No. 22O148

IN THE

Supreme Court of the United States

STATE OF MISSOURI, STATE OF ALABAMA,
STATE OF ARKANSAS, STATE OF INDIANA,
STATE OF IOWA, STATE OF LOUISIANA,
STATE OF NEBRASKA, STATE OF NEVADA,
STATE OF NORTH DAKOTA, STATE OF OKLAHOMA,
STATE OF TEXAS, STATE OF UTAH,
AND STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF CALIFORNIA,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF OF CENTER FOR CONSUMER FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

WILLIAM S. CONSOVOY
Counsel of Record
CAROLINE A. COOK
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Amicus Curiae

February 2, 2018

277813

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court Has an Unflagging Duty to Exercise Original Jurisdiction over This Dispute 4

A. Declining original jurisdiction over a controversy between two or more states violates 28 U.S.C. § 1251(a) 5

B. A discretionary approach to original jurisdiction violates Article III when the controversy is between states 7

C. The decisions creating a discretionary approach to original jurisdiction should be reconsidered 9

II. Plaintiffs' Motion for Leave to File Bill of Complaint Should Be Granted Even under This Court's Discretionary Approach 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Yungkau,
329 U.S. 482 (1947) 5

Bors v. Preston,
111 U.S. 252 (1884) 7

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 10

California v. West Virginia,
454 U.S. 1027 (1981) 9

Chisholm v. Georgia,
2 U.S. 419 (1793) 11

Cohens v. Virginia,
19 U.S. 264 (1821) 9

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 9

Georgia v. Pennsylvania R.R. Co.,
324 U.S. 439 (1945) 11

Haywood v. Drone,
556 U.S. 729 (2009) 7

Illinois v. City of Milwaukee,
406 U.S. 91, 93 (1972) 4, 13, 14

Page

Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016) 6

Lopez v. Davis,
531 U.S. 230 (2001) 5

Lyng v. Nw. Indian Cemetery Prot. Ass'n,
485 U.S. 439 (1988) 14

Maryland v. Louisiana,
451. U.S. 725 (1981) 14, 15, 16, 17

Merrell Dow Pharm. Inc. v. Thompson,
478 U.S. 804, 829 (1986) 10, 13

Missouri v. Illinois,
180 U.S. 208 (1901) 11

Nebraska v. Colorado,
136 S. Ct. 1034 (2016) 9, 12

New Mexico v. Colorado,
137 S. Ct. 2319 (2017) 9

Ohio v. Wyandotte Chemicals Corp.,
401 U.S. 493 (1971) 9, 12, 17

Sheldon v. Sill,
49 U.S. 441 (1850) 7

Page

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004). 6

Sprint Commc'ns, Inc. v. Jacobs,
134 S. Ct. 584 (2013). 9

Stanfield v. Swenson,
381 F.2d 755 (8th Cir. 1967) 5

United States v. Monsanto,
491 U.S. 600 (1989). 5

Wisconsin v. Pelican Ins. Co.,
127 U.S. 265 (1888). 13

Wyoming v. Oklahoma,
502 U.S. 437 (1992). 15, 17-18

Younger v. Harris,
401 U.S. 37 (1971) 10

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I 7

U.S. Const. Art. III. . . . . *passim*

28 U.S.C. § 1251 . . . . *passim*

Page

28 U.S.C. § 1254 6

28 U.S.C. § 1257 6

OTHER AUTHORITIES

Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443 (1989) 8

Noah Webster, *American Dictionary of the English Language* (1828) 5

Note, *Ohio v. Wyandotte Chemicals Corp.: Forum Non Conveniens in the Supreme Court*, 67 Nw. U. L. Rev. 59 (1972) 6

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's *The Federal Courts and the Federal System* (2d ed. 1973) 9-10

2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) 5

The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665 (1959) 11

Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185 (1993) 11

INTEREST OF *AMICI CURIAE*[1]

Founded in 1996, the Center for Consumer Freedom ("CCF") is a nonprofit organization devoted to promoting personal responsibility and protecting consumer choices. To that end, CCF actively supports the rights of adults and parents to choose how they live their lives, what they eat and drink, how they manage their finances, and how they enjoy themselves. CCF advances these interests through advocacy designed to educate the public, policymakers, and courts on issues related to public choice concerning food, beverage, health, finance, and other consumer issues that are vital to the national economy.

CCF has a strong interest in this original action. California has enacted a law that seeks to prohibit the sale of certain animal products within its borders unless the animals are housed in a manner that California finds acceptable. This is precisely the kind of intrusive legislation that CCF believes is illegal, unwise, and contrary to the national marketplace of ideas established by the Founders. This law is bad for consumers (especially those who lack financial means to pay the inevitably higher prices for eggs). It also is bad for the farmers who must radically alter their operations to satisfy the demands of California. And, as the bill of complaint explains, the law harms Plaintiff States given that many of them are themselves consumers and producers, and all of them

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

are duty bound as sovereigns to protect their citizens from this brand of extraterritorial legislation. CCF thus urges the Court to accept jurisdiction over this important original action.

SUMMARY OF ARGUMENT

This Court has a duty to exercise original jurisdiction in *all* controversies between states, including this one. This obligation is confirmed in the mandatory language of the Judiciary Act of 1789, which commands that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (codified at 28 U.S.C. § 1251(a)). This unambiguous statutory language employs a clear and discretionless imperative. To decline jurisdiction in a controversy between two or more states is to violate the plain text of this statute.

The Court's duty to hear controversies between states is also derived from the Constitution. Article III mandates that "[t]he judicial Power shall extend … to Controversies between two or more States," vesting this judicial power "in one supreme Court, and in such inferior Courts as the Congress may … ordain and establish." U.S. Const. Art. III, §§ 1. 2. Pursuant to these constitutional provisions, some federal court *must* hear these controversies between states. Whether that obligation is shared between the Supreme Court and lower courts or borne by the Supreme Court alone is a matter left to Congress. And Congress chose to vest the entirety of this Article III duty in the Supreme Court by giving it "original *and exclusive* jurisdiction" over these disputes. 28 U.S.C. § 1251(a). If

this Court declines to hear a controversy between two or more states, it nullifies Article III's guarantee of federal judicial review.

Prior decisions establishing a discretionary approach to this Court's original jurisdiction over controversies between states are unjustified and should be reconsidered. Declining original jurisdiction impairs the very interests of comity and federalism that motivated the Framers to create this jurisdictional duty in the first place. The Court's rationales regarding its purported lack of competence, modern role as an appellate tribunal, and crowded docket are all policy judgments that the Court is not authorized to make and that contradict those of Congress, the branch of government that is empowered to make such judgments.

But even pursuant to its discretionary approach, this Court should exercise jurisdiction in this important original action. The seriousness and dignity of this claim are paramount. Plaintiff States' sovereign interests as tax collectors, consumers, producers, and *parens patriae* of citizen-consumers, have been significantly and negatively impacted by California's regulations. And no other forum is available to adjudicate this dispute. Controversies between states fall under this Court's exclusive jurisdiction and private suits, of which there are currently none, would be insufficient to represent Plaintiff States' interests. Initial review by the Supreme Court is Plaintiff States' only avenue for relief, and this Court should not deny them an opportunity to be heard by declining jurisdiction.

ARGUMENT

I. This Court Has an Unflagging Duty to Exercise Original Jurisdiction over This Dispute.

Article III establishes that "[i]n all Cases … in which a State shall be [a] Party, the supreme Court shall have original Jurisdiction." U.S. Const. Art. III, § 2, cl. 2. Pursuant to this language, Congress enacted the Judiciary Act of 1789, which provides that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (codified at 28 U.S.C. § 1251(a)).

Despite the mandatory language these provisions employ, the Court has adopted a discretionary approach to its original jurisdiction in controversies between states. The Court has "construe[d] 28 U.S.C. § 1251(a)(1), [and] Art. III, § 2, cl. 2, to honor [its] original jurisdiction but to make it obligatory only in appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). But neither the Constitution nor Congress has afforded the Court the discretion to decline jurisdiction over such controversies. Rather, both command the Court to exercise its jurisdiction in cases between states. Therefore, so long as Plaintiffs' bill of complaint presents a "controvers[y] between two or more States," 28 U.S.C. § 1251(a), which it does, the Court must accept this case and resolve the dispute.

A. Declining original jurisdiction over a controversy between two or more states violates 28 U.S.C. § 1251(a).

Section 1251(a) provides that "[t]he Supreme Court *shall* have original and exclusive jurisdiction of *all* controversies between two or more States." 28 U.S.C. § 1251(a) (emphasis added). At the time of the Founding, the word "shall" was understood as indicating a mandate or "command" when used in the third person. Noah Webster, *American Dictionary of the English Language* (1828); *see also* 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "shall" when used in the third person as "it is commanded," and further equating "shall" with "ought"); *id.* (defining "ought" as "[t]o be obliged by duty").

To this day, Congress "use[s] 'shall' to impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (explaining that the "usual sense" of "shall" is "mandatory"); *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967) ("When used in statutes the word 'shall' is generally regarded as an imperative or mandatory and therefore one which must be given a compulsory meaning."). Absent a clear indication to the contrary, then, Congress's use of "shall" imposes a mandatory duty on the legislation's subject. *See, e.g.*, *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

Nothing in Section 1251(a) indicates that the use of "shall" was meant to create discretion. Rather, the contrast between Section 1251(a)'s language and that of other provisions of the Judiciary Act of 1789 confirms

Congress used "shall" in the ordinary way. Those provisions, unlike Section 1251(a), describe circumstances when the Supreme Court "may" accept jurisdiction. Section 1254, for example, provides that "[c]ases in courts of appeals *may* be reviewed by the Supreme Court" either by "writ of certiorari" or via "certification." 28 U.S.C. § 1254 (emphasis added); *see also* 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari."). Congress knows how to create jurisdictional discretion when it wants to. "When a statute distinguishes between 'may' and 'shall,'" however, "it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). That is what Congress did here.

Finally, nothing in Section 1251(a)'s text suggests an implicit reservation of discretion to decline original jurisdiction in controversies between two or more states. And the authority to exercise such discretion cannot be considered inherent in a grant of mandatory jurisdiction given that the First Congress would have been unfamiliar with the concept. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The notion of jurisdiction "made discretionary by the showing of an alternative forum, *forum non conveniens*, did not exist … in any American court until … about 1800," and the "English courts did not adopt the doctrine until the twentieth century." Note, *Ohio v. Wyandotte Chemicals Corp.: Forum Non Conveniens in the Supreme Court*, 67 Nw. U. L. Rev. 59, 76 & n.114 (1972).

When the First Congress decided that the Supreme Court "shall" decide these important disputes, it was not intending to leave the matter to the Court's discretion. It was exercising its constitutional authority to make the choice itself. Regardless of whether the Court deems that choice wise, the Constitution's allocation of that authority must be respected.

B. A discretionary approach to original jurisdiction violates Article III when the controversy is between states.

Section 2 of Article III states that "[t]he judicial Power shall extend … to Controversies between two or more States." U.S. Const. Art. III, § 2, cl. 1. It further stipulates that this "judicial Power shall be vested in one supreme Court, and in such inferior Courts as the Congress may … ordain and establish." U.S. Const. Art. III, § 1. Together, these provisions impose on the judiciary a constitutional duty to hear controversies between states. In other words, some federal court *must* accept jurisdiction over a dispute between two or more states.

Which tribunal of the judicial branch shoulders this burden partially depends on Congress. The Constitution vests the legislative branch with the authority to create lower federal courts. U.S. Const. Art. I, § 8; U.S. Const. Art. III, § 1; *see also Haywood v. Drone*, 556 U.S. 729, 743-56 (2009) (Thomas, J., dissenting). The power to create lower courts is the power to create "concurrent original jurisdiction" over federal claims. *Bors v. Preston*, 111 U.S. 252, 258 (1884); *see also Sheldon v. Sill*, 49 U.S. 441, 448-49 (1850). When Congress allows for concurrent jurisdiction, the constitutional duty imposed by Section 2 is shared between the Supreme Court and the lower courts.

The Supreme Court cannot violate a shared duty unilaterally. Accordingly, it does not violate Article III by declining original jurisdiction over cases that Congress empowered lower courts to hear, because these other federal tribunals remain available to exercise the judicial power and hear the case. Conversely, when the Supreme Court possesses exclusive jurisdiction over a category of cases, declining original jurisdiction means that Article III's promise of judicial review will be negated because there will be no federal court to hear the dispute. Even those that take a narrow view of Article III concede this point. *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 486 n.202 (1989) (recognizing that for "state party cases that also raise federal questions ... some federal court must be open, at least on appeal").

For controversies between two or more states, Congress decided that "[t]he Supreme Court shall have original *and exclusive* jurisdiction." 28 U.S.C. § 1251(a) (emphasis added). By depriving the lower courts of original jurisdiction, Congress made initial Supreme Court review the only avenue for relief. Notably, this is the only aspect of the Supreme Court's original jurisdiction that Congress chose to make exclusive. Here too, Congress knew what it was doing. *Compare id.* § 1251(b) ("The Supreme Court shall have original *but not exclusive* jurisdiction of" suits involving an ambassador or foreign state, a controversy between the United States and a state, or a state suing another state's citizens or foreign aliens. (emphasis added)). Because the Court is the only tribunal that wields Article III's judicial power in controversies between states, it is obligated under Article III to hear all such cases.

C. The decisions creating a discretionary approach to original jurisdiction should be reconsidered.

The Court's discretionary review of bills of complaint regarding controversies between states demonstrates a marked departure from the "time-honored maxim of 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). Chief Justice John Marshall, writing for the Court in *Cohens v. Virginia*, embraced this maxim: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. 264, 404 (1821). More recently, this Court "has cautioned" that "[j]urisdiction existing, … a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)).

The concept of discretionary original jurisdiction is, at best, "questionable." *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of motion for leave to file bill of complaint); *see also New Mexico v. Colorado*, 137 S. Ct. 2319 (Mem) (2017) (Thomas, J., and Alito, J., noting their dissent from denial of motion for leave to file bill of complaint); *California v. West Virginia*, 454 U.S. 1027, 1027-28 (1981) (Stevens, J., dissenting from denial of motion for leave to file bill of complaint). The concept also has elicited strong criticism from scholars. *See, e.g.,* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's *The Federal Courts and the Federal System*

284-87 (2d ed. 1973) (describing the proposition that "the congressional grant of exclusive jurisdiction under § 1251(a) … requir[es] resort to [the Supreme Court's] obligatory jurisdiction only in appropriate cases" as "an oxymoron" (internal quotation marks omitted)).

The criticism has merit. This Court has recognized only "narrow exceptions" to "Chief Justice Marshall's famous dictum," and each exception has "been justified by compelling judicial concerns of comity and federalism." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 829 n.7 (1986) (citing *Younger v. Harris,* 401 U.S. 37 (1971); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943)). In contrast, the Court's discretionary approach to original jurisdiction departs wholesale from the judicial duty under Article III to exercise jurisdiction, and it does so in a manner that cuts against comity and state interests.

Controversies between states were committed to the Supreme Court's original jurisdiction in order to preserve states' dignity and interests as quasi-sovereigns. *See, e.g.,* Alexander Hamilton, *The Federalist No. 80* (explaining that it is "essential to the peace of the Union" that state-to-state controversies be "committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States"); Hamilton, *The Federalist No. 81* ("In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."). In short, "the Founders treated the states as quasi-sovereigns and, to match the dignity of the tribunal to the dignity of the parties, gave the Supreme Court original jurisdiction over any case 'in which a State shall be Party.' That special status went to only one other category—namely, cases 'affecting Ambassadors, other

public Ministers, and Consuls.'" Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 186-87 (1993). Given those concerns, Congress saw fit to ensure that the Supreme Court was the *only* tribunal permitted to hear such sensitive disputes. *See* The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (codified at 28 U.S.C. § 1251(a)).

This Court has previously acknowledged "that the grant of original jurisdiction may be traced to the obligation of the federal government to provide a forum for the adjustment of differences which might otherwise have been resolved by war or diplomatic negotiation [between the formerly independent sovereign states] prior to the formation of the federal union." *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 669 (1959); *see Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945) ("The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States."); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy."); *Chisholm v. Georgia*, 2 U.S. 419, 475 (1793) ("[D]omestic tranquillity requires, that the contentions of States should be peaceably terminated by a common judicatory; and … in a free country justice ought not to depend on the will of either of the litigants.").

Yet, more recently, the Court has lost sight of this historical context. Because the Court has not exercised

original jurisdiction in all controversies between states, many states that long ago surrendered their diplomatic and war-marking powers to the federal government have found themselves without *any* forum in which to settle their disputes.[2] The rationale provided by these more-recent cases cannot justify such a departure from first principles.

For example, the Court has cited its purported lack of "special competence in dealing with the numerous conflicts between States." *Wyandotte Chemicals Corp.,* 401 U.S. at 497-98. But this justification is merely a "policy judgment[]." *Nebraska*, 136 S. Ct. at 1035. And this policy judgment conflicts with the one that the Founders made and "with the policy choices that Congress made in the statutory text specifying the Court's original jurisdiction." *Id.*; *see also* Note, 67 Nw. U. L. Rev. at 72-73. As explained above, the Constitution allocated such policy judgments to Congress—not the Court.

The Court also points to the "enhanced importance of [its] role" as "an appellate tribunal" in the modern federal system when justifying its discretionary approach to original jurisdiction. *Wyandotte Chemicals Corp.,* 401 U.S. at 498-99. Although it "may be socially realistic," the Constitution does not give the Court the authority to declare "that its primary role in the present American legal system is to function as the final federal appellate

2. The Court has long recognized that state court is an unacceptable alternative. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499-500 (1971) ("[N]o State should be compelled to resort to the tribunals of other States for redress since parochial factors might often lead to the appearance, if not reality of partiality to one's own.").

court." Note, 67 Nw. U. L. Rev. at 65. In fact, Article III establishes "the Court's original jurisdiction as of apparently pre-eminent significance compared with [its] appellate jurisdiction." *Id.* Moreover, the First Congress broadly created Article III original jurisdiction but created appellate jurisdiction for only a narrow subset of cases. *See* The Judiciary Act of 1789, ch.20, § 13, 1 Stat. 80-81; *id.* § 22, 1 Stat. 84; *id.* §§ 9, 11, 1 Stat. 76-77, 78-79; *see also Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (recognizing that laws passed by the First Congress are "weighty evidence of [the Constitution's] true meaning"), *overruled on other grounds by Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268 (1935).

The Court has candidly explained that it "incline[s] to a sparing use of [its] original jurisdiction so that [its] increasing duties with the appellate docket will not suffer." *Illinois*, 406 U.S. at 93-94. But, again, that is only justifiable when concurrent jurisdiction exists. In controversies between states, over which the Supreme Court has *exclusive* jurisdiction, to not exercise original jurisdiction is to effectively deny the existence of federal jurisdiction altogether. But this Court has, quite correctly, recognized that "[i]t would be wholly illegitimate ... to determine that there was no jurisdiction … simply because the Court thought that there were too many cases in the federal courts." *Merrell Dow Pharm. Inc.*, 478 U.S. at 829 n.7.

* * *

Section 1251(a) and Article III require this Court to exercise original jurisdiction over controversies between two or more states. This Court's discretionary approach

to accepting bills of complaint in such cases is indefensible. Because "the complaining State[s] ha[ve] suffered a wrong through the action of the other State, furnishing ground for judicial redress," their bill of complaint presents a "proper 'controversy'" that is, accordingly, subject to this Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 735 (1981) (quotation omitted). The Court is thus obligated to grant the motion for leave to file bill of complaint.

II. Plaintiffs' Motion for Leave to File Bill of Complaint Should Be Granted Even under This Court's Discretionary Approach.

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Prot. Ass'n,* 485 U.S. 439, 445 (1988). The Court can do so here by concluding that it should accept jurisdiction over this dispute pursuant to its discretionary approach. Under governing precedent, this Court "honor[s its] original jurisdiction … in appropriate cases." *Illinois*, 406 U.S. at 93. "[T]he question of what is appropriate concerns … the seriousness and dignity of the claim" and "the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Id.* Because Plaintiffs' claim is of sufficient seriousness and dignity, and because no other adequate forums are available to adjudicate their claim, accepting original jurisdiction is appropriate.

First, the seriousness and dignity of this federal claim warrants original jurisdiction. Such jurisdiction is

appropriate when, as here, a case "implicates serious and important concerns of federalism." *Maryland*, 451 U.S. at 744. *Wyoming v. Oklahoma* provides a useful example. In that case, Wyoming brought a Commerce Clause challenge against an Oklahoma statute that required Oklahoma utility companies to blend at least ten percent of Oklahoma coal with their then-existing use of Wyoming coal. 502 U.S. 437, 443-44 (1992). Although Wyoming did not itself sell coal, it collected severance tax on the extraction of coal within its borders. *Id.* at 442. The Court concluded that it was "beyond peradventure that Wyoming ha[d] raised a claim of sufficient 'seriousness and dignity.'" *Id.* at 451. In doing so, it rejected Oklahoma's argument that the *de minimis* losses in tax revenue were not sufficiently "serious," stating that this Court will "decline any invitation to key the exercise of [its] original jurisdiction on the amount in controversy." *Id.* at 452-53.

Like Oklahoma, California has passed a law "which directly affects [Plaintiff States'] ability to collect … tax revenues, an action undertaken" in their capacity as sovereigns. *Id.* at 451. If forced to comply with these regulations, Plaintiff States will also suffer increased prices—both directly, as purchasers of the commodities for consumption, and indirectly, as *parens patriae* to their citizen-consumers. *See Maryland*, 451 U.S. at 744. Furthermore, some Plaintiff States are producers of these commodities and will suffer increased production costs and decreased profits.

Even if Plaintiff States and their citizen-farmers chose not to comply with California's regulations, they would still suffer harm. Like Wyoming's coal, Plaintiff States' agriculture products are "resource[s] of great

value primarily carried into other States for use, and [Plaintiff States] derive[] significant revenue from this interstate movement." *Wyoming*, 502 U.S. at 453. Not complying with the California regulations, and therefore significantly limiting their exports, would result in substantial harms to Plaintiff States as tax collectors and producers.

"[T]he practical effect" of the California statute therefore "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted [its own] legislation" of this kind. *Id.* at 453-54 (quotation omitted). The Court has recognized that this is an "important" consideration in assessing the seriousness and dignity of a state's claim, because "what one State may do others may." *Id.* at 453.

If other states were to pass legislation like that of California, a chaotic regulatory regime would emerge, subjecting farmers nationwide to the whims of state legislatures across the country. Moreover, such a regime would greatly impinge on the dignity of states and their sovereign powers to collect tax revenues and to establish their own regulations for farming practices within their borders. Put simply, Plaintiff State's claim "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction.'" *Id.* at 451 (quoting *Maryland*, 451 U.S. at 744).

Second, no other forum is available. This Court has recognized that it would not be "appropriate" to decline original jurisdiction when doing so would "disserve any of the principal policies underlying the Article III jurisdictional grant," including "the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not reality, of partiality to one's own." *Wyandotte Chemicals Corp.*, 401 U.S. at 499-500. If the Court declines jurisdiction in this case, Plaintiff States will have no other federal forum in which to seek redress because, as explained *supra*, lower federal courts lack jurisdiction over controversies between states.

The fact that farmers affected in Plaintiff States "could bring suit raising [these] challenge[s]" does nothing for Plaintiffs and their sovereign interests. *Wyoming*, 502 U.S. at 451-52. As the Court explained, the possibility of actions brought by Wyoming miners affected by the Oklahoma law were insufficient alternatives to Wyoming's original action, because "Wyoming's interests would not be directly represented" in suits brought by private parties. *Id.* at 452. So too here. The Plaintiff States' interests as consumers, for example, would be entirely unrepresented in a private-farmer suit; as would the interests of citizen-consumers. And despite the fact that these consumers "are faced with increased costs aggregating millions of dollars per year," they "cannot be expected to litigate [this dispute] given that the [price increase charged] to each consumer [is] likely to be relatively small." *Maryland*, 451 U.S. at 739.

Moreover, "no pending action exists to which [this Court] could defer adjudication on this issue." *Wyoming,*

502 U.S. at 452. "[W]ithout assurances … that a State's interests under the Constitution will find a forum for appropriate hearing and full relief," this Court should exercise its original jurisdiction and grant Plaintiff States' motion for leave to file bill of complaint. *Id.*

CONCLUSION

For the reasons stated, this Court should grant Plaintiffs' motion for leave to file bill of complaint.

Respectfully submitted,

William S. Consovoy
Counsel of Record
Caroline A. Cook
Consovoy McCarthy Park PLLC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Amicus Curiae

February 2, 2018