No. 22O160

In The
Supreme Court of the United States

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF

ETHAN W. BLEVINS
Counsel of Record
STEPHEN S. DAVIS
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
EBlevins@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Regulation

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. PLF attorneys have participated as lead counsel in many cases before the U.S. Supreme Court and the U.S. Courts of Appeals in defense of property rights and the separation of powers. *See, e.g.*, *Wilkins v. United States*, 598 U.S. 152 (2023) (holding that the Quiet Title Act's statute of limitations is non-jurisdictional); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (holding that a law granting an access right to union representatives was a Fifth Amendment taking); *Lofstad v. Raimondo*, No. 24-1420, 2024 WL 4314257 (3d Cir. Sept. 25, 2024) (council created by Magnuson-Stevens Act violated Appointments Clause).

PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues presented by the bill of complaint in this case.

---

[1] Pursuant to Rule 37.2, Amicus Curiae provided timely notice to all parties. Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most of Utah is not governed or controlled by the governor, the state legislature, or state agencies—it is governed by federal bureaucrats. And half of these federal lands are not used to fulfil any enumerated power within the Constitution. The federal government owns most of the western states. *See* Megan Jenkins, et al., *With the Stroke of a Pen: The Antiquities Act and Executive Discretion*, Pacific Legal Foundation Research in Brief (2024).[2] But the federal government is both more and less than a normal property owner. This Court's precedents have established that the federal government may exercise sovereign power over land it owns, to the exclusion of the state. *See Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). It must, however, exercise that sovereign control to pursue a valid federal purpose.

Despite this Court's insistence that the federal government cannot usurp a police power reserved to the states, the federal government exercises all the traditional functions of a state government over these lands. *See id.* But that is not all. Congress has committed this police power—an authority that does not sit well with a system of enumerated powers—to the Department of Interior, which enjoys an unfettered discretion to rule as it sees fit.

Thus, in the western states, federal bureaucrats have more say over governance of most of the land within those states than the state governments. Federal agency officers, beholden neither to the

---

[2] https://pacificlegal.org/wp-content/uploads/2024/05/24-09_Stroke-of-a-Pen_report_final-preview.pdf.

national electorate, nor the state electorate, create and enforce their own civil and criminal codes governing everything from horses to homelessness. *See United States v. Pheasant*, 2023 WL 3095959, at *7 (D. Nev. Apr. 26, 2023). For most of the western United States, an unelected federal bureaucrat is the only sheriff in town.

The 640 million acres owned by the federal government—28% of the United States—is a separation-of-powers-free zone. *See* Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 1 (2017). This includes 248 million acres managed by BLM that is not dedicated to any valid federal purpose. *Id.* For over a quarter of the United States, the vertical federal structure that separates state and federal sovereignties has broken down, and the horizontal separation between Congress and the executive branch has likewise collapsed.

This is no mere turf war. The separation of powers is designed to protect individual liberty. The horizontal separation of powers promotes freedom because "[t]here can be no liberty where the legislative and executive powers are united," *The Federalist No. 47* at 301 (James Madison) (C. Rossiter ed. 1961), and the vertical separation of powers likewise protects freedom by creating "a healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The horizontal and vertical separation of powers thus forms a "double security" for "the rights of the people." *The Federalist No. 51* at 323 (James Madison) (C. Rossiter ed. 1961). These dual checks have broken

down in states dominated by federal holdings. Across most of the West, there are no checks save one: a blank check to the administrative state.

This Court should grant Utah's motion for leave to file its bill of complaint and require the federal government to dispose of federal holdings that it has not dedicated to a federal purpose, thus restoring the separation of powers that shelters individual liberty.

ARGUMENT

This Court should grant Utah's motion for three reasons.

First, widespread federal agency control of land in the West has never sat well with our system of separated powers. Only this Court can address this constitutional aberration. It should do so.

Second, the failure to dedicate much of these federal holdings to a federal purpose obligates Congress to dispose of them. Utah's request for relief does not endanger the federal lands reserved for the valid exercise of federal power. It will simply allow the state to have what the states east of the Rockies have always enjoyed: authority over the territory within its jurisdiction.

Third, the Court should grant the motion because it must. The Constitution says, "the supreme Court *shall* have original jurisdiction" in "all Cases . . . in which a State shall be a Party." U.S. Const. art. III, § 3, cl. 2 (emphasis added). Just like the inferior federal courts, this Court cannot turn away parties who invoke its original jurisdiction.

I.

FEDERAL BUREAUCRATIC SOVEREIGNTY OVER MOST OF UTAH IS ANATHEMA TO THE SEPARATION OF POWERS

This Court should address the tension between federal holdings and the separation of powers.

A. Federal Control over Public Lands Defies the Federal-State Balance That Protects Liberty

When the federal government owns land, it carries more than a mere bundle of sticks—it carries both crown and scepter as well. The federal ownership of land imbues the federal government with the full suite of sovereign power. Thus, such ownership also carries the risk that federal power over public lands will overflow its banks and flood the domain of state authority.

The federal government's powers "are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45* at 292–93 (James Madison) (C. Rossiter ed. 1961). While this is implied by the constitutional structure, the Framers thought the point vital enough to underscore in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States." U.S. Const. amend. X. *See also* 3 Joseph Story, *Commentaries on the Constitution of the United States* 752 (1833) ("This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution.").

Hence, the "general power of governing," also known as the police power, is "possessed by the States but not by the Federal Government[.]" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012). This general power is too vast to enumerate, but it at least includes public safety, police protection, sanitation, public health, education, parks and recreation, punishing street crime, nuisance abatement, zoning for development, and general land use. *Id.* at 535. *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022–23 (1992); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (overruled on other grounds by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

Yet the federal government exercises these unenumerated powers on public lands. *See Camfield v. United States*, 167 U.S. 518, 525–26 (1897). This sits in tension with the fundamental principles that the federal government "is acknowledged by all, to be one of enumerated powers[,]" *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819), that "enumeration presupposes something not enumerated[,]" *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824), and that "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

As discussed further below, the Property Clause, U.S. Const. art. IV, § 3, cl. 2, does not somehow override the "defined and limited" nature of the federal government when it comes to federal holdings. That Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536. Yet despite the Constitution's

careful design, the federal government exercises federal police power over most of the West, to the exclusion of state authority.

This affront to federalism is an affront to individual liberty. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992).

B. Federal Holdings in the West Undermine Accountable Governance

Federal holdings place control over the West in the hands of officials accountable to other states. It is a hallmark of federalism that "jurisdictions compete for potential migrants by offering the most attractive possible package of public services and taxes." Ilya Somin, *Foot Voting, Federalism, and Political Freedom*, Federalism and Subsidiarity: NOMOS LV 110, 121 (James E. Fleming and Jacob T. Levy, eds. 2014). This competitive process encourages good policy and growing prosperity. *See id.* at 127–28.

Widespread federal holdings in the West short-circuit this competitive process. Federal land gives federal officials loyal to other state constituencies a toehold in competitor states. As long experience has demonstrated, public land ownership has depressed both economic development and state revenue in the western states. *See* John Francis, *Public Lands*, (Center for the Study of Federalism 2006).[3]

Members of Congress from the eastern states have long exercised disproportionate power over the fate of

[3] https://federalism.org/encyclopedia/policy-areas/public-lands/.

the West through federal holdings. "From the earliest days, these options took on East/West overtones, with easterners more likely to view the lands as national public property, and westerners more likely to view the lands as necessary for local use and development." Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 2 (2017).

At best, federal legislators and bureaucrats who do not represent these states have no incentive to consider the interests of the state and its people. They "are far removed from the actual costs and benefits associated with their actions, and the result is poor resource economics and stewardship." Terry L. Anderson, *et al.*, *How and Why to Privatize Federal Lands* 4 (Cato Institute Policy Analysis No. 363) (1999).[4] At worst, they have incentives to pursue public-lands policies that dampen the competitive strength of the western states.

The western states lack the political power to prevent the other half of the country from controlling the West. *See* Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 Colum. L. Rev. 817, 832 n.105 (1980). Ninety-three percent of federally owned land sits in the twelve western states, but those states control only 24% of the U.S. Senate and around 20% of the House, most of whom represent California alone. *See id.*

This poor system of incentives has reaped poor management. The land management agencies have routinely run large deficits despite sitting on some of the most valuable land in the nation. *See* Anderson, *et al.*, *supra* at 2. The land agencies have a poor record

[4] https://www.cato.org/sites/cato.org/files/pubs/pdf/pa363.pdf.

of conservation as well. *See id.* at 6–7. *See also* Megan E. Jenkins, *et al.*, *Addressing the Maintenance Backlog on Federal Public Lands* (Center for Growth and Opportunity 2020).[5] Contrast this with how the eastern states have managed their state-owned lands, which is "an economic and environmental success story." *See* Robert H. Nelson, *State-Owned Lands in the Eastern United States: Lessons from State Land Management in Practice*, PERC Public Lands Report 42 (2018).[6] A system that places power in the hands of accountable and local actors would have similar benefits for the West.

The perverse incentives that have led to this mismanagement would ease were Congress required to honor the equal footing guaranteed to the states. Utah is "entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law[.]" *Pollard v. Hagan*, 44 U.S. 212, 228 (1845). This Court should place sovereignty over Utah in the hands of those most accountable to its people.

C. Federal Lands Encourage Excessive Delegations That Erode the Separation of Powers

Not only are the public lands governed by lawmakers accountable to competing constituencies, but those lawmakers have delegated vast discretion to govern the public lands to even less democratically accountable bureaucrats.

---

[5] https://www.thecgo.org/wp-content/uploads/2020/03/addressing-the-maintenance-backlog-on-federal-public-lands.pdf.

[6] https://www.perc.org/wp-content/uploads/2018/03/PERC-ELR-web.pdf.

The legislature cannot delegate its lawmaking authority. Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (cleaned up).

But no intelligible principle guides federal agencies managing public lands. Indeed, the BLM, the agency in charge of 240 million acres of the United States—over twice the size of California—enjoys so much discretion from Congress that it has effectively become a sovereign in its own right.

Consider the regulatory discretion over land management granted to the Department of Interior under the Federal Land Policy and Management Act (FLPMA): "The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon." 43 U.S.C. § 1733(a).

This capacious mandate gives the BLM the dual roles of legislature and governor over these lands. "In fact, the BLM has used this authority to write regulations criminalizing behavior that the state would normally criminalize, like outdated vehicle registration, coal exploration, horse adoption, noisiness, fraud, discrimination, and homelessness," not to mention Interior rules regarding public lands that stretch "from housing policies, to traffic laws, to firearms regulations, to mining rules, to agriculture certifications," to name a few. *Pheasant*, 2023 WL 3095959 at *6–7.

Indeed, a federal district court has held that FLPMA violates the non-delegation doctrine. *Id.* at *7–8. In *Pheasant*, a BLM officer had charged a dirt-biker with three felonies related to his failure to use a taillight on public lands as required by BLM regulations adopted under FLPMA. The district court said FLPMA "gives the Secretary of the Interior the authority to promulgate its own criminal code on 68% of the land in Nevada, giving the BLM a larger jurisdictional area than the state police." *Id.* at *7. Not to mention, unlike the BLM, the state police cannot create the criminal code they enforce. Thus, the federal government "controls a majority of the land in Nevada and has the authority to write the laws on that area of public land, acting with as much authority as both the state legislature and the governor." *Id.*

If any doubt remains about the granular control undemocratic agencies exercise over most of the West—and the often-dubious policies that result—a brief tour through the Code of Federal Regulations should lay such doubt to rest. To mention a few examples: federal agency rules forbid driving cars that are too loud, cleaning your shoes or clothes in an outdoor pump, using too much wood on a campfire, running a footrace, searching for buried treasure, or picking someone up in a hot air balloon. *See* 43 C.F.R. §§ 8343.1(b), 8365.2-1(a), 6302.15(b), 6302.20(i), 3715.6(j), 6302.20. All these activities are subject to criminal penalties. 43 U.S.C. §§ 1733, 373b. Federal bureaucrats who cannot be voted out are the real lawmakers across most of the West, and they seem to enjoy this role, perhaps too much.

Such delegation of lawmaking authority is nigh-inevitable when the federal government controls over half of the West. The New York City Planning Commission has enough on its hands just overseeing land use in five boroughs covering about 200,000 acres. Congress oversees 640 million acres in addition to its other priorities. Widespread holdings have thus encouraged the excessive and unlawful delegation of lawmaking authority to federal agencies to exercise a police power over public lands.

Congress has also left the decision whether to retain public lands to the unfettered discretion of the Department of Interior. The Interior Secretary is empowered to dispose of federal land if the Secretary deems "that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1). Since federal ownership comes packaged together with federal sovereignty, this authority gives a federal agency discretion over whether to exercise an exclusive federal police power complete with a criminal code drafted by the agency over millions of acres of land. The statute thus "purports to endow the [Secretary of the Interior] with the power to write his own criminal code governing" most of the West. *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting). The only principle guiding this extraordinary power is that disposal must satisfy the Department of Interior's notions of what will be in the national interest.

Thanks to excessive delegations by Congress, a "distant federal bureaucracy" has come to control more of the West than the "more local and more accountable" state governments. *NFIB*, 567 U.S. at 536. Bureaucrats acting as armchair-Justinians have

built a *corpus juris* so detailed that it sets how much wood campers can throw on their campfires. This is not what the Framers pictured as the proper role for the federal government.

II.

THE FEDERAL GOVERNMENT MUST DISPOSE OF UNAPPROPRIATED LANDS

Utah does not challenge the ownership of all 36 million acres of federal lands within Utah. Instead, Utah focuses on 18.8 million acres of federal lands managed by the BLM. These lands are distinguishable from other federal lands because Congress has never reserved Utah's BLM lands for a federal purpose. FLPMA disavows any such purpose by stating that the Utah BLM lands must be kept by the United States no matter their utility for a federal purpose.

A. Congress Must Pursue an Enumerated Power When It Indefinitely Retains Lands Within a State

The Property Clause does not authorize the United States to indefinitely hold property without devoting it to a federal purpose consistent with an enumerated power. The clause provides, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2. While this presupposes that some "property" or "territory" may belong to the United States and entrusts Congress with management and disposal of that property, it does not by itself empower Congress to hold property forever without using it for some federal purpose. *See* Robert G. Natelson, *Federal*

Land Retention and the Constitution's Property Clause: The Original Understanding, 76 U. Colo. L. Rev. 327, 377 (2005).

The Property Clause is not a font of independent federal power. Rather, the Property Clause limits Congress's management power to "needful" rules and regulations. U.S. Const. art. IV, § 3, cl. 2. This qualification requires that property owned by the United States may be held and managed only in pursuit of some enumerated power. The power to manage property is not a power unto itself, otherwise there would be nothing to measure the "needfulness" of Congress's rules and regulations against.

The power granted by the Property Clause is like that given under the Necessary and Proper clause. In *McCulloch v. Maryland*, 17 U.S. at 324, this Court explained that if the federal bank "be a fit instrument to an authorized purpose, it may be used, not being specially prohibited." That case recognized that "necessary" means needed "to carry into execution the powers conferred on it." *Id.* "Needful" in the Property Clause recognizes the same limit on Congress's management powers: any land held and managed by Congress must be needed to carry into execution the powers conferred on Congress. *See id.*

Secondly, other provisions of the Constitution place limits on the United States' power to hold property within a state. The Takings Clause limits the government's power to acquire private property by condemnation to "public uses" and the Enclave Clause limits the federal government's purchase of any land to state-approved purchases for use as forts, arsenals, and "other needful buildings." U.S. Const. art. I, § 8, cl. 17. It would seem fruitless for the Framers to so

carefully circumscribe these powers to acquire and hold property if the Property Clause was an independent and "unlimited" source of authority over property within a state. *See* Donald J. Kochan, *Public Lands and the Federal Government's Compact-based Duty to "Dispose,"* 2013 BYU L. Rev. 1133, 1167–82 (2014) (explaining that this Court's statements about the unlimited nature of the Property Clause power are dicta).

Finally, even though this Court has likened Congress's power under the Property Clause to that of a proprietor, *see Light v. United States*, 220 U.S. 523, 536 (1911), its ownership is still fundamentally different. Whereas the owner of private property may hold property for any purpose not forbidden by law, the opposite is true for the United States. The federal government is a limited government of enumerated powers. *NFIB*, 567 U.S. at 534. The federal government may only hold property for a purpose authorized by the United States Constitution. *See* U.S. Const. amend. X.

B. The Utah BLM Lands in This Case Are Not Being Held for Any Federal Purpose

When the United States decides to indefinitely hold lands in pursuit of an enumerated power, Congress must pass a law stating the purpose for retaining the lands or authorizing the purposes for which the Executive may do so. *See, e.g.*, Yellowstone National Park Protection Act, ch. 24, 17 Stat. 32 (1872) (reserving lands at the headwaters of the Yellowstone River for use as a public park); 30 Stat. 11 (1897) (authorizing the President to reserve forest lands to protect the nations' timber and water supplies); 36 Stat. 827 (1910) (an act authorizing the

President to set aside public lands for hydropower sites and irrigation, among other purposes).

In this case, Congress has never passed a law stating the federal purpose for retaining the 18.8 million acres of BLM lands. Instead, and contrary to centuries of history and policy of divesting itself of lands it has not reserved for a federal purpose, Congress has disavowed any need for a federal purpose for the Utah BLM lands. It simply claims that the lands will be held indefinitely unless BLM deems it in the national interest to dispose of them. *See* 43 U.S.C. § 1701(a). Congress has gotten it backwards. Retaining the lands must serve some federal purpose—one which furthers the national interest and contemplated by the Constitution—to justify retention of such lands. Otherwise, the United States lacks the power to hold the lands indefinitely.

The action by Congress, or the Executive acting with congressional authority, of specifying a federal purpose for holding property is known as creating a "reservation" of lands belonging to the United States and is distinguished from the act of withdrawing lands.

Federal land is deemed "withdrawn" when Congress or the Executive exempted the land from entry or settlement under early homestead and mining laws. *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 784 (10th Cir. 2005) ("A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws."). A withdrawal, however, is not necessarily a decision by Congress or the Executive to devote such withdrawn land to any federal purpose. *Id.*

Congress or the Executive reserve federal land only when they dedicate the land to some federal purpose. *Id.* ("A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use."). *See also* 63C Am. Jur. 2d Public Lands § 31 (2024).

This Court has already applied this principle of limiting federal ownership to the exercise of federal purposes in the context of water rights. Under the doctrine of federal reserved water rights, the federal government is deemed to have reserved enough water to satisfy the purposes for which the reservation was made but no more. *See Winters v. United States*, 207 U.S. 564, 565 (1908). By contrast, in *Sierra Club v. Watt*, 659 F.2d 203, 206 (D.C. Cir. 1981), the court held that no water was reserved by passage of FLPMA for the Utah BLM lands because "under [FLPMA] . . . no reservation of land is effected."

The Utah BLM lands are thus "unappropriated" because FLPMA has not reserved them for any federal purpose. Rather, FLPMA merely requires the Secretary of Interior to manage lands under land use plans created by the Secretary. 43 U.S.C. § 1732(a). Lawsuits seeking to compel the Secretary to take specific action with respect to BLM lands usually fail, because this Court has held that FLPMA's planning mandates are not tantamount to a "specific statutory command" requiring agency action. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71, (2004). In other words, there is no federal purpose to which the agency must devote the land, and the land is therefore unappropriated. Simply managing the land as the agency deems fit under the broad powers delegated by

FLPMA does not satisfy the demand for a specific federal purpose.

III.

THIS COURT SHOULD CLARIFY THE MEANING OF THE ORIGINAL JURISDICTION CLAUSE OF ARTICLE III

A. Controversies Between the United States and a State over Disputed Land—Exactly like This One—Are a Core Reason the Framers Endowed this Court with Original Jurisdiction

The Constitution created an intricate system of coexisting and competing sovereign governments, vesting the national judicial power in this Court, which it empowered to resolve inter-federal controversies. One major source of such federal-state controversies has been the control of land within and among the states. This Court's original jurisdiction has been invoked often to resolve such disputes, as it should be now.

The Constitution created only one Court, and it defined this Court's original jurisdiction in specific terms. Article III begins by "vest[ing]" the "judicial Power" in this Court, and in any "inferior" courts that Congress may create. Section 2 of Article III then "extends" that judicial power to many cases involving the Constitution, federal law, and suits between sovereign governments.

The Original Jurisdiction Clause in Section 2 of Article III sets forth the cases over which the Supreme Court "shall" exercise its original jurisdiction. It says, "[i]n all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction." U.S.

Const. art. III, § 2, cl. 2. "In all the other Cases [listed in the preceding clause of Section 2], the supreme Court shall have appellate Jurisdiction . . . ." *Id.*

As Alexander Hamilton explained, the Constitution first vested the judicial power, then defined the extent of that power, and then, "afterward[,] divide[d] the jurisdiction of the Supreme Court into original and appellate, but g[ave] no definition of that [original and appellate jurisdiction] of the subordinate courts." *The Federalist No. 82* at 493 (Alexander Hamilton) (C. Rossiter, ed., 1961). Hamilton understood that territorial disputes were a primary reason to grant the Court its original jurisdiction, having proposed a special provision for resolving controversies between a state and the United States "over 'claim of territory' . . . reminiscent of that under the Articles of Confederation." Lochlan F. Shelfer, *The Supreme Court's Original Jurisdiction Over Disputes Between the United States and a State*, 66 Buff. L. Rev. 193, 213 (2018).

B. This Court Should Clarify the Meaning of the Original Jurisdiction Clause

Congress lacks the power to "assign original jurisdiction to [the supreme court] in other cases than those specified" in Article III. *Marbury*, 5 U.S. at 174 ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."). Had the Framers intended for Congress to "apportion the judicial power between the supreme and inferior courts according to the will of that body,"

Section 2 of Article III would "certainly have been useless," having been reduced to "mere surplusage," and "entirely without meaning." *Id.* Thus, this Court's original jurisdiction is fixed by Article III Section 2.

But inconsistencies between three of this Court's major original-jurisdiction cases—*Cohens v. Virginia*, 19 U.S. 264 (1821), *United States v. Texas*, 143 U.S. 621 (1892), and *Texas v. ICC*, 258 U.S. 158 (1922)—call out for resolution. *Cohens* stated, "the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party . . . ." 19 U.S. at 398–99. This "diversity reading" of the Original Jurisdiction Clause limits this Court's "state-party-based original jurisdiction" to only the "three cases in which federal jurisdiction exists based on the presence of a state as a party," including 1) controversies between two or more states; 2) controversies between a state and citizens of another state; and 3) controversies between a state and foreign states, citizens or subjects. *See* Shelfer, *supra*, at 208–09.

United States v. Texas later embraced controversies between a state and the United States. *See* 143 U.S. at 644. The case aptly involved disputed territory. The United States sued Texas by filing an original action in this Court seeking "a decree determining the true line between the United States and the state of Texas" and settling jurisdiction over 1.5 million acres along the Texas border. *Id.* at 637. In granting the United States' motion to file its bill of complaint, this Court held that "[t]he words in the constitution, 'in all cases . . . in which a state shall be

party, the supreme court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a state may be made of right a party defendant, *or in which a state may of right be a party plaintiff*." *Id.* at 643–44 (emphasis added). Continuing, this Court added,

> unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States *in this court*—especially if they be suits, the correct decision of which depends upon the constitution, laws, or treaties of the United States—are to be excluded from *its original jurisdiction as defined in the constitution*. That instrument . . . confers upon this court original jurisdiction 'in all cases' 'in which a state shall be party;' that is, in all cases mentioned in the preceding clause in which a state may of right be made a party defendant, *as well as in all cases in which a state may of right institute a suit in a court of the United States*.

Id. at 644 (emphasis added).

Texas later returned the favor by suing the Interstate Commerce Commission, alleging that parts of the Transportation Act of 1920 were unconstitutional. *See Texas,* 258 U.S. at 159–60. This time, however, this Court dismissed the bill of complaint, holding the Court lacked original jurisdiction because "both defendants are sued as corporate entities created by the United States for governmental purposes" and as such "they are not citizens of any state, but have the same relation to one state as to another." *Id.* at 160.

This Court should settle the meaning of the Original Jurisdiction Clause. One scholar has proposed a reading that brings this Court's prior decisions in line based upon the history of Article III, the convention debates regarding this Court's original jurisdiction, and the meaning of Article III during ratification. *See* Shelfer, *supra*, at 212–18. Shelfer argues that this Court has original jurisdiction over controversies between a state and the United States "because the constitutional language extending federal jurisdiction over controversies 'to which the United States shall be a party' is a combination of two jurisdictional grants over controversies between the United States and an individual state, and over controversies between the United States and other parties." *Id.* at 211. This harmonizing approach honors the text and original meaning of Article III and restores the correct balance between the national and state governments.

The Framers meant to confer the Supreme Court with original jurisdiction in cases between a state and the United States. *See Texas*, 143 U.S. at 639 ("By the articles of confederation, congress was made 'the last resort on appeal in all disputes and differences' then subsisting or which thereafter might arise 'between two or more states concerning boundary, jurisdiction, or any other cause whatever'. . . .) (quoting Articles of Confederation, art. IX). As Hamilton explained, "In cases in which a State might happen to be a party, it would ill suit [that State's] dignity to be turned over to an inferior tribunal." *The Federalist No. 81* at 482 (Alexander Hamilton) (C. Rossiter ed. 1961). Indeed, this Court has stated that states possess a special status to invoke this Court's original jurisdiction in

cases involving the state's land. *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447–48 (1945) ("In determining whether a State may invoke our original jurisdiction in a dispute which is justiciable the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests . . . in all the earth and air within its domain.'") (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

C. This Court Must Guard the Judicial Power Conferred upon It in Article III

This Court should grant Utah's motion to clarify the meaning of the Original Jurisdiction Clause and fulfill its constitutional duty by deciding the cases within its jurisdiction. Chief Justice Marshall's admonition in *Cohens* rings as true today as it did 203 years ago:

> 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. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

19 U.S. at 404. As members of this Court have recently stated, Article III "establishes [this Court's] original jurisdiction in mandatory terms . . . [i]n all Cases . . .

in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction." *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (Thomas, J., dissenting) (quoting *Cohens*, 19 U.S. at 404). *See also Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) ("In my view, we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction.") (Alito and Thomas, JJ., dissenting).

CONCLUSION

"In the tension between federal and state power lies the promise of liberty." *Gregory*, 501 U.S. at 459. This Court should grant Utah's motion and renew that promise.

DATED: October 2024.

Respectfully submitted,

ETHAN W. BLEVINS
Counsel of Record
STEPHEN S. DAVIS
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
EBlevins@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation