No. 22O154

In the Supreme Court of the United States

NEW HAMPSHIRE,

Plaintiff,

v.

MASSACHUSETTS,

Defendant.

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ARKANSAS, INDIANA, KENTUCKY, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, TEXAS, AND UTAH IN SUPPORT OF NEW HAMPSHIRE'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

DAVE YOST
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
KYSER BLAKELY
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae State of Ohio
(additional counsel listed at the end of the brief)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF *AMICI* INTEREST

New Hampshire wants to sue Massachusetts in this Court.* Under the Court's precedent, it needs permission to do so. But under Article III and 28 U.S.C. §1251(a), it does not. The Constitution and an act of Congress give this Court mandatory original jurisdiction over cases between two States. The *amici* States urge this Court to recognize the mandatory nature of its jurisdiction in such cases. Until the Court does so, the States will continue to be denied their right of guaranteed access to this forum in interstate disputes.

SUMMARY OF ARGUMENT

New Hampshire, in accordance with this Court's rules, sought leave to file its bill of complaint against Massachusetts. This raises the following question: Does the Court have discretion *not* to decide original actions brought by one State against another? The answer to that question is "no." The Constitution and statutory law *both* require this Court to hear and decide all original interstate disputes.

Turning first to the Constitution, Article III gives this Court "original Jurisdiction" in cases "affecting Ambassadors, other public Ministers and Consuls, *and those in which a State shall be a Party*." U.S. Const. art. III, §2, cl.2 (emphasis added). It has "appellate Jurisdiction" in all other cases, "with such Exceptions … as the Congress shall make." *Id.* The Constitution, by granting Congress power to curtail

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* The *amici* States, as required by Rule 37.2(a), notified all parties of their intent to file this *amicus* brief more than ten days before its due date.

the Court's appellate jurisdiction, impliedly recognizes that Congress *lacks* authority to curtail the Court's original jurisdiction. *See Martin v. Hunter's Lessee*, 1 Wheat. 304, 332–33 (1816). In other words, the Court has jurisdiction over its original docket automatically, by virtue of the Constitution, without regard to any act of Congress. And that constitutionally conferred jurisdiction is necessarily mandatory, as courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

The People vested this Court with mandatory jurisdiction over interstate disputes for a reason. One of the flaws in the Articles of Confederation was that it "created no judicial power" pursuant to which the States could secure resolution of their disputes. *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838). Why was this a flaw? Because sovereigns unable to resolve their disagreements in courts of law may resort to fields of battle. To avoid that dangerous form of dispute resolution, the Framers guaranteed the States a neutral forum in which their disputes would be "peaceably terminated." 3 Joseph Story, Commentaries on the Constitution of the United States §1632, p. 501 (1833); The Federalist No. 80 (A. Hamilton), p. 536 (Cooke ed., 1961). This Court must not deny the States what the Constitution guarantees them.

Congress cemented the mandatory nature of this Court's original jurisdiction over interstate disputes in 28 U.S.C. §1251(a). That section says: "The Supreme Court *shall* have original and *exclusive* jurisdiction of all controversies between two or more States." §1251(a) (emphasis added). This statute is

best read to confer mandatory jurisdiction in original disputes between two or more States. As an initial matter, nothing in §1251(a) confers any discretion not to decide interstate disputes. Congress's silence on the matter is telling in light of other statutes that *expressly* give this Court discretion to manage its docket. *See* 28 U.S.C. §§1254, 1257. In addition to the absence of any discretion-conferring language, the statute's grant of *exclusive* jurisdiction implies that the Court's jurisdiction is mandatory. Section 1251(a) establishes that when a controversy arises "between two States, this Court—and only this Court—has jurisdiction over it." *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint). Given the critical importance of interstate disputes, it is hard to believe that Congress would empower this Court to refuse to hear cases that cannot be brought in any other forum. *See Arizona v. California*, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting from denial of motion for leave to file complaint).

This Court, it is true, has claimed complete discretion over when to exercise its original jurisdiction. *See, e.g.*, *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971). But it has never explained how this discretion can be reconciled with the Constitution or §1251(a). Instead, the Court has justified the discretionary approach to its original docket with appeals to "prudential" policy considerations. *California v. Texas*, 457 U.S. 164, 168 (1982) (*per curiam*). More precisely, the Court has said that it lacks "'special competence in dealing with' many interstate disputes," and argued that hearing these cases would interfere with the Court's "modern role 'as an appel-

late tribunal.'" *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint) (quoting *Wyandotte*, 401 U.S. at 498). These justifications do not withstand scrutiny. First, "[p]rudential" considerations cannot override properly vested jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 128 (2014). But even if they could, the supposed prudential concerns do not justify a discretionary approach. Far from *lacking* special competence to resolve interstate disputes, this Court is the *only* forum with competence to do so. *See* §1251(a). And, given that this Court can appoint special masters to help it resolve the relatively small number of interstate disputes that proceed to litigation, the Court can fulfill its constitutional duty to review these original cases without being distracted from its role as an "appellate" tribunal.

Stare decisis perhaps counsels in favor of retaining discretionary jurisdiction in other original suits, like suits between a State and an out-of-state citizen, which may be numerous and can be brought in other courts. But *stare decisis* does not justify the Court in refusing to carry out its duty to resolve interstate disputes. *Arizona*, 140 S. Ct. at 685 (Thomas, J., dissenting from denial of motion for leave to file complaint); *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (Stevens, J., dissenting). To deny the States access to this Court in interstate disputes is to deny them an important part of the consideration they received for agreeing to join the Union. As such, *stare decisis* carries little force in deciding whether to retain the discretionary approach in its application to interstate disputes. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018).

ARGUMENT

I. This Court's original jurisdiction in cases between States is mandatory.

The Court should grant New Hampshire's motion for leave to file a bill of complaint. Indeed, it *must* grant the motion: the Constitution and 28 U.S.C. §1251(a) both require this Court to hear and decide original actions between two States.

A. The Constitution vests the "judicial Power" in federal courts. Art. III, §1. That power authorizes the courts to resolve various forms of "Cases" and "Controversies." *Id.*, §2. Indeed, the power *compels* courts to resolve cases and controversies over which they have jurisdiction. As Chief Justice Marshall recognized long ago, courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821).

To be sure, the obligation to exercise the judicial power in cases where jurisdiction is given does not compel federal courts to resolve those cases in any particular way. It does not, in other words, "eliminate" or "call into question, the federal courts' discretion in determining whether to grant certain types of relief." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). For example, the judicial power no doubt includes the power to deny an award of equitable relief. *Id.* The judicial power also includes, presumably, the ability to resolve cases on non-merits grounds such as *forum non conveniens*. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 555 (1985); *see also Gardner v. Thomas*, 14 Johns. 134, 137–38 (N.Y.

1817) (applying the doctrine). But regardless of the *way in which* courts resolve cases, their "'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). In writing that Courts must hear and decide cases over which they have jurisdiction, "Chief Justice Marshall did not add the disclaimer: except courts may refuse to hear an issue if they think it makes sense to demur under a balancing test" or some other rule of prudence. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 749 (6th Cir. 2019).

In light of that principle, it is important to know what, exactly, this Court's jurisdiction consists of. Article III provides the starting point. It divides the Court's jurisdiction into original and appellate jurisdiction. U.S. Const. art. III, §2, cl.2; *see also Marbury v. Madison*, 1 Cranch 137, 175 (1803). The relevant language is as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III, §2, cl.2.

The key difference between the grants of original and appellate jurisdiction is that Congress can make "Exceptions" to the Court's appellate jurisdiction but

not to its original jurisdiction; the express grant of authority to limit appellate jurisdiction implies that Congress has no authority to limit the Court's original jurisdiction. For if Congress had the power to limit the Court's jurisdiction over cases and controversies generally, there would be no need to expressly vest in Congress the power to limit the Court's appellate jurisdiction. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 332–33 (1816). From this, it follows that the Court's original jurisdiction is mandatory. If Congress cannot make exceptions to the Court's original jurisdiction, and if courts are dutybound to hear and decide cases over which they have jurisdiction, *Cohens*, 6 Wheat. at 404, then there is no basis for inferring that this Court has any discretion over whether to hear and decide original matters. *Cf. Kansas v. Colorado*, 556 U.S. 98, 110 (2009) (Roberts, C.J., concurring).

The nature of the Constitution further supports the conclusion that the Court's original jurisdiction is mandatory. That "founding document specifically recognizes the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quotation omitted). Sovereigns, of course, not infrequently have disagreements with one another. In general, when those disputes become intractable, they are often resolved through economic coercion (such as sanctions and tariffs) or war. The States, just like other sovereigns, can find themselves in standoffs against their peers. Yet, the Articles of Confederation "created no judicial power" pursuant to which those interstate disputes could be resolved. *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838). The Framers recognized this flaw; they understood that "domestic tranquility requires, that the contentions of states should be

peaceably terminated by a common judicatory." 3 Joseph Story, Commentaries on the Constitution of the United States §1632, p. 501 (1833). The Framers thus viewed the creation of a legal venue for resolving interstate disputes as "essential to the peace of the union." The Federalist No. 80 (A. Hamilton), p. 536 (Cooke ed., 1961). That is what Article III provides: a venue for resolving disputes that could "amount to *casus belli* if the States were fully sovereign." *South Carolina v. North Carolina*, 558 U.S. 256, 277 (2010) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)). It would be surprising, to say the least, if the same document that opened the doors to this badly-needed forum simultaneously gave that forum unlimited discretion to shut its doors and turn the key.

B. Even if Congress *could* carve an exception into the Court's original jurisdiction over cases between States, Congress has not done that. To the contrary, Congress enacted the following statute: "The Supreme Court *shall* have original and *exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. §1251(a) (emphasis added). This statute makes clear that, when a controversy arises "between two States, this Court—and only this Court—has jurisdiction over it." *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint). And for two main reasons, this jurisdictional grant is best understood as mandatory, not discretionary.

First, the statute does not say or imply that the jurisdiction it confers is discretionary. Its silence on the matter is especially conspicuous in light of other

statutes, passed alongside §1251, that *do* give this Court discretion to decide whether to hear a case. For example, the very same 1948 act that enacted §1251 contains other provisions that empower the Court, in cases arising under its appellate jurisdiction, to grant or deny writs of *certiorari* to federal courts of appeals and state courts. *See* Act of June 25, 1948, 80 Pub. L. 773, §§1254, 1257, 62 Stat. 869, 928–29. Tellingly, however, §1251 contains no discretion-conferring language. In that sense, §1251 is identical to other provisions included within the same act—for example, the provision giving this Court appellate jurisdiction over direct appeals from three-judge district courts, 28 U.S.C. §1253—that have long been understood to confer mandatory jurisdiction. *See Goldstein v. Cox*, 396 U.S. 471, 477–78 (1970); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2336 (2018) (Sotomayor, J., dissenting). Section 1251(a), just like §1253, gives this Court no discretion to decline to exercise jurisdiction. "The statute says what it says—or perhaps better put here, does not say what it does not say." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018).

Second, there is no reason to think that Congress *wanted* to give the Court discretion to decline jurisdiction over interstate disputes. Indeed, one finds contrary evidence in the fact that §1251(a) makes this Court's jurisdiction over such disputes "exclusive." The exclusivity means that when "this Court does not exercise jurisdiction over a controversy between two States, then the complaining State has no judicial forum in which to seek relief." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint). It is both unreasonable and "inequitable" to read §1251(a)

as simultaneously making this Court the *exclusive* forum for resolving interstate disputes while at the same time allowing the Court to refuse, at its pleasure, to decide those disputes. *Arizona v. California*, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting from denial of motion for leave to file complaint).

All told, as multiple Justices have recognized, §1251(a) must be read to confer mandatory original jurisdiction in interstate disputes. *See California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (Stevens, J., dissenting); *Nebraska*, 136 S. Ct. at 1034 (Thomas, J., joined by Alito, J., dissenting from the denial of motion for leave to file complaint).

* * *

Article III and §1251(a) require this Court to hear New Hampshire's claims against Massachusetts. Accordingly, this Court should grant the motion for leave to file a bill of complaint.

II. This Court's cases holding that original jurisdiction is discretionary should not be applied to disputes between States.

Although Article III is best read as conferring mandatory original jurisdiction when a "State shall be Party," this Court has interpreted the grant of original jurisdiction as conferring discretionary jurisdiction. *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971). And, notwithstanding 28 U.S.C. §1251(a), this Court has applied its discretionary reading even in original actions between two or more States. *See Texas v. New Mexico*, 462 U.S. 554, 570 (1983); *California v. Texas*, 457 U.S. 164, 168 (1982) (*per curiam*); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981); *Arizona v. New Mexico*, 425

U.S. 794, 796 (1976) (*per curiam*); *see also Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court should overrule these cases treating original jurisdiction as discretionary in the context of interstate disputes. Those cases are "grievously or egregiously wrong." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part). While *stare decisis* might justify retaining the discretionary approach in some types of original actions—for example, in actions between a State and an out-of-state citizen—it does not justify retaining this rule in its application to interstate disputes.

A. The decisions treating original jurisdiction as discretionary are products of an era in which "courts paid less attention to … text as the definitive expression of Congress's will" and the Constitution's meaning. *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020) (op. of Kavanaugh, J.). That is not meant to be an insult; it is what the Court said it was doing in deeming its original jurisdiction discretionary. In explaining its discretionary approach, the Court acknowledged that "it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so." *Wyandotte*, 401 U.S. at 497. Based on a series of "policy considerations," however, the Court has "transform[ed] its mandatory, original jurisdiction into discretionary jurisdiction." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint).

The "prudential" concerns that gave rise to this approach, *California*, 457 U.S. at 168, are explained best in *Wyandotte*—a case between Ohio and out-of-state citizens. *Wyandotte* deemed it "evident … that changes in the American legal system and the devel-

opment of American society have rendered untenable, as a practical matter, the view that this Court must" do what Article III requires. 401 U.S. at 497. According to the Court, it would be impractical to hear all suits brought by a State against out-of-state citizens given "the frequency with which States and nonresidents clash over the application of state laws." *Id*. Hearing every one of those cases would also be both unproductive and unnecessary, because federal courts have no "special competence" over such disputes and because the States can sue in some other forum. *Id*. at 497–98. What is more, focusing on those matters "would unavoidably" distract the Court from "matters of federal law and national import." *Id*. at 498. The Court thus determined that it may decline jurisdiction in any original matter between a State and an out-of-state citizen if: "(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant"; and "(2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities." *Id*. at 499.

Wyandotte's reasoning "is inapplicable to cases" between two States. *West Virginia*, 454 U.S. at 1027 (Stevens, J., dissenting). Unlike cases brought by a State against out-of-state citizens, interstate disputes do not arise with great frequency. "As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the court has been sought in controversies between two or more States." *Louisiana*, 176 U.S. at 18 (internal quotation marks omitted). And regardless of how many

interstate disputes arise, no other court is even *allowed* to hear them. *See* 28 U.S.C. §1251(a). Thus, there is no other forum in which the aggrieved State may seek relief. In contrast, States can always sue out-of-state citizens in some forum other than this one. *See* 28 U.S.C. §1251(b). Finally, because resolving interstate disputes is "essential to the peace of the Union," *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1495 (2019) (quotation omitted), all controversies between States are the very sort of cases—those involving issues of "national import"—for which *Wyandotte* claimed the Court needed to preserve its resources, 401 U.S. at 498. At the very least, there is no indication that the Court would be meaningfully distracted from issues of "national import" by allowing all suits between States to proceed. The Court can, and almost always does, appoint special masters to assist in these cases. *See, e.g.*, *Florida v. Georgia*, 138 S. Ct. 2502, 2508 (2018); *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018); *see also* Kristin A. Linsley, *Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between States*, 18 J. App. Prac. & Process 21, 51–52 (2017). And the Court today decides far fewer cases than it did in the 1970s, when the Court decided *Wyandotte*. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 Wash & Lee L. Rev. 737, 737–38 (2001). Thus, there are fewer cases from which an increase in the number of original actions might distract.

Notwithstanding the inapplicability of *Wyandotte*'s reasoning to interstate disputes, this Court has declared that Article III and §1251(a) give it "substantial discretion to make case-by-case judgments as to the practical necessity of an original fo-

rum in this Court for particular disputes within [its] constitutional original jurisdiction." *Texas*, 462 U.S. at 570. True, the Court has described its original jurisdiction as "delicate and grave," *Louisiana*, 176 U.S. at 15, and it has often repeated the notion that its "original jurisdiction should be invoked sparingly," *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972) (quoting *Utah v. United States*, 394 U.S. 89, 95 (1969)). But the Court has never explained why that is true. It certainly has not provided a textual hook. In one case, the Court said that it "construe[d] 28 U.S.C. §1251" *and* "Art. III, §2, cl.2, to honor [its] original jurisdiction but to make it obligatory only in appropriate cases." *Illinois*, 406 U.S. at 93. That reasoning reflects "not a construction" of the relevant text, "but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). There is simply no way to "construe" either the statute or the Constitution to bear that meaning. The discretionary approach to original jurisdiction is, for better or worse, a judge-made rule with no basis in the text.

B. It may be that *stare decisis* counsels against an outright abandonment of the rule that original jurisdiction is discretionary. But the same cannot be said for the rule's application to controversies between States. Indeed, the factors that generally inform the *stare decisis* analysis militate in favor of changing course.

First, *stare decisis* traditionally has less force in the constitutional context. That makes sense. When the Court interprets the Constitution, its reading "can be altered only by constitutional amendment or by overruling" earlier decisions. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Here, the question wheth-

er the Court has discretion to deny review in cases between States arises under the Constitution. Thus, at least with respect to the mandatory nature of Article III, *stare decisis* has only a weak pull.

Second, an "important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018). As explained above, the cases holding that the Court has discretion not to decide cases over which it has original jurisdiction are poorly reasoned; each and every such decision rests on policy considerations, not legal principles. *See, e.g.*, *Texas*, 462 U.S. at 570; *California*, 457 U.S. at 168; *Maryland*, 451 U.S. at 739; *Arizona*, 425 U.S. at 796–97; *Illinois*, 406 U.S. at 93–94; *Wyandotte*, 401 U.S. at 497–99. This policy-driven approach embodies a kind of analysis the Court has abandoned in other areas. *Compare, e.g., J. I. Case Co. v. Borak,* 377 U.S. 426, 433 (1964) *and Allen v. Wright,* 468 U.S. 737, 751 (1984), *with*, *respectively, Alexander v. Sandoval,* 532 U.S. 275, 287 (2001) *and Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 128 (2014). The reasoning is especially weak with respect to the question whether jurisdiction is mandatory in State-versus-State disputes. In that context, none of the policy justifications for treating original jurisdiction as discretionary even apply. *See above* 12–14; *see also West Virginia*, 454 U.S. at 1027 (Stevens, J., dissenting). In sum, the discretionary approach is not just wrong, but "grievously or egregiously wrong," weakening the force of *stare decisis*. *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part); *accord Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring).

Third, and most important of all, the policy-based rule prevents the States—the coequal sovereigns that united to form this country—from getting the full benefit of their constitutional bargain. *See Hyatt*, 139 S. Ct. at 1497–99. When precedent prevents "the States from exercising their lawful sovereign powers in our federal system, the court should be vigilant in correcting the error." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018). For all the reasons outlined above, this Court's cases claiming "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas*, 462 U.S. at 570, deny the States the adjudicatory forum they won when they ratified the Constitution or later joined the Union. The denial of that forum is serious because, by law, *see* §1251(a), there is no other court that can adjudicate interstate suits. Given the "want of another suitable forum," *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939), the Court's "discretionary approach" is especially injurious to the States, *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint).

Fourth, this is not a case where overruling settled precedent will unfairly prejudice those who have "acted in reliance on a previous decision." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Indeed, given the inherently unpredictable nature of the discretionary approach, it is hard to see how any State could have acted in reliance upon it.

Finally, and relatedly, the discretionary approach is "unworkable." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). True, the doctrine is "workable" in the sense that it gives the Court complete discretion to do what it likes, making the doctrine impossible to

misapply. But it is unworkable in the sense that it provides neither the States nor the Court with any meaningful guidance. And when States are denied a forum in this Court, they have nowhere else to turn. *See Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint); *West Virginia*, 454 U.S. at 1027 (Stevens, J., dissenting).

* * *

In sum, when one State files a bill of complaint against another State, this Court has mandatory jurisdiction over that suit. Although this Court has held otherwise, *stare decisis* does not justify retaining that rule. The Court should thus hold that it lacks power to deny leave to file a bill of complaint in an interstate dispute. On that basis, it should grant New Hampshire's motion.

CONCLUSION

This Court should grant the motion for leave to file a bill of complaint.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
KYSER BLAKELY
Deputy Solicitor General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

Counsel for Amicus Curiae
the State of Ohio

Additional counsel listed on the following page.

DECEMBER 2020

Additional Counsel

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DANIEL CAMERON
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

ERIC SCHMITT
Attorney General
State of Missouri

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

MIKE HUNTER
Attorney General
State of Oklahoma

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah