No. 22O157

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA; MICHAEL S. REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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REPLY

This case is no ordinary challenge to an agency action. As Defendants recognize, the State of Alaska has brought many suits against the United States and federal officers in lower federal courts. And the State will continue to do so when it is subject to federal overreach.

But the State has brought *this case* directly in this Court because it uniquely satisfies all the requirements for this Court's original jurisdiction. Unlike the vast majority of state plaintiffs that challenge agency actions, Alaska has no adequate forum to resolve this dispute. The State must proceed through piecemeal litigation while running the substantial risk that its claims will be time-barred. And while its two cases slowly wend their way through the lower courts, the State will lose billions of dollars in revenue, thousands of new jobs won't be created, the nation's dependency on foreign copper will continue to grow, and our transition to renewable energy will be further delayed.

To the extent the merits matter at this stage, the State's claims are serious. Defendants all but concede that the State's takings claims have merit, making only a sovereign-immunity argument that is foreclosed by this Court's precedent. And the State's contract and statutory claims are consistent with both the text and purpose of the Statehood Act and the Cook Inlet Land Exchange.

The Court is no stranger to original actions between Alaska and the United States. It should grant the State's motion and hear the case.

I. The State has no adequate and alternative forum to resolve its claims.

Defendants urge this Court to deny the State's motion because "alternative forums are available for all of its claims." BIO.15. But the Court doesn't assess only whether another forum is available. It asks whether there is "another *adequate* forum in which to settle [the] claim[s]." *United States v. Nevada*, 412 U.S. 534, 535-38 (1973) (emphasis added); *see, e.g.*, *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972) (same). When the available forum is "imperfect," this factor strongly supports the Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 743 n.19 (1981).

Georgia v. Pa. R.R. Co., 324 U.S. 439 (1945), is directly on point. There, defendants (who were citizens of multiple states) urged the Court to deny original jurisdiction because Georgia could file multiple lawsuits in different states. *Id.* at 465-66. But the Court refused to "depriv[e] Georgia of the original jurisdiction of this Court merely because each of the defendants could be found in some judicial district." *Id.* at 466. "Unless it were clear that all of them could be found in some convenient forum," the Court "could not say that Georgia had a 'proper and adequate remedy' apart from the original jurisdiction of this Court." *Id.* Thus, when "a state makes out a case which comes within [the Court's] original juris-

diction," it need not "go further and show that no other forum is available to it." *Id.*

Here, too, the State's options are far from "adequate." All parties agree that the State has no single forum to resolve its claims. Its request for injunctive relief to set aside agency action would go to district court, and its breach of contract and takings claims would go to the Court of Federal Claims. Br.31-33. Not only does this require piecemeal litigation, but it puts the State in a precarious position. Because "the CFC lacks jurisdiction over an action 'for or in respect to' a claim that is also the subject of an action pending in another court,'" the State cannot file its action in the CFC for monetary damages while its action in the district court is pending. *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 309-10, 318 (2011) (quoting 28 U.S.C. §1500). The State thus "face[s] a choice between equally unattractive options: forgo injunctive relief in the district court to preserve [its] claim for monetary relief in the CFC, or pursue injunctive relief and hope that the statute of limitations on [its contract and] takings claim[s] does not expire before the district court action is resolved." *Id.* at 323-24 (Sotomayor, J., concurring in the judgment) (citation omitted).

Defendants argue that the State's inadequate options are by "congressional design." BIO.16. But when it comes to the States, Congress and the Founders have already spoken. This Court has original jurisdiction "[i]n all Cases … in which a State shall be Party." U.S. Const., art. III, §2, cl.2.; *see* 28 U.S.C. §1251 (same). Absent an explicit command, the

Court presumes that Congress does not intend for its procedural schemes to withdraw or limit this Court's original jurisdiction. *See California v. Arizona*, 440 U.S. 59, 65-68 (1979). At any rate, an original action *furthers* Congressional purpose by placing the entire litigation in one forum, which will "save the Government from burdens of redundant litigation." *Tohono O'Odham Nation*, 563 U.S. at 315.

Defendants downplay the significant risk that Alaska's contract and takings claims will be time-barred if this Court declines original jurisdiction. BIO.16-17. Challenges to agency actions can be stuck in courts for years and even decades. Pet.33. Indeed, agency proceedings and litigation over the Pebble deposit have already been ongoing for *more than a decade*. Br.13-17.

But significant delay from piecemeal litigation risks more than triggering a statute of limitations. As the State's amici explain, "this case is too urgent to wait while it wends through the lower courts and inevitably returns to this Court as a certiorari petition." NMA-Br.12. Copper is the "lifeblood of electricity," essential not only for our present-day economy but also the future of electric vehicles, charging stations, renewable energy, and transmission lines. N-Dyn-Br.4-10; NMA-Br.4-5, 10-15. Copper demand in the United States is exploding, and this demand cannot be met without new mines. N-Dyn-Br.3, 10-13, 21.

Indeed, "there *already is* 'a global copper shortage.'" NMA-Br.14-15. "Analysts, industry lead-

ers, and international organizations now routinely warn of a massive copper shortfall," with "both parties" deeming it a "threat to our national security" given China's influence over the copper market. *Id.* at 5, 9-10; N-Dyn-Br.3, 12. "To put it bluntly, . . . [a] few more years' delay in the lower courts will reverberate throughout the national and global energy markets and jeopardize our Nation's ability to meet critical renewable energy targets." NMA-Br.6, 15-16; *see* N-Dyn-Br.23-24. The Court's review is urgently needed.

II. The State's claims are appropriate for this Court's original jurisdiction.

Defendants' assertion that the case doesn't implicate Alaska's "sovereign interests" is downright wrong. The federal government has stripped the State of its ability to manage its land, water, and natural resources—all "matter[s] of great state concern." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). The federal government has deprived the State of billions of dollars—tax revenue that Congress long ago determined was critical to funding the Alaska state and local governments. Br.4-6, 12-13. And the federal government has prevented the creation of thousands of new, high-paying jobs for Alaskans. Br.13; AIDEA-Br. 18-22. These sovereign interests plainly warrant this Court's original jurisdiction.

Granting the State's motion will not "open the floodgates to routine disputes" in the future. BIO.21. Alaska is "the exception, not the rule." *Sturgeon v. Frost*, 577 U.S. 424, 440 (2016). Indeed, this case has several features that distinguish it from typical state

challenges to agency action. The State lacks an adequate forum to litigate its claims, as explained above. And the subject matter involves "sovereignty and property," two issues repeatedly addressed by this Court's original jurisdiction. Shapiro, *Supreme Court Practice* §10.2; *see, e.g.*, *California*, 440 U.S. at 68 n.8 (many original actions have "involved complicated questions of title to land"). That Alaska has pursued (and will pursue) other challenges to federal overreach in the lower courts is simply more proof of the unique nature of this case.

III. The State's Bill of Complaint raises serious claims warranting this Court's original jurisdiction.

At this early stage of the case, the Court concerns itself with the adequacy of the alternative forums and the nature of the State's interests. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Defendants are free to file a motion to dismiss after the State's motion is granted, as Defendants have requested. *See, e.g.*, *Montana v. Wyoming*, 552 U.S. 1175 (2008) (granting Montana leave to file a complaint; allowing Wyoming to move to dismiss; and subsequently denying Wyoming's motion). Yet even if the Court peeks at the merits, the State has brought substantial claims for relief meriting this Court's original jurisdiction.[1]

[1] This Court's original jurisdiction is not discretionary just because this suit falls within the Court's "non-exclusive" original jurisdiction. BIO.14 n.2; *see* Br.34-36. When "[j]urisdiction exist[s]," this Court's "'obligation' to hear and decide a case is

1. The most obvious claims warranting this Court's attention are the State's takings claims. Defendants never dispute that the State has raised serious claims for an unconstitutional taking. For good reason. Defendants destroyed all economic value of the Pebble deposit and the hundreds of square miles of surrounding lands, nullified the State's reasonable investment-backed expectations, and forced the State to bear burdens that the whole country should share. Br.30-31. The State must receive just compensation for the loss of its property.

Defendants' only response is that the United States has waived sovereign immunity for takings and contract claims only in the CFC and not in this Court. But the Court rejected a nearly identical argument in *California v. Arizona*. There, California filed an original action to quiet title to submerged lands claimed by the United States. 440 U.S. at 60-61. The United States argued that Congress "withdr[e]w the [Court's] original jurisdiction" over the case because Congress had waived sovereign immunity for quiet title actions only in the "district court." *Id.* at 63-65; *see* 28 U.S.C. §1346(f) ("The district courts shall have exclusive original jurisdiction … to quiet title ….").

'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013). "Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction." *Nebraska v. Colorado*, 136 S.Ct. 1034, 1034 (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint).

But the Court disagreed. If the United States' "contention were accepted," the Court recognized, "a grave constitutional question would immediately arise" as to "whether Congress can deprive this Court of original jurisdiction conferred upon it by the Constitution." *Id.* at 65. It was "extremely doubtful" that Congress has "the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution." *Id.* at 66. Because Congress "show[ed] no intention to divest this Court of jurisdiction over quiet-title actions against the United States in cases otherwise within [the Court's] original jurisdiction," the Court found "no bar to this original suit in the Supreme Court." *Id*. at 65-68.

The waiver statute at issue here is no different. The Tucker Act "effects a waiver of [the United States'] sovereign immunity," *United States v. Mitchell*, 463 U.S. 206, 215 (1983), for "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," 28 U.S.C. §1491. This provision is "'the widest and most unequivocal waiver of federal immunity from suit.'" *Mitchell*, 463 U.S. at 215. That the Tucker Act, like the Quiet-Title Act, waives immunity for a specific court (the CFC) is of no moment. *See* 28 U.S.C. §1491. Because nothing in the Tucker Act shows any "intention to divest this Court of jurisdiction over [takings and contract] actions against the United States in cases otherwise within [the Court's] original jurisdiction," there is "no bar to this original suit." *California*, 440 U.S. at 65-68; *see Quality Tooling, Inc. v. United States*, 47 F.3d 1569,

1575 (Fed. Cir. 1995) ("The Tucker Act waives the government's immunity from suit on its contracts in any court to which Congress grants jurisdiction to hear the claim. No further waiver, no 'ritualistic formula,' is necessary." (quoting *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939))).

2. Defendants dispute the merits of the State's contract and statutory claims, but their arguments fare no better. First, Defendants don't deny that the Statehood Act and the Land Exchange are contracts that impose binding obligations on Defendants. BIO.22 n.6. Defendants also recognize that the Statehood Act and the Land Exchange are enforceable statutes. *See* BIO.21-22. The key question, then, concerns the meaning of Section 6(i) of the Statehood Act: when the parties agreed that the land Alaska received "shall include mineral deposits" that "shall be subject to lease by the State as the State legislature may direct," did their agreements allow the EPA to impose new requirements decades later that shut down any mineral leasing from occurring on these lands?

The answer is "no." Plainly read, Section 6(i) grants the State authority to lease the mineral deposits on the granted lands: Alaska can lease the minerals "as the State legislature may direct." This Court presumes that "the legislature says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

Defendants insist that Section 6(i) cannot be read to "displace other federal law" because it "does

not address the regulation of mining itself or the protection of affected waters." BIO.23-24. But this silence isn't surprising. When Congress passed the Statehood Act in 1959, no federal law existed that could shut down the State's ability to lease minerals on state-owned lands. Indeed, until the Clean Water Act of 1972, "[t]he States [led] the national effort to prevent, control and abate water pollution," and "the Federal role [was] limited to support of, and assistance to, the States." S. Rep. 92-414 at 3669 (Oct. 28, 1971). There thus was no need for the parties to address the issue.

ASARCO v. Kadish, 490 U.S. 605 (1989), supports the State's interpretation, not the Defendants'. There, the Court held that Arizona's right to lease mineral deposits "as the State legislature may direct" in the Jones Act could not override the "specific requirements imposed by [an earlier] federal statute" that were incorporated into the Jones Act. *Id.* at 625, 628-33. This incorporated "language of the original grants of these lands to Arizona" was "the decisive basis" for the Court's decision. *Id.* at 628-33. Not so here. Defendants seek to impose *new* restrictions that were adopted decades *after* the Statehood Act. As *ASARCO* makes clear, Congress cannot "grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous." *Id.* at 632.

Unlike the statutes in *ASARCO* and *Case v. Bowles*, 327 U.S. 92 (1946), moreover, the purpose and

legislative history of the Statehood Act and Land Exchange confirm the State's reading. Congress gave these mineral-rich lands to Alaska because that was the only way to ensure the survival of the isolated and sparsely populated state. Br.4-6; AIDEA-Br.11-14. Likewise, in the Land Exchange, the State insisted on receiving these mineral-rich lands in exchange for surrendering its claims to other valuable lands. Br.6-9. This "historical context" is critical to understanding these agreements. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 509 (2010). The State would never have agreed to terms that allowed the United States to destroy the benefit of the bargain so easily. *See* AIDEA-Br.16.

The "scope" of the State's arguments isn't far-reaching; it is limited by the text of the Statehood Act and the Land Exchange. BIO.26-27. In those agreements, Defendants promised that the lands at issue would be "subject to lease by the State as the State legislature may direct." Statehood Act §6(i). Most federal laws, regulations, and agency actions don't impinge this promise. BIO.26-27. But this case involves a clear breach. Defendants admit that their veto prevents *any* mining from *ever* occurring on the Pebble deposit. Indeed, that was their intention. Br.17. Defendants' actions simply cannot be "harmonized," BIO.24, with the United States' prior commitments, *see* Br.27.

The "unmistakability" doctrine likewise has no application here. The State doesn't ask the Court "to infer from silence [a] limit on sovereign power." *United States v. Winstar Corp.*, 518 U.S. 839, 881 (1996)

(plurality). The State instead seeks "the benefit of promises by the Government to insure [the State] against any losses arising from future regulatory change." *Id.* A requirement "to pay money supposes no surrender of sovereign power by a sovereign with the power to contract." *Id.* Yet even if the doctrine applied, the promise to let Alaska lease its mineral deposits "is unmistakably clear," and there is no need for "a *further* promise not to go back on the promise." *Id.* at 921 (Scalia, J., concurring in the judgment).

Last, Defendants don't deny that the contracts are subject to an implied covenant of good faith and fair dealing. BIO.27. Nor do they dispute that the State's lands are no longer "subject to lease by the State as the State legislature may direct" because of their actions. Statehood Act §6(i). Defendants instead insist that they didn't destroy *all* of the State's intended benefits, since the State received other lands through the Statehood Act outside the Pebble deposit. BIO.28. But that isn't how the covenant of good faith and fair dealing works. The government breaches its good-faith obligations when it "depriv[es] its contracting partners of a *substantial measure* of the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1305 (Fed. Cir. 2005) (emphasis added). Because Defendants have deprived the State of billions of dollars in expected benefits, Br.30, the State is entitled to relief.

CONCLUSION

For these reasons, the Court should grant the motion for leave to file a bill of complaint.

Respectfully submitted,

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