No. 22O160

In the Supreme Court of the United States

UTAH, *Plaintiff*

v.

UNITED STATES

On Motion for Leave to File Bill of Complaint

BRIEF OF U.S. SENATORS MIKE LEE, MITT ROMNEY, AND OTHER WESTERN MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING UTAH

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
HANNAH C. SMITH
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provision

Statutes

Rule

INTRODUCTION, SUMMARY, AND INTERESTS OF *AMICI CURIAE*[1]

The bill of complaint, which asks this Court to review the legality of the federal government's continued control of large portions of Utah, raises important questions about the proper scope of state sovereignty, the proper understanding of vertical and horizontal federalism, and this Court's authority to enforce the Constitution's separation of powers. These fundamental questions cry for this Court's attention.

Because of the importance of these questions to Utah's sovereignty, this case is deeply important to *Amici*, including Utah's two U.S. Senators and a group of Representatives from Utah and other western States.[2] Those States' sovereign territories are effectively being held captive by an overbearing federal government. *Amici* are committed to serving the interests of their States and their constituents by ensuring that their States remain full sovereigns in our federal system. *Amici* therefore agree with Utah that this Court should compel the United States to return to Utah control over its lands.

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or their counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of the intent of *amici curiae* to file this brief.

[2] *Amici* include United States Senators from Utah Mike Lee and Mitt Romney, each of Utah's four congressional representatives, Congressman Blake Moore, Congresswoman Celeste Maloy, Congressman John Curtis, and Congressman Burgess Owens, and Wyoming Congresswoman Harriet M. Hageman.

Given the preliminary procedural posture of this case, however, *Amici* write separately to stress two points. First, as a textual matter, the exercise of this Court's original jurisdiction is mandatory under the plain language and history of the Constitution and 28 U.S.C. § 1251. No less than the district courts, this Court has a "virtually unflagging" obligation to hear cases that invoke its original jurisdiction. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

Second, this case raises issues of national importance that meet and exceed the standard this Court usually applies when deciding whether to grant leave to file an original bill of complaint—or, for that matter, to grant a petition for certiorari. That is because the federal government's actions challenged in this case undermine the very reason that States ceded aspects of their sovereignty to the federal government. To begin the process of reversing the harms that Utah and other western States have experienced from the United States' perpetual control over their lands, this Court should, and must, exercise its original jurisdiction to hear this important dispute on the merits. At a minimum, Utah and its citizens deserve to be heard on the merits.

STATEMENT

The United States currently owns over two-thirds of Utah's land. Bill of Compl. ¶ 1. Nearly half of that land is "unappropriated" and held without serving any designated purpose or fulfilling any enumerated power. *Ibid.*

This unappropriated land is managed by the federal Bureau of Land Management ("BLM"), which retains all revenue earned from leasing those lands and their natural resources to private parties. *Id.* ¶ 49. Consequently, Utah is stripped of its sovereign powers over more than one-third of its land. *Id.* ¶ 2. Specifically, Utah is prevented from taxing those federal land holdings and otherwise legislating over their use. *Ibid.*

The United States' formal policy is to retain these unappropriated lands indefinitely, regardless of the interests of Utah and its citizens, or any federal need for the affected land. See 43 U.S.C. § 1701(a)(1). Utah leaders have repeatedly asked the United States to relinquish ownership of these lands. With the exception of congressionally directed transfers, those requests have been ignored. See, *e.g.*, Utah Code § 63L-6-103.

ADDITIONAL REASONS FOR GRANTING THE MOTION FOR LEAVE

I. This Court Lacks Discretion to Deny the Motion for Leave to File.

The clearest reason for the Court to grant the motion for leave to file the bill of complaint is that, constitutionally and statutorily, the Court has no discretion to deny it. Both the Constitution and 28

U.S.C. § 1251 establish the Court's original jurisdiction. Specifically, Article III, § 2, Clause 2 vests this Court with original jurisdiction over "all cases * * * in which a State shall be Party." U.S. Const. art. III, § 2, cl. 2. And Congress has reaffirmed the Court's original jurisdiction over "*[a]ll* controversies between the United States and a State." 28 U.S.C. § 1251(b)(2) (emphasis added). As shown below, neither a plain reading of these provisions' text nor their historical context gives this Court discretion to choose when and whether to exercise its original jurisdiction—as long as the statutory requirements are satisfied, as they are here.

A. The Text and History of Both the Constitution and 28 U.S.C. § 1251 Should Control.

As this Court has often emphasized, whether interpreting the Constitution or a statute, the text should control. See *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 19-22 (2022) (constitutional text); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, [courts] look first to its language."). This is because "[o]nly the written word is the law." *Bostock* v. *Clayton County*, 590 U.S. 644, 653 (2020).

In cases of ambiguity, however, this Court can look to historical practice to inform its interpretation. *Bruen*, 597 U.S. at 20; *Vidal* v. *Elster*, 602 U.S. 286, 301 (2024). But history cannot override statutory text: Even where historical practice may contradict the text, if it is clear, the text controls. See, *e.g., Vidal*, 602 U.S. at 301; *United States* v. *Rahimi*, 144 S. Ct. 1889, 1912 n.2 (2024) (Kavanaugh, J., concurring)

("[H]istory contrary to clear text is not to be followed.") (collecting examples).

B. Neither the Text Nor the History of Either Provision Purports to Grant the Court Discretion in Exercising Its Original Jurisdiction.

Here, both constitutional and statutory text affirm that the Court lacks discretion in exercising its original jurisdiction.

1. The text of Article III declares that "[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 (emphasis added). This statement is made without equivocation or caveat. And no additional language suggests the Court is empowered to withhold its original jurisdiction at will. See *ibid.*

2. Like the constitutional language it mirrors, the text of 28 U.S.C. § 1251 is clear that the Court's original jurisdiction is not discretionary. The statutory language states that "[t]he Supreme Court *shall* have" original jurisdiction in "[a]ll controversies between the United States and a State." 28 U.S.C. § 1251(b)(2) (emphasis added).

That is not a term that suggests permission. When Congress intends to grant this or any other federal court *discretion* to exercise its jurisdiction, it knows how to say so—either by using the permissive "may" or, even more clearly, by using the word "discretion." *E.g.*, 28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court."); *id.* § 1292(b) ("The Court of Appeals which

would have jurisdiction of an appeal * * * may * * *, in its discretion, permit an appeal to be taken from such order."). As this Court has recognized, "[w]hen, as is the case" with jurisdictional statutes, "Congress distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty." *Maine Cmty. Health Options* v. *United States*, 590 U.S. 296, 311 (2020) (cleaned up).

Indeed, in other jurisdictional contexts, this Court has treated the word "shall" to *require* that the relevant court exercise jurisdiction. The constitutional and statutory language assigning this Court original jurisdiction, for example, is identical to that used in both 28 U.S.C. § 1331 and 28 U.S.C. § 1332, the statutes that grant original jurisdiction to the federal district courts. There, Congress established that "[t]he district courts *shall* have original jurisdiction" of civil actions based upon a federal question or arising in diversity, respectively. And the Court has interpreted that jurisdictional assignment to mean that district courts may not decline to hear cases that otherwise satisfy the statute's requirements. It has explained, for example, that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." *Willcox* v. *Consolidated Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909); accord *Colorado River Water Conservation Dist.*, 424 U.S. at 817 (federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them").

These cases show that this Court has long understood that, where Congress says a federal court "shall have" jurisdiction, it means that it has not only

the right to hear a case, but also the concomitant duty to do so. As Justice Alito has rightly explained, a district court's declining to exercise its jurisdiction would be grounds for immediate reversal. *Texas* v. *California*, 141 S. Ct. 1469, 1469-1470 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint) (acknowledging that in such a case, an appellate court would "reverse in the blink of an eye").

That same analysis applies to the text of the constitutional and statutory provisions that establish this Court's original jurisdiction. Because the Constitution and 28 U.S.C.§ 1251 indicate that the Court "shall" have original jurisdiction in such a case, the Court is obligated, no less than the federal district courts in analogous contexts, to exercise it. The Court cannot both deny Utah leave to file its complaint and comply with these textual directives.

3. To be sure, as Justice Thomas has emphasized, although "[f]ederal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction," the Court "has long exercised such discretion." *Nebraska* v. *Colorado*, 577 U.S. 1211, 1211 (2016) (Thomas, J., dissenting from denial of motion for leave to file bill of complaint). But, when viewed against this Court's historical practices, it is a comparatively recent phenomenon that only really arose in the 20th Century. And it should not be followed here.

Justice Alito, for example, has explained that, "[f]or the first 150 years after the adoption of the Constitution, the Court never refused to permit the filing of a complaint in a case falling within its original jurisdiction," *Texas* v. *California*, 141 S. Ct. at 1470

(Alito, J., dissenting from the denial of motion for leave to file a bill of complaint), and instead dutifully followed the "time-honored maxim * * * that a court possessed of jurisdiction must exercise it." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 496-497 (1971).

Indeed, at least as early as 1821, Chief Justice Marshall wrote in *Cohens* v. *Virginia* that the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. 264, 404 (1821). The Court would not begin to question its responsibility to exercise its original jurisdiction for almost another eighty years. See *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900) (suggesting original jurisdiction was not intended to be exercised except when "the necessity was absolute"). But, for reasons previously explained, the Court erred in veering then from the path properly marked by the Constitution and the original-jurisdiction statute.

In short, this Court's long history (before 1900) of respecting its obligation to exercise original jurisdiction over "all controversies" between the United States and a State reinforces the understanding that the Court's original jurisdiction is not discretionary. And, because neither the text nor the history of the Constitution or 28 U.S.C. § 1251 supports the idea that the Court's original jurisdiction is subject to discretion, the Court should grant Utah's motion for leave to file its bill of complaint.

II. Even If the Court Had Discretion to Deny Leave to File the Bill of Complaint, the Court Should Grant Leave Here.

Even if this Court concludes that it does have discretion to deny the motion to file, the issues presented by this case are extraordinarily important and warrant this Court's review—even under the Court's Rule 10 discretionary criteria for considering petitions for certiorari. As shown below and in Utah's motion for leave, the federal government continues to deny a State its rightful sovereignty and equality with other States, even though the Constitution affords Utah both. And this case presents a pure legal question about the extent of federal power, the resolution of which could resolve or mitigate many other disputes between States and the federal government. Accordingly, whatever standard the Court applies, it should still grant Utah leave to file.

A. The Federal Government Is Unconstitutionally Depriving Utah of Its Sovereignty.

That the federal government currently deprives Utah of its full sovereignty cannot be doubted. The United States owns approximately sixty-nine percent of the land in Utah to the complete deprivation of the State. Nearly half of that land is not being used by the federal government to carry out any enumerated power; instead, the land is simply being held in perpetuity for federal profit. So, in over two-thirds of the land within its state lines, Utah is stripped of its sovereign power to tax, exercise eminent domain, and even regulate. Under the federal government's view,

each of those core elements of Utah's sovereign powers must yield to the federal government's direct control of the land "without limitations." *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976).

This sovereignty dispute is exactly the type of case over which this Court should exercise original jurisdiction. As the Court has previously noted, "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983). And that is true here: The federal government denies Utah basic sovereign powers over more than one-third of its territory for no constitutional purpose. Bill of Compl. ¶ 1-2. And both common sense and history confirm that, if anything would justify war, it is one country's continued occupation of another. Such occupation, after all, necessarily entails the exploitation of resources belonging to the other and an unnecessary risk that the occupying country will hinder the occupied country's political processes. Indeed, the Constitution's drafters were themselves prepared to take action (and did) against an abusive federal power for much less.

That is not to say that Utah, as part of the federal system of sovereignty, would be justified in actually going to war against the United States. Not at all. The unique relationship between the States and the federal government means that what the United States is doing to Utah is not directly analogous to one sovereign nation's physical invasion of another.

But this Court has never required States to make a showing that war is actually justified when it considers whether to allow a State to invoke the Court's original jurisdiction. Instead, the standard is whether the federal government's actions *would* amount to an invasion and conquest of that land if—assuming a counterfactual—Utah were a separate sovereign nation. See Bill of Compl. ¶ 46. Here they do.

Accordingly, the deprivation of state sovereignty at issue here is a "serious[] and dignif[ied]" claim warranting this Court's attention. *Mississippi* v. *Louisiana*, 506 U.S. 73, 76-77 (1992). It squarely raises a question that "has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c).

B. The Federal Government's Indefinitely Retaining Lands in Western States Denies Them Equal Statehood and Representation.

The federal government's indefinite retention of land in Utah also significantly reduces Utah's equality with other States. As this Court has long held, "'[t]his Union' was and is a union of [S]tates, *equal* in power, dignity, and authority." *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911) (emphasis added); see also 28 Stat. 107 (July 16, 1894) (admitting Utah into the union "on an equal footing with the original States"). Yet the United States' control over large swaths of land in Utah and other western States imposes second-class status on them.

1. In other circumstances, this Court has found that the federal government cannot exercise control

over State lands in a way that contravenes the State's equal position with other States. In *Coyle*, for example, the Court held that Oklahoma was not bound by the enabling act's requirement to place its seat of government in a specific city. 221 U.S. at 579. The Court reasoned that, without the authority to determine its own capital, the State would not be "equal in power" with the other States. *Ibid.*

The federal government's denial of Utah's equality with other States is even more severe here. In the practices challenged in Utah's complaint, the federal government goes far beyond merely restricting Utah's right to determine the seat of its government. By allocating control over one-third of Utah's land to the BLM, the United States altogether denies Utah ownership over that land. Furthermore, the federal government's land ownership in Utah and nine other western States is unequal compared to other States, denying them sovereignty over a far higher percentage of their land than the other 40 States. Br. in Supp. of Mot. for Leave to File Bill of Compl. 3 (collecting sources). As a result, the federal government's unequal land ownership deprives the former States of their authority to locally manage the lands in the way most conducive to the health, growth, and enjoyment of each State's citizens.

2. Additionally, the federal government's unequal land ownership effectively reduces the relative power of these States' congressional delegations. Because of that inequality, the congressional delegations of Utah and other western States are required to expend time and political capital solely to ensure proper management of federal

lands—issues other State congressional delegations do not have to consider. The reduction in Utah's effective congressional power, in turn, reduces the State's effective representation as compared to other States, undermining the State's equal representation.

Only by returning to Utah ownership over its lands can the United States rectify the State's loss of control and make it fully equal with the other States. As this Court put it in *Coyle,* "the constitutional equality of the [S]tates is essential to the harmonious operation of the scheme upon which the Republic was organized." 221 U.S. at 580. As long as the federal government unconstitutionally retains unappropriated lands in the western States, they will be unequal with their sister States—unequal in sovereignty, unequal in congressional power, and unequal in representation.

This inequality is a serious and grave question that deserves this Court's attention. It is, once again, a question that "has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

C. Restricting Federal Land Ownership Would Mitigate or Resolve Separation of Powers Conflicts and Antiquities Act Overreach.

But there is more. Federal lands are often the subject of litigation regarding the scope of the President's and BLM's statutory authority. While those issues are not directly implicated by this case, they are exacerbated by the federal government's extensive property fiefdom in the western States. Resolving the issue at hand could mitigate or

eliminate many separation of powers issues about the scope of the President's and BLM's authority.

For example, States, municipalities, and individuals often challenge the President's designation of national monuments and the withdrawal of lands from public use under the Antiquities Act, with courts examining whether such actions exceed the authority granted by Congress. See, *e.g.*, *Murphy Co.* v. *Biden*, 65 F.4th 1122 (9th Cir. 2023); *Garfield County* v. *Biden*, No. 4:22-cv-00059-DN-PK, 2023 WL 2561539, at *1 (D. Utah Mar. 17, 2023); *Utah Ass'n of Counties* v. *Bush*, 316 F. Supp. 2d 1172, 1179-1180 (D. Utah 2004) (gathering legal challenges to the Antiquities Act). Many of these challenges center on the proposition that "[a] statute permitting the President in his sole discretion to designate as monuments 'landmarks,' 'structures,' and 'objects'—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea." *Massachusetts Lobstermen's Ass'n* v. *Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting denial of certiorari). As the Chief Justice recently recognized, "how to interpret the Antiquities Act's 'smallest area compatible' requirement" is a question of significant importance. *Ibid.* The President should not have more control over Utah's land than the people of Utah or their elected representatives.

But the Antiquities Act is also limited to "land owned or controlled by the Federal Government." 54 U.S.C § 320301(a). Therefore, the United States'

unconstitutional permanent land ownership exacerbates the separation-of-powers issue that the Antiquities Act implicates. And limiting the federal government's power to hold land in perpetuity would narrow or resolve existing disputes over that Act and other exercises of the BLM's and the President's authority over federal land.

That is one more reason why the issues presented here are questions that "ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

CONCLUSION

The Court lacks discretion to deny Utah an opportunity to litigate the issues presented in its proposed complaint in this Court. But even if the Court had such discretion, the Court's usual considerations for exercising its discretionary jurisdiction are amply satisfied. The motion for leave to file the bill of complaint should be granted.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
HANNAH C. SMITH
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

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