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Amicus Brief of Federal Courts Scholars in *Alabama v. California*, Supreme Court of the United States, No. 158, Original

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Amicus Brief of Federal Courts Scholars in *Alabama v. California*, Supreme Court of the United States, No. 158, Original

Arthur D. Hellman, F. Andrew Hessick,
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Abstract

This amicus brief was submitted to the United States Supreme Court in support of the motion by Alabama and other states to file a bill of complaint against California and other states under the Court's original jurisdiction. The brief addresses one issue alone: it argues that under Article III of the Constitution and section 1251 of the Judicial Code, the Court has a duty to exercise its exclusive, original jurisdiction over actions in which one state brings suit against another state. The brief takes no position on any other procedural or merits issues that may be raised by the motion or the action.

Under Article III of the Constitution, the Supreme Court's original jurisdiction encompasses only two categories of cases: cases to which a state is a party and cases affecting ambassadors and other public ministers. Under section 1251 of the Judicial Code – following the pattern established by the Judiciary Act of 1789 – the Court has original and *exclusive* jurisdiction over a single class of cases: actions brought by one state against another state. Text, context, and history make clear that the Court has a duty to exercise that jurisdiction; there is no discretion to turn these cases away (except on case-specific grounds, such as nonjusticiability).

For the first century and a half under the Constitution, the Court never refused to permit the filing of a complaint in a case falling within its original jurisdiction. But in more recent decades, the Court has repeatedly done so, even in cases where the jurisdiction is exclusive. The brief argues, in accordance with several recent dissenting statements, that where the jurisdiction is exclusive – i.e., where one state brings suit against another state – the Court must at least allow the filing of the complaint.

This does not mean that the Court must decide the merits of the state's claim (for example, if the state lacks standing) or give the case plenary consideration. But in contrast to the certiorari jurisdiction, the Court does not have discretion to deny a motion by one state to file a complaint against another state.

The brief recognizes that the Court may have concerns about the practical implications of opening up access to its original docket. But the

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Court can act summarily to dismiss filings that are truly frivolous. For example, the Court could grant the motion to file the complaint but simultaneously order the plaintiff state to show cause why the complaint should not be dismissed for lack of standing or for failure to state a claim upon which relief can be granted.

The Court's current practice is particularly troubling in cases where the proposed complaint alleges the violation of federal law by the defendant state. As Chief Justice Marshall observed, "the primary motive" for creating a "judicial department" for the new national government was "the desire of having a [national] tribunal for the decision of all national questions." So, even if party status alone in a state-against-state case did not put it within this Court's original, exclusive jurisdiction, the case's assertion of federal questions would, as one prominent scholar has said, require that "some federal court—supreme or inferior—be open, at trial or on appeal, . . . to hear and resolve finally [the] given federal question." And because, under the plain language of Section 1251, no "inferior" court has original jurisdiction over cases like this one and this Court does have jurisdiction, this Court must exercise that jurisdiction.

No. 158, Original

IN THE
Supreme Court of the United States

ALABAMA, ET AL.,

Plaintiffs,

v.

CALIFORNIA, ET AL.,

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF *AMICI CURIAE* FEDERAL COURTS SCHOLARS IN SUPPORT OF MOVANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST[1]

Taking no position on the merits of the claims in this matter, *amici* submit this brief to offer their academic perspective, for this Court's consideration, on the nature and reasons for its duty to exercise exclusive, original jurisdiction over state-versus-state actions.

Arthur D. Hellman is Professor Emeritus at the University of Pittsburgh School of Law, where he has taught and written about federal courts and constitutional law. Professor Hellman has worked with the Judiciary Committees in the House and Senate in drafting federal courts legislation. In addition to his drafting work, Professor Hellman has testified as an invited witness at numerous hearings of both Judiciary Committees. His testimony has focused on a wide variety of legislative issues related to the federal courts, including the jurisdiction of the Supreme Court. Professor Hellman's many writings about the Supreme Court have been published in the *Harvard Law Review*, the *Supreme Court Review*, and

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no entity or person, aside from *amici curiae*, its members, or its counsel, made such a monetary contribution to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief pursuant to Rule 37.2.

other journals.

Derek Muller is Professor of Law at the University of Notre Dame Law School. His research and teaching interests include federal courts and civil procedure. He is co-author on a Federal Courts casebook published by Carolina Academic Press. He has published more than thirty academic articles, some of which have most recently appeared in the *William & Mary Law Review*, the *Florida Law Review*, and the *Georgia Law Review*.

Robert Pushaw is a professor at the Pepperdine University Caruso School of Law where he teaches and writes about constitutional law and the federal courts. Professor Pushaw has written scholarly articles published in myriad law journals, including the *Yale Law Journal*, the *Michigan Law Review*, the *California Law Review*, the *Cornell Law Review*, and many more, including several articles on the topic of federal courts and their jurisdiction.

Andrew Hessick is the Judge John J. Parker Distinguished Professor of Law at the University of North Carolina School of Law, where he teaches and writes about federal courts. Professor Hessick has written in the *California Law Review*, the *Cornell Law Review*, the *Northwestern University Law Review*, the *Notre Dame Law Review*, the *University of Chicago Law Review*, and the *William & Mary Law Review*. His work was cited in *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *June Med. Servs. L.*

L. C. v. Russo, 140 S. Ct. 2103 (2020); *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020); and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The text, context, and history of the Constitution and the Judiciary Act of 1789 (and its progeny) make clear that this Court has a duty to exercise its exclusive jurisdiction over state-against-state original actions, as several Members of this Court have noted over the decades. There is, by definition, no other court in the country whose doors are open to such suits, which may be filed in this Court "exclusive[ly]." 28 U.S.C. § 1251(a). Under the traditional Anglo-American understanding of jurisdiction, which neither the Constitution nor Congress has altered in any relevant manner, this Court lacks discretion to turn these cases away (except on case-specific grounds, such as nonjusticiability). Reasonable minds may differ over whether this Court should refrain from adjudicating original actions falling within its *nonexclusive* jurisdiction, given that other tribunals are also available to resolve those matters, and thus long-applied abstention and venue principles might support this Court's practice of occasionally staying its hand. But the same is not true of cases, such as this one, that implicate this Court's original, exclusive jurisdiction. And it is especially difficult to justify the declination of jurisdiction when, as here, the case involves federal questions.

We recognize that the Court may have concerns about the practical implications of opening up access to its original docket. But the Court can act summarily to dismiss filings that are truly frivolous. And because the States are repeat players in this Court, we believe that such summary dismissals will have the effect of deterring States from abusing their privilege.

II. The resolution of state-against-state actions is a core function of this Court under our constitutional structure's original design, which depends upon the peaceful resolution of interstate conflicts. The Framers assigned these suits to this Court precisely because they cannot be heard by state courts and because they raise serious matters of federal harmony.

This Court should grant the motion for leave to file a bill of complaint. *Amici* express no view on any other procedural or merits issues that may or may not be raised by the motion or this action.

ARGUMENT

I. THIS COURT HAS A DUTY TO EXERCISE ITS EXCLUSIVE JURISDICTION OVER STATE-AGAINST-STATE ORIGINAL ACTIONS

The text and history of the Constitution and statutory law compel the conclusion that this Court's original, exclusive jurisdiction over state-against-

state disputes is mandatory.

A. The Constitution and Congress Have Unambiguously Vested This Court with Exclusive, Original Jurisdiction Over State-Against-State Disputes

1. The Constitution vests "[t]he judicial power of the United States . . . in one supreme Court," which, unlike the "inferior" federal courts, Article III itself establishes. U.S. Const. art. III, § 1. This power "extend[s] . . . to Controversies between two or more States." U.S. Const. art. III, § 2. And, in such "Controversies," the Supreme Court itself "shall have original jurisdiction." *Id.* (original jurisdiction in cases "in which a State shall be Party"); *see Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them.").

Under Article III, this Court's original jurisdiction is self-executing and fixed. It does not depend upon an act of Congress. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451, 463–64, 467, 479 (1793); *see also Arizona v. California*, 373 U.S. 546, 564 (1963). Nor can it be altered by Congressional action. Article III implicitly provides as much: by subjecting only this Court's *appellate* jurisdiction to "such Exceptions, and . . . such Regulations as the Congress shall make," the Constitution makes clear that no "Exception" or "Regulation" can limit this Court's *original* jurisdiction. *See* Martin H. Redish, *Congressional*

Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 Vill. L. Rev. 900, 901 (1982). Nor can Congress expand it, as *Marbury v. Madison* teaches. 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting argument that "the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States"); *see also Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 332 (1816).

Article III's grant of original jurisdiction is also "mandatory." James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 571 (1994). This means that the Constitution "*requires* the federal judiciary (more specifically, the Supreme Court) to exercise jurisdiction over" certain kinds of cases that the Original Jurisdiction Clause identifies. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1602 (1990) (emphasis added). "Scholars have generally accepted the proposition that the clause mandates the assertion of original jurisdiction." Pfander, *supra*, at 558 n.12; *see, e.g.*, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 749–50 (1984).

2. Statutory law has long since been in accord.

Although this Court has often said that its original jurisdiction does not require "enabling" legislation, "[n]evertheless, beginning with the provision at issue in Marbury, § 13 of the Judiciary Act of 1789, Congress has specified the Court's original jurisdiction" consistent with Article III. Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and The Federal System* 267 (7th ed. 2015) (citation omitted) (hereinafter "Hart & Wechsler"). The 1789 Act provided that the Court "shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." Judiciary Act of 1789, § 13, 1 Stat. 73, 80–81 (1789); *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled on other grounds by Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935) (noting that the Judiciary Act of 1789 "is contemporaneous and weighty evidence of [Article III's] true meaning").

The current statute, 28 U.S.C. § 1251, likewise distinguishes between two categories of cases in which this Court has original jurisdiction: disputes in which that jurisdiction is "not exclusive" and ones in which it is "exclusive." *Id.* The former covers cases involving "ambassadors, other public ministers, consuls, or vice consuls of foreign states [as] parties," cases "between the United States and a State," and cases "by a State against the citizens of another State

or against aliens." *Id.* § 1251(b). By contrast, the latter category—in which this Court "shall have original *and exclusive* jurisdiction"—comprises just one type of action: "*all* controversies between two or more States." *Id.* § 1251(a) (emphasis added). This is just such a "controversy."

B. This Court Lacks Discretion to Decline to Exercise Its Exclusive, Original Jurisdiction

As Chief Justice Marshall famously wrote on behalf of the Court, "it is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). It follows that a federal court (including this one) "ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Id.*; *see* David P. Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term*, 1976 Sup. Ct. Rev. 183, 214–15 (defending this statement). This "time-honored maxim" derives from "the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496–97 (1971). Hence "a jurisdictional statute . . . vesting a power in the federal courts to adjudicate" a given claim imposes a "corresponding duty to do so." Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 112 (1984). Otherwise "absurd results [ ] would flow," including that "every

substantive right . . . would effectively be subject to a practical veto by the federal judiciary," which could choose to disregard a "particular federal statute" or a "particular suit" whenever it thought advisable. *Id.* at 112–13.

Heeding *Cohens*' maxim and reading Section 1251 (and its statutory predecessors) alongside Article III, many jurists and scholars have correctly concluded, as Justice Thomas, joined by Justice Alito, did in 2016, that "[f]ederal law is unambiguous: If there is a controversy between two States, this Court—and only this Court—has jurisdiction over it," and this Court "can[not] opt to decline [it]." *Nebraska v. Colorado*, 577 U.S. 1211 (2016) (Thomas, J., dissenting). Section 1251's statutory context "confirms" as much: "When Congress has chosen to give this Court discretion over its merits docket, it has done so clearly." *Id.* Whereas Section 1251 uses "shall," the certiorari statutes, by contrast, describe cases that "*may* be reviewed." 28 U.S.C. § 1254(1) (emphasis added) (cases "in" the federal courts of appeals); *id.* § 1257(a) (final judgments or decrees of state courts). Consider also that the statute uses the word "all"—"*all* controversies between two or more states." *Id.* § 1251(a) (emphasis added). And, indeed, "[f]or the first 150 years after the adoption of the Constitution, the Court never refused to permit the filing of a complaint in a case falling within its original jurisdiction." *Texas v. California*, 141 S. Ct. 1469, 1470 (2021) (Alito, J., dissenting) (citing Stephen M. Shapiro, et al., *Supreme Court Practice* 634 (10th ed.

2013)); *see also* Julie Vick Stevenson, *Exclusive Original Jurisdiction of the United States Supreme Court: Does It Still Exist?*, 1982 B.Y.U. L. Rev. 727, 729 (1982) ("During the first one hundred and fifty years of its existence, the Supreme Court exercised original jurisdiction over all cases that came within the article III definition of original jurisdiction, regardless of the exclusive or nonexclusive nature of the jurisdiction.").

There is a question whether this principle mandates also that this Court adjudicate all matters on its docket over which it has original, *nonexclusive* jurisdiction. The leading case, *Ohio v. Wyandotte Chemicals Corporation*, reiterates *Cohens* but notes that "changes in the American legal system and the development of American society have rendered [that practice] untenable." 401 U.S. at 496–97. And "sound discretion" there was thought to favor abstention, primarily because *other tribunals* were equally open to, and capable of resolving, the dispute: Ohio courts had "a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law . . . upon which our determination would have to rest." *Id.* at 500.

While *amici* might differ over whether *Wyandotte Chemicals* is sound, all recognize that it at least has roots in other abstention- and venue-related principles that this Court has long blessed—and that the lower courts routinely apply. Federal district and

appellate judges, we are often and properly told, have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Yet in several scenarios they may (and sometimes must) turn away cases that Congress has constitutionally obliged them to resolve, but—critically—only when some *other* court clearly is available and is the more appropriate forum. *See, e.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (discussing *Younger* abstention but noting that circumstances justifying *Younger* abstention are rare). The venue-transfer statute and the doctrine of forum non conveniens likewise address cases in which more than one court has jurisdiction but one court is the more suitable forum. *See* 28 U.S.C. § 1404; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).[2]

Cases falling within this Court's original, *exclusive* jurisdiction are another matter. Applying Section 1251(a)'s "uncompromising language," this Court long has held that the description of its "jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Mississippi v. Louisiana*, 506 U.S. 73, 77–78 & n.1 (1992) (adding that no one disputed, nor had the Court ever

[2] Even if the policy concerns that carried the day in *Wyandotte Chemicals* are thought to be relevant, they do not apply to this case. It cannot be said that "this lawsuit [does not raise] difficult or important problems of federal law." 401 U.S. at 504. Nor does this suit call upon the Court to engage in factfinding of any kind; the issues are purely legal.

"questioned," "Congress's authority to make our original jurisdiction exclusive in some cases and concurrent in others"). This point "follows from the plain meaning of 'exclusive,' and has been remarked upon by opinions in our original jurisdiction cases." *Id.* at 78 (citations omitted). The word "exclusive" probably equally bars state courts from adjudicating such disputes, *see Nebraska*, 577 U.S. 1211 (Thomas, J., dissenting), and, even if it does not, a State is unable "to hale another [State] into its courts without the latter's consent." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 245 (2019). Given *Mississippi*'s unimpeachable logic, "[o]ne might doubt that § 1251(a)'s language is any less 'uncompromising' in requiring the Supreme Court to hear such disputes than in forbidding lower federal courts from doing so." Hart & Wechsler 275.

State-versus-state disputes are different in kind from "nonexclusive" original cases, and the stakes of abstaining are significantly higher. *See* Hart & Wechsler 274 (noting that extension of *Wyandotte* to cases within this Court's exclusive original jurisdiction was "surely a dramatic expansion of the *Wyandotte* doctrine"). Should this Court "decline" to exercise jurisdiction over such a case, "the complaining State has no judicial forum in which to seek relief." *Nebraska*, 577 U.S. 1211 (Thomas, J., dissenting); *see also Louisiana v. Mississippi*, 488 U.S. 990 (1988) (White, J., dissenting, joined by Stevens, J., and Scalia, J.) (objecting to denial of motion for leave to file bill of complaint given that

dispute was "plainly within our original jurisdiction" and "[n]o other court may entertain Louisiana's complaint against Mississippi"). That was not true of the plaintiff in *Wyandotte Chemicals*. As Justice Stevens explained in 1981, "[a]lthough the Court [in *Wyandotte Chemicals*] ha[d] explained why it will decline to exercise its nonexclusive jurisdiction over cases in which only one of the parties is a State, that explanation is inapplicable to cases in which our jurisdiction is exclusive." *California v. W. Virginia*, 454 U.S. 1027, 1027–28 (1981) (Stevens, J., dissenting) (citation omitted). The majority offered no response on this point, and it is hard to think of a plausible one. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 561 (1985) (noting that the Court's disposition had "elicited strong (and in my view unanswerable) dissent" from Justice Stevens); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1712 (2000) (critiquing the Court for "going to the embarrassing extreme of refusing to hear a case between states where its jurisdiction was exclusive").

With *Wyandotte Chemical*'s policy arguments set to one side, one is left with the maxim that this Court "ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens,* 19 U.S. (6 Wheat.) at 404. Any "policy judgments" to the contrary are therefore irrelevant, since they are "in conflict with the policy choices that Congress made in the statutory text

specifying the Court's original jurisdiction" and should therefore not control. *Nebraska*, 577 U.S. 1211 (Thomas, J., dissenting).

This is not to say that every state-versus-state complaint, simply because it is filed in this Court, requires that this Court adjudicate it on the merits. To begin, it still must be a justiciable "case" or "controversy." *New York v. Illinois*, 274 U.S. 488, 490 (1927); *Texas v. Florida*, 306 U.S. 398 (1939). In particular, "it must appear that the complaining state has suffered a wrong through the action of the defending state, furnishing ground for judicial redress, or that the former is asserting a right against the latter that is susceptible of judicial enforcement pursuant to recognized principles of equity or common law." Stephen M. Shapiro, et al., *Supreme Court Practice* 10-6 (11th ed. 2019). And "[n]ecessarily excluded from the category" of justiciable matters "are political disputes between states and disputes arising out of a maladministration of state laws by officials to the injury of citizens of another state." *Id.* 10-6 n.7. Beyond justiciability, the case must also be pressed by the real party in interest and not be "patently without merit." *Id.* at 10-9–10-10. And if States are abusing the privilege of mandatory jurisdiction with truly frivolous filings, the Court can devise means for dealing summarily with such filings. For example, the Court could allow the filing of the complaint but simultaneously ask the State to show cause why the complaint should not be dismissed—for failure to state a claim upon which relief can be granted, for

lack of Article III standing, or for some other case-specific reason evident on the face of the motion.

II. THIS COURT'S OBLIGATION TO EXERCISE ITS EXCLUSIVE, ORIGINAL JURISDICTION COMPORTS WITH—AND PROMOTES—THE FRAMERS' VISION OF ITS ROLE IN THE FEDERAL STRUCTURE

The original design of the federal courts in general and the Supreme Court in particular was "to preserve the harmony of states and that of the citizens thereof." 1 *The Records of the Federal Convention of 1787*, at 238 (Max Farrand ed., rev. ed. 1966) (quoting Edmund Randolph). Although, as part of the Madisonian Compromise, discretion over the creation of and vesting of jurisdiction in inferior federal tribunals was left to Congress, *Patchak v. Zinke*, 583 U.S. 244, 252 (2018), the Framers well understood that state courts could not possibly be an effective forum for resolving controversies between states. After all, as Representative Stone noted in the debate over the first Judiciary Act, "the State courts could not determine between State and State, because their judgment would be ineffectual; they could never carry it into execution." Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1597–98 (1990) (citation omitted). This meant that at least one federal tribunal was necessitated by this inherently federal problem, and neither its existence nor core aspects of its jurisdiction could wisely be left to legislative whim.

For that reason, the Framers chose "to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government." *Ames v. Kansas,* 111 U.S. 449, 464 (1884). Whereas under the Articles of Confederation "compulsory jurisdiction" over state-versus-state disputes resided in the Senate, "unanimity prevailed" at the Constitutional Convention in favor of "the Virginia proposal for compulsory jurisdiction in the Supreme Court." William S. Barnes, *Suits Between States in the Supreme Court*, 7 Vand. L. Rev. 494, 495 (1954) (citation omitted); *see also* Charles Warren, *Supreme Court and Sovereign States* 37 (1924) (describing same "compulsory jurisdiction"). The Founders thought this "a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon." *South Carolina v. Regan*, 465 U.S. 367, 397 (1984) (O'Connor, J., concurring in the judgment); *see also Federalist* No. 80 (A. Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."); Paul Verkuil, *Original Jurisdiction*, in Heritage Guide to the Constitution ("No forum other than the Supreme Court can act with the authority and dignity necessary to resolve what are in effect diplomatic encounters between contending sovereigns under our

constitutional system.").[3] Hence, as this Court reiterated recently, its "role in these cases is to serve as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *Texas v. New Mexico*, 583 U.S. 407, 412 (2018) (citation omitted).

While Plaintiffs and Defendants do not seem to be at risk of going to war over their present dispute, "the sensitive political implications of [state-versus-state] disputes," by their very nature, tend to "make them appropriate for resolution by the highest Court in the land." Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 864 n.360 (1983); *see also* Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 Wm. & Mary L. Rev. 1289, 1330 n.200 (2005) (finding it "[s]urprising[ ]" that this Court "has declined to exercise its statutorily mandated exclusive original jurisdiction over 'Controversies' between states ….").

Although the jurisdiction invoked here "depends entirely on the character of the parties," and it is thus irrelevant "what may be the subject of controversy," *Cohens*, 19 U.S. (6 Wheat.) at 378, it is particularly appropriate that this Court resolve state-against-

[3] *Available at* https://www.heritage.org/constitution/#!/articles/3/essays/116/original-jurisdiction.

state disputes asserting federal questions. It was federal-question cases in particular, Chief Justice Marshall explained in an important essay, that "are, as was to be expected, the objects which stood first in the mind of the framers of the constitution." John Marshall, *A Friend of the Constitution* (1819), in John Marshall's Defense of *McCulloch v. Maryland* 204 (Gerald Gunther ed., 1969). In fact, as Marshall observed, "the primary motive" for creating a federal "judicial department" was "the desire of having a [national] tribunal for the decision of all national questions." *Id.*; *see generally* Arthur D. Hellman, *The Federal Question Jurisdiction Under Article III: "First in the Mind of the Framers," But Today, Perhaps, Falling Short of the Framers' Expectations*, 104 Boston U. L. Rev. (forthcoming 2024).[4] So, even if party status alone in a state-against-state case did not put it within this Court's original, exclusive jurisdiction, the case's assertion of federal questions would, as one prominent scholar has said, require "some federal court—supreme or inferior—be open, at trial or on appeal, . . . to hear and resolve finally [the] given federal question." Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 206 (1985). And because, under the plain language of Section 1251, no "inferior" court has original jurisdiction over cases like this one and this Court does have jurisdiction, this Court must exercise that

[4] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4748866.

jurisdiction.

"It is precisely because these [suits between states] have a 'delicate and grave' character that they were placed exclusively in [this Court's] hands." *Texas v. California*, 141 S. Ct. at 1472 (2021) (Alito, J., dissenting) (citations omitted). The Court's belated custom of closing its doors to most of these cases "is no way to treat a sovereign State that wants its dispute with another State settled in this Court." *Louisiana*, 488 U.S. at 990 (White, J., dissenting). And it would be especially anomalous to deny any forum to a State that is asserting claims that another State is engaging in conduct that federal law forbids.

CONCLUSION

The motion for leave to file a bill of complaint should be granted.

Respectfully submitted,

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