

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LE ROY TORRES,)
Petitioner,)
v.) No. 20-603
TEXAS DEPARTMENT OF PUBLIC SAFETY,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (10:00 a.m.)

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

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

8 Mr. Tutt.

9 ORAL ARGUMENT OF ANDREW T. TUTT
10 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

8 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

14 But even accepting that it is --

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

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

1 JUSTICE GORSUCH: Well --

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

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

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

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

21 MR. TUTT: It --

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

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

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

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

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

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

20 But even --

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

25 MR. TUTT: The war powers are

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

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

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

25 So why should it matter here?

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

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

9 Now --

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

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

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

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

7 JUSTICE KAVANAUGH: What's your third?

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

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

22 JUSTICE GORSUCH: Counsel, I --

23 JUSTICE KAVANAUGH: How important is
24 --

25 JUSTICE GORSUCH: Oh, please, go

1 ahead.

2 JUSTICE KAVANAUGH: No.

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

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

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

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

25 Now it's true that Congress has

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

5 JUSTICE GORSUCH: I guess --

6 MR. TUTT: They cannot --

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

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

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

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

1 Constitution would have dealt with that.

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

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

13 JUSTICE BARRETT: But no one --

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

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

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

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

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

8 JUSTICE BARRETT: But no one is --

9 JUSTICE ALITO: Can I ask you --

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

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

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

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

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

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

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

1 JUSTICE ALITO: Isn't your --

2 MR. TUTT: But --

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

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

13 But --

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. TUTT: Yes, Your Honor.

21 JUSTICE GORSUCH: -- about this case.

22 MR. TUTT: Yes, Your Honor.

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

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

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

13 JUSTICE GORSUCH: Yeah.

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

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

1 the recruitment and retention of soldiers.

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

7 MR. TUTT: I --

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

10 MR. TUTT: Yes, and --

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

13 MR. TUTT: I --

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

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

21 JUSTICE BARRETT: Yes or no?

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

23 JUSTICE BARRETT: Just yes or no.

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

25 JUSTICE BARRETT: Okay.

1 MR. TUTT: Yes, Your Honor.

2 CHIEF JUSTICE ROBERTS: I'm sorry, yes

3 -- yes to -- I've lost track of the question.

4 (Laughter.)

5 MR. TUTT: I apologize --

6 CHIEF JUSTICE ROBERTS: Yes --

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

8 CHIEF JUSTICE ROBERTS: -- yes to

9 what?

10 MR. TUTT: Yes, a proper exercise --

11 it is a proper exercise of the war powers or if

12 it is a proper exercise of the war powers to --

13 JUSTICE KAVANAUGH: But the "if" is

14 big, right?

15 MR. TUTT: Yes, Your Honor.

16 JUSTICE KAVANAUGH: So you're not

17 giving -- yeah.

18 MR. TUTT: Yes.

19 JUSTICE KAVANAUGH: Don't give away

20 the "if."

21 MR. TUTT: No. The -- the "if" is --

22 is -- is all in this particular situation.

23 JUSTICE KAVANAUGH: Yeah.

24 MR. TUTT: If it is -- if it is

25 necessary to raise and support armies to permit

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

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

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

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

25 JUSTICE BARRETT: So you're broadly

1 speaking beyond just the raise and support
2 armies?

3 MR. TUTT: Yes, Your Honor.

4 JUSTICE BARRETT: Yeah.

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

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

1 all of them.

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

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

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

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

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

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

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

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

3 JUSTICE KAGAN: Mr. --

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

6 MR. TUTT: Oh, I apologize.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 These are --

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

13 MR. TUTT: Yeah?

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

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

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

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

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

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

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

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

25 MR. TUTT: Yes, Your Honor.

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

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

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

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

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

23 JUSTICE THOMAS: Thank you.

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

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

7 MR. TUTT: Yes, Your Honor.

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

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

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

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

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

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

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

16 MR. TUTT: Yeah.

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

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: Because?

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

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

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

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

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

25 Well, so is commerce and trying to get

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

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

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

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

17 MR. TUTT: Yes.

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

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

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

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

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

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

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

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

14 So thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. TUTT: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Mr. Michel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 failing. And it may be --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE BREYER: Just any one or two.

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

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

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

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

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

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

13 JUSTICE BREYER: Very well.

14 MR. MICHEL: -- of war powers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 of the Convention surrender analysis.

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

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

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

1 Amendment and implying similar authority under
2 war powers?

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

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

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer?

2 Justice Alito?

3 Justice Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

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

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

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

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

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

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

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

1 government, made when they enacted this statute.

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

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

13 JUSTICE GORSUCH: I understand.

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

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

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

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

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

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

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

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

22 JUSTICE GORSUCH: Defend it.

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

24 JUSTICE GORSUCH: Right.

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

1 tougher argument than in --

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

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

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

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

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

25 JUSTICE KAVANAUGH: And just on the --

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

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

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

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

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

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

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 Thank you, counsel.

19 General Stone.

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

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

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

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

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

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

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

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

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

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

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

25 Nothing in the Plan of Convention that

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

8 MR. STONE: So --

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

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

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

25 This Court has also described states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. STONE: To some extent, but I

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

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

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

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

22 JUSTICE KAVANAUGH: Can --

23 MR. STONE: -- amongst many.

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

1 CHIEF JUSTICE ROBERTS: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But there are other powers that are,

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

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

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

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

1 retained.

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

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

1 suits, essentially had agreed not to raise that.

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

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

15 JUSTICE BREYER: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. STONE: No doubt.

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

11 MR. STONE: Of course.

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

15 MR. STONE: Absolutely, Your Honor.

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

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

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

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

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

1 getting at.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Unfortunately, to the extent this

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

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

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

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

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

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

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

7 JUSTICE BREYER: Vietnam.

8 MR. STONE: I'm sorry?

9 JUSTICE BREYER: Vietnam as an
10 example.

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

13 JUSTICE BREYER: What they might mean.

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

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

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

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

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

18 JUSTICE BREYER: It was Hamilton.

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

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

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

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

25 JUSTICE BREYER: Thank you.

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

3 JUSTICE GORSUCH: Small question.

4 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

1 CHIEF JUSTICE ROBERTS: Go ahead.

2 Justice Thomas, any questions?

3 JUSTICE THOMAS: No questions,

4 Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Justice

6 Breyer?

7 Justice Alito?

8 Justice Sotomayor?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. STONE: Much further than Union

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

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

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

1 Justice Kavanaugh?

2 Justice Barrett?

3 Thank you, counsel.

4 Rebuttal, Mr. Tutt?

5 REBUTTAL ARGUMENT OF ANDREW T. TUTT

6 ON BEHALF OF THE PETITIONER

7 MR. TUTT: Thank you, Mr. Chief

8 Justice. Just a few points.

9 Texas opened by saying that it's a
10 means/ends distinction, that that's what's at
11 stake, that the powers may be great but the
12 means can be limited. But if you go to the
13 Federalist Number 23 by Alexander Hamilton, he
14 addresses this directly, and he says that the
15 means ought to be proportioned to the end.
16 "These powers ought to exist without limitation:
17 Because it is impossible to foresee or to define
18 the extent and variety of national exigencies
19 and the correspondent extent and variety of the
20 means which may be necessary to satisfy them."

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

1 support of the national forces."

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

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

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

25 Texas's argument is a bit puzzling

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

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

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 11:42 a.m., the case
2 was submitted.)
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Official - Subject to Final Review

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