No. 160, Original

In the

Supreme Court of the United States

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES,

Defendant.

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

The federal government's response confirms that this sovereign dispute belongs in this Court. The United States' indefinite retention of huge swathes of Utah's territory severely restricts Utah's sovereignty—both absolutely and relative to its sister sovereigns—including its powers to tax, legislate, and exercise eminent domain. If the United States worked a comparable bait-and-switch on a foreign sovereign, promising a temporary incursion and then deciding to stay indefinitely, it would be a *casus belli*. This Court's original jurisdiction is designed to defuse that kind of dispute between domestic sovereigns. The issues are purely legal and surpassingly important, as Utah's ample amicus support attests. And the federal government's actions are flatly unconstitutional. While the Framers authorized the federal government to maintain enclaves, own property needed to carry out its Article I powers, and to "dispose of" acquired federal lands, they did not empower it to retain unappropriated lands within a State in perpetuity. The federal government is nevertheless indefinitely retaining millions upon millions of acres of land across ten western States and Alaska—including almost one third of Utah—wholly untethered from any constitutionally enumerated function. The Framers, who hotly debated the prospect of small federal enclaves, would be appalled. This Court should not relegate this foundational sovereign dispute to a district court hemmed in by dicta. It should grant review and end this intolerable departure from the Constitution's original design.

ARGUMENT

I. Utah's Claims Warrant This Court's Original Jurisdiction.

1. The "seriousness and dignity" of Utah's claims readily warrant an exercise of this Court's original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992). The federal government's policy of indefinitely retaining unappropriated lands deprives Utah of basic incidents of sovereignty over nearly one-third of the land within its borders. That diminution upsets not only the Constitution's careful balance between federal and state power, but also the foundational principle that all States enjoy equal sovereignty. Utah's constitutional claims against the United States are precisely the type of "high claims affecting state sovereignty" that call for an exercise of this Court's original jurisdiction. *South Carolina v. North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., concurring in part and dissenting in part); *see* U.S.Senators.Br.9-15; Am.Lands.Council.Br.8-12; Idaho.Br.25-27; Ariz./N.M.Ctys.Br.4-8.

The federal government's contention that Utah's claims do not "sound[] in sovereignty and property," Opp.12-13, blinks reality. While Utah does not directly contest the federal government's current title to the vast lands at issue, Utah vigorously disputes the federal government's claim that it may retain them and deny Utah incidents of sovereignty over them indefinitely. This case thus mirrors other original-jurisdiction cases involving federal-state disputes over the "exercise [of] sovereign rights." *United States v. Maine*, 420 U.S. 515, 517 (1975); *see, e.g.*, *United States v. Texas*, 339 U.S. 707, 709 (1950). Regardless,

as the United States recently acknowledged, this Court's original jurisdiction is "paradigmatically appropriate" not just for border disputes but for any "clash of sovereign interests"—including cases implicating "the equality of States." U.S.Br.5-6, *Texas v. California*, No. 153, Original (U.S. Dec. 4, 2020).

2. The other relevant considerations likewise cut strongly in favor of exercising jurisdiction. This case presents a pure question of constitutional law that this Court is best positioned to answer, and any follow-on "factual disputes about how [particular federal lands] are being used" can be resolved by a special master after this Court decides that constitutional question. *Contra* Opp.10.[1] Relegating that weighty question to district court would be inconsistent with the seriousness and dignity of Utah's claims, and treating the mere existence of that forum as a sufficient ground to deny Utah's motion would nullify the Framers' and Congress' decision to grant this Court original jurisdiction over federal-state controversies. *See* U.S. Const. art. III, §2, cl.2; 28 U.S.C. §1251(b)(2). *Contra* Opp.8-9. Relegation to the lower courts would be especially inappropriate here, as the Tenth Circuit has already indicated that it believes itself bound by dicta in this Court's precedents. Mot.13. *Contra* Opp.10-11. This Court should honor its "virtually unflagging obligation" to "exercise the jurisdiction given [it]," *Colo. River Water*

[1] *Contra* Ute.Tribe.Br.9-13, the unappropriated lands at issue do not include any of the 1.5 million acres of public lands within the exterior boundaries of the original Uncompahgre reservation, as they are being used in service of constitutionally enumerated powers. *See* Compl.¶43.

Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), and grant Utah leave to file its complaint. *See* U.S.Senators.Br.2-8; Idaho.Br.25; Iowa.Br.3-5.

II. There Are No Threshold Barriers To Resolving Utah's Claims.

Hoping to avoid the merits, the federal government raises four purported "threshold barriers" to Utah's claims. Opp.14-20. All are meritless.

1. Like most "[d]isputes regarding the extent of congressional power," this lawsuit is plainly justiciable. *United States v. Morrison*, 529 U.S. 598, 616-18 & nn.7-8 (2000). Indeed, it is "emphatically the province and duty of the judiciary to say" whether the United States' indefinite land-retention policy is consistent with the Constitution's "careful enumeration of federal powers." *Id.* Utah is not "ask[ing] this Court to exercise … the power to dispose of public lands," Opp.15; it is simply asking the Court to perform its role as "the ultimate expositor of the constitutional text." *Morrison*, 529 U.S. at 617 n.7.

Nor does Utah seek an order "direct[ing] Congress to enact new statutes." *Contra* Opp.15. Utah instead targets the validity of existing statutes—namely, the portions of 43 U.S.C. §§1701(a)(1) and 1713(a) that announce and implement an indefinite land-retention policy. Compl.¶56, Prayer for Relief ¶B. Absent those provisions, the Secretary of the Interior would have ample authority to dispose of unappropriated lands (as the Constitution requires). *See* 43 U.S.C. §§1713, 1740; 43 C.F.R. §§2710.0-1 to -8, 2711.1-2711.4.

2. Utah clearly has standing. Utah is undisputedly suffering ongoing injuries in the form of lost tax revenue and diminished sovereign authority;

those injuries are readily traceable to the challenged land-retention policies; and if this Court holds those policies unconstitutional, there is unquestionably a "substantial likelihood" that the order would relieve Utah's economic and sovereign injuries "to some extent." *Massachusetts v. EPA*, 549 U.S. 497, 521, 525-26 (2007). That is more than enough to satisfy Article III.

Congress' authority to reserve land for constitutionally enumerated purposes does not alter the analysis. *Contra* Opp.17-18. Article III is satisfied whenever a judicial order would eliminate the asserted legal basis for injurious government conduct, even if the government could potentially reach the same result a different way. *See Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (collecting cases). And the odds of Congress taking the highly dubious step of trying to reserve the vast lands at issue here for enumerated purposes—on top of the 19 million acres in Utah it has already reserved—are vanishingly slim.

3. Sovereign immunity likewise poses no barrier to Utah's claims. The notion that the United States could simply ignore the constitutional limitations on its authority to retain property within States, for example, by seizing enclaves without consent, is contrary to the basic constitutional design. But there is no need to reach that issue, because, as the federal government concedes, Opp.18, Congress has waived sovereign immunity for any federal action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof has acted" unlawfully. 5 U.S.C. §702. This suit falls squarely within that waiver: Utah alleges that the

Bureau of Land Management ("BLM") is giving effect to an unconstitutional federal policy, and Utah seeks non-monetary relief. Compl.¶¶1, 40, 46, 54-56.

That Utah named the United States rather than BLM as the defendant makes no difference. Section 702's waiver of sovereign immunity applies equally in suits against agencies and suits "against the United States." 5 U.S.C. §703; *see, e.g.*, *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (en banc); *A.E. Finley & Assocs., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990). And that waiver is not limited to cases challenging "final agency action," *contra* Opp.19; it is "a broad waiver of 'any' and 'all' immunity for non-monetary claims." *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1172 & n.36 (9th Cir. 2017).

4. Finally, Utah's claims are not time-barred. Statutes of limitations and laches are "generally inapplicable against a State." *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). And "an ongoing violation of constitutional rights"—as opposed to a discrete, past offense—"cannot be insulated by [a] statute of limitations" anyway. *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997); *see, e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968). Nor can laches bar claims seeking relief from "ongoing conduct that threatens future harm." *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001); *see Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959-60 (9th Cir. 2001). The nature of Utah's claim—which challenges not a single, discrete action but indefinite ownership—makes the suggestion that it waited too long to sue

particularly inappropriate. Utah cannot lose its constitutional rights and essential sovereignty because it exhausted all other possibilities before reluctantly suing the United States.

III. Utah's Claims Are Substantial.

To the extent this Court takes the merits into account, *see* Mot.14, the strength of Utah's claims strongly favors granting Utah leave to file its bill of complaint. The federal government's indefinite retention of much of Utah cannot be reconciled with the Constitution. At the very least, Utah's challenge to that untenable state of affairs is plainly substantial.

A. The Constitution Does Not Authorize the United States to Indefinitely Hold Unappropriated Lands in Utah.

The federal government "can exercise only the powers granted to it" by the Constitution, *Bond v. United States*, 572 U.S. 844, 854 (2014), and nothing in the Constitution empowers it to indefinitely hold land within a State without using it in service of any enumerated power. On the contrary, the Constitution carefully limits the federal government's power to hold land: It may "exercise exclusive Legislation" over the District of Columbia and federal enclaves purchased with State consent, and it may hold additional land as "necessary and proper for carrying into Execution" an enumerated power. U.S. Const. art. I, §8, cls.17-18. Beyond that, the United States has the power to regulate and "dispose of" lands in its possession. *Id.* art. IV, §3, cl.2. That means the power to "put [them] into the hands of another"—not to retain them indefinitely. *Dispose*, Samuel Johnson's Dictionary of the English Language (1755).

Numerous examples from the Constitutional Convention and its immediate aftermath confirm the plain meaning of that straightforward text. Mot.17-18, 21-24. And the historical context in which the Constitution was ratified underscores the point: The Framers (and the public) understood the Property Clause to empower the federal government only to convey away unappropriated lands, not to hold them forever. Mot.18-20. The Clause would never have been adopted had it been understood to authorize the federal government to retain vast swathes of land within States in perpetuity. Mot.20-21, 29-30.

The federal government's failure to abide by those constitutional limitations has serious structural ramifications. After more than a century of steady expansion of federal power over unappropriated lands, the United States' ownership of nearly 70% of Utah's territory upends both the federal-state balance of power and the balance of power among the States. Mot.27-29; *see* Pac.Legal.Found.Br.5-13; Am.Lands.Council.Br.12-25; Sutherland.Inst.Br.3-11. The Framers "denied the National Government" the general police power and instead "reposed [it] in the States." *Morrison*, 529 U.S. at 618. Yet the United States unabashedly claims "the police power"—"subject to no limitations"—over nearly 70% of Utah's land. Opp.23. Conversely, Utah's sovereign authority to legislate for the benefit of its own citizens—e.g., by managing watersheds, wildlife, and other natural resources; establishing highways, fiber optic networks, and electric transmission lines; and regulating grazing, recreation, and other land use—is severely curtailed. *See* Utah.Leg.Br.4-24; Utah.Ctys.Br.4-21; Utah.Pub.Lands.Council.Br.11-

21. The same problem extends far beyond Utah, as other western States similarly find themselves governed by distant federal bureaucrats instead of their elected representatives. *See* Idaho.Br.6-25; Ariz./N.M.Ctys.Br.11-12, 15-20; Wyo.Leg.Br.7-10.

B. The Federal Government's Contrary Arguments Are Meritless.

1. The federal government begins by citing its authority to make "needful Rules and Regulations respecting" federal land. Opp.21, 26. But as the Property Clause itself makes clear, the authority to *regulate* land does not encompass the authority to acquire, hold, or dispose of it. Otherwise, the Clause's express grant of authority "to dispose" of land would be superfluous, and the Framers would not have agonized over the extent of the federal government's authority to acquire and hold land. *See* Mot.20-21.

The federal government's contention that the power "to dispose of" land somehow includes the power to retain it indefinitely, Opp.22, is weaker still. The government does not (and cannot) deny that "to dispose" means to "transfer" to someone else. *Compare* Mot.17-18, 21, 23-24, *with* Opp.22. And while the federal government may have substantial discretion to determine when and how to transfer public lands, Opp.22, 28, no one disposes of something by retaining it indefinitely. The government cites *United States v. Gratiot*, 39 U.S. (14 Pet.) 526 (1840), but that case was decided half a century after the Constitution was ratified, and it merely upheld a law that reserved lead mines in the Indiana territory for "future disposal" and authorized the President to lease them "for a term not exceeding five years." *Id.* at 537-

38. That is a far cry from holding millions of acres within a State in perpetuity. Indeed, Congress authorized the sale of those lead mines in 1846. Act of July 11, 1846, ch.36, 9 Stat. 37.

Nor can the United States' perpetual retention of lands be justified as a "necessary and proper" means of "rais[ing] money" for other enumerated purposes. Opp.26-27. The Necessary and Proper Clause does not authorize the federal government to use whatever means it wants to raise whatever funds it wants for its other enumerated purposes; if it did, both the Taxing Clause and the Sixteenth Amendment would be superfluous. *Contra* Opp.26-27.

The federal government's invocation of the Supremacy Clause is equally misplaced. *Contra* Opp.27. Utah has never suggested that State laws can override (constitutional) federal laws; its express objection is relevant only to show that it does not consent to the ongoing federal retention of unappropriated lands within its borders. *Cf. Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938).

Finally, the federal government's view that the Property Clause confers a broad power rather than a limited one, Opp.28, ignores plain text and the fundamental rule that the federal government "can exercise only the powers granted to it." *Bond*, 572 U.S. at 854; *see* U.S. Const. amend. X. The power to acquire land for federal enclaves with consent precludes non-consensual acquisition, and the power to grant exclusive rights for "limited Times" precludes "a regime of perpetual copyrights," *Eldred v. Ashcroft*,

537 U.S. 186, 208-09 (2003). Similarly, the power "to dispose of" property forecloses its perpetual retention.

2. Early American history overwhelmingly supports Utah's position. The Framers viewed public lands as a "source of federal revenue," Opp.24, but that is because they expected the government to *sell* them, not become the Nation's landlord. *See* Mot.18-22. Early 19th-century disputes over whether new States should obtain title to public lands within their borders, Opp.29, were about government power to *sell* land and enjoy the proceeds, not about retaining it indefinitely. *See* Mot.22-24. And early federal statutes that "reserved" lands containing mines or saline deposits did not contemplate their indefinite retention; to the contrary, they were reserved for "future disposal"—for example, via land grants to new States upon their admission to the Union. *See, e.g.*, Act of May 18, 1796, ch.29, §3, 1 Stat. 464, 466; *Morton v. Nebraska*, 88 U.S. (21 Wall.) 660, 667, 669 (1874).

3. The federal government's reliance on precedent is equally unavailing, as this Court has never squarely encountered a challenge to its asserted authority to perpetually hold unappropriated lands within a State. While a handful of cases suggest—in dicta—that indefinite land-retention might be permissible, Opp.22-23, none seriously grapples with the relevant constitutional text and history or the vertical and horizontal federalism consequences of that claim. They instead treat infinite land retention as a far-fetched hypothetical—and one case acknowledges that such a practice would be "wrong" and "discriminate against the State." *Stearns v. Minnesota*, 179 U.S. 223, 242-43 (1900).

This Court's precedents involving Congress' "power over conduct on its own property," *Kleppe v. New Mexico*, 426 U.S. 529, 538, 543-45 (1976), and its incidental power to regulate private land to protect its own property, *see Camfield v. United States*, 167 U.S. 518, 525-26 (1897), do not help the federal government. Instead, they underscore that Utah enjoys less sovereign power over the lands at issue here than over the rest of the State. Congress' authority to make "needful Rules and Regulations respecting" the lands the United States properly holds is precisely why the Framers worried about the new federal government's acquisition and retention of property and strictly limited it. It is simply not faithful to their design to allow the federal government to indefinitely retain more than two-thirds of a sovereign state, which is why nothing like this happened in the Framing Era and citizens living in the original 13 States have no contact with BLM.

* * *

The Framers would be alarmed by the prospect of the federal sovereign exercising indefinite ownership over a substantial percentage of a sovereign State. Their alarm would be ameliorated only by their foresight in granting original jurisdiction to this Court to resolve such serious sovereign disputes between a State and the United States. This case cannot be resolved by a district court hemmed in by dicta. It is a momentous dispute about first principles that only this Court can resolve. This Court should exercise its original jurisdiction and grant Utah's claims a full hearing in the forum that the Framers intended.

CONCLUSION

This Court should grant Utah leave to file its bill of complaint.

Respectfully submitted,

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