No. 20-

In the Supreme Court of the United States

LE ROY TORRES, PETITIONER,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Congress gave the over 19 million military servicemembers—including over 800,000 who work for state and local government employers—a cause of action to remedy adverse employment actions taken because of their military service. It enacted USERRA pursuant to its constitutional War Powers, U.S. Const. art. I, § 8, cls. 11-16, recognizing that unremedied employment discrimination by state employers based on military service could interfere with the nation's "ability to provide for a strong national defense." H.R. Rep. No. 105-448, at 5 (1998). USERRA's cause of action against state employers may be pursued *only* in state courts.

In a sharply divided decision that conflicts with the Constitution's text, structure, and history, the court below, a Texas intermediate appellate court with jurisdiction over more than 2 million Texas citizens, held that USERRA's cause of action is unconstitutional because Congress lacks the power to authorize lawsuits against nonconsenting states pursuant to its War Powers.

The question presented is whether Congress has the power to authorize suits against nonconsenting states pursuant to its War Powers.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Torres v. Tex. Dep't of Pub. Safety*, No. 19-0107, Supreme Court of Texas. Petition for review denied June 5, 2020.
- *Tex. Dep't of Pub. Safety v. Torres*, No. 13-17-00659-CV, Court of Appeals, Thirteenth District of Texas. Judgment entered November 20, 2018; rehearing denied December 19, 2018.
- *Torres v. Tex. Dep't of Pub. Safety*, No. 2017-CCV-61016-1, County Court at Law Number One, Nueces County, Texas. Judgment entered November 21, 2017.

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OPINIONS BELOW

The order of the Supreme Court of Texas (App.29a-43a) denying a petition for review is unreported. The opinion of the court of appeals (App.1a-28a) is reported at 583 S.W.3d 221 (Tex. App. 2018). The trial court's order (App.49a) is not reported.

JURISDICTION

The court of appeals entered judgment on November 20, 2018. App. 20a. The Supreme Court of Texas denied a timely petition for review on June 5, 2020. App.33a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions of the U.S. Constitution and U.S. Code are produced in the Appendix. *See* App.50a-71a.

STATEMENT

The court below invalidated an act of Congress, leaving many of the more than 800,000 veterans and servicemembers who work for state and local governments vulnerable to discrimination on the basis of their military service. The decision thwarts the aims of a federal law duly enacted to protect veterans and servicemembers, leaves untold numbers of veterans and servicemembers without a remedy when states discriminate against them on the basis of their service, and calls into doubt Congress's power to authorize lawsuits against nonconsenting states pursuant to its War Powers even in times of urgent national need. The decision warrants this Court's review.

Congress enacted the federal statute at issue here—the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")—pursuant to its War Powers. USERRA reflects Congress's unmistakable intent to provide a remedy for discrimination on the basis of military service by states acting as employers, expressly authorizing civil actions for money damages against "a

State (as an employer)," 38 U.S.C. § 4323(a)(3), (d)(3), thereby deliberately precluding a defense of sovereign immunity in suits brought against states in state courts, *see* H.R. Rep. No. 105-448, at 5-6 (1998). Thus, the only question in this case is whether Congress has the constitutional power to authorize lawsuits against nonconsenting states when necessary to carry out its War Powers. That is a question this Court has never considered, and it is imperative that the Court now answer it. The answer is yes.

The Constitution grants Congress a number of powers known collectively as the War Powers. Article I authorizes Congress to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "[r]egulat[e] … the land and naval Forces." U.S. Const. art. I, § 8, cls. 11-16. The breadth of Congress's War Powers is difficult to overstate. "This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (quoting John Quincy Adams), *overruled in part on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). "From *its very nature* the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law." *Macintosh*, 283 U.S. at 622 (emphasis added). These "drastic powers" are necessary "[t]o the end that war may not result in defeat." *Id.*

And unlike the vast majority of Congress's Article I powers, the War Powers are both "plenary and *exclusive*." *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1871) (emphasis added). They were never exercised individually by the states; the colonies exercised them always and only "in their collective and corporate capacity as the United States of America." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936).

That means that the states have no sovereign immunity against suits pursuant to the War Powers. This Court has held that Congress may authorize suits against nonconsenting states when the states agreed in the "plan of the [constitutional] convention" to cede their sovereign immunity to lawsuits authorized under particular powers. *See Allen v. Cooper*, 140 S. Ct. 994, 1002-03 (2020). The Bankruptcy Power is one such power. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373 (2006). The War Powers are another. The Constitution's text, its structure, its history, and the War Powers' "very nature" all place that conclusion beyond doubt.

The divided court below nevertheless held, overruling the trial court, that the War Powers' extraordinary qualities are immaterial because the War Powers are physically located in Article I of the Constitution. Citing this Court's statements in *Alden v. Maine*, 527 U.S. 706, 712 (1999), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996), that Article I powers generally cannot be used to abrogate state sovereign immunity, the court held that the War Powers—"tremendous" as they are—cannot be used to authorize suits against nonconsenting states, even if necessary to raise an army or end a war. App.12a. The court accordingly invalidated USERRA's cause of action as unconstitutional, joining three state supreme courts (Virginia, Alabama, and Delaware) and four state appellate courts (New Mexico, Georgia, Tennessee, and Florida) that have reached the same conclusion since *Alden*.

This Court often grants review when lower courts refuse to enforce a federal statute on constitutional grounds. It did so just last term in a case about state sovereign immunity. *See Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020). It should do the same here. State courts nationwide are systematically disregarding a federal law that Congress concluded was necessary for the national

defense. This Court—not a battery of state courts—should be the final arbiter of the question whether Congress has the power to authorize suits against nonconsenting states when needed to carry out its War Powers. And that is especially so because the states' refusal to enforce USERRA has devastating real-world consequences for servicemembers and veterans facing discrimination.

"Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable," this Court should grant certiorari and reverse the judgment. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993).

A. Legal Background

1. Knowing that protecting veterans as they return from duty is critical to ensuring its ability to raise and support armies and otherwise wage war effectively, over the past 80 years Congress has consistently expanded protections for veterans reentering the workforce. Congress enacted those protections "to compensate for the disruption of careers and the financial setback that military service meant for many veterans." 140 Cong. Rec. S7670-71 (June 27, 1994) (statement of Sen. Rockefeller).

Congress's efforts began in the midst of World War II, when it established a right to reemployment for draftees and voluntary enlistees to ensure they could not be punished for "serv[ing] their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see* Selective Training and Service Act, Pub. L. No. 76-783, 54 Stat. 885, 890 (1940). Congress recognized that some servicemembers worked for state and local government employers and declared as "the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay." 54 Stat. at 890.

In the decades after the war, Congress extended reemployment rights to reservists and National Guard members, whom Congress described as "essential to our national defense." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 561 (1981) (quoting H.R. Rep. No. 1303, 89th Cong., 2d Sess., at 3 (1966)). Congress also expanded substantive protections to prohibit employment discrimination on the basis of military service—discrimination that by the 1960s had "become an increasing problem." *Id.* at 557 (quoting S. Rep. No. 1477, 90th Cong., 2d Sess., at 1-2 (1968)).

Congress further enhanced protections for servicemembers during the Vietnam War. *See* Pub. L. No. 93-508 § 404, 88 Stat. 1578, 1594 (1974). In the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Congress concluded that its earlier approach had proven insufficiently protective and authorized servicemembers to sue states in federal court to enforce the Act. *See* 88 Stat. 1594-96. Congress found that expansion necessary to protect the many servicemembers and veterans who had also chosen to serve the public in civilian life as "school teachers, policemen, fireman, and other State, county, and city employees." Rep. of Comm. on Vets' Affs., S. Rep. No. 93-907, at 109-10 (1974) ("[S]ome State and local jurisdictions have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Or if they do, they seem unwilling to grant them seniority or other benefits which would have [accrued] to them had they not served their country in the military.").

2. In the wake of the Persian Gulf War, Congress enacted USERRA to "restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law" while correcting judicial misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston). USERRA aimed to "clarify and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." 137

Cong. Rec. H2972-80, H2978 (May 14, 1991) (statement of Rep. Penny); *see* 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston).

Congress enacted USERRA, like the statute's predecessors, pursuant to its constitutional War Powers. *See* 144 Cong. Rec. 4458 (1998) (statement of Rep. Evans) (noting that "the authority for laws involving veterans benefits is derived from the War Powers clause"); U.S. Intervenor Br. at 11, *McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440), https://bit.ly/3oUIoX8 (explaining that "[c]ourts of appeals … have uniformly held that Congress enacted USERRA, and its predecessor laws, pursuant to its War Powers" and that "USERRA plays a central role in maintaining Congress's ability to raise and support an Army and Navy").

3. USERRA establishes broad substantive protections for servicemembers, including the right to take military leave from civilian jobs, to be promptly reemployed upon return from service, and to be free from discrimination based on military service. 38 U.S.C. §§ 4311-13, 4316. For servicemembers who incur disabilities during their military service, USERRA requires employers to make reasonable efforts to accommodate those disabilities and to rehire the servicemembers in the position they would have held but for their military service or in a position of equivalent "seniority, status, and pay." 38 U.S.C. § 4313(a)(3); *see* 20 C.F.R. § 1002.225.

An employee who has suffered discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. 38 U.S.C. § 4323. Unlike most federal employment statutes, USERRA applies to private- and public-sector employers of all sizes, including federal, state, and local governments. § 4303(4).

4. Shortly after USERRA's enactment, this Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44,

76 (1996), that Congress's powers under the Indian Commerce Clause of Article I do not include the power to subject state governments to suit in federal court. Congress responded by amending USERRA to expressly authorize suit against state employers in *state* court. *See* Pub. L. No. 105-368, § 211 (Nov. 11, 1998). USERRA now provides that, "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). The purpose is "to assure that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA" and "to preclude a defense of sovereign immunity" "in an action brought under this chapter." H.R. Rep. No. 105-448, at 5-6 (1998).

5. Despite Congress's efforts, many state courts since 1998 have systematically blocked servicemembers from suing their state employers. These courts have held that *Seminole Tribe* and *Alden* categorically foreclose suits against states under any statute enacted pursuant to Article I—even the War Powers—unless the state has voluntarily waived its immunity by statute.[1]

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[1] *See Clark v. Va. Dep't of State Police*, 793 S.E.2d 1, 7 (Va. 2016); *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, 693 S.E.2d 868, 870-71 (Ga. Ct. App. 2010) (exception of bankruptcy cases); *Janowski v. Div. of State Police*, 981 A.2d 1166, 1170 (Del. 2009); *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-63 (Ala. 2001); *see also Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012), *cert. denied* 568 U.S. 1195 (2013); *Ramirez v. State ex rel. Child., Youth & Fams. Dep't*, 326 P.3d 474, 480-82, 483 (N.M. Ct. App. 2014), *rev'd on other grounds sub nom. Ramirez v. N.M. Child., Youth and Fams. Dep't*, 372 P.3d 497 (N.M. 2016); *Fla. Dep't of Highway Safety & Motor Vehicles v. Hightower*, No. 1D19-227, 2020 WL 5988204, at *3-*4, *6 (Fla. Dist. Ct. App. Oct. 9, 2020).

B. Factual Background

Petitioner Le Roy Torres enlisted in the U.S. Army Reserve in 1989. App.73a. For 18 years, he served as an Army reservist while employed as a state trooper for the Texas Department of Public Safety. *Id.* Petitioner, at this point a Second Lieutenant, was called to active duty and deployed to Iraq in November 2007. App.73a-74a.

While deployed, Petitioner, like thousands of fellow soldiers serving in Iraq, suffered lung damage after being exposed to toxic fumes emanating from the now-infamous "burn pits." App.74a. These huge open-air pits smoldered 24 hours a day on many military bases, spouting thick, black smoke as they burned everything from trash, to ammunition, to medicine, to human waste. *See* Peggy McCarthy, *Toxic Exposure on Army Bases Sparks Battle for Health Benefits*, Associated Press (May 14, 2019), https://perma.cc/YH32-4LHS; James Risen, V*eterans Sound Alarm Over Burn-Pit Exposure*, N.Y. Times (Aug. 6, 2010), https://nyti.ms/31wbCyz.

Petitioner was honorably discharged a year after his deployment. App.74a. When he returned to Texas, Petitioner notified the Texas Department of Public Safety of his intent to be reemployed. *Id.* He explained that his lung damage prevented him from performing all of his previous duties as a Texas state trooper. *Id.* Petitioner thus requested to be placed in a different position within the Department. *Id.* He meanwhile received a diagnosis of constrictive bronchiolitis—a devastating respiratory condition that causes narrowing of the airways and difficulty breathing. *Id.*; *see* Matthew S. King et al., *Constrictive Bronchiolitis in Soldiers Returning from Iraq and Afghanistan*, 365 New Eng. J. Med. 222, 223 (2011).

The Department declined Petitioner's requested accommodation. It instead offered him a temporary position in his previous capacity as a state trooper and informed him that he would be fired if he did not report to

duty. App.74a-75a. Rather than take on duties he could not perform, Petitioner resigned. App.75a. Petitioner and his wife, Rosie, have since co-founded a nonprofit organization, Burn Pits 360, which for over a decade has advocated for servicemembers and families of servicemembers injured by toxic burn pits while serving their country.[2]

C. Proceedings Below

1. On May 25, 2017, Petitioner filed suit against the Department of Public Safety seeking declaratory and monetary relief under USERRA. App.79a. Petitioner alleged that the Department violated USERRA by failing to offer him a job after his return from active duty that would accommodate his disability. App.75a-78a. The Department moved to dismiss for lack of jurisdiction. App.49a. Acknowledging that USERRA expressly allows individuals to sue Texas in state court, the Department nevertheless contended that Texas had sovereign immunity from suit under USERRA. CR.40-44. Following a hearing, the trial court denied the Department's motion. App.49a.

2. A divided court of appeals reversed. The court held that USERRA was unconstitutional insofar as it authorized suits against states because Congress lacks the power to abrogate sovereign immunity pursuant to its War Powers. App.15a. The court of appeals read *Seminole Tribe* and *Alden* as foreclosing Congress from abrogating state sovereign immunity using any of its Article I powers, including its War Powers. App.7a-11a. The court viewed as irrelevant, App.12a-13a, this Court's later

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[2] *See* Statement of Le Roy Torres, *An Assessment of the Potential Health Effects of Burn Pit Exposure Among Veterans: Hearing Before the Subcomm. on Health, H. Comm. on Veterans' Affs.*, (2018), https://bit.ly/35mJCkO; *About Burn Pits 360*, Burn Pits 360, https://bit.ly/34fHeNo.

decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which held that Congress has the power to abrogate state sovereign immunity pursuant to its Article I Bankruptcy Power.

Justice Benavides dissented. App.21a-28a. "Congress," she explained, "intended to protect citizens who served our country in suits against a state when they were discriminated against by an employer upon returning from combat." App.23a. Yet the majority left "our armed forces [with] no remedy in state courts when they have faced employment discrimination from a state agency due to their service to our country." App.22a. Petitioner moved for rehearing en banc, which the court denied over two dissents. App.47a-48a.

On February 22, 2019, Petitioner petitioned for review in the Supreme Court of Texas. The court requested full briefing on the merits before denying review on June 5, 2020. App.33a, 44a-46a.

REASONS THE PETITION SHOULD BE GRANTED

This Court should grant review to decide whether Congress has the power to permit suits against nonconsenting states pursuant to its War Powers. A state court of appeals with jurisdiction over a population larger than that of many states has held a federal statute unconstitutional, and a state supreme court has refused even to review the correctness of that decision.

The decision below is wrong. Text, structure, and history show that the states agreed in the plan of the convention not to assert an immunity to suits authorized under the War Powers.

The decision below is also important. The Texas court's erasure of a remedy against states for discrimination on the basis of military service threatens to harm hundreds of thousands of veterans working as state employees. Texas has now joined multiple other states in

declaring this statute unconstitutional. That conclusion not only interferes with Congress's ability to provide for the national defense today, but it may interfere with Congress's ability to exercise its War Powers in the future, in a time of dire national need.

This case is a good vehicle to address the question presented. The appeal arises from a reasoned decision with a dissent, on an issue in which a deeper split is unlikely to arise (and indeed has not arisen in the two decades since *Alden*), and no future case is likely to offer a better opportunity to address the question presented than the decision below.

I. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW

A. The Court of Appeals' Invalidation of a Federal Statute Warrants This Court's Review

USERRA is an important federal statute meant to protect the United States' ability to provide a strong national defense. The invalidation of one of its central provisions as unconstitutional justifies this Court's review. This Court has granted certiorari many times for that reason alone. *See, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013) ("[I]n light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional, we granted the petition.").

In cases involving important federal statutes, no split is necessary to warrant this Court's immediate intervention—it is enough that the statute embodies a federal policy so important it was agreed upon and made law by two co-equal branches of the federal government. *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225 (2015); *United States v. Alvarez*, 567 U.S. 709 (2012); *Holder v. Humanitarian*

L. Project, 561 U.S. 1 (2010); *United States v. Comstock*, 560 U.S. 126 (2010); *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Williams*, 553 U.S. 285 (2008); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 264 (10th ed. 2013) ("Where the decision below holds a federal statute unconstitutional … , certiorari is usually granted because of the obvious importance of the case."). As the Solicitor General noted in obtaining a grant just last term—without any split—"any decision invalidating an Act of Congress on constitutional grounds is significant." Petition for a Writ of Certiorari at 11, *Iancu v. Brunetti*, 139 S. Ct. 782 (2019) (No. 18-302) (citing cases).

The Court recognized this fact just last Term, in just this context, when it granted certiorari in *Allen v. Cooper*, 140 S. Ct. 994 (2020). In every respect, *Allen* presented a weaker case for certiorari than this one: The Fourth Circuit joined the unbroken consensus of lower courts in holding that the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), cannot validly authorize suits for copyright infringement against states because Congress lacks the power to abrogate sovereign immunity under the Intellectual Property Clause. *See* Petition for Writ of Certiorari at 15 & n.4, *Allen*, 140 S. Ct. 994 (No. 18-877) (citing cases). Not only did the petitioner acknowledge the absence of division among the lower courts, *see id.* at 2, 15, but the issue there (unlike here) was not even an issue of first impression in this Court. *Allen* held that its decision was dictated by prior precedent holding that Congress has no power to abrogate sovereign immunity under the exact clause at issue. *See* 140 S. Ct. at 999, 1000-02. "[T]his Court granted certiorari" nonetheless "[b]ecause the Court of Appeals held a federal statute invalid." *Id.* at 1000. Here, as in *Allen*, the court of appeals "exercise[d] … the grave power of annulling an Act of Congress" that abrogated state sovereign

immunity on constitutional grounds. *United States v. Gainey*, 380 U.S. 63, 65 (1965).

The reflexively dismissive character of state-court decisions invalidating USERRA bolsters the need for this Court's review. This Court permits issues to percolate in the lower courts to benefit from a diverse array of opinions analyzing difficult constitutional questions. But though the constitutional question presented here is both difficult and important, lower courts have reduced their analysis to a formula. Step one, recite *Seminole Tribe*'s and *Alden*'s statements that Congress lacks the power to abrogate sovereign immunity under its Article I powers; step two, dismiss the case. *See supra* note 1 (citing cases). The lower courts have done so even though this Court later held that the language they cited relies on an "erroneous" assumption that was "not fully debated" and is thus nonbinding *dicta*. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). They have done so even though the United States has intervened in many of these cases to explain that *Seminole Tribe* and *Alden* are inapplicable and to stress the importance of USERRA to the defense of the United States. *See infra* Section I.C. It happened again here. The United States did not intervene, but the majority did little more than point to *Seminole Tribe* and *Alden* and dismiss the case. App.12a. Petitioner marshalled an array of textual, structural, and historical evidence showing that the War Powers are *unique*—that the states agreed in the plan of the convention not to assert sovereign immunity against their exercise—but the Texas Supreme Court did not even grant review. App.33a.

As the final arbiter of questions of federal constitutional law, this Court should decide this important question about the outer limits of the War Powers, not a collection of state courts without serious reflection. Without this Court's intervention, USERRA's protections will die by a thousand cuts without any meaningful analysis of

whether the Constitution's text, structure, and history permit the statute's invalidation. Servicemembers who work for state governments will suffer, uncertain whether they can rely on USERRA's protections. *See infra* Section I.B.2. And Congress will be forced to legislate in the shadow of grave uncertainty about the full extent of its War Powers.

Finally, the court below's invalidation of USERRA was especially pernicious because USERRA represents an appropriate and highly circumscribed use of Congress's authority under the War Powers to authorize suits against nonconsenting states. The connection between Congress's need to provide for the national defense and its need to protect veterans and servicemembers from discrimination by state employers on the basis of their service is direct and demonstrated. And USERRA's incursion on legitimate state prerogatives is narrow because USERRA authorizes suits against the states only in their roles as employers of veterans and servicemembers and only for service-related discrimination. Congress's work in crafting USERRA and balancing the state and national interests involved deserves this Court's review and affirmation. At minimum this Court, not 50 state courts, should be the final authority on the scope of Congress's War Powers in this area.

B. The Elimination of USERRA's Private Right of Action Against State Employers Harms Hundreds of Thousands of Veterans

A lower-court decision declaring a federal statute unconstitutional alone warrants certiorari, but USERRA is no ordinary federal statute. This Court's review is especially urgent because the invalidation of USERRA leaves hundreds of thousands of Americans vulnerable to discrimination on the basis of their military service, and in particular discrimination on the basis of injuries they incurred defending our nation.

1. Nearly 19 million Americans—about 8% of the adult population—are veterans of our nation's armed forces. Bureau of Lab. Stat., U.S. Dep't of Lab., USDL-20-0452, *Employment Situation of Veterans — 2019*, at 2 (2020), https://bit.ly/3nAGtX8 (hereinafter *Employment Situation*). They range in age from 18 years old to well over 100. Jonathan E. Vespa, U.S. Census Bureau, *Those Who Served: America's Veterans from World War II to the War on Terror* 1 (2020), https://bit.ly/2SFvTj6 (hereinafter *Those Who Served*). They are men and (increasingly) women. *Id.* at 5-6 & fig.4. And they come from every state and every walk of life. *Id.* at 6-8 & tbl.2; *Employment Situation* tbl.6A. They are united by their devotion, in peacetime and in war, to supporting and defending the United States, its Constitution, and its people.

Over 4.7 million veterans—a quarter of those who have served—suffer from a service-connected disability. *Employment Situation* tbl.7.[3] Many veterans bear the scars of their service on their bodies. *See* Kelly Ann Holder, U.S. Census Bureau, *The Disability of Veterans* 12 fig.6 & tbl.1 (2016), https://bit.ly/36PW7YK (describing incidence of various physical disabilities). But for many more their injuries are invisible. "[V]eterans … are more likely to suffer from trauma-related injuries, substance abuse, and mental health disorders than people who have never served in the armed forces." *Those Who Served* 8. And veterans commit suicide at a significantly greater rate than the general population. Off. of Mental Health & Suicide Prevention, U.S. Dep't of Veterans Affs., *2019 National Veteran Suicide Prevention Annual Report* 3 (2019), https://bit.ly/2SFu7yr.

The number of disabled veterans—and severely disabled veterans in particular—has more than doubled

[3] A service-connected disability is a health condition or impairment caused or made worse by military service.

since 1990. Nat'l Ctr. for Veterans Analysis & Stat., U.S. Dep't of Veterans Affs., *Statistical Trends: Veterans with a Service-Connected Disability, 1990 to 2018*, at 4-7 (2019), https://bit.ly/3dpesgx. Nearly *half* of veterans who served in the wars in Afghanistan and Iraq have a service-connected disability. *Those Who Served* 11. And 39% of disabled post-9/11 veterans suffer from the most severe disabilities (defined as a "disability rating" of 70 or higher).[4] *Id.* at 9, 11.

Millions of these veterans were exposed to the toxic fumes of open burn pits in Afghanistan and Iraq. And many of them, like Petitioner, continue to suffer from associated respiratory, cardiovascular, and other health conditions to this day. *See* Peter J. Lim & Ali R. Tayyeb, *Critical Analysis of the Healthcare Response to Burn-Pit-Related Illnesses for Post-9/11 Iraq and Afghanistan Veterans*, 7 Open J. Emergency Med. 17, 18 (2019), https://bit.ly/36NA3xN; Off. of Pub. Health, Veterans Health Admin., U.S. Dep't of Veterans Affs., *Report on Data from the Airborne Hazards and Open Burn Pit (AH&OBP) Registry* 5-9 (2015), https://bit.ly/3lMSIhl.

State governments are some of the largest employers of veterans generally and of disabled veterans in particular. The most recent government data (from 2019) show that nearly 10% of employed veterans—over 800,000—work for their state or local government. *Employment Situation* tbl.8. And roughly *a quarter* of those veterans suffer from a disability. *See id.* That amounts to over 200,000 veterans who both work for their state or local government *and* suffer from a service-connected

[4] A disability rating of 70 includes such disabilities as the "amputation of [the forearm] below insertion of pronator teres," 38 C.F.R. § 4.71a, the "[a]natomical loss of one eye" with "20/200" vision in the remaining eye, § 4.79, and "near-continuous panic … affecting the ability to function independently, appropriately and effectively," § 4.130.

disability. *See id.* And many more state government employees are not disabled but still face discrimination on account of their veteran status.

2. Veterans and servicemembers who work for Texas, Virginia, Florida, Tennessee, Georgia, Delaware, and Alabama—all of which have state appellate or Supreme Court decisions holding that sovereign immunity bars USERRA suits for damages against states as employers—have no effective means of enforcing their rights under USERRA. For veterans and servicemembers who work for these states, as many as a quarter million, USERRA essentially has no teeth at all.

USERRA has two enforcement mechanisms. Under 38 U.S.C. § 4323(a)(3) a veteran who has suffered employment discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. This private right of action provides veterans vital protection from discrimination based on their veteran status or service-connected disability.

USERRA has another enforcement mechanism—an administrative process involving the Department of Labor (DOL) and the Department of Justice (DOJ)—but it is woefully ineffective. In lieu of a private suit in state court, veterans can file a complaint with DOL that culminates (in theory) in a suit brought by DOJ on behalf of the veteran claimant. But since DOJ's Civil Rights Division was granted authority to bring USERRA suits against employers in 2004, it has filed only 107 lawsuits, notwithstanding the many thousands of complaints that have been filed. *See* Off. of Veterans' Emp. & Training, U.S. Dep't of Lab., *Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2019 Annual Report to Congress* 8-10 & fig.1. (2020), https://bit.ly/30PZJFY.

Take, for example, fiscal year (FY) 2019, the subject of DOL's most recent report to Congress. Veterans filed

950 new complaints with DOL in FY 2019, which when added to the 163 cases still open from FY 2018 amounted to 1,127 open cases. *Id.* at 10 fig.1. DOL referred only 40 cases to DOJ that year, and only 15 of those were against state agencies. *Id.* at 17. In 24 of the 40 cases, DOJ disagreed with DOL's merits assessment and took no action. *Id.* And of the 16 cases that DOJ *agreed had merit* (including six against state agencies), DOJ offered representation in just *two*. *Id.* Neither of those cases was against a state agency. *Id.*

This useless administrative route makes USERRA's private right of action—which permits veterans to file directly in state court without exhausting the administrative process—a necessary avenue for veterans to vindicate their rights. A lawsuit is often far faster, far less cumbersome, and far more efficient than the administrative process. By foreclosing that relief to the hundreds of thousands of veterans who work for state governments, state courts nationwide are effectively denying *any* relief to all but the small fraction of USERRA claims that can successfully run the administrative gauntlet.

C. Clarity Regarding the Scope of Congress's War Powers Is of Vital Importance to the Federal Government's Interests

The United States also has a strong interest in clarity regarding the scope of Congress's War Powers. This Court has never authoritatively interpreted the War Powers in the context of state sovereign immunity. Guidance in this arena—which implicates governmental interests of the highest order—is vital to Congress's ability to legislate effectively while remaining within the bounds of its constitutional authority. In case after case, the federal government has asserted its "strong interest in defending USERRA's constitutionality" and consistently argued that "Congress has authority, under its War Powers, to authorize private individuals to bring USERRA claims

against state employers." U.S. Amicus Br. at 2, *Clark v. Va. Dep't of State Police*, 793 S.E.2d 1 (Va. 2016) (No. 151857), https://bit.ly/3oLSYQ8; *see, e.g.*, U.S. Amicus Br., *Ramirez v. State ex rel. Child., Youth & Fams. Dep't*, 326 P.3d 474 (N.M. Ct. App. 2014) (No. 31,820), https://bit.ly/35SQcQs; U.S. Amicus Br., *Ramirez v. State Child., Youth & Fams. Dep't*, 372 P.3d 497 (N.M. 2016) (No. S-1-SC-34613), https://bit.ly/3oLSGc0; U.S. Intervenor Br. at 34, *Weaver v. Madison City Bd. of Educ.*, No. 5:11-CV-3558-TMP (N.D. Ala. Aug. 14, 2013), https://bit.ly/2HSXDin; U.S. Intervenor Br. at 4-5, 18, *McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440), https://bit.ly/3oUIoX8. This petition presents the Court with the opportunity to provide much-needed clarity on this important question.

II. The Decision Below Is Wrong

In addition to the legal and practical importance of the question presented, this Court's review is warranted to correct the constitutional error in the decision below. Contrary to the court of appeals' holding, Congress has had the power to authorize suits against nonconsenting states pursuant to its War Powers since the Founding—as the text, structure, and history of the War Powers all decisively establish.

A. This Court Has Never Considered Whether Congress May Authorize Suits Against Nonconsenting States Pursuant to Its War Powers

This Court has never considered whether Congress may authorize suits against nonconsenting states pursuant to its War Powers. The Court below incorrectly proceeded on the theory that this Court *did* consider this question implicitly in *Seminole Tribe* and *Alden*. App.11a-12a. But that fundamentally misunderstands this Court's decisions. This Court has never entertained a claim that the War Powers may be used to authorize

suits against the states under the test this Court has long used to determine whether Congress may authorize such suits pursuant to its constitutional powers.

For the first 200 years of the nation's history this Court had no reason to consider this question. As late as 1989, a plurality of the Court stated that the Court's precedents "mark[ed] a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages" under all of its Article I powers. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. 44.

The relevant constitutional analysis has changed. In a series of cases over the last 25 years, the Court has clarified that in fact Congress may authorize suits against nonconsenting states under only *some* Article I powers. *Seminole Tribe*, 517 U.S. at 72-73 (no abrogation under the Indian Commerce Clause); *Alden*, 527 U.S. at 754 (constitutional limits on abrogation apply to state courts); *Katz*, U.S. at 373, 377 (abrogation permissible under the Bankruptcy Clause); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672, 680 (1999) (no abrogation under Intellectual Property Clause); *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020) (we meant what we said in *Florida Prepaid*). The Court has returned to the constitutional test announced by Alexander Hamilton in *The Federalist* No. 81, and endorsed by the Court in *Seminole Tribe*—namely, Congress may authorize suits against the states without their consent where there was a "surrender of [sovereign] immunity in the plan of the convention." 517 U.S. at 68 (quoting *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322-23 (1934)); *accord Allen*, 140 S. Ct. at 1003 (similar); *Alden*, 527 U.S. at 713, 730 (similar).

In *Katz*, the Court applied that test in determining that the Bankruptcy Power is one such power that the

states surrendered in the "plan of the convention." 546 U.S. at 373, 377; *see Allen*, 140 S. Ct. at 1003. The Court explained that the "assumption" in *Seminole Tribe* that its holding would preclude suits pursuant to the Bankruptcy Power "was erroneous." 546 U.S. at 363.

Thus, for two centuries Congress had no reason to doubt—and this Court had no reason to consider—whether Congress could authorize suits against nonconsenting states pursuant to its War Powers. But lower courts, including the court of appeals below, have now concluded, without engaging in the appropriate constitutional analysis, that Congress categorically lacks that power based on the mistaken belief that *Seminole Tribe* and *Alden* have already decided the question.

B. The Constitution's Text, Structure, and History Establish That Congress May Authorize Suits Against the States Pursuant to Its War Powers

In determining whether "the States agreed in the plan of the Convention not to assert [sovereign] immunity" in suits authorized under a particular power, this Court uses conventional tools of constitutional interpretation, looking to factors like the "[t]he history of the … Clause," "the reasons it was inserted in the Constitution," and "legislation considered and enacted in the immediate wake of the Constitution's ratification," *Katz*, 546 U.S. at 362, 373, in addition to text and structure, *id.* at 370 (analyzing the text of the Bankruptcy Clause). *See also id.* at 379 (Thomas, J., dissenting) (relying on "text, structure, [and] history"); *The Federalist* No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining how to determine whether the "plan of the convention" "alienat[ed] … State sovereignty" with respect to a federal power). Every tool of constitutional interpretation points toward the conclusion that the states agreed to surrender their sovereign immunity in suits authorized under the War Powers in the plan of the Constitutional Convention.

Text and Structure. The War Powers provide Congress with the powers "To declare War," U.S. Const. art. I, § 8, cl. 11, "To raise and support Armies," cl. 12, "To provide and maintain a Navy," cl. 13, "To make Rules for the Government and Regulation of the land and naval Forces," cl. 14, "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," cl. 15, and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress," cl. 16.

These vast powers are *exclusively federal*. Unlike the Commerce Clause and many other clauses of Article I, the federal government shares *none* of the War Powers with the states.[5] *Only* Congress declares war. *Only* Congress raises and supports armies and provides and maintains a navy. As the Constitution's text expressly provides: "No State shall, without the Consent of Congress … keep Troops, or Ships of War in time of Peace, … or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, § 10, cl. 3. Where any of the War Powers are shared with the states, Article I shares them expressly. *See* U.S. Const. art. I, § 8, cl. 16 ("[R]eserving to the States respectively, the Appointment of the Officers, and the Authority

[5] Federal and state governments share "concurrent" power to regulate commerce. *E.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089-91 (2018). States may regulate interstate commerce so long as they do not discriminate against other states or impose "undue burdens" on interstate commerce. *Id.* at 2090-91. And Congress can enable states to regulate even more broadly. *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

of training the Militia according to the discipline prescribed by Congress[.]").

Further evidencing the intention for Congress to have plenary and exclusive authority in this area, the War Powers are the only powers Congress is *required* to exercise. The Constitution mandates that the United States "*shall* protect each [state] against Invasion; and on Application [from the state] … against domestic Violence." U.S. Const. art. IV, § 4 (emphasis added). The exclusivity of congressional authority to exercise the War Powers is unexceptional; the states did not possess such powers even before the Constitution was ratified. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936).

The exclusively federal nature of the War Powers is not an accident but rather an acknowledgment that the need to limit state sovereign immunity is *necessary* to Congress's effective execution of this authority. These powers embrace every phase of the national defense, including the protection of the armed forces from injury and from the dangers that attend the rise, prosecution, and progress of war. Congress's authority to provide for the successful conduct and definitive resolution of war necessarily includes the authority to provide for proceedings to definitively resolve any legal entanglements between states and foreign sovereigns, foreign citizens, American citizens, and American soldiers. As this Court has said, "the war power of the federal government … is [the] power to wage war successfully." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

Original Understanding. Peace treaties the United States entered into in the immediate aftermath of the Revolutionary War—ratified by the Supremacy Clause, *see* U.S. Const. art. VI (confirming "all Treaties made" before the Constitution's ratification to be the "Law of the Land")—show that Congress intended its War Powers to

authorize suits against the states. The power to end wars and enter binding peace treaties is possibly the *most* vital incident of the federal government's War Powers. The accepted view at the Founding was that Congress could authorize suits against nonconsenting states in peace treaties both before and after the ratification of the Eleventh Amendment. "The amendment's specific wording derives … from the desire … to assuage the … clamor over … *Chisholm v. Georgia* while guaranteeing the enforceability against the states of the controversial peace treaty with Great Britain." John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1894 (1983). That is compelling evidence that the states surrendered their immunity to suits authorized under the War Powers as part of the plan of the Convention.

As the price of peace to end the Revolutionary War, the British insisted that all British debts that predated the war were to be paid to British creditors. *See* Provisional Articles Between the United States of America, and his Britannic Majesty, 8 Stat. 54, 56 (1782). During the war, to raise money for the effort and punish the British, individual states extinguished British debts held by American citizens, typically ordering the debt paid to the state instead of the original British creditor. *See* Gibbons, *supra*, at 1903. The Framers were aware "of the likelihood that suits would be brought against the states under article III to enforce the peace treaty," and the "best evidence is that each [state ratifying] convention [to consider the issue] interpreted the judiciary article, as originally written, to allow the states to be sued in the federal courts." Gibbons, *supra*, at 1913-14.

The Eleventh Amendment was drafted to preserve the ability to bring suits under the treaty. That is because it was necessary to secure peace for the United States to represent to the British that all debts of British creditors

would be paid notwithstanding state confiscation laws. *Id.* at 1922-23, 1935. The Eleventh Amendment's drafters and ratifiers wrote it carefully and *specifically* to preserve the ability of the federal government to authorize suits against nonconsenting states pursuant to federal question jurisdiction. *See id.* at 1934-35. The Eleventh Amendment was drafted so that "[i]t could still be accurately represented to Great Britain that the state courts were open, and that the Supreme Court would continue to exercise appellate jurisdiction over federal questions to compel treaty compliance by a state." *Id.* at 1935. "[T]he perceived need to convince the British that the courts would correct peace treaty violations counseled against restricting the scope of federal question jurisdiction under article III over suits against states." *Id.*

Put differently, suits against states under the War Powers were not merely contemplated in "the plan of the Convention," *Katz*, 546 U.S. at 373—they were a *reason for* the Convention. The Framers anticipated lawsuits against states to enforce the post–Revolutionary War treaties, and delegates in Philadelphia and in state assemblies specifically debated whether Article III (and later the Eleventh Amendment) permitted such suits. *See* Gibbons, *supra* at 1899-1914. The prevailing view was that they did. *Id.* at 1913-14. Thus, even more clearly than with respect to the Bankruptcy Clause, at issue in *Katz*, the states "agreed in the plan of the Convention not to assert any sovereign immunity defense" in suits arising from War Powers legislation. *Katz*, 546 U.S. at 377.

History and Purpose. The Framers viewed Congress's War Powers as uniquely critical to the nation's success, and they believed that the federal government needed to have plenary exclusive power when exercising those powers. Madison and Hamilton, for example, insisted that these powers could have "no limitation[s]" or "constitutional barriers." *The Federalist* No. 23, at 153

(Alexander Hamilton), No. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961). They were adamant that Congress have the "*indefinite power* of raising *troops* … in *peace*, as well as in *war*," *The Federalist* No. 41, at 256 (James Madison) (Clinton Rossiter ed., 1961), and that "[s]ecurity against foreign danger … is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils," *id.*

Congress has taken many actions throughout this nation's history that would not and could not be authorized by any source of constitutional power other than the War Powers. Congress has exercised its War Powers to "apprehend[], restrain[], secure[] and remove[]" noncombatant foreign nationals of a hostile power living in the United States. *See* Alien Enemies Act of 1798, ch. 66, § 1, 1 Stat. 577; 50 U.S.C. §§ 21-24. It has established military tribunals and delimited their scope and procedures. Act of Mar. 3, 1865, ch. 79, § 12, 13 Stat. 487, 489; *see Hamdan v. Rumsfeld*, 548 U.S. 557, 590-92 (2006). It has conscripted soldiers in wartime and in peace. *See, e.g.*, Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76; Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 3(a), 54 Stat. 885, 885-86. And it has imposed criminal sanctions on individuals who evade military conscription. *See Arver v. United States*, 245 U.S. 366, 380-90 (1918). The power to conscript troops, President Lincoln opined in the midst of the Civil War, is given to Congress "fully, completely, unconditionally. It is not a power to raise armies if State authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if.'" Abraham Lincoln, *Opinion on the Draft*, Aug. 15, 1863, *in* 2 Abraham Lincoln: Complete Works 388, 389 (John G. Nicolay & John Hay eds., 1920).

Congress's extraordinary actions under its War Powers have included altering the most basic rules of state and federal court jurisdiction and even displacing an entire state judicial system. This Court has upheld federal statutes enacted during wartime "that retroactively tolled *all* [state-law] civil and criminal limitations for periods during which the war had made service of process impossible or courts inaccessible." *Stogner v. California*, 539 U.S. 607, 620 (2003) (citing *Stewart v. Kahn*, 11 U.S. (Wall.) 493, 503-04 (1871)); *see also Hanger v. Abbott*, 73 U.S. 532, 542 (1867). And in *The Grapeshot*, 76 U.S. 129, 133 (1869), and *Mechanics' & Traders' Bank v. Union Bank of La.*, 89 U.S. 276, 295-98 (1874), in the Civil War's aftermath, this Court affirmed Congress's power to establish an entire provisional Louisiana court system, administered by federal military officers, with original and appellate jurisdiction to hear and decide all cases, civil and criminal, arising under federal and Louisiana law. The authority of these courts was sweeping and plenary, *Mechanics' & Traders' Bank*, 89 U.S. at 294-95, and Congress later transferred "all judgments, orders, and decrees of the Provisional Court" to the appropriate Louisiana court, ordering that they "should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly," *The Grapeshot*, 76 U.S. at 132. This Court had "no doubt" that both the provisional courts and the transfer of judgments were constitutional. *Id.* at 133.

Thus, as with the Bankruptcy Clause, events in the "wake of the Constitution's ratification," *Katz*, 546 U.S. at 373, show that the War Powers have long been understood to subordinate state sovereignty, of which sovereign immunity is an integral part, *see Alden*, 527 U.S. at 729-30.

* * *

The court below failed to analyze any of the foregoing evidence. *See* App.9a-10a. Instead, the court below

dispensed with the Article I question as though it was conclusively decided by *Seminole Tribe* and *Alden*. App.11a-12a. This was error, and a consequential one: Thorough analysis of the War Powers and this Court's precedent shows overwhelmingly that Congress has the authority to legislate precisely as it did in USERRA.

Absent this Court's review, proper examination of the question presented may never occur. There is every indication that the lower courts will continue to repeat the assumption set forth in *Seminole Tribe* and *Alden* that *no* Article I powers except the Bankruptcy Power authorize suits against nonconsenting states, without engaging in the requisite "[c]areful study and reflection." *Katz*, 546 U.S. at 363. This Court's review will confirm that the states agreed to surrender their sovereign immunity to suits brought pursuant to statutes enacted through Congress's War Powers.

III. This Case Is a Good Vehicle to Decide the Question Presented

The Court should decide this important question now. There is no sign that the state courts charged with stewarding USERRA will find that USERRA permits suits against nonconsenting states when it is in their self-interest to find USERRA unconstitutional and when dictum in this Court's precedent provides plausible cover for such a holding. This Court, not the states, should be the final arbiter of Congress's most important constitutional powers.

1. The Texas Supreme Court's decision not to grant discretionary review of this important question shows that this issue is no longer meaningfully percolating in the lower courts, but stagnating. In just the past few weeks an intermediate Florida appellate court held USERRA unconstitutional using the same reflexive cite-*Alden*-and-dismiss formula state courts now routinely employ. *Fla. Dep't of Highway Safety & Motor Vehicles v. Hightower*,

No. 1D19-227, 2020 WL 5988204 (Fla. Dist. Ct. App. Oct. 9, 2020). There is no benefit in waiting further.

The judgment of the Texas Court of Appeals is as important as the judgment of a state supreme court. Texas's Thirteenth Judicial District, covering more than 2 million people, is larger than 12 states and the District of Columbia. If it were a state, it would have two congresspeople. Tens of thousands of veterans live within its jurisdiction. In light of the Texas Supreme Court's denial of review, Texas courts are likely to treat the court below's decision as a controlling interpretation for the entire State of Texas, home to 38 million people and to Fort Hood, one of the Army's most important bases.

2. This case is a good vehicle because the court below provided a reasoned decision on the merits over a dissent. The legal issue is squarely presented, there are no obstacles to review, and, as explained, no further percolation is likely given the trend of state courts reflexively holding USERRA suits against states unconstitutional.

3. This case has none of the deficiencies that the United States identified as grounds for denying the petition for certiorari in *Clark v. Virginia Department of State Police*, No. 16-1043 (U.S.). In *Clark* this Court called for the views of the Solicitor General, who argued that "[t]he Supreme Court of Virginia," which had invalidated USERRA's cause of action, "correctly determined that *Katz* does not control this case," U.S. Amicus Br. at 9, *Clark*, No. 16-1043, and that the petitioner had "failed to present any meaningful argument that, independent of *Katz*, the nature of Congress's war powers means that the States at the convention agreed not to assert immunity against suits by servicemembers in their own courts," *id.* at 10. The Solicitor General also argued that "[t]he relative scarcity of decisions on the question presented suggests that suits alleging that state agencies have failed to

comply with USERRA and analogous state laws are rare." *Id.* at 13.

Neither argument applies here. Petitioner squarely argues that the text of the Constitution, its history, and the nature of Congress's War Powers all show that the states agreed at the Convention not to assert immunity against suits authorized under them. And, as Petitioner has explained, private suits against states under USERRA are frequent; over 800,000 veterans work for state and local governments; and Congress for over 80 years has viewed the private damages remedy as essential to safeguarding Congress's ability to raise and support armies.

CONCLUSION

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

Respectfully submitted.

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APPENDICES