No. 20-603

# In the Supreme Court of the United States

LE ROY TORRES, PETITIONER

*v.*

TEXAS DEPARTMENT OF PUBLIC SAFETY

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

ELIZABETH B. PRELOGAR
*Solicitor General*
*Counsel of Record*
KRISTEN CLARKE
*Assistant Attorney General*
CURTIS E. GANNON
*Deputy Solicitor General*
CHRISTOPHER G. MICHEL
*Assistant to the Solicitor General*
THOMAS E. CHANDLER
ELIZABETH PARR HECKER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

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

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:

Cases—Continued: Page

Constitution, statutes, and rule: Page

Statutes and rule—Continued: Page



Miscellaneous:

# In the Supreme Court of the United States

No. 20-603

LE ROY TORRES, PETITIONER

*v.*

TEXAS DEPARTMENT OF PUBLIC SAFETY

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

### A. Statutory Background

1. The Constitution confers on Congress the powers to "raise and support Armies" and "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12-13. Those war powers are "broad and sweeping." *Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006) (citation omitted). As relevant here, Congress has over the past 80 years exercised the war powers to enact a series of statutes reflecting a "national policy to encourage service in the United States Armed Forces" by giving service members "the right to return to civilian employment without adverse effect on their career

progress." H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998) (House Report).

After the Vietnam War, Congress addressed the particular problem of state and local-government employers that refused to re-employ returning veterans in places such as police departments, fire departments, and schools. S. Rep. No. 907, 93d Cong., 2d Sess. 110 (1974). In the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VRRA), Pub. L. No. 93-508, 88 Stat. 1578, Congress required state and local governments to re-employ such veterans (with limited exceptions) and authorized veterans to sue noncomplying employers in federal court for monetary relief. § 404, 88 Stat. 1595-1596.

In response to suits under the VRRA, several state employers invoked sovereign immunity as a defense. The federal courts of appeals that addressed that defense uniformly rejected it, explaining that Congress could enact the challenged provision "under the war powers contained in Article I, Section 8." *Jennings* v. *Illinois Office of Educ.*, 589 F.2d 935, 937 (7th Cir.), cert. denied, 441 U.S. 967 (1979); see, *e.g.*, *Reopell* v. *Massachusetts*, 936 F.2d 12, 15-16 (1st Cir.), cert. denied, 502 U.S. 1004 (1991); *Peel* v. *Florida Dep't of Transp.*, 600 F.2d 1070, 1080 (5th Cir. 1979). Ultimately, "no State defendant * * * ever successfully argued that it was immune from" suit under the VRRA. House Report 4.

2. a. Following the Gulf War, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103-353, 108 Stat. 3149. USERRA generally reiterated and strengthened the employment rights provided in predecessor statutes, see 38 U.S.C. 4311-4319, with the stated purpose "to encourage noncareer service in the uniformed

services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," 38 U.S.C. 4301(a)(1).

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

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

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

*state* employers for monetary relief in *state* court "in accordance with the laws of the State," 38 U.S.C. 4323(b)(2). In addition, when a USERRA plaintiff uses the prescribed administrative process, the United States may sue a state or private employer on behalf of the plaintiff in federal court. 38 U.S.C. 4323(a)(1) and (b)(1). A committee report accompanying the amendments explained that they were adopted to ensure "that the policy of maintaining a strong national defense is not inadvertently frustrated by States refusing to grant employees the rights afforded to them by USERRA." House Report 5.

c. In 1999, this Court held in *Alden* v. *Maine*, 527 U.S. 706, that sovereign-immunity principles barred Congress from subjecting States to private-damages suits in state court under the Fair Labor Standards Act of 1938, 29 U.S.C. 203, which was enacted pursuant to Congress's authority to regulate interstate commerce. 527 U.S. at 712. The Court reasoned that, for many of the same reasons identified in *Seminole Tribe*, "the powers delegated to Congress under Article I * * * do not include the power to subject nonconsenting States to private suits for damages in state courts." *Ibid.* The Court explained that the "Constitution's structure, its history, and the authoritative interpretations by this Court make clear" that "States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today * * * except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713.

States promptly invoked *Alden* in defending against suits filed under the amended USERRA provision allowing private damages suits against States in state

court. In the first major decision addressing the question, the Alabama Supreme Court agreed that "*Alden* forecloses, on constitutional grounds, resort to Article I as the basis for subjecting [a State] to suit in a state court on a remedy based upon Congress's assertion of its powers with respect to military preparedness." *Larkins* v. *Department of Mental Health & Mental Retardation*, 806 So. 2d 358, 362-363 (2001).

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

USERRA plaintiffs then relied on *Katz* to argue that the statute's authorization of private damages suits against States in state court is permissible because States had surrendered in the plan of the Convention their sovereign immunity to suits under statutes enacted pursuant to Congress's war powers. Since 2008, the United States has intervened or filed amicus briefs to support the constitutionality of the challenged provision in a number of cases. See Pet. 18-19 (collecting cases). Courts that have reached the issue, however, have uniformly held that the USERRA provision is unconstitutional under the sovereign-immunity principles

articulated in *Alden* (albeit in some cases over dissent). See Pet. 7 n.1.

e. In 2017, this Court invited the United States to express its views on whether to grant a petition for a writ of certiorari in a case involving the USERRA provision's constitutionality. *Clark* v. *Virginia Dep't of State Police*, 137 S. Ct. 2149. The government submitted a brief contending that certiorari should be denied. U.S. Invitation Br. at 6, *Clark* v. *Virginia Dep't of State Police*, 138 S. Ct. 500 (2017) (No. 16-1043). The brief stated that "Congress may have power to authorize damages suits against state entities under USERRA, but not on the basis of the arguments raised below or raised in the petition." *Id.* at 11. The brief also noted that there was no conflict in the lower courts on the question presented, the issue arises relatively infrequently, and Congress was considering legislation requiring States to waive any sovereign immunity to USERRA suits in return for federal funding. *Id.* at 11-14. This Court denied certiorari in December 2017. *Clark*, 138 S. Ct. 500.

**B. Proceedings Below**

1. For nearly a decade, petitioner was both a state trooper employed by respondent and a member of the United States Army Reserve. Pet. App. 2a. In 2007, he was called up to active military duty and deployed to Iraq. See *ibid.* He alleges that, while serving there, he was exposed to "burn pits," resulting in damage to his lungs. *Id.* at 74a. After he was honorably discharged, petitioner returned to Texas and asked respondent to re-employ him in a different position because his lung damage prevented him from serving as a state trooper. See *ibid.* According to petitioner, respondent offered him only temporary re-employment as a state trooper.

See *ibid.* Rather than accept a position he could not perform, petitioner resigned. See *id.* at 75a.

Petitioner then sued in state court, alleging that respondent had violated USERRA by failing to re-employ him in a position that accommodated his disability. Pet. App. 75a-79a; see 38 U.S.C. 4313(a)(3). Respondent moved to dismiss on sovereign-immunity grounds. Pet. App. 49a. The state trial court denied that motion in a summary order. *Ibid.*

2. The state intermediate appellate court reversed. Pet. App. 1a-28a. The court concluded that respondent's sovereign immunity had not been "validly abrogated by Congress or waived by the legislature." *Id.* at 2a. The court read *Seminole Tribe* and *Alden* as "support[ing] the broad principle that * * * state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation." *Id.* at 12a. And while the court acknowledged that "*Katz* recognized a limited exception to this rule for actions to enforce certain bankruptcy statutes," the court understood that exception to be "derived from the particular attributes of *in rem* bankruptcy jurisdiction which are not present in this case." *Ibid.* The court added that all other appellate courts to confront the question since *Alden* had reached the same conclusion. *Id.* at 13a-14a.

The state court of appeals then rejected petitioner's argument that Texas had waived its sovereign immunity to USERRA suits. Pet. App. 16a-19a. The court recognized that several provisions in chapters 437 and 613 of the Texas Government Code provide employment rights and remedies generally similar to those provided by USERRA. *Id.* at 17a-19a & n.9. The court explained, however, that exhaustion of specified administrative remedies is a precondition to any waiver of sovereign

immunity in chapter 437, and "[t]here is no dispute that [petitioner] has not exhausted" those remedies with respect to the claims at issue. *Id.* at 18a (citing Tex. Gov't Code Ann. § 437.411(a) (West 2021)). The court found the provisions in chapter 613 inapplicable because they authorize only a court order compelling "a public official to comply with" the statutory requirements—not the monetary relief that petitioner seeks. *Id.* at 18a-19a n.9 (quoting Tex. Gov't Code Ann. § 613.021(a) (West 2021)).

One member of the court of appeals panel dissented, reasoning that petitioner's claims should be allowed to proceed under both USERRA and state law, or he should be allowed to replead them. Pet. App. 21a-28a.

3. The Supreme Court of Texas denied discretionary review. Pet. App. 32a-33a.

**C. Subsequent Developments**

After the Texas court of appeals issued its decision in this case, this Court decided *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244 (2021), which held that the States "consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates." *Id.* at 2259. The Court accordingly allowed a private suit against New Jersey to proceed under a federal statute authorizing natural-gas companies to condemn rights of way to build pipelines. *Id.* at 2263.

**DISCUSSION**

The state intermediate appellate court erred in concluding that Congress did not validly authorize private damages suits against state employers under USERRA. Four years ago, however, this Court denied review in a case presenting the same question that petitioner raises here. See *Clark* v. *Virginia Department of State Police*, 138 S. Ct. 500 (2017). The arguments

supporting certiorari are not yet more compelling than they were in 2017. There remains no conflict among the handful of state courts that have addressed the question; the decision in this case of one of the 14 intermediate state appellate courts in Texas has limited reach; and prospective USERRA plaintiffs retain other mechanisms to obtain relief against state employers, including through suits by the United States. Moreover, this Court's recent decision in *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244 (2021), could lead courts in Texas and other States to reach a different conclusion as to the sovereign-immunity question here. The Court should await further developments in the lower courts before addressing the constitutionality of the USERRA provision at issue.

**A. The USERRA Provision At Issue Is Constitutional**

USERRA allows a service member or veteran to sue a state employer for monetary relief in state court to redress a violation of the statute's military-employment protections. 38 U.S.C. 4323(b)(2). That provision constitutes a valid exercise of Congress's powers to raise and support Armies and provide and maintain a Navy. U.S. Const. Art. I, § 8, Cls. 12-13. The court below erred in holding that state sovereign immunity bars suits under the provision. Contrary to the court's analysis, the sovereign immunity surrendered by States in the "plan of the Convention," *Alden* v. *Maine*, 527 U.S. 706, 713 (1999), includes immunity to suits under statutes enacted by Congress pursuant to its war powers.

1. a. USERRA's creation of employment protections for service members and veterans—enforceable through suits for monetary relief against state and other employers—is a straightforward exercise of Congress's powers to "raise and support Armies" and "pro-

vide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12-13. Those "'broad and sweeping'" powers permit measures to promote military recruitment—including, for example, "requir[ing] campus access for military recruiters." *Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.* (*FAIR*), 547 U.S. 47, 58 (2006) (citation omitted). Indeed, recruitment is central to raising and supporting military forces; "the mind cannot conceive an army without the [personnel] to compose it." *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918).

USERRA fits squarely within that authority. The statute's stated purpose is "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). USERRA follows a long line of statutes similarly recognizing that one "called to the colors [ought] not to be penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946); see pp. 2-4, *supra*. And the particular provision at issue here was expressly justified by the need to "maintain[] a strong national defense." House Report 5. Courts interpreting USERRA and its predecessors thus have consistently recognized that such statutes embody an exercise of Congress's "war powers." *Clark* v. *Virginia Dep't of State Police,* 793 S.E.2d 1, 5 & n.5 (Va. 2016) (collecting cases), cert. denied, 138 S. Ct. 500 (2017).

b. As this Court has frequently explained, "'States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution'" and which they generally "retain." *PennEast*, 141 S. Ct. at 2258 (quoting *Alden*, 527 U.S. at 713); see, *e.g.*, *Allen* v. *Cooper*, 140 S. Ct. 994,

1000 (2020); *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1493-1496 (2019); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 69-70 (1996). That immunity, however, is not absolute; "a State may be subject to suit" in "limited circumstances." *PennEast*, 141 S. Ct. at 2258.

Those circumstances include instances in which a State "'unequivocally'" consents to suit; suits under statutes in which Congress has clearly "abrogate[d] state sovereign immunity under the Fourteenth Amendment"; and, of particular relevance here, suits to which States "implicitly" waived immunity "in the 'plan of the Convention'"—"shorthand for the 'structure of the original Constitution itself.'" *PennEast*, 141 S. Ct. at 2258 (citations omitted); see *Alden*, 527 U.S. at 755-757. The Court has found such "plan of the Convention" waivers "in the context of bankruptcy proceedings, suits by other States, * * * suits by the Federal Government," and suits pursuant to the federal eminent-domain power. *PennEast*, 141 S. Ct. at 2258 (citations omitted); see *Central Va. Cmty. College* v. *Katz*, 546 U.S. 356, 373 (2006).

c. This Court has never addressed whether States consented in the plan of the Convention to suits authorized by Congress's war powers. But the Constitution's text, structure, and history strongly indicate that they did. And that conclusion is further strengthened by this Court's recognition that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *FAIR*, 547 U.S. at 58 (citation omitted).

The war powers are not just an important aspect of the Constitution's structure; they are a central reason for its adoption. "When the Framers met in Philadelphia in the summer of 1787, they sought to create a co-

hesive national sovereign in response to the failings of the Articles of Confederation." *PennEast*, 141 S. Ct. at 2263. One of those failings was "the want of power in Congress to raise an army and the dependence upon the States" to provide military manpower and materiel. *Selective Draft Law Cases*, 245 U.S. at 381. In particular, the Articles of Confederation left Congress with "merely a power of making requisitions upon the States" to provide soldiers and supplies—a system that proved "replete with obstructions" to a unified and effective "system of defence." *The Federalist No. 22*, at 137 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1174, at 65 (1833) (describing the "utter inadequacy and impropriety of this system of requisition").

Several provisions of the Constitution responded to that problem. Congress was given a broad array of war powers, including the powers to raise and support Armies and provide and maintain a Navy. U.S. Const. Art. I, § 8, Cls. 12-16. The Constitution also expressly *withheld* war powers from the States. See *id.* § 10, Cl. 3 ("No State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace, * * * or engage in War."). And it specifically "reserv[ed] to the States" only one narrow sphere of control over the militia, involving "Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* § 8, Cl. 16.

The "plan of the Convention," *Alden*, 527 U.S. at 713, accordingly "divest[ed] the States of the traditional diplomatic and military tools that * * * sovereigns possess," *Hyatt*, 139 S. Ct. at 1497. The States' "'surrender'" of sovereignty over the field of raising and supporting military forces is a "fundamental postulate[] im-

plicit in the constitutional design." *Alden*, 527 U.S. at 729 (citation omitted); see *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936) (discussing the "irrefutable postulate that" States "'did not possess [certain] peculiar features of sovereignty—they could not make war, nor * * * raise troops, or equip vessels, for war'") (citation omitted). And inherent in that surrender of sovereignty is a surrender of sovereign immunity against suits authorized by Congress pursuant to its own powers in that field. See *PennEast*, 141 S. Ct. at 2259. Just as the States "renounced their" sovereignty and agreed to "yield to" the federal government's eminent-domain power, they did the same with respect to the federal government's power to raise and support military forces. *Ibid.*; see, *e.g.*, *Selective Draft Law Cases*, 245 U.S. at 381 (explaining that the Constitution "manifestly intended to give * * * all" power "to raise armies" to Congress "and leave none to the States").

Contemporaneous accounts of both the war powers and sovereign immunity buttress that conclusion. Alexander Hamilton explained that States would retain immunity from suit except where "an alienation of state sovereignty" occurred in the "plan of the convention." *The Federalist No. 81*, at 548. And he explained that such an "alienation of State sovereignty" would occur where the Constitution grants "in one instance an authority to the Union and in another prohibited the States from exercising the like authority." *The Federalist No. 32*, at 200. That is precisely what the Framers did with the war powers. See p. 12, *supra*. As Hamilton described, the Constitution's allocation of the war powers worked "an entire change in the first principles of the system"—"discard[ing] the fallacious scheme" of reliance on the States and "invest[ing]" the national

government "with full power," absent "constitutional shackles" from the States, to "support * * * an army and navy." *The Federalist No. 23*, at 147-148; see *Katz*, 546 U.S. at 376-377 n.13 (referencing Hamilton's framework in finding a waiver of sovereign immunity).

In keeping with that understanding, this Court has consistently rejected state-imposed limits on federal war powers—even when they involve otherwise-central exercises of state sovereignty. In *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), for example, the Court denied a State's attempt to retrieve, through a writ of habeas corpus, an individual in military custody for having deserted the Army. *Id.* at 408-409. The Court explained that the federal government can "determine, without question from any State authority, how the armies shall be raised," and that "[n]o interference with the execution of this power of the National government * * * could be permitted without greatly impairing the efficiency" of the military. *Id.* at 408. Likewise, in *Case* v. *Bowles*, 327 U.S. 92 (1946), the Court rejected a Tenth Amendment challenge to an exercise of Congress's war powers. *Id.* at 102. The Court explained that allowing an assertion of state sovereignty to obstruct federal action in that field would render "the constitutional grant of the power to make war * * * inadequate to accomplish its full purpose." *Ibid.*; see *National League of Cities* v. *Usery*, 426 U.S. 833, 854-855 n.18 (1976) (reaffirming that understanding).

Those principles require the same result here: Like suits by other States, suits by the United States, and suits under the federal bankruptcy and eminent-domain powers, petitioner's suit authorized by the federal war powers "falls comfortably within the class of suits to

which States consented under the plan of the Convention." *PennEast*, 141 S. Ct. at 2259.

2. In the decision below (which was issued before *PennEast*), the state intermediate appellate court did not engage in the textual, structural, or historical analysis that this Court's precedents require. The court instead relied on what it viewed as "the broad principle" articulated in *Seminole Tribe* and *Alden* that "state agencies' immunity to private suits in both federal and state courts cannot be abrogated by Article I legislation." Pet. App. 12a. But as *PennEast* and *Katz* demonstrate, "congressional abrogation is not the only means of subjecting States to suit." *PennEast*, 141 S. Ct. at 2259. "States can also be sued if they have consented to suit in the plan of the Convention." *Ibid.*; see *Katz*, 546 U.S. at 373. As explained above, States provided such consent to suits authorized by the war powers.[1]

Respondent similarly contends (Br. in Opp. 8-13) that this Court's decision in *Allen* indicates that bankruptcy is the only Article I power over which States waived sovereign immunity to suit. But as the Court held in *PennEast* (which was issued after respondent

---

[1] The state court of appeals also suggested that USERRA was enacted under the Necessary and Proper Clause rather than the war powers. Pet. App. 11a-12a; see Br. in Opp. 15 (similar). As discussed above, and as every other court to address the question appears to have recognized, that is mistaken. See p. 10, *supra*. In any event, congressional reliance on the Necessary and Proper Clause would not change the outcome because the provision would still be necessary and proper "for carrying into Execution" the war powers. U.S. Const. Art. I, § 8, Cl. 18. That conclusion is reinforced by *PennEast*, which held that state sovereign immunity did not bar suit under a statute that authorized exercise of federal eminent-domain power and therefore relied on the Necessary and Proper Clause. See 141 S. Ct. at 2259; *id.* at 2266-2267 (Barrett, J., dissenting).

filed its brief in opposition), bankruptcy is not the only area in which States "agreed in the plan of the Convention not to assert any sovereign immunity defense," and *Allen* poses no barrier to such a finding. 141 S. Ct. at 2259 (quoting *Allen*, 140 S. Ct. at 1003).

Respondent also contends (Br. in Opp. 15-19) that the historical evidence supporting petitioner's position is insufficient because there are no express references to waivers of sovereign immunity in the Convention's discussion of the war powers or early federal practice. But there were no express references with respect to the powers at issue in *PennEast*, *Katz*, and earlier cases that nevertheless found "waivers of sovereign immunity to which all States *implicitly* consented at the founding." *PennEast*, 141 S. Ct. at 2258 (emphasis added). And *PennEast* makes clear that a "historical analogue" is not necessary for Congress to authorize suits pursuant to a power over which States have surrendered sovereign immunity. *Id.* at 2261.

Finally, respondent contends (Br. in Opp. 19) that the war powers at most amount to an "exclusive" and "plenary" grant of authority of the kind that *Seminole Tribe* found insufficient to support a surrender of sovereign immunity with respect to the Indian Commerce Clause. That comparison is inapt. The Founding generation did not adopt the Constitution specifically to divest States of sovereignty over Indian commerce. By contrast, the need to ensure that States had no role in raising military forces spurred the adoption of the Constitution after the near-catastrophe of the requisition system. See pp. 11-14, *supra*. The Constitution confirms as much by expressly withholding war powers from States, see U.S. Const. Art. I, § 10, Cl. 3, while containing no such provision regarding Indian commerce. That

difference underscores the greater extent of the impingement on state sovereignty that the plan of the Convention worked with respect to the war powers.

**B. This Court's Review Would Be Premature**

A lower-court decision invalidating a federal statute on constitutional grounds often warrants this Court's review. See Pet. 11-12. But this Court denied a petition for a writ of certiorari on the same question presented four years ago in *Clark*, and the case for review now is no stronger than it was then.

1. As an initial matter, the court below and the parties in their briefing before this Court did not have the benefit of this Court's significant recent decision in *PennEast*. As noted above, that decision undermines the argument advanced by respondent (and other States in similar cases) that no Article I power except bankruptcy gave rise to a surrender of state sovereign immunity. Given that doctrinal development, it would be appropriate for the Court to allow lower courts to address the effect of *PennEast* on the question presented before addressing that issue itself. For similar reasons, the Court could consider granting the petition, vacating the decision below, and remanding for further consideration in light of *PennEast*.

2. In addition, as the United States explained in its 2017 invitation brief, the question presented here arises infrequently, and no conflict among the lower courts exists. U.S. Invitation Br. at 11-13, *Clark*, *supra* (No. 16-1043). At that time, three state supreme courts had held that sovereign immunity bars suits under the challenged USERRA provision. See *ibid.* Since then, it appears that the only decisions addressing the question presented are the decision of the state intermediate appellate court below—one of Texas's fourteen intermedi-

ate appellate courts—and a decision by one of Florida's five intermediate appellate courts. See *Department of Highway Safety & Motor Vehicles* v. *Hightower*, 306 So. 3d 1193 (Fla. Dist. Ct. App. 2020). Both courts recognized the issue as one of "first impression" in their jurisdictions, *id.* at 1195; Pet. App. 2a, even though the USERRA provision has been in force for more than 20 years. The Texas Supreme Court declined to grant review in this case. Pet. App. 32a-33a.[2] The Florida Supreme Court does not appear to have been asked to grant review in *Hightower*. And the question seems not to have arisen in any other appellate courts in those States or elsewhere.

The uniform acceptance of sovereign-immunity assertions in several States' courts may be a reason for the relative paucity of such suits, as prospective plaintiffs in other States may be discouraged from bringing claims that they expect could be dismissed under a similar approach. But this Court's recent decision finding a surrender of state sovereign immunity in *PennEast*—combined with the United States' confirmation that it will continue to defend the constitutionality of the USERRA provision in question—could encourage more prospective plaintiffs to file such suits. Those suits in turn would produce further developments in the lower courts, which could assist this Court in any eventual review of the question presented.

3. Legislative developments may also affect the urgency for review by this Court. A State "may of course

---

[2] Although the Texas Supreme Court requested briefs on the merits in this case, Pet. App. 44a-45a, its denial of review "is not evidence that the Court agrees with the law as decided by the court of appeals," *Loram Maintenance of Way, Inc.* v. *Ianni*, 210 S.W.3d 593, 596 (Tex. 2006); see Tex. R. App. P. 56.1(a)-(c).

consent to suit" under a particular statute, *PennEast*, 141 S. Ct. at 2258, and the question presented here will accordingly have no salience in States that waive sovereign immunity to USERRA suits. In Tennessee, for example, an intermediate appellate court held that sovereign immunity bars USERRA claims against state employers, see Pet. 7 n.1 (citing *Smith* v. *Tennessee Nat'l Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), cert. denied, 568 U.S. 1195 (2013)), but the legislature then "enacted a statute waiving Tennessee's sovereign immunity for USERRA claims," *Smith* v. *Tennessee Nat'l Guard*, 551 S.W.3d 702, 706 (Tenn.), cert. denied, 139 S. Ct. 354 (2018). Similarly, during the pendency of USERRA litigation against a state employer in Minnesota, the legislature "passed a law waiving state sovereign immunity from USERRA claims." *Breaker* v. *Bemidji State Univ.*, 899 N.W.2d 515, 518 (Minn. Ct. App. 2017); see *id.* at 520-524 (concluding that sovereign immunity would have barred suit before that waiver). And in at least one recent case, Mississippi did not assert sovereign immunity in the appeal of a USERRA suit that affirmed a damages award against a state employer. See *Webster* v. *Mississippi Dep't of Wildlife, Fisheries & Parks*, 257 So. 3d 277, 280 (Miss. 2018).

The Texas intermediate appellate court in this case did not determine whether the State has waived its sovereign immunity with respect to USERRA claims. The court instead held that it did not have to address that question because (1) petitioner had not exhausted his administrative remedies, which the court understood as a prerequisite to any potential waiver of sovereign immunity under chapter 437 of the Texas Government Code, see Pet. App. 18a, and (2) petitioner had asserted a claim for monetary relief, which the court understood

as outside the scope of any waiver of sovereign immunity under chapter 613 of the Texas Government Code, see *id.* at 18a-19a n.9. The dissent below appeared to find a waiver of state sovereign immunity in this case, see *id.* at 28a, and a different Texas intermediate appellate court or the Texas Supreme Court could agree with that reading of state law, cf. *Ramirez* v. *State Children, Youth & Families Dep't*, 372 P.3d 497, 507 (N.M. 2016) (state supreme court concluding, contrary to state intermediate appellate court, that state law waived sovereign immunity to USERRA claims).

Moreover, in Texas, the legislature recently considered a bill that would have expressly waived sovereign immunity to USERRA claims. Tex. H.B. 4390, 87th Leg., R.S. (2021). It instead adopted legislation that permits certain service members to file suits in state court alleging violations of USERRA or similar state statutes without exhausting administrative remedies. Tex. S.B. 484, 87th Leg., R.S. (2021) (Tex. Gov't Code Ann. § 437.2131) (West 2021)). The precise scope of that provision—including whether it applies to federal service members or against state employers—is unclear and has not yet been interpreted by state courts. Cf. Pet. App. 17a n.8. But the passage of the provision illustrates the continuing potential for legislative developments in this area. Relatedly, Congress has considered legislation that would require States receiving federal financial assistance to waive sovereign immunity in USERRA actions. See Justice for Servicemembers and Veterans Act of 2017, S. 646, 115th Cong., 1st Sess. § 102. If enacted, such a law would provide an incentive for Texas and other States to waive sovereign immunity to the extent they have not already done so.

4. Finally, as noted in the United States' invitation brief in *Clark* (at 13), a private suit is not the only option available to a prospective USERRA plaintiff. USERRA allows the United States to sue a state employer on behalf of a plaintiff who proceeds through the statute's administrative mechanism. See 38 U.S.C. 4323(a)(1) and (b)(1). Under those provisions, an individual who believes a state employer has violated USERRA may file a complaint with DOL, which will investigate the complaint and (if warranted) attempt to resolve it with the state employer. 38 U.S.C. 4322(a)-(d). If those efforts are unsuccessful, DOL will at the employee's request refer the complaint to DOJ, which may bring an action "in the name of the United States" against the state employer in federal court. 38 U.S.C. 4323(a)(1); see 38 U.S.C. 4322(e) and 4323(b)(1). Such a "suit[] by the Federal Government" is not barred by state sovereign immunity. *PennEast*, 141 S. Ct. at 2248.

Petitioner derides (Pet. 17-18; Reply Br. 4) USERRA's alternative enforcement mechanism as "useless," "woefully ineffective," and "utterly broken," principally because few complaints have resulted in suits by DOJ. Those criticisms are misplaced. DOL has informed this Office that, over the past decade, it has received 748 USERRA complaints from service members employed by States. DOL obtained relief for the service member 169 times, thereby obviating any need for a referral of 23% of the complaints. Another 227 complaints (30%) were closed for reasons within the control of the service member (*e.g.*, the service member elected to stop pursuing the complaint). And 310 complaints (41%) were determined by DOL to be either meritless or ineligible for relief. Thus, DOL either resolved, appropriately closed, or found no merit after investigation in 94% of

the complaints it received. Of the remaining 42 complaints (6%), 19 service members did not request a referral, and DOL referred 23 to DOJ. DOJ filed suit in some, facilitated settlements in others, and on some occasions determined not to pursue litigation.[3]

The limited number of referrals from DOL to DOJ thus does not demonstrate that USERRA's administrative mechanism is ineffective. That mechanism has in fact resulted in an appropriate disposition of many USERRA complaints without the need for frequent litigation, and it remains an important resource for service members and veterans who are victims of employer conduct prohibited by USERRA.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*
KRISTEN CLARKE
*Assistant Attorney General*
CURTIS E. GANNON
*Deputy Solicitor General*
CHRISTOPHER G. MICHEL
*Assistant to the Solicitor General*
THOMAS E. CHANDLER
ELIZABETH PARR HECKER
*Attorneys*

NOVEMBER 2021

---

[3] As requested by service members, DOL also referred to DOJ 55 of the complaints that it had found meritless or ineligible.