No. 20-603

# In the Supreme Court of the United States

LE ROY TORRES, PETITIONER,

*v.*

TEXAS DEPARTMENT OF PUBLIC SAFETY.

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

## BRIEF OF AMICI CURIAE STATES OF MONTANA AND 14 OTHER STATES IN SUPPORT OF DEFENDANT-RESPONDENT


AUSTIN KNUDSEN
*Attorney General*

KRISTIN HANSEN
*Lieutenant General*

MONTANA DEPARTMENT OF JUSTICE
215 N Sanders
Helena, MT 59601
David.Dewhirst@mt.gov
(406) 444-2026

DAVID M.S. DEWHIRST
*Solicitor General*
**Counsel of Record*

KATHLEEN L. SMITHGALL
*Assistant Solicitor General*

TIMOTHY J. LONGFIELD
*Assistant Attorney General*

*Counsel for Amicus Curiae State of Montana*

(Additional Counsel listed on signature page)

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## INTEREST OF AMICI CURIAE

Both before and after ratification of the Eleventh Amendment, the Constitution's design and structure affirmed two essential principles: "that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (citation, quotation marks omitted). Indeed, these are "presupposition[s]"—first principles—that guide and infuse proper constitutional interpretation. *Id.* These fundamental principles honor the constitutional bargain struck in 1788, a bargain that strung together dual and cooperative sovereigns. And it is that unique amalgam that has produced the world's most thriving and durable form of government. It's worth protecting.

But Petitioner and his amici in this case encourage the Court to step away from these constitutional presuppositions and create a vast new abrogation of sovereign immunity. Because that result and the methodology employed to reach it threaten the constitutional design protected by these foundational constitutional principles, Amici Curiae States of Montana, Alabama, Alaska, Arkansas, Florida, Idaho, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia—co-sovereigns under the Constitution—encourage the Court to reject Petitioner's proposed departure and affirm the decision below.

## SUMMARY OF ARGUMENT

From the beginning, States' sovereign immunity from private suit has been undisputed and inarguable. The "limited circumstances" to the contrary are few. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (identifying exceptions where States consent to suit, Congress clearly abrogates immunity under the Fourteenth Amendment, or abrogation is implied by the "the structure of the original Constitution itself" (citation, quotation marks omitted)). When the Court, on occasion, has deviated from this fundamental view of sovereignty, the corrective response has been swift and resolute.

Article I, Section 8 enumerates powers the Framers wished to vest in a single, administrative authority. They hoped this would arrest the bewildering array of conflicting State measures that worked—often deliberately—at cross-purposes. Policies governing interstate commerce, intellectual property matters, and the common defense needed to be determined and effectuated by one, national government. But the States' cession of those powers did not include a capitulation of sovereign immunity. And this Court's precedents, with temporary hiccups, has consistently reaffirmed that rule.

One precedential exception lingers, and the Petitioner and his amici seek to make that exception the rule. Under their reasoning, Article I, Section 8 may harbor multiple avenues of sovereign immunity abrogation. But this Court has already rejected that path, and it should do so again here.

## ARGUMENT

### I. Immunity from private suit is an integral part of State sovereignty in American federalism.

A fundamental aspect of American federalism is that each State, while a component part of the nation, is also "a sovereign entity in our federal system." *Seminole Tribe*, 517 U.S. at 54. And, as has been recognized since before the States ratified the Constitution and established that federal system, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the State's] consent." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST No. 81 (Alexander Hamilton)). As the history of State sovereign immunity jurisprudence demonstrates, a broad view of such immunity is implicit in "our constitutional design" and reflects "the understanding of sovereign immunity shared by the States that ratified the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019). On the occasions in which State sovereign immunity doctrine has departed from its broad, historical roots, prompt course corrections have followed—with one aberrant exception. Reversal would be inconsistent with the longstanding recognition of sovereign States' immunity from private suit and create uncertainty in contexts far beyond those implicated in this suit, subjecting States to suit—and miring this Court in interminable litigation—for decades to come.

**1.** The original States preexisted the United States, making them antecedent sovereigns possessed with all the powers of sovereignty. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–16 (1936). Immunity from suit was a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999).

After the Revolution, and operating under the "infirm[ ]" Articles of Confederation, the States were "flushed with the enjoyment of independent and sovereign power; (instead of a diminished disposition to part with it,) [and they] persevered in omissions and in measures incompatible with their relations to the Federal Govt. and with those among themselves." 3 Records of the Federal Convention of 1787, pp 542–43 (M. Farrand ed. 1911) (reprinting James Madison, Preface to Debates in the Convention of 1787) (hereinafter Farrand's Records). Many States faced debt from the war and feared suit from their creditors. *See Cohens v. Virginia,* 6 Wheat. 264, 406 (1821). Violations of contracts became familiar as States resisted claims from both creditor States "as well as Citizens Creditors within the State." 3 Farrand's Records 548.

Curiously, State sovereign immunity was scarcely discussed during the 1787 Constitutional Convention. This is because the delegates to the convention understood immunity from suit to be an inherent component of the States' sovereignty—they did not believe the Constitution's text would be interpreted to divest the States of their sovereign immunity. For instance,

Article III permits suits "between a State and Citizens of another State" and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST., art. III, § 2, cl. 1. Yet there's "no record of any debate … at the Constitutional Convention" about whether these clauses waived the States' sovereign immunity. Erwin Chemerinsky, Federal Jurisdiction § 7.2, at 426 (6th ed. 2012); *cf.* Graham K. Bryant, *The Historical Argument for State Sovereign Immunity in Bankruptcy Proceedings*, 87 Miss. L.J. 49, 69 (2018) ("Had the delegates to the convention imagined that by accepting [the bankruptcy clause], they were opening their states to suit by private individuals, one would expect at least some discussion on that point."). Indeed, "[t]he 1787 draft in fact said nothing on the subject [of abrogating traditional understandings of State sovereign immunity]." *Seminole Tribe*, 517 U.S. at 104 (Souter, J., dissenting).

Given the States' concerns and their reliance on immunity from suit as an intrinsic aspect of their sovereignty, however, the status of State sovereign immunity was a paramount issue when the Constitution came before the States for ratification. In Virginia, for instance, George Mason warned that the language in Article III would eviscerate the traditional understanding of State sovereignty and could result in multiple forced repayments of war debt: "[E]very liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or

private offender?" 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 526–27 (reprinted 1937) [hereinafter Elliot's Debates]. Patrick Henry similarly believed the Constitution permitted States to be sued against their will, describing as "perfectly incomprehensible" the assertion that States could sue individuals but not be sued by individuals because the text did not "discriminat[e] between plaintiff and defendant." *Id.* at 543.

Faced with these concerns, the ratifying States relied on assurances by prominent Framers that the Constitution would not permit private individuals to hale States into court without their consent. Alexander Hamilton, appealing to the traditional understanding of sovereign immunity in the Anglo-American legal tradition, wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.

THE FEDERALIST NO. 81, at 549 (Cooke ed., 1961) (Hamilton) (emphasis added). Turning to the pressing concern that individual creditors could engage the federal judiciary to force States to repay their war debts, Hamilton explained that "there is no color to pretend that the State governments would, by the adoption of

that plan, be divested of the privilege of paying their own debts in their own way …. The contracts between a nation and individuals are only binding on the conscience of the sovereign." *Id.* He dismissed fears that the Constitution had "ascribe[d] to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve" States being subject to judicial process without their consent as "altogether forced and unwarrantable." *Id.*

Defending the Constitution at the Virginia ratifying convention, James Madison dismissed concerns that the constitutional text curtailed State sovereign immunity by stating "[i]t is not in the power of individuals to call any state into court." 3 Elliot's Debates 533. John Marshall similarly found that proposition unthinkable: "I hope that no gentleman will think that a state will be called at the bar of the federal court …. It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555.

Shortly after ratification, the precise situation of which Mason and Henry warned came to pass: the Court ordered a sovereign State to appear in federal court to defend a suit brought by a private individual to recover debt. *Chisholm v. Georgia*, 2 Dall. 419, 479 (1793). In so doing, the Court "created … a shock of surprise throughout the country." *Hans*, 134 U.S. at 11.

The reaction to *Chisholm* was swift. Less than three weeks after the case was decided, both houses of Congress had passed what would become the Eleventh

Amendment. It was ratified within a year. *See* Chemerinsky at 430–31. The Nation thus collectively rebuffed—with emphatic rapidity—the first effort to restrict the historically broad understanding of State sovereign immunity.

This broad understanding remained undisturbed for decades. Beyond the unique Fourteenth Amendment context, it remained "a point … unquestioned" that a State cannot "be sued as defendant in any court in this country without [its] consent." *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883). Confirming that States are immune from suit by both their own citizens and citizens of other States, the Court held that any other result would be as "startling and unexpected" as the repudiated *Chisholm* decision, "a construction never imagined or dreamed of" by the Framers. *Hans*, 134 U.S. at 15. Instead, the Court reaffirmed that the "suability of a State, without its consent, was a thing unknown to the law." *Id.* at 16.

**2.** Nearly a century after *Cunningham* and *Hans*, however, the Court again deviated from the traditional understanding of State sovereign immunity. And as with *Chisholm*—though less rapidly—the doctrine ultimately returned to its traditional roots.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that a State could not assert its sovereign immunity in another State's courts, even when sued there by a private individual, because there existed no "rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted."

*Id.* at 418. Rejecting the historical understanding of State sovereign immunity that had hitherto prevailed, the Court concluded that one State's immunity in the courts of another State was merely "a matter of comity." *Id.* at 425. Then, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court for the first time found that Congress could abrogate State sovereign immunity through the exercise of its Article I, Section 8 powers—specifically the Commerce Clause—notwithstanding the "principle of sovereign immunity found in the Eleventh Amendment." *Id.* at 14–15. Tellingly, however, the Court reached this result without garnering a majority supportive of any single rationale.

Recognizing that the *Union Gas* decision "deviated sharply from [its] established federalism jurisprudence and essentially eviscerated [the] decision in *Hans*," the Court overturned *Union Gas* in *Seminole Tribe*, 517 U.S. at 64, 66. The Court recognized that *Union Gas* was an anomaly "based upon … a misreading of precedent" because its holding "that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III … contradict[ed] [the Court's] unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction." *Id.* at 65 (quoting *Union Gas*, 491 U.S. at 39 (Scalia, J., dissenting)). In overturning *Union Gas*, the Court expressly acknowledged that it was restoring its jurisprudence to the historical understanding of State sovereign immunity, an understanding far broader than the Eleventh Amendment's text. *Id.* at 67 ("For over a century, we have

grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment."); *see Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934) ("Manifestly, we cannot … assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States.").

Three years later the Court reaffirmed that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers" in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999). And similarly, in *Alden*, 527 U.S. at 712, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." This conclusion followed from the "settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Id.* at 728.

Indeed, except for a single aberrant decision limited to the Bankruptcy Clause's unique context, *Central Va. Community College v. Katz*, 546 U.S. 356 (2006)—a decision whose reasoning has been cabined, *see Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020) ("[E]verything in *Katz* is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism."), and historical underpinnings questioned, *see* Bryant, *supra*, at 78

("The *Katz* majority's interpretation of the Article I, Section 8 Bankruptcy Clause does not comport with the Framers' understanding of the clause as evidenced by the Constitutional Convention's history and the postwar social environment of the ratifying states."), *see also infra* Part III—the Court has consistently ruled that "the specific Article I powers delegated to Congress" do not include "the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers." *Alden*, 527 U.S. at 732.

The Court's endorsement of the broad, historical view of State sovereign immunity has continued in its recent terms. In *Franchise Tax Board of California*, the Court overturned *Hall*'s conclusion that a State cannot assert its sovereign immunity in the courts of another State, restoring the original understanding that "interstate sovereign immunity is preserved in the constitutional design." 139 S. Ct. at 1496. The Court explained that it overruled *Hall* despite stare decisis because *Hall* was "irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.* at 1499.

Similarly, in *Allen*, the Court concluded that Congress could not use its copyright authority to strip States of their immunity from suit by private individuals, and in doing so, declined the invitation to conduct a "general, 'clause-by-clause' reexamination of Article I" to see if any of the powers set forth therein

authorize an intrusion upon the States' sovereign immunity. 140 S. Ct. at 1003. Instead, it again reaffirmed that Congress cannot use its delegated Article I, Section 8 powers to abrogate or otherwise curtail State sovereign immunity. *Id.* at 1002. This is because there is no principled way to design a taxonomy of the Article I, Section 8 powers whereby some have the power to abrogate State sovereign immunity and others do not.

## II. The Framers reserved the powers under Article I, Section 8 to Congress's exclusive supervision because they are core federal government powers that require a single administrator.

Article I, Section 8 of the U.S. Constitution enumerates twenty-six unique powers of Congress, ranging from the "Power To lay and collect Taxes, Duties, Imposts and Excises" to the power to "make all Laws which shall be necessary and proper for carrying into Execution" the other powers. U.S. CONST. art. I, § 8. Despite that list's range, the powers are consolidated in that section for a common reason: "[T]o secure uniformity of treatment[,]" only a single actor, rather than numerous states, may properly administer those powers. F. Regis Noel, *A History of the Bankruptcy Law* 89–91 (1919). James Madison described the fundamental shortcoming of the Articles of Confederation as a uniformity problem. The Articles' dependence on "so many independant communities, each consulting more or less its particular interests & convenience and distrusting the compliance of the others" made an

unworkable foundation for a federal system of government. 3 Farrand's Records 548. Recognizing that reality, the drafters of the Constitution placed certain powers under the "exclusive supervision of the Congress" by "design[ing] [those provisions] to occupy *National* ground." Noel, *supra*, at 90 (emphasis added).

In short, the Framers designed Article I, Section 8 to redress weaknesses of the Articles of Confederation by concentrating certain powers into the legislature of a strong central government that possessed the exclusive authority to promulgate laws in certain fields. But none of the Framers could have "imagined or dreamed of" a construction under which this delegation of limited powers divested the states of their sovereign immunity. *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco*, 292 U.S. at 327); *see supra* Part I.

Given that the sole reason the Article I, Section 8 powers are gathered in that Section is to address the uniformity problem of the Articles of Confederation, there is accordingly no principled way to taxonomize them such that Congress may abrogate States' immunity under some of Article I, Section 8's delegated powers but not others. Nor should such a distinction be made. The *Union Gas* dissenters—later vindicated—correctly observed that there was no distinction between any of the Article I powers with regard to their effect on sovereign immunity: "if the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers." *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)

(quoted with approval in *Seminole Tribe*, 517 U.S. at 62); *see also Seminole Tribe*, 517 U.S. at 93–94 (Stevens, J., dissenting) (explaining that there exists "no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States, and with the Indian tribes, the power to establish uniform laws on the subject of bankruptcy, [or] the power to promote the progress of science and the arts by granting exclusive rights" (citations omitted)).

Consider, for example, two of Congress's Article I, Section 8 powers that have received exceptional scrutiny from the Court: the powers to make "uniform Laws on the subject of Bankruptcies throughout the United States" and to enact intellectual property legislation. U.S. CONST. art. I § 8, cl. 4, 8. Each State could implement its own systems for regulating bankruptcy and intellectual property. But permitting them the authority to do so would result in up to fifty different and conflicting systems, directly undermining the Framers' goal of uniformity. In this respect—which is the only respect considered by the Framers in grouping them in Article I, Section 8—the bankruptcy and intellectual property powers are indistinguishable.

Yet the Court has reached opposite conclusions on whether Congress may abrogate States' immunity from private suits under them. It held that by ratifying the bankruptcy clause, States had "agreed … not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to Laws on the subject of Bankruptcies." *Katz*, 546 U.S. at 377

(citation, quotation marks omitted). But it had also concluded that Congress could not abrogate States' sovereign immunity under Article I in the intellectual property context. *Fla. Prepaid*, 527 U.S. at 635–648; *see also Allen*, 140 S. Ct. at 1003 (upholding the default rule of sovereign immunity in the intellectual property context).

The Court's efforts to distance its State sovereign immunity jurisprudence from *Katz*—describing that decision as viewing "bankruptcy as on a different plane, governed by principles all its own," making *Katz* "a good-for-one-clause-only holding," *Allen*, 140 S. Ct. at 1003—indicate that its aberrant analysis should have no application in the case at bar.

## III. *Katz* is an aberration which lacks limiting principles, upends traditional abrogation doctrine, has been cabined by the Court, and should not be reexamined and applied in this case.

*Katz* stands alone in this Court's sovereign immunity jurisprudence for several reasons. First, *Katz* was decided in a very specific context not present here. Second, it disregards principles set forth in this Court's foundational decisions. And third, the holding stands in tension with the constitutional text. Torres's and the United States' invitation to revivify its strange rationale should be rejected here.

**1.** The Bankruptcy Clause empowers Congress "To establish … uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art.

I, § 8, cl. 4. *Katz* concluded that the Bankruptcy Clause permitted Congress to abrogate States' sovereign immunity from suit. 546 U.S. at 377–79. But *Katz*'s own analysis limits its application to the unique bankruptcy context. Bankruptcy jurisdiction, generally, is *in rem* …." *Id.* at 362. Now and at the time of ratification, "the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the res." *Id.* And according to the Court, the "narrow jurisdiction" required to facilitate the distribution of property "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 378. Any "intrusion upon state sovereignty," the Court concluded, would "not contravene the norms" exemplified by the Eleventh Amendment. *Id.* at 375.

More importantly, *Katz* reasoned that the Bankruptcy Clause "reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings." *Id.* at 362. Bankruptcy law, at the time of ratification, was a "patchwork of insolvency and bankruptcy laws" resulting from "the uncoordinated actions of multiple sovereigns." *Id.* at 366. In other words, it was a tangled mess. And according to *Katz*, the Framers "agree[d] on the importance of authorizing a uniform federal response to the problem[]." *Id.* at 369. Some evidence supports the notion that States acquiesced to this scheme, for Congress in 1800 adopted the

Bankruptcy Act, which authorized federal courts to issue writs of habeas corpus to release debtors from State prisons. *Id.* at 373–74. That was only five years after ratification of the Eleventh Amendment, a time "rife with discussion of States' sovereignty and their amenability to suit." *Id.* at 375. Yet, as *Katz* notes, "there appears to be no record of any objection to the bankruptcy legislation or its grant of habeas relief … based on an infringement of sovereign immunity." *Id.* And indeed, States have generally considered themselves bound by bankruptcy court orders discharging debts. *Id.* at 364.

For the *Katz* majority, the evidence suggested that "the States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in [federal bankruptcy] proceedings. *Id.* at 377 (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). As the Court in *Allen* later explained, the Bankruptcy Clause idiomatically embraced the idea that federal courts could impose on State sovereignty. "In that, it was *sui generis*—again, 'unique'—among Article I's grants of authority." *Allen*, 140 S. Ct. a 1002. *Katz* considered abrogation of sovereign immunity within the narrow confines of a unique Article I clause situated within a discrete legal and historical context. Its reasoning should therefore stretch no further than that singular context.

**2.** Other considerations highlighted by the *Katz* dissent also counsel against using that decision as a lodestar in abrogation cases. First, *Katz* departed from—but didn't directly reckon with—the Court's

longstanding "framework for examining the question of state sovereign immunity jurisprudence under our Constitution." *Id.* at 380 (Thomas, J., dissenting). This framework contemplates abrogation of State sovereign immunity only when "*there is a surrender of this immunity in the plan of the convention*." *Id.* (quoting *Hans*, 134 U.S. at 13 (emphasis in original)). This indeed "is a fundamental rule of jurisprudence." *Id.* (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)). For instance, no intention to abrogate States' sovereign immunity has been found in any other Article I clause. *Id.* at 382. Indeed, before *Katz*, it was settled that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 381 (quoting *Seminole Tribe*, 517 U.S. at 73). The Court had even concluded as much about provisions within Article I, Section 8. *Id.* at 381–82. According to the dissent, then, the relevant history "confirms that the adoption of the Constitution merely established federal power to legislate in the area of bankruptcy law, and did not manifest an additional intention to waive the States' sovereign immunity against suit." *Id.* at 380.

*Katz*'s contrary Bankruptcy Clause conclusion is therefore historically suspect and marks a significant departure from this Court's precedents. *Id.* at 382. It quietly but radically transformed the Court's "fundamental rule of jurisprudence," *id.* at 380, and ignored the cardinal doctrine that Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. *Seminole Tribe*, 517 U.S. at 73; *see id.* at 72 ("Even when the Constitution vests in

Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Stranger still, *Katz* didn't even acknowledge its departure from established jurisprudence. 546 U.S.at 382–83 (Thomas, J., dissenting) (observing that *Katz* overruled—*sub silentio—Hoffman v. Conn. Dept. of Income Maint.*, 492 U.S. 96, 104 (1989)). And *Katz* also "discarded" the Court's usual rule "that *Congress* must speak, and indeed speak unequivocally, to abrogate sovereign immunity." *Allen*, 140 S. Ct. at 1003 (emphasis in original).

Luckily, this Court in *Allen* sequestered *Katz*, confining it strictly to the bankruptcy context and eliminating the possibility that its rationale would spread elsewhere. 140 S. Ct. at 1002 ("[E]verything in *Katz* is about and limited to the Bankruptcy Clause"). At best, therefore, *Katz* is a narrow decision with no real applicability beyond its factual borders.

**3.** But the United States props up *Katz*'s jettisoned rationale in this case and conflates the States' abnegation of sovereignty over the common defense with a supposed abrogation of sovereign immunity: having "ratified the Constitution," and relinquished "any sovereignty in the military arena, States have no basis to assert sovereign immunity to suits authorized under Congress's military powers." U.S. Br. 20 (citing *Katz*, 546 U.S. at 363). Under this sweeping "*Katz* 2.0" view, States are automatically deprived of sovereign immunity in areas where (1) the Constitution granted

authority to the United States and (2) prohibited the States from exercising that authority. U.S. Br. 20-21.

Those two factors may be correct so far as they go. The States indeed relinquished the war powers, in large part, to the federal government by ratifying the Constitution. But it simply doesn't follow—as a matter of logic or jurisprudence—that States thereby renounced their sovereign immunity. *Cf. PennEast*, 141 S. Ct. at 2260 ("[T]he eminent domain power is inextricably intertwined with the ability to condemn. We have even at times equated the eminent domain power with the power to bring condemnation proceedings."). Quite simply, the war powers conferred on the federal government are not "inextricably intertwined" with the ability to authorize private suits against States in State courts to enforce veterans' preference schemes. *Id.*; *Monaco*, 292 U.S. at 330–31 (1934) (relying, in part, on Federalist 81 to conclude that the agreement not to enter into any treaties or agreements with foreign powers didn't mean States were implicitly consenting to being sued by foreign governments without their consent).[1]

The reasoning advanced by the United States merely invites reaffirmation of the *Katz* anomaly this Court rejected just two years ago. *Allen*, 140 S. Ct. at

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[1] Lest there be any doubt, Amici States strongly support veterans, not least through a variety of legal preference and protection programs. *See, e.g.*, Resp. Br. 5. But the attempted abrogation of State sovereign immunity in this case cannot go unanswered, for it threatens to realign basic propositions underpinning our constitutional structure.

1002–03. And it necessarily invites a "clause-by-clause approach to evaluating whether a particular clause of Article I allows the abrogation of sovereign immunity." *Id.* at 1002 (citation, quotation marks omitted). But this court shut that door in *Seminole Tribe*, 517 U.S. at 72–73, and *Allen* made clear that *Katz* didn't change that one bit. 140 S. Ct. at 1002–03 (describing *Katz* as "a good-for-one-clause-only holding").

And that's as it should be. Reviving *Katz*'s rationale would declare open season on State sovereignty. *Hans*, 134 U.S. at 13 ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."). The Court should not accept Torres's and amici's invitation to perform a clause-by-clause analysis that the Court disavowed in *Allen*. To do so would create uncertainty and hardship for the States, illegitimately diminish their sovereignty, and water down this Court's sovereign immunity jurisprudence in a way the Framers wouldn't recognize.

## CONCLUSION

This Court should affirm the decision below.

Respectfully submitted.

AUSTIN KNUDSEN
*Attorney General*
KRISTIN HANSEN
*Lieutenant General*
DAVID M.S. DEWHIRST
*Solicitor General*
*Counsel of Record*
KATHLEEN L. SMITHGALL
*Assistant Solicitor General*
TIMOTHY J. LONGFIELD
*Assistant Attorney General*
MONTANA DEPARTMENT OF JUSTICE
215 N Sanders
Helena, MT 59601
(406) 444-2026
david.dewhirst@mt.gov

*Counsel for Amicus Curiae*
*State of Montana*

March 9, 2022

## ADDITIONAL COUNSEL

Steve Marshall
ALABAMA
ATTORNEY GENERAL

Treg Taylor
ALASKA
ATTORNEY GENERAL

Leslie Rutledge
ARKANSAS
ATTORNEY GENERAL

Ashley Moody
FLORIDA
ATTORNEY GENERAL

Lawrence G. Wasden
IDAHO
ATTORNEY GENERAL

Jeff Landry
LOUISIANA
ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI
ATTORNEY GENERAL

Doug Peterson
NEBRASKA
ATTORNEY GENERAL

John M. O'Connor
OKLAHOMA
ATTORNEY GENERAL

Alan Wilson
SOUTH CAROLINA
ATTORNEY GENERAL

Jason Ravnsborg
SOUTH DAKOTA
ATTORNEY GENERAL

Herbert H. Slatery III
TENNESSEE ATTORNEY
GENERAL & REPORTER

Sean D. Reyes
UTAH
ATTORNEY GENERAL

Patrick Morrisey
WEST VIRGINIA
ATTORNEY GENERAL