No. 129 Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AUDUBON NATURALIST SOCIETY AND BRIEF OF AUDUBON NATURALIST SOCIETY IN SUPPORT OF STATE OF MARYLAND

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF AUDUBON NATURALIST SOCIETY

The Audubon Naturalist Society (ANS) respectfully moves the Court for leave to file this *amicus curiae* brief in support of the State of Maryland. The State of Maryland has consented to ANS filing this *amicus* brief. *See* Letter from Andrew H. Baida to Christopher D. Man of 2/3/03 (filed with the Court). But consistent with its practice of withholding consent to *amici* with adverse views in this case, the Commonwealth of Virginia has withheld its consent for ANS to file this brief. Despite prior objections from the Commonwealth, this Court has granted ANS permission to participate as an *amicus* in earlier proceedings in this case. *See Virginia v. Maryland*, 530 U.S. 1201 (2000) (granting ANS' motion to file an *amicus* brief in opposition to the Bill of Complaint over the Commonwealth's objection). The same interests that justified ANS' involvement in prior proceedings justifies granting ANS the right to participate at this stage of the case.

Established in 1897, ANS is the oldest naturalist organization in the Washington metropolitan area, with more than 10,000 members from Virginia, Maryland and Washington, D.C. ANS and its members have a long history of both protecting and using the Potomac River. ANS' involvement in this litigation began in 1998, when the Fairfax County Water Authority proposed constructing a mid-river intake in a segment of the Potomac that is within the State of Maryland. For well over forty years, ANS has organized bird watching and guided nature tours near that intake. ANS also conducts kayaking and canoe trips along this portion of the Potomac. Indeed, prior kayaking trips had traversed the exact area where the proposed intake eventually was built. ANS also has offered nature photography courses and graduate environmental courses for Virginia's teachers in that area.

ANS depends on those activities and others like them to attract new members and promote member participation.

These activities also provide a forum in which ANS can teach its members and the public about the importance of conservation. ANS has found that the natural environment provides the best classroom for teaching environmental values.

ANS believes that this Court would benefit from hearing the views of the persons who actually use the Potomac River and who will be impacted by the Court's decision. Moreover, many of the issues raised by ANS either are not addressed in as much detail by the parties or are not addressed by them at all. For example, ANS alone demonstrates that the Commonwealth does not represent the views of all Virginians through affidavits by some of ANS' Virginia members, thus rendering the Commonwealth without standing to bring this *parens patriae* action on behalf of all Virginia citizens.

For these and other reasons addressed in more detail in the accompanying *amicus* brief, ANS respectfully requests that the Court grant it leave to file its *amicus curiae* brief.

Respectfully submitted,

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COMMONWEALTH OF VIRGINIA,
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AMICUS CURIAE BRIEF OF AUDUBON NATURALIST SOCIETY

INTEREST OF *AMICUS CURIAE*

Although the Fairfax County Water Authority's (the "Authority") intake has been built and there is no longer any live controversy between the states, the Commonwealth's request for sweeping declaratory relief threatens ANS' interests.[1] The Commonwealth requests that Virginians (and by implication Marylanders) be given the unfettered right to withdraw water from the Potomac River and construct whatever they like in parts of the river that are within the State of Maryland, and do so free from Maryland's regulatory oversight. Virginia obviously cannot regulate activities with-

[1] No counsel for a party authored any part of this brief. No person or entity other than *amicus* and its counsel made any monetary contribution towards the preparation or submission of this brief.

in the State of Maryland, so a ruling barring Maryland from regulating water withdrawals and construction in the Potomac would produce a dangerous regulatory void. ANS is concerned that this regulatory void will lead to a tragedy of the commons, where the unregulated use of a public resource leads to the destruction of that resource. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968). Under such a scenario, the interests of ANS and its members would plainly suffer.

ANS believes that the flow of the Potomac River should be preserved for all living things that depend upon a minimum flow of the river for their survival, and that the aesthetic beauty of the river should not be disturbed unnecessarily through the construction of a multitude of structures on the Potomac. ANS agrees with Justice Holmes' now-famous observation: "A river is more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This treasure belongs to all of the people, and water withdrawals from the river and construction upon the river should be carefully regulated so that the river's many uses can be enjoyed by all. An unguarded treasure will surely be lost.

In addition, ANS' members in Virginia are particularly concerned by the Commonwealth's attempt to represent them as *parens patriae*. ANS has submitted affidavits from two of its many members who opposed the Authority's intake on environmental grounds and who object to the Commonwealth's claim to represent their interests as *parens patriae*. (De Noyer Aff., ANS Br. in Opp'n Bill of Compl. at 7a-8a, *Virginia v. Maryland*, (U.S. Apr. 21, 2000) (No. 129)); (Ridder Aff., *id.* at 4a-6a.) Dr. De Noyer is among the country's most respected geophysicists, with nearly fifty years of experience, and has served as the Chairman of the Fairfax County Environmental Quality Advisory Council. He

also is a customer of the Authority and, as an elected member of the Herndon Town Council, represents an entire community that drinks the Authority's water. (*Id.* at 4a-5a.) Affiant Marrie Ridder has been appointed Chairman of the Virginia Council on the Environment by two Virginia Governors and is a riparian land owner on the Virginia side of the Potomac River. (*Id.* at 7a-8a.)

ANS' Virginia members are concerned that, by bringing this suit in a *parens patriae* capacity, the Commonwealth could bind them to representations made by the Commonwealth in this litigation.[2] These members may be involved in future litigation against the Commonwealth and land owners who may initiate future construction projects on the Potomac River that threaten these members' interests. The Commonwealth has conceded that it does not represent these parties' true interests, and has gone so far as to suggest that the views of these Virginians "can be adequately represented by the State of Maryland." (Letter from Frederick S. Fisher to Christopher D. Man of 5/28/00, *id.* at 2a-3a.) It would, of course, turn the law of *parens patriae* standing on its head to accept the Commonwealth's claim that it should serve as guardians over ANS' Virginia members when it acknowledges that their interests would be better protected by its adversary.

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[2] *See, e.g., Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) ("[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and 'they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994); *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

SUMMARY OF ARGUMENT

I. The Court should dismiss this cases because there is no live case or controversy. In asking this Court to hear this case, the Commonwealth identified only one Virginia entity—the Authority—that had been denied the right to construct an improvement in the Potomac. But that permit was later granted, and the project has been completed. Nothing more remains of this case than an academic debate between the two states. There is no Virginian with an imminent plan to initiate construction in the Potomac and no Virginian with an imminent plan to withdraw more water from the Potomac than already is authorized by a water appropriation permit issued by Maryland. Consequently, there is no live case or controversy.

II. The Commonwealth lacks standing to sue. The Commonwealth has not shown itself to be directly aggrieved by any action taken by Maryland, but has asserted its right to represent the Authority and other Virginians in this case in a *parens patriae* capacity. But this is not an appropriate case for *parens patriae* standing. This simply is not a case where the people of Virginia face a grave, generalized threat and cannot protect their own interests. The rights afforded to Virginia's riparian landowners under the various compacts can be enforced directly by these landowners, as the Authority did in obtaining a construction permit by appealing the initial denial through Maryland's legal system. And not only can Virginia's riparians defend themselves, many are opposed to having their interests represented by the Commonwealth in this case. In addition, there is no grave, generalized threat to the people of Virginia caused by the State of Maryland that warrants providing the Commonwealth *parens patriae* standing in this case. The Commonwealth cannot identify any existing injury whatsoever to any Virginian caused by the State of Maryland.

III. The Commonwealth's suggestion that its citizens were afforded absolute rights to the Potomac under various compacts—free from police power regulation—is contrary to the common law principles incorporated into those compacts. The compacts at issue do not abrogate Maryland's police power. The Compact of 1785 and its progeny establish only a principle of nondiscrimination: The riparian rights of citizens of Virginia and of Maryland along the Potomac River are to be respected equally. Riparian rights are not absolute, but always have been subject to regulation. In particular, the right to wharf out and make improvements does not vest until the wharf or improvement has been made. Until that occurs, their construction can be regulated or even prohibited. Similarly, the right to make water withdrawals always has been subject to limitation; for example, the water cannot be wasted or diverted from the riparian lands. Accordingly, even if the Court finds a live controversy and that Virginia has standing, the Court should conclude that Maryland can continue to regulate the exercise of riparian rights by Virginia and Maryland landowners in an evenhanded manner.

ARGUMENT

I. THIS COURT LACKS JURISDICTION.

While it is clear that the Commonwealth of Virginia and the State of Maryland fundamentally disagree as to the meaning of the Compact of 1785 and its progeny, there is no concrete dispute between the states. The impetus for the Commonwealth filing the Bill of Complaint was Maryland Department of the Environment's decision to deny the Authority a permit to construct a mid-river intake. But since the Court agreed to hear the case, the State of Maryland granted the Authority the necessary permit and the intake has been constructed. This case is now moot based on the orig-

inal facts presented to the Court, and the Commonwealth has not identified any other dispute between a Virginia entity and the State of Maryland that would justify retaining jurisdiction.

A. The Completion of the Authority's Intake Moots the Commonwealth's First, Second and Third Prayers for Relief.

In addressing the Commonwealth's Third Prayer for Relief, requesting that Maryland be enjoined from requiring the Authority to obtain a construction permit before building the intake, the Special Master explained: "That permit has been granted, and that intake pipe has been constructed. Hence, Virginia's Third Prayer is moot." Report of the Special Master, *Virginia v. Maryland*, at 9 (U.S. Dec. 9, 2002) (No. 129) [hereinafter Report]. The recommendation to dismiss the Third Prayer for Relief is correct, but fails to recognize that the same underlying events mooted the First and Second Prayers for Relief as well.

Like the Third Prayer for Relief, the First and Second Prayers both depend upon the Authority's dispute with the State of Maryland to remain a live controversy. The Commonwealth's First Prayer was for a declaratory judgment that the Compact of 1785, the Black-Jenkins Award of 1877, and Compact of 1958 all applied upstream of the tidal reach of the Potomac River. (Report at 9.) At the time the Bill of Complaint was filed, the Authority was the only Virginia entity in dispute with the State of Maryland concerning construction in the Potomac above tidewater. Now that that dispute has been resolved, there is no dispute between any Virginia entity and the State of Maryland over whether the various agreements apply above tidewater. Accordingly, the case is moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of

the litigation (standing) must continue throughout its existence (mootness).'") (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).

Similarly, the Second Prayer for Relief requested a declaratory judgment that Maryland could not require any Virginia entity to obtain a construction permit before constructing an improvement in the Potomac River. (Report at 9.) But again, the only live dispute between a Virginia entity and the State of Maryland at the time the Bill of Complaint was filed concerned the Authority's permit for a mid-river intake. With that controversy now resolved—and with no new controversy having yet emerged—the Commonwealth's Second Prayer is moot as well.

B. The Commonwealth's Fourth Prayer for Relief Is Not Ripe.

The Commonwealth's Fourth Prayer for Relief—requesting the Court to enjoin Maryland from requiring water appropriation permits from Virginia entities before they can withdraw water from the Potomac River—was never ripe.[3] Maryland has denied neither the Commonwealth nor any Virginian the right to appropriate water from the Potomac

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[3] In the Maryland litigation, the Authority itself explicitly declared that "[b]ecause the Authority does *not* seek an increase in its water appropriation authorization in this proceeding, the *quantity* of water to be taken from the Potomac in the future is irrelevant." (Pre-Hr'g Br. of the Auth., ANS Br. in Opp'n Bill of Compl. at 47a-48a, *Virginia v. Maryland*, (U.S. Apr. 21, 2000) (No. 129).) The Authority's existing water appropriation permit allows it to make withdrawals from either the current shoreline intake or the proposed mid-river intake. (*Id.* at 47a.) The Authority also claimed that the capacity of the treatment plant would prevent it from increasing its appropriation. (*Id.* at 48a ("[T]he mixing chamber and conduit establish a 'bottleneck' and physically limit increases in the maximum intake capacity beyond that of the existing intake.").)

River and the Authority explicitly has disclaimed any intention of seeking an increase in its water appropriation in the near future. In its opening brief, the Commonwealth rightly conceded this: "Maryland, to date, has not denied any Virginia user a permit to appropriate water from the Potomac River . . . ." (Va. Br. in Supp. Bill of Compl. at 29, *Virginia v. Maryland*, 530 U.S. 1201 (2000) (No. 129).) Subsequently, General Earley—Virginia's Attorney General when this case was filed—conceded this claim's lack of ripeness by reportedly saying "'our case is very clear cut. We just want to improve our water quality. *We don't want to take one extra drop of water.*'" *Earley Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1 (emphasis added).[4]

The fact that there is no Virginia entity seeking to withdraw more water from the Potomac River than already is authorized by a Maryland water appropriation permit demonstrates that there is no ripe challenge to Maryland's permitting scheme. *See, e.g.*, *New York v. Illinois*, 274 U.S. 488, 490 (1927) (refusing to decide "abstract questions respecting the right of the plaintiff state and her citizens to use the waters" for possible future projects sometime "in the indefinite future"); *New Jersey v. Sargent*, 269 U.S. 328, 339 (1926) (rejecting New Jersey's challenge to the Federal Water Power Act premised upon its claimed intention to begin water power development because "the state is merely shown to be contemplating power development and water conservation in the future. There is no showing that it has determined on or is about to proceed with any definite project").

Despite these shortcomings in the Bill of Complaint, the Special Master allowed this claim to remain in the case for three reasons: First, the Special Master concluded that fed-

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[4] The *Fairfax Journal* also reported that "'[i]f Maryland agrees to issue the permit, Virginia will withdraw its case with alacrity,' [Attorney General Earley] added." *Earley Expects Va. to Win Water-Intake Fight*, Fairfax J., Oct. 13, 2000, at A1.

eral jurisdiction is available to all claims so long as jurisdiction exists as to any one claim. (Special Master's Mem. of Decision No. 2 at 2, *Virginia v. Maryland*, (U.S. Dec. 28, 2000) (No. 129).) Second, the Special Master concluded that the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2000), authorized the Court to resolve purely legal disagreements between the states. (*Id.* at 2-3.) Third, the Special Master concluded that this Court implicitly ruled that it had jurisdiction by agreeing to hear the case. (*Id.* at 3-4.) Each of these conclusions is mistaken.

Claim-by-claim analysis. The Special Master's conclusion that the Court can resolve all claims brought by the Commonwealth so long as it has jurisdiction to decide any one claim is wrong as a matter of law and irrelevant now that the Commonwealth's remaining claims are moot. While it is true that the existence of subject matter jurisdiction over any one claim is sufficient to present an Article III case or controversy with respect to that claim, such a finding does not eliminate the need for the Court to consider its jurisdiction to decide the remaining claims.

Federal courts must have subject matter jurisdiction over each claim in a case before them. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). Even if the Court were to conclude that a justiciable case exists with regard to one claim, those claims that are moot, not ripe, or that the Commonwealth lacks standing to assert must be struck from the Bill of Complaint. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 341 (1931) (rejecting a claim in a Bill of Complaint on ripeness grounds); *New York v. Illinois*, 274 U.S. 488, 489 (1927) (upholding Special Master's decision to strike a claim from a Bill of Complaint on ripeness grounds).

The Declaratory Judgment Act. Likewise, the Special Master erred in assuming that the Declaratory Judgment Act nullified Article III's constitutional limitation on this Court's jurisdiction. This Court explicitly has held that "federal courts established pursuant to Article III of the Constitution do not render advisory opinions . . . . '[C]oncrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) (internal citations omitted); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (explaining that congressional legislation would violate Article III if it attempted to confer standing on persons who had not actually been injured); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-78 (1992) (holding that Congress cannot legislate around Article III's requirements). In elaborating upon the case or controversy requirement, this Court has explained that "[a]bstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal citations omitted) (addressing claim for declaratory relief). Thus, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citations omitted) (addressing claim for declaratory relief). Plainly, the academic dispute between the two states on the meanings of the various compacts—whether raised in the declaratory judgment context or otherwise—is inadequate to place a live case or controversy squarely before the Court.

Law of the case. By granting Virginia leave to file the Bill of Complaint over jurisdictional objections, this Court appears to have followed its "normal practice of permitting

the suit to be filed and of referring all questions (including the standing question) to a special master . . . ." *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting). It would appear peculiar for the Court to have used its limited resources to reach a decision on its subject matter jurisdiction without a full briefing of the issue by the parties and at the preliminary stage of allowing a Bill of Complaint to be filed. *Cf. Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting) ("The Court does not, indeed it cannot and should not try to, give to the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits."). The Court has "often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Nevertheless, the Special Master has inferred from this Court's order granting the Commonwealth leave to file its Bill of Complaint that the Court implicitly rejected jurisdictional arguments that previously had been made. (Special Master's Mem. of Decision No. 2 at 3-4.) Regardless of what the Court intended in granting Virginia leave to file its Bill of Complaint, the record now demonstrates conclusively that jurisdiction does not exist. The case, therefore, should be dismissed.

II. THE COMMONWEALTH LACKS *PARENS PATRIAE* STANDING TO PURSUE THE CLAIMS OF RIPARIAN LANDOWNERS ON VIRGINIA'S SIDE OF THE POTOMAC RIVER.

Article VII of the Compact of 1785 concerns the riparian rights of the citizens of Virginia and Maryland, not the sovereign rights of those states. By its express terms, Article VII provides a "privilege" of making improvements in the river to the "*citizens* of each state respectively . . . in the shores of the Patowmack river *adjoining their lands*." Compact of 1785, art. VII, 1785-86 Md. Laws ch. 1, 1785 Va.

Acts ch. 17 (emphasis added).[5] Those riparian land owners are perfectly capable of enforcing their own rights. Indeed, the Authority has done so with the very counsel the Commonwealth now relies upon. The Authority requested the permit on its own behalf and, after the preliminary denial of the permit, initiated litigation before a Maryland administrative law judge to obtain the permit and ultimately prevailed. Plainly, it was the Authority and not the Commonwealth that was the real party in interest when this case began. And, in the event other Virginia riparians decide to pursue similar projects in the river, they—and not the Commonwealth—will be the real party in interest to assert their rights.

A. Allowing the Commonwealth to Invoke Original Jurisdiction on Behalf of the Real Party in Interest Would Distort the Article III Jurisdiction of the Federal Courts.

In attempting to step into the shoes of the Authority and other riparians, the Commonwealth seeks to invoke the jurisdiction of this Court by arguing that a state may become the real party in interest whenever it chooses. For federal jurisdiction, the identity of a state as the real party in interest is of the utmost importance. Ordinary litigants typically acquire federal jurisdiction only when their suits involve a federal question, 28 U.S.C. § 1331, or are diversity actions where the matter in controversy exceeds $75,000, *id.* § 1332. Even then, jurisdiction is limited to the lower federal courts.

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[5] At the very least, acknowledging that the only Virginia beneficiaries to Article VII are Virginia's riparian landowners requires a substantial narrowing of the relief recommended by the Special Master. The Special Master recommends that Article VII's rights, as he interprets them, be extended to "Virginia, its governmental subdivisions, and its citizens." (Report at 14 (Recommendations I.A & I.B.).) To accept those recommendations, the Court would be rewriting and substantially expanding the Compact.

By contrast, original jurisdiction exists in this Court "in all Cases . . . in which a state shall be a party," U.S. Const., art. III, § 2, cl. 2, regardless of whether a federal question is present or the monetary value at issue. Moreover, "the original jurisdiction of this court is exclusive over suits between states, though not exclusive over those between a state and citizens of another state." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900). *Compare* 28 U.S.C. § 1251(a) (exclusive original jurisdiction for disputes between states), *with id.* § 1251(b)(3) (original, but not exclusive, jurisdiction in disputes between a state and citizens of another state or aliens).

Because of the constitutional necessity of separating cases involving "States" from those involving private "Citizens," it has "become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972) ("[T]he State must bring an action on its own behalf and not on behalf of particular citizens."); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 395 (1938); *Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900). The Commonwealth cannot circumvent this requirement by supplementing the claims of its citizens with "abstract questions of political power, of sovereignty, of government." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). This Court has concluded that

> if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress

> private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, § 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate.

Pennsylvania v. New Jersey, 426 U.S. 660, 665-66 (1976).[6]

B. The Commonwealth Is An Inappropriate *Parens Patriae* Class Representative.

The Commonwealth's assertion of *parens patriae* turns the doctrine on its head. Applying *parens patriae* here would not give the Commonwealth the ability to vindicate the interests of people who cannot defend themselves. As a practical matter, the Commonwealth's position would eliminate any viable forum for the Virginia riparians it seeks to help. If the Commonwealth were found to be the real party in interest, and not the riparian seeking a permit, 28 U.S.C. § 1251(a) would strip all courts but this one of jurisdiction to hear legal challenges to a permit denial by Maryland. This Court cannot hear all such claims, which would leave the majority of Virginia riparians without any judicial remedy. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (recognizing that the Court may decline to hear cases within its exclusive jurisdiction).

By its plain language, Article VII of the Compact does not vest any right in the Commonwealth but instead confers rights upon third parties—Virginia and Maryland riparian land owners. Where compacts confer rights upon third

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[6] This Court also repeatedly has expressed its concern that the Eleventh Amendment not be circumvented by allowing one state to sue another state on behalf of its citizens. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (noting that the Eleventh Amendment is violated "if the plaintiff State is actually suing to recover for injuries to specific individuals"); *Standard Oil Co.*, 405 U.S. at 259 n.12; *Cook*, 304 U.S. at 392-93.

parties, those parties have standing to assert those rights independently of their states. Indeed, riparians and other third-party beneficiaries often have done so under this very Compact. *See, e.g., United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47 (1921); *Evans v. United States*, 31 App. D.C. 544 (1908); *Ex Parte Marsh*, 57 F. 719 (E.D. Va. 1893). Moreover, third party beneficiaries to a compact are not bound by their state's own construction of the compact—they can even sue to challenge their own state's construction of the compact. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140 (1911); *Green v. Biddle*, 21 U.S. 1 (1823).

Applying *parens patriae* standing also would bind an enormous class of persons to a litigating position that is hostile to the interests of many of its class members, including ANS' Virginia members who are customers of the Authority, (*see* DeNoyer Aff., ANS Br. in Opp'n Bill of Compl. at 4a-6a), and riparians on the Potomac, (*see* Rider Aff., ANS Br. in Opp'n Bill of Compl. at 7a-8a); *see also supra* note 2 (listing cases finding *parens patriae* actions binding on the state's citizens). The Commonwealth itself concedes that the interests of these Virginians would be better represented by its adversary—the State of Maryland. (Letter from Frederick S. Fisher to Christopher D. Man of 5/28/00, *id.* at 2a-3a (explaining that ANS' Virginia members' interests "can be adequately represented by the State of Maryland").) Allowing direct actions by individuals, like the one the Authority pursued, or class actions that provide class members with an adequate representative and an opportunity to opt out are clearly preferable. *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 n.9 (9th Cir. 1973).

C. The Commonwealth Lacks A Quasi-Sovereign Interest That Would Support *Parens Patriae* Standing.

ANS does not question the Commonwealth's ability to assert *parens patriae* in a proper case for equitable apportionment or to protect its citizens from a common injury caused by another state, but this is not such a case. There are no allegations in this case that Virginians are being denied their fair share of waters from the Potomac. The Commonwealth has not identified even a single Virginia riparian who has submitted a pending water appropriation request to Maryland, and the Commonwealth concedes that Maryland never has denied such a request. (Br. at 29.) And there is no valid claim that the existence of Maryland's regulatory regime for construction projects on the river and water appropriation permits poses a detriment to the citizens of Virginia generally. To the contrary, those regulations help protect the river and all who use it, riparian land owners in particular.

With no particular construction project or water appropriation request by any Virginian being blocked by Maryland, it is hard to conceive of any generalized injury to the people of Virginia that would warrant granting the Commonwealth *parens patriae* standing in this case. Of course, any such conjecture on the Commonwealth's part would be outside the record and inadequate to confer federal jurisdiction.

This Court has stated that it will "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal citations omitted), and that "'[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422

U.S. 490, 517-18 (1975)). The Court also has emphasized that "[b]efore this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence," *New York v. New Jersey*, 256 U.S. 296, 309 (1921), and the petitioning state must "demonstrate that the injury for which it seeks redress was directly caused by the actions of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); *see Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 501 (1971) ("History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth . . . . The solution [has been] to saddle the party seeking relief with an unusually high standard of proof . . . ."). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical,'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (internal citations omitted), and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal citation omitted). There is nothing in the record that even remotely suggests by clear and convincing evidence that Maryland poses a real and immediate threat to the people of Virginia. There is nothing in the record suggesting any current threat of any magnitude at all.

III. THE COMPACT OF 1785 AND ITS PROGENY DO NOT PROVIDE RIPARIAN LANDOWNERS ABSOLUTE RIGHTS.

A. Riparian Rights Were Not Absolute at Common Law.

The Special Master erroneously viewed the "privilege" afforded riparian landowners on both sides of the Potomac River by Article VII of the Compact of 1785 to wharf out and

make other improvements, and to withdraw water, as vesting them with an absolute right to do so free from any police power regulation. But the rights afforded under the Compact are riparian rights, which always have been understood to be subject to police power regulation. For example, under the common law, riparian landowners were required to make reasonable use of any waters withdrawn, and were precluded from diverting water for non-riparian uses outside the watershed.[7] *See, e.g.*, *Atchison v. Peterson*, 87 U.S. 507, 512 (1874) (identifying common law prohibition against diversion for non-riparian use outside the watershed); *Town of Purcellville v. Potts*, 179 Va. 514, 521 (1942) ("While a riparian owner is entitled to a reasonable use of the water, he has no right to divert it for use beyond his riparian land, and any such diversion and use is an infringement on the rights of the lower riparian proprietors who are thereby deprived of the flow. Such a diversion is an extraordinary and not a reasonable use."). These rights can be restricted when necessary to protect the general welfare. *See, e.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) ("The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."). This Court also has explained that the riparian right of wharfing out and making improvements does

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[7] In modern times, most people receive water from their municipality and entities like the Authority. Because this involves diverting water from rivers for non-riparian use, it would not have been sanctioned at common law. *See, e.g.*, *Town of Purcellville*, 179 Va. at 522-23. "In the eastern states, where riparian rights prevail, it was necessary to pass special laws granting authority to companies and even municipalities selling water to their residents to take water for use on non-riparian lands." David H. Getches, Water Law 418 (3d ed. 1997). To the extent that the Commonwealth or the Special Master suggest that the Authority or other riparians are authorized by the Compact to distribute water to non-riparian users, that suggestion is flatly mistaken.

"not vest until exercised, [it is] a mere license, revocable at the pleasure of the legislature unless acted upon." *Shiveley v. Bowlby*, 152 U.S. 1, 56 (1894).

At common law, both Virginia and Maryland recognized that any "privilege" of wharfing out or making improvements in public waterways was subject to police power regulation. The Supreme Court of Virginia explained: "Appellant has built no wharf or pier, nor any like structure. . . . When she does exercise that right, it must be in accordance with such rules and regulations as the commonwealth imposes for the protection of the rights of the public." *Taylor v. Commonwealth*, 47 S.E. 875, 881 (Va. 1904). The Supreme Court of Virginia emphasized that "we think it well established that the right to build wharves is one which is subject to state regulation, and, while it involves a certain use of the soil under the water for the specific purposes designated, is not exclusive ownership." *Id.* at 880. Looking to the Compact, other courts have explained that "it is at least a doubtful question whether this compact confers rights upon the riparian proprietor which are not defeasible by legislation." *Potomac Steamboat Co. v. Upper Steamboat Co.*, 11 D.C. (MacArth. & M.) 285 (1880), *aff'd*, 109 U.S. 672 (1884); *see United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 357, 360 (1933) (refusing mandamus because the claim that Article VII of the Compact superseded the authority of the government that owned the bed of the Potomac River to devote the riverbed to a public purpose raised only "doubtful questions" and petitioners were "not shown to be clearly entitled" to an absolute to right to wharf out under the Compact). There is nothing in the language of the Compact or its legislative history to suggest that the states believed they were modifying the nature of riparian rights in any way; they merely were securing the equal enjoyment of those well-understood common law rights for citizens on both sides of the Potomac.

B. Rights Afforded Riparian Land Owners Under Article VII Are Not Absolute.

In construing the Compact and its progeny in *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Court expressed the view that the Commonwealth and Maryland did nothing more than safeguard the riparian rights of their citizens: "[T]he privileges reserved to the citizens of the respective states in the compact of 1785, and its subsequent ratifications, indicate the intention of each state to maintain riparian rights and privileges to its citizens on their own side of the river." *Id.* at 580-81; *see Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 64 (1921) (explaining that Article VII of the Compact conferred its rights upon "the citizens of each State"); *see also* Potomac River Compact of 1958, art. VII, § 1, 1958 Md. Laws ch. 269, 1959 Va. Acts ch. 28, Pub. L. No. 87-783, 76 Stat. 797 (1962) (describing Article VII of the Compact of 1785 as "relating to rights of riparian owners"). In the United States' view, Article VII of the Compact "was at most a commercial and political arrangement between sovereigns and the right of individuals under it were not in the nature of grants but remained at all times subject to the control of the contracting parties." Br. of United States at 32, *United States ex rel. Greathouse v. Dern,* 289 U.S. 352 (1933) (No. 677).

Not only would the conversion of the Compact "privilege" into an absolute right to construct potential nuisances free from government regulation be completely foreign to the law of property and traditional understandings of the police power, it is defied by history. The "privilege," as conceived by the Commonwealth, plainly did not survive in the Potomac River within the District of Columbia upon the creation of the District (originally carved out of both Maryland and Virginia). *See Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 66 (1921) (noting that the District had the right to fill in the Potomac along the Virginia shore even though it "will interrupt previously existing access to the water front"). In

United States ex rel. Guesthouse v. Hurley, 63 F.2d 137 (D.C.), *aff'd*, 289 U.S. 352 (1933), the court rejected the claim that Article VII of the Compact required the Secretary of War to issue a dredge and fill permit. The court explained that Article VII's authority to make "wharves or other improvements is treated in the compact as merely a privilege in the nature of an easement that may be continued or destroyed . . . ." *Id.* at 139. Maryland and Virginia had the complete authority to abrogate Article VII privileges after 1785 and, upon joint cessation to the United States to form the District, the United States had the full authority to abrogate Article VII rights. *Id.* at 140. After upholding the Secretary's authority to deny the permit on the basis of public policy not related to navigation, the Supreme Court refused a petition for mandamus because the petitioner's Compact claims raised only "doubtful questions." *United States ex rel. Greathouse v. Dern,* 289 U.S. 352, 357 (1933); *see also id.* at 360 (explaining that mandamus was "invoked to protect rights to which petitioners are not shown to be clearly entitled").

Moreover, Article VII would not have been understood as creating any absolute right to wharf out or make improvements in Maryland's waters because such "privileges" could be conferred only through special legislation and would not vest as of right until the construction was completed. In reviewing the governing Maryland cases of the relevant time period, the United States has advised this Court that the "decisions clearly treat the beds of navigable rivers as the exclusive property of the State and not subject to encroachment by the building of wharves or otherwise except with the express permission of the State in the nature of a grant." Br. of United States at 26, *United States ex rel. Greathouse v. Dern,* 289 U.S. 352 (1933) (No. 677); *see also id.* at 24 ("The first *general* grants to riparian proprietors in Maryland to make improvements in the waters in front of their lands and to make wharves was not made until 1835."). Even after such grants were made, a "riparian owner had no vested title to the

land covered by water immediately in front of his property, nor to improvements built out of the water, until the improvements had been actually completed . . . ." *Brady v. Mayor of Baltimore*, 101 A. 142, 143 (Md. 1917) (citing *Giraud v. Hughes*, 1 Gill. & J. 249 (Md. 1829)); *see* Br. of United States at 26, *United States ex. rel. Greathouse v. Dern*, 289 U.S. 352 (1933) (No. 677) (agreeing with this understanding of Maryland law). Moreover, "before the riparian owner had made any improvements in front of his property, the state could intercept his right to make them by a grant of the land covered by water." *Brady*, 191 A. at 143 (citing *Casey's Lessee v. Inloes*, 1 Gill. 430 (Md. 1844)).

The Commonwealth's construction of the Compact presumes the impossible—that its signatories intended to create a regulatory void.[8] In 1785, there was no role for the federal government in regulating the Potomac River and the Commonwealth could not exercise its police power within the Potomac because the river is in Maryland. Consequently, Maryland must have had regulatory authority if any government was to have such a power. Moreover, it is clear from the Compact itself that some governmental entity was to have regulatory authority because Article VII specified that no improvement in the waterway could be made that would

[8] It is extremely doubtful that the signatories to the Compact would have contemplated that Article VII would affect the police power other than to require that Maryland treat Virginia's riparians the same as its own. The sophisticated politicians that negotiated and approved the Compact recognized the need for a police power that was capable of addressing unforeseen threats to the public interest. *See, e.g.*, Act of November 10, 1769, 8 Henning's Statutes at Large of Virginia 424 (1821) (requiring the wide spread removal of wooden chimneys from homes). Indeed, the police power of Virginia and Maryland was used far more broadly before the signing of the Constitution than it could be today. *See, e.g.*, Act of February 12, 1772, 8 Henning's Statutes at Large of Virginia 643 (1821) (ordering owners of wetlands in Alexandria to drain those lots at their own expense within two years or forfeit their land).

threaten navigation. For this explicit limitation to have any meaning, Maryland would have needed the authority to enforce this limitation in its own waters.

C. The Special Master's Recommendation Barring Any State from Regulating Construction in the Potomac River and Water Withdrawals from the River Would Violate the Public Trust Doctrine.

The Special Master's recommendation that this Court find that the Compact of 1785 provided Virginia riparians, and Maryland riparians by implication,[9] an absolute right to initiate construction projects in the Potomac River and make water withdrawals from the river free of regulatory oversight would pose an unconscionable threat to the State of Maryland's police power and is barred by the public trust doctrine.

It would be difficult to understate the importance of the rights secured by the public trust doctrine, as they lie at the very core of what it means to be a free people. More than 500 years before our colonial ancestors rose up against the King of England to demand the liberties that are now secured by the Bill of Rights, our English ancestors demanded a concession from the Crown that secured citizens the common right to the beds of navigable rivers and the waters that flow over them. In securing those public trust rights for the people in the Magna Carta in 1215, an important buffer was placed between government and the people that has since distinguished our "society as one of citizens rather than serfs." Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 484 (1970); *see also Martin v. Waddell*, 41 U.S.

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[9] Whatever privileges are bestowed upon riparian land owners under Article VII of the Compact of 1785, they were bestowed upon "[t]he citizens of each state respectively." Compact of 1785, art. VII, 1785-86 Md. Laws ch. 1, 1785 Va. Acts ch. 17.

(16 Pet.) 367, 414 (1842) (explaining that the survival of early American settlements would have been impossible without the public trust doctrine); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 553 (1837) (noting that the economy of early America would have been stagnant without the public trust doctrine).

The public trust doctrine requires that the states hold such lands "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The public trust doctrine also protects values that are "recreational and ecological – the scenic views of the [water body] and its shore, the purity of the air, and the use of the [water body] for nesting and feeding by birds." *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983).

The public trust rights secured by the Magna Carta were specifically incorporated into the land grant to Lord Baltimore in 1632 and were intended "for the common use of the new community about to be established as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property . . . ." *Morris v. United States*, 174 U.S. 196, 227 (1899). "[U]pon the Revolution the state of Maryland became possessed of the navigable waters of the state, including the Potomac river, and of the soils thereunder, for the common use and benefit of its inhabitants . . . ." *Id.*; *see Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 97 (1838) (explaining that "as the Potomac river is a navigable stream, [it is] a part of the *jus publicum*"); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) ("The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence 'became themselves sovereign; and in that character hold the

absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.'") (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)). Likewise, the Maryland Court of Appeals continuously has recognized that these lands are "held by the State for the benefit of the inhabitants of Maryland and this holding is of a general fiduciary character." *Bd. of Pub. Works v. Lamar Corp.*, 262 Md. 24, 35 (1971); *see also Smith v. Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855) (recognizing that the State of Maryland holds the beds of its navigable waters "in trust for[] the enjoyment of certain public rights" and has a "duty to preserve unimpaired those public uses for which the soil is held").

The Special Master's construction of the Compact is a direct assault on the rights secured by the public trust doctrine. It would strip the State of Maryland of its fiduciary duty to safeguard the Potomac River for the public use. There is, of course, no reason to believe that the signatories to the Compact had any intention of stripping the public of the rights to the Potomac River that they had enjoyed even as British subjects or that either state had sent their delegation to Mt. Vernon to negotiate the mutual abandonment of their police powers.[10] To the extent this could have been the intention of the signatories, Maryland lacked the authority to enter into the Compact and its progeny and those agreements are void: "The state can no more abdicate its trust over property in which the whole people are interested, like

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[10] The Attorney General of Virginia's description to this Court of the public trust doctrine in Virginia at the time that the Compact was signed demonstrates that the doctrine would have prevented the Commonwealth from accepting the sacrifice of pubic trust rights that it now asserts that Maryland made. *See* Br. *Amicus Curiae* of the Thirteen Original States at 19, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1987) (No. 86-870).

navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Ill. Cent. R. Co.*, 146 U.S. at 543 (invalidating sale of property subject to public trust doctrine).

CONCLUSION

For the forgoing reasons, the Court should either dismiss this case or find that the rights provided by Article VII of the Compact of 1785 and its progeny extend only to riparian land owners in Virginia and Maryland and are subject to even-handed regulation by the State of Maryland.

Respectfully submitted,

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