers  
7 from engaging in that flatly illegal policy, one  
8 would think that that either would be effective,  
9 or if it weren't, but if it weren't effective  
10 then the court would face a constitutional  
11 crisis because a state is sort of deliberately  
12 disobeying federal court orders.

13           So I think there is nothing left for  
14 the courts to do at that point. It would be a  
15 matter for an executive branch.

16           I'm not quite sure that I'm perfectly  
17 following the third question --

18           JUSTICE BREYER: It was Hamilton.

19           MR. STONE: -- regarding the extent of  
20 Hamilton's statements, except as to point out  
21 that no doubt, for example, in the Indian  
22 commerce context, that power certainly had  
23 shades of war and peace. It would be utterly  
24 unsurprising to have described to the founders  
25 that the power to govern relations with the

1 Indian tribes would be the power, in fact, to --  
2 to engage in policies and to prevent battles  
3 with Indian tribes, prevent the loss of life and  
4 otherwise settle these through treaty agreements  
5 and, nonetheless, this Court has held that  
6 neither that clause nor the treaty clause can be  
7 used to expose states to private damages  
8 actions.

9 I mean, taking -- taking things at  
10 sort of one level of generality, it is, of  
11 course, the case that the federal Constitution  
12 provides the federal government with profound  
13 powers relating to war and peace. It's just  
14 this Court has observed many times before that  
15 sometimes those powers don't come with state  
16 sovereign immunity because that's a separate  
17 aspect of sovereignty.

18 And so the fact that the states have,  
19 indeed, given up great powers related to war and  
20 peace, large aspects of their sovereignty, does  
21 not mean they've given up all of it, otherwise  
22 the concept of calling states residual  
23 sovereigns just sort of doesn't have any -- any  
24 further purpose.

25 JUSTICE BREYER: Thank you.

1           MR. STONE:  If there are no further  
2 questions I would save the balance of my time.

3           JUSTICE GORSUCH:  Small question.

4           CHIEF JUSTICE ROBERTS:  Go ahead.

5           JUSTICE GORSUCH:  A small question.  
6 Did you preserve the state law immunity argument  
7 as an adequate and independent state law ground?  
8 The government, federal government says you did  
9 not, and you didn't really respond to that in  
10 your brief.

11           MR. STONE:  Yes, Your Honor, we did  
12 preserve it.  The quote on which the federal  
13 government and Mr. Torres rely was speaking  
14 specifically as to federal law of immunity.  
15 There are a number of places in that lower court  
16 brief where the states specifically, I believe,  
17 cites Alden and describes about the distinct  
18 power that a sovereign has in its own courts as  
19 independent from a federal law immunity.

20           So we certainly raised it for purposes  
21 of what would be considered preservation under  
22 Texas law.  It was considered raised before the  
23 Texas Supreme Court also.  To the extent that  
24 this Court's looking about whether or not it was  
25 raised, it was raised in the briefs below.

1 CHIEF JUSTICE ROBERTS: Go ahead.

2 Justice Thomas, any questions?

3 JUSTICE THOMAS: No questions,

4 Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Justice

6 Breyer?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, I -- I  
10 can't take much from the lack of cases or  
11 evidence of Congress doing something until a  
12 need arises because I can't see Congress  
13 prophylactically passing rules if it doesn't see  
14 they're necessary until they become necessary.

15 And really the Vietnam War is what  
16 made this statute necessary because it is the  
17 first time that we see a state potentially  
18 taking action that's going to directly affect  
19 the military's power.

20 But do you discount the 1830s history  
21 where, as did Justice Gorsuch, with respect to  
22 the habeas power, and there courts were  
23 releasing federal military officers from state  
24 custody because they were needed for the war  
25 efforts at the time and the courts and the

1 states had absolutely no hesitation in saying  
2 that Congressional need superseded the state's  
3 need to -- to hold a prisoner in custody.

4 That was an individual suit, not for  
5 money, I grant you, but you didn't need money  
6 there because all you needed was the person to  
7 be released.

8 So I guess what I'm asking is you  
9 concede that the states knew that if they  
10 impeded the war effort they would be sued by the  
11 federal government, at least. I know that the  
12 first opportunity an individual had to sue in  
13 the 1830s for his own release the courts gave  
14 him that power, the individual, to sue the  
15 state, in state courts.

16 So what is the next step missing with  
17 respect to the plan of the convention that we  
18 need some further proof that there was a belief  
19 that there wasn't a power to sue the states for  
20 individual damages? The federal government  
21 could. Why can't the individual?

22 MR. STONE: Well, Your Honor, just to  
23 make sure I'm -- I'm keeping myself clear, what  
24 I've conceded is that of course there is a  
25 separate plan of the convention waiver for any

1 kind of lawsuit by the federal government  
2 against any state. So that applies in and out  
3 of the war context regardless.

4 Our position would be that suits in  
5 and of the nature of habeas corpus simply don't  
6 implicate whether or not states believe they  
7 were -- they gave up their sovereign immunity,  
8 because, going back to Blackstone, sovereigns  
9 have never thought themselves having the power  
10 to erect a state sovereign immunity defense in  
11 habeas, neither in English practice nor in  
12 American practice. So those habeas cases are  
13 interesting for purposes of the discussion of  
14 sort of state and federal power, perhaps  
15 supremacy issues and other contexts, but the  
16 fact that those state habeas cases were  
17 permitted tells us nothing about whether or not  
18 the states believed they could raise such a -- a  
19 sovereign immunity defense, because no state  
20 believed it had a sovereign immunity defense to  
21 a habeas action.

22 What's missing here is some sort of  
23 exercise by Congress or historical practice that  
24 would be an -- an analogue where, pursuant to  
25 the exercise of a war power or something related

1 to war, Congress or in English practice, had  
2 delegated to individuals the ability to bring  
3 lawsuits against nonconsenting states for  
4 something thematically related to war. You  
5 know, so, for example, an individual happened to  
6 miss their employment while they had been  
7 conscripted or something like that.

8           If Mr. Torres had presented that, that  
9 would be powerful evidence that there was some  
10 association between the exercise of war powers  
11 and these private damages actions and powerful  
12 evidence for a Plan of the Convention waiver.  
13 And that's just not here.

14           CHIEF JUSTICE ROBERTS: Justice Kagan  
15 -- oh, I'm sorry, Justice Alito? I went out of  
16 turn.

17           JUSTICE ALITO: Mr. Stone -- General  
18 Stone, could you comment on how far you think  
19 the argument would go if we agree with  
20 Petitioners? If states could not assert  
21 sovereign immunity with respect to any claim  
22 that is supported -- that is necessary and  
23 proper to raise and -- raise armies, how far  
24 would that go?

25           MR. STONE: Much further than Union



1 Gas, Your Honor. So, at a minimum, you'd have  
2 virtually every power that could be associated  
3 with the exercise of war, which, as a basic  
4 historical matter, includes the power to tax,  
5 borrow, spend, the power to -- to be able to  
6 raise money, the ability to -- to restrict  
7 commerce in order to direct that individuals may  
8 be sanctioned or to mandate the production of  
9 certain materiel. Of course, it would go  
10 through virtually all of Article I, Section 8's  
11 war powers as such, which my friend on the other  
12 side summarizes I believe eight of those powers,  
13 and then for perhaps any other powers so long as  
14 in -- being used in an ancillary sense to either  
15 wage war or to make peace.

16 Said differently, it would require  
17 essentially the complete abrogation or the  
18 complete sort of disregard of Seminole Tribe and  
19 every case from it. And it certainly would take  
20 the commentary in PennEast and Katz that these  
21 are sort of narrow, specific exceptions to a  
22 broad rule of sovereignty and it would render  
23 those flatly inaccurate.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 Justice Gorsuch? No?

1 Justice Kavanaugh?

2 Justice Barrett?

3 Thank you, counsel.

4 Rebuttal, Mr. Tutt?

5 REBUTTAL ARGUMENT OF ANDREW T. TUTT

6 ON BEHALF OF THE PETITIONER

7 MR. TUTT: Thank you, Mr. Chief

8 Justice. Just a few points.

9 Texas opened by saying that it's a  
10 means/ends distinction, that that's what's at  
11 stake, that the powers may be great but the  
12 means can be limited. But if you go to the  
13 Federalist Number 23 by Alexander Hamilton, he  
14 addresses this directly, and he says that the  
15 means ought to be proportioned to the end.

16 "These powers ought to exist without limitation:  
17 Because it is impossible to foresee or to define  
18 the extent and variety of national exigencies  
19 and the correspondent extent and variety of the  
20 means which may be necessary to satisfy them."

21 "There can be no limitation of that  
22 authority, which is to provide for the defense  
23 and protection of the community, in any matter  
24 essential to its efficacy; that is, in any  
25 matter essential to the formation, direction or

1 support of the national forces."

2 This is all in one essay of the  
3 Federalist Papers.

4 The purpose of sovereign immunity is  
5 to protect liberty and the local autonomy of the  
6 states, their democratic accountability. But in  
7 the area of war, it is only by vesting the war  
8 powers exclusively in the federal government  
9 that liberty can protected in the way the  
10 Constitution intends. The Constitution did not  
11 intend to protect an abstract sovereign immunity  
12 of the states when it would cost the liberty of  
13 individual citizens. The war powers do not  
14 favor a peacetime draft over the encouragement  
15 of volunteers to put their bodies and their  
16 lives on the line in our military.

17 I want to -- I think that Justice  
18 Kagan is absolutely right that after PennEast, I  
19 think that the analysis is different. A  
20 uniquely national power where suits against the  
21 states are incidental to its exercise is exactly  
22 the kind of power that the Court has held  
23 entails a sovereign immunity waiver. This is  
24 not going to be limitless.

25 Texas's argument is a bit puzzling

1 because they say that there will be a -- a flood  
2 of suits and the federal government will create  
3 all kinds of causes of action against the  
4 states. And yet, on the other hand, Texas  
5 points out that no states have ever been  
6 authorized and that states were -- these suits  
7 were authorized only very late in the republic  
8 because of the special solicitude the government  
9 already provides to the states because it  
10 understands their importance in the federal  
11 system.

12           Captain Torres went to war, and when  
13 he came home, he brought a piece of the war with  
14 him. And if he had been a member of the local  
15 sheriff's department or a U.S. marshal or worked  
16 for any other employer, he would have been able  
17 to sue to vindicate his rights. But because he  
18 worked for Texas, he had no cause of action.  
19 The war powers do not -- do not countenance that  
20 result. It's not right. We're asking this  
21 Court to make it right. I urge you to reverse.

22           Thank you, Your Honor.

23           CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25           The case is submitted.

1                   (Whereupon, at 11:42 a.m., the case  
2 was submitted.)  
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