No. 157, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,
Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

On Motion for Leave To File Bill of Complaint

BRIEF OF UNITED TRIBES OF BRISTOL BAY AND BRISTOL BAY NATIVE CORPORATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus United Tribes of Bristol Bay ("UTBB") is a consortium of 15 federally recognized Tribes that have resided in the Bristol Bay region of Southwest Alaska since time immemorial. Because their livelihood, subsistence, traditions, and culture depend on an ecologically healthy Bristol Bay, UTBB has been leading environmental work in the region for decades.

Amicus Bristol Bay Native Corporation ("BBNC") is an Alaska Native Regional Corporation created by Congress to advance the financial, cultural, and subsistence interests of its ~12,000 shareholders. *See* Alaska Native Claims Settlement Act, 43 U.S.C. § 1606. BBNC's businesses in seafood, construction, tourism, government services, and other industries generate more than $2 billion in revenue annually. BBNC owns three million acres of subsurface land in Bristol Bay and more than 115,000 acres of surface lands, which it manages pursuant to land and resource policies that recognize the value of the region's fisheries and subsistence, reflecting the importance of Bristol Bay's lands to the health of the salmon and people of Bristol Bay.

UTBB and BBNC oppose development of the proposed Pebble Mine. They sought and support the Environmental Protection Agency's ("EPA") final determination protecting Bristol Bay. The mine would risk destroying Earth's most productive subsistence,

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[1] Counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date.

commercial, and recreational salmon fisheries upon which Bristol Bay's Alaska Native communities (including *amici*'s members and shareholders) rely for sustenance, cultural and religious practices, and economic opportunities. Bristol Bay's commercial fishing industry alone produces more than $2.2 billion a year in revenue and supports more than 15,000 jobs, including many held by BBNC shareholders and UTBB members. EPA's restrictions on mining the Pebble deposit are necessary to protect Bristol Bay's fisheries and Native communities.

Alaska, the Pebble Limited Partnership ("PLP") – an entity that owns mineral rights in the region but never has developed a mine – and *amici* have spent a decade engaging with EPA and years litigating in district court and the Ninth Circuit, resulting in EPA's action to protect Bristol Bay from mining. In response, Alaska, supported by PLP, devised the novel strategy of filing an "original action" in this Court instead of bringing its objections in the normal federal court forums where they belong. But the only thing "original" about this case is the breathtaking expansion of this Court's original jurisdiction Alaska seeks. The Court should deny Alaska's motion and reject any effort to avoid normal Administrative Procedure Act ("APA") processes for judicial review of EPA's determination.

SUMMARY OF ARGUMENT

I. This Court's original jurisdiction over suits by States against the United States is not exclusive. For more than a century, States have brought cases against the United States in the forums Congress designated when it waived the United States' immunity from suit. This Court long has deferred to Congress's forum designations, requiring States to litigate their

cases against the United States in those forums, rather than directly in this Court.

Alaska is no exception; it previously has sued the United States and its agencies in the courts Congress specified. Congress made federal district court the initial arbiter of Alaska's federal APA challenges and vested the Court of Federal Claims with jurisdiction over Alaska's takings and breach-of-contract claims. Alaska has pursued similar claims in those courts, with appellate review in this Court.

The usual justifications for this Court's exercise of original jurisdiction are absent here. The forums Congress designated have jurisdiction to adjudicate Alaska's claims and can afford full relief. This case is unlike prior original actions between States and the United States because it is not a title dispute; it is a challenge to a federal agency's exercise of regulatory power. Hearing this case now would disrupt the orderly course of litigation in the forums Congress designated to decide Alaska's claims.

II. Alaska's reasons for expanding the Court's exercise of original jurisdiction are unpersuasive. Alaska objects to litigating in two separate forums, but that does not make either forum inadequate. Alaska can avoid the potential statute-of-limitations problem it posits by filing first in the Court of Federal Claims.

The cases on which Alaska relies to expand the Court's original jurisdiction confirm that its position has no limiting principle. Cases *between* States – in which original jurisdiction is "exclusive," 28 U.S.C. § 1251(a) – do not support Alaska's argument that original jurisdiction in suits by States against the United States is compulsory. This Court has held the opposite for more than a century. Further, Alaska's

citations to original actions between States and the United States, all of which involved title and boundary disputes, demonstrate that Alaska's challenge to EPA action would be the anomaly.

Nor is Alaska's claim to "exceptionalism" persuasive. Alaska seeks an exception to the normal rules on the ground that Alaska's statehood act gives it "unique" property interests and regulatory powers. But Congress used the same language for mineral land grants in more than a dozen other States. The Court should see Alaska's motion for what it is: an attempt to transform an ordinary challenge to federal agency action into an extraordinary effort to use state property free from federal regulation.

III. If the Court grants Alaska leave to file its complaint, the Court should resolve the substantial legal challenges to Alaska's claims on a motion to dismiss. Doing so would be consistent with this Court's practice of resolving such questions at the earliest juncture to avoid wasting judicial resources.

ARGUMENT

I. THE COURT SHOULD RESPECT CONGRESS'S FORUM DESIGNATIONS AND DECLINE TO EXPAND DISCRETIONARY ORIGINAL JURISDICTION OVER CASES AGAINST THE UNITED STATES

A. Congress Provided Forums For Cases By States Against The United States

The Court has interpreted its original jurisdiction "[i]n all Cases . . . in which a State shall be Party," U.S. Const. art. III, § 2, cl. 2, to give it concurrent, but not exclusive, jurisdiction in cases between States and the United States. Long ago, the Court held that Congress may designate other tribunals to hear such suits. In *United States v. Louisiana*, 123 U.S. 32, 36

(1887), the Court reiterated "the conclusion reached [in *Ames v. Kansas*, 111 U.S. 449 (1884)] that the original jurisdiction of the supreme court, in cases where a state is a party, is not made exclusive by the constitution, and that it is competent for congress to authorize suits by a state to be brought in the inferior courts of the United States." *See also North Dakota ex rel. Lemke v. Chicago & N.W. Ry. Co.*, 257 U.S. 485, 491 (1922) ("There is no doubt that a state can sue in the District Court when the United States is a party and has consented to be sued there and has not expressed its consent to be sued elsewhere.").

States routinely sue the United States and its agencies in the forums Congress specified. *See*, *e.g.*, *California ex rel. Becerra v. U.S. Dep't of Interior*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (challenge to repeal of regulations governing mineral royalties for federal land leases); *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981) (challenge to United States' authority to restrict vehicles on wilderness lands); *Mississippi Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269 (5th Cir. 1980) (challenge to EPA's authority to promulgate water standard). States also have brought challenges under their statehood acts in congressionally designated forums. *See*, *e.g.*, *Andrus v. Utah*, 446 U.S. 500 (1980) (challenge to Interior's refusal to permit Utah to select oil shale lands under its statehood act initially filed in district court).

Like other States, Alaska has sued federal agencies in district court, including intervening in PLP's suit challenging EPA's initiation of Clean Water Act of 1977 ("CWA") proceedings to restrict mining in Bristol Bay. *See Pebble L.P. v. EPA*, No. 3:14-cv-00097-HRH, ECF #48 (D. Alaska July 1, 2014) ("Alaska *PLP* Interv. Compl.") (alleging violation of Alaska's statehood act and follow-on legislation); *see also*, *e.g.*, *Alaska v.*

Newland, No. 3:23-cv-00007-SLG, ECF #1 (D. Alaska Jan. 17, 2023) (challenging federal agency decision to make land located in Alaska a tribal reservation); *Alaska v. National Marine Fisheries Serv.*, No. 3:22-cv-00249-JMK, ECF #1 (D. Alaska Nov. 16, 2022) (challenging federal agency action under Endangered Species Act of 1973); *Alaska Dep't of Fish & Game v. Federal Subsistence Bd.*, No. 3:20-cv-00195-SLG, ECF #1 (D. Alaska Aug. 10, 2020) (challenging federal agency's regulation of hunting and fishing); *Watt v. Alaska*, 451 U.S. 259 (1981) (suit against Interior over lease revenues on wildlife refuges); *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) (challenging federal agency wildlife management), *adhered to sub nom. John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam); *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979) (same).

B. This Court Defers To Congress's Forum Designations

States cannot sue the United States, in this Court or otherwise, unless Congress has so authorized. *See Kansas v. United States*, 204 U.S. 331, 343 (1907) (dismissing Kansas's complaint because "United States ha[d] not consented to be sued"). By contrast, the United States can freely sue States, and States can sue one another, because States waived immunity by virtue of the constitutional compact. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (collecting cases).

Because the United States can be sued only if Congress waives federal sovereign immunity, this Court defers to Congress's forum choices. In *Minnesota v. United States*, 305 U.S. 382 (1939), the Court held that it lacked jurisdiction over a condemnation proceeding against the United States that Minnesota

had brought in state court, because Congress had waived federal sovereign immunity and directed that suit be brought in federal district court. *Id.* at 389-90. The Court explained: "it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought." *Id.* at 388.

In respecting Congress's forum choices for suits against the United States, the Court observed that the "right of the State is sufficiently protected by its right to appeal [to the Supreme Court]." *North Dakota*, 257 U.S. at 491. There, the Court held North Dakota's suit to enjoin private parties from following a federal agency order could not proceed as an original action because Congress required the United States to be a party and for such suits "to be brought" in federal district court. *Id.* at 489-91. The Court reasoned: "it seems to us pretty clear that the State should be remitted to the remedy offered by the statutes – a suit in the District Court in which the United States is made a party," given the guardrail provided by the State's "right to appeal" to this Court. *Id.* at 490-91.[2]

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[2] In contrast, in 1978, Congress made original jurisdiction in cases *between* States in which the United States is not a party "exclusive," not discretionary. *See* 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."); *Maryland v. Louisiana*, 451 U.S. 725, 735 (1981). Such "State v. State" cases do not present the issues of "public policy" implicated by congressional waivers of federal sovereign immunity. *See North Dakota*, 257 U.S. at 490. Notwithstanding its "exclusive" jurisdiction, this Court has exercised discretion to decline jurisdiction over some "actions between two States." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

C. Congress Designated Adequate Forums To Adjudicate Alaska's Claims

The Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (citing *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971)); *accord Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976) (per curiam). This "particular reluctance" "applies squarely to 'controversies between the United States and a State,' of which [the Court] ha[s] 'original *but not exclusive* jurisdiction.'" *Nebraska v. Wyoming*, 515 U.S. 1, 26 (1995) (Thomas, J., concurring in part and dissenting in part) (quoting 28 U.S.C. § 1251(b)(2)) (emphasis by Justice Thomas). Congress designated adequate forums for Alaska's claims when it waived federal sovereign immunity.

1. Congress made federal district court the initial arbiter of Alaska's claim challenging EPA's § 404(c) final determination. The APA waives federal sovereign immunity for claims, like Alaska's, that challenge such agency actions and seek relief "'*other than money damages*.'" *Lane v. Pena*, 518 U.S. 187, 196 (1996) (quoting 5 U.S.C. § 702). Congress generally designated federal district courts to hear APA claims. *See* 5 U.S.C. § 704 (authorizing "judicial review" of "final agency action"); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see also Califano v. Sanders*, 430 U.S. 99, 105-07 (1977). In the CWA, Congress directed APA challenges to EPA final action to be brought in federal district court, aside from enumerated challenges not at issue here, which must be brought in a federal court of appeals. *See* 33 U.S.C. § 1369(b)(1); *National Ass'n of Mfrs. v. Department of Def.*, 583 U.S.

109, 117-18, 121, 129 (2018) ("*NAM*"); *see also*, *e.g.*, *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 609 (D.C. Cir. 2013) (reviewing challenge to EPA § 404(c) determination filed in district court).

As Alaska recognizes (at 32), district court is thus the proper forum for challenging EPA's § 404(c) determination. *See* Compl. ¶¶ 180-187. States routinely bring challenges to EPA actions in the forums Congress specified, with appeals to this Court under its appellate jurisdiction. *See*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014). Indeed, Alaska previously challenged, in district court, EPA's authority to undertake a CWA § 404(c) action for the proposed Pebble Mine. *See* Alaska *PLP* Interv. Compl., *supra*; *accord Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (Alaska intervened in APA challenge to § 404(a) permit).

Alaska cites *no instance* in which the Court exercised original jurisdiction of an APA case brought by a State against the United States. The Court should not allow Alaska's case to be the first; doing so would set a dangerous precedent for States to challenge myriad agency actions backed by voluminous findings directly in this Court, contravening decades of contrary practice.[3]

2. Alaska's takings and breach-of-contract claims belong in the Court of Federal Claims ("CFC"), which the Tucker Act designated as the proper forum. *See*

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[3] This Court declined to exercise jurisdiction over a State's suit challenging federal agency action and alleging a taking. *See Mississippi v. United States*, 499 U.S. 916 (1991). The United States opposed Mississippi's motion for leave on the ground that its claims (if cognizable) were more appropriately heard in federal district court. *See* U.S. Opp., No. 117, Orig. (U.S. Feb. 1991).

28 U.S.C. § 1491(a)(1). Congress waived the United States' sovereign immunity for claims over $10,000 alleging that the government breached a contract or took property without just compensation. *See id.*; *United States v. Mitchell*, 463 U.S. 206, 211-12 & n.10 (1983). The CFC has "exclusive jurisdiction" over such claims, *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality), "'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute,'" *Horne v. Department of Agric.*, 569 U.S. 513, 527 (2013) (quoting *Eastern Enters.*, 524 U.S. at 520 (plurality)).

Because the CWA did not withdraw this grant of jurisdiction, the Tucker Act "is available to provide compensation for takings that may result from [a federal agency's] exercise of jurisdiction over wetlands." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985). The "proper forum for resolving such a dispute" therefore is "a suit for compensation in the Claims Court." *Id.* at 129 n.6; *see United Affiliates Corp. v. United States*, No. 1:17-cv-00067-TCW, ECF #1 (Ct. Cl. Jan. 13, 2017) ("*UAC* Compl.") (alleging taking by Army Corps under CWA § 404).

Alaska concedes (at 32) that the Tucker Act governs its contract and takings claims, making the CFC the proper forum.[4] These claims seek monetary compensation for EPA's decision to "effectively prevent[] any mining from ever occurring on the Pebble deposit and the surrounding area," which Alaska alleges violates its statehood act and follow-on legislation. *See id.*; Compl. ¶¶ 173-192.

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[4] Alaska's statehood act incorporated then-existing federal law, including the Tucker Act. *See* Pub. L. No. 85-508, § 8(d), 72 Stat. 339, 345 (1958).

This Court long has held the CFC competent to adjudicate such claims, including when a State is plaintiff. In 1887, the year Congress enacted the Tucker Act, the United States appealed a money-damages judgment of the claims court grounded on that court's interpretation of a statehood act. This Court rejected the government's contention that the claims court could not "hear and determine a cause in which the state is a party in a suit against the United States." *Louisiana*, 123 U.S. at 34-35. The Court reasoned that Congress, in a statutory grant of "swamp lands," "ma[de] no exception" for a state plaintiff when it "consented [for the United States] to be sued in the court of claims." *Id.* at 36-37. Alaska therefore can bring its takings and contract claims in the CFC.

Like other States, Alaska has brought money-damages claims against the United States in the CFC. *See*, *e.g.*, *Alaska v. United States*, 35 Fed. Cl. 685, 687 (1996) (breach-of-contract and takings claims), *aff'd*, 119 F.3d 16 (Fed. Cir. 1997); *Alaska v. United States*, 32 Fed. Cl. 689, 692-94 (1995) (takings claim). Other States have followed the same course. *See*, *e.g.*, *Estes v. United States*, 123 Fed. Cl. 74, 76 (2015) (state takings and breach-of-contract claims regarding U.S. savings bonds).

Alaska cites no instance of a State litigating a contract or takings claim seeking money damages against the United States directly in this Court. The dearth of such cases reflects the "basically equitable . . . nature" of "proceedings under this Court's original jurisdiction." *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973); *see also Kansas v. Nebraska*, 574 U.S. 445, 453-55 (2015) (Court's original jurisdiction has an "essentially equitable character"); *Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210, 256-57 (1840)

("proceedings" in original jurisdiction cases typically "regulated by the rules and usages of the Court of Chancery").[5]

D. Accepting Jurisdiction Would Expand Original Actions Against The United States

The paradigmatic original action between a State and the United States is a dispute over title or geographic boundaries. Alaska has litigated several such disputes under the Court's original jurisdiction.[6] Other States have, too.[7] But this case neither presents such a dispute nor implicates the policies that make such disputes appropriate for original jurisdiction.

Long ago, the Court cited two interrelated policies that support applying its tradition of "determin[ing] questions of boundary between two or more states" in original actions to "controversies of like character

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[5] In evaluating jurisdiction over claims *between* States, the Court considers two additional factors, neither of which applies here: first, "the belief that no State should be compelled to resort to the tribunals of other States for redress," *Wyandotte*, 401 U.S. at 500; and, second, the concern that "a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State," *id.*

[6] *See*, *e.g.*, *United States v. Alaska*, 503 U.S. 569 (1992) (dispute over ownership of submerged lands to be created during coastal extension project); *United States v. Alaska*, 521 U.S. 1 (1997) (title dispute over submerged lands); *United States v. Alaska*, 530 U.S. 1021 (2000) (dispute over title to submerged lands and U.S.-Alaska boundaries); *Alaska v. United States*, 545 U.S. 75 (2005) (title dispute over submerged lands).

[7] *See*, *e.g.*, *United States v. Wyoming*, 331 U.S. 440 (1947) (U.S. sued Wyoming and oil company over title to oil lands); *United States v. Louisiana*, 339 U.S. 699 (1950) (U.S. sued Louisiana over title to submerged lands).

between the United States and a state." *United States v. Texas*, 143 U.S. 621, 645-48 (1892). First, that the United States should not "be at the mercy" of a state court to resolve fundamental questions of sovereignty over property. *Id.* at 641. Second, that exercising original jurisdiction is necessary (given the absence of an alternative forum) to avoid "a trial of physical strength between the government of the Union and [a State]." *Id.* These parameters continue to govern the narrow set of original actions involving the United States. *Supra* nn.6-7.

Alaska's challenge to EPA's regulation of Alaska-owned lands is not a title or boundary dispute; it addresses the proper exercise of federal regulatory authority. The policies animating this Court's exercise of original jurisdiction over title disputes do not apply, because Congress specified non-state courts for Alaska's claims. This Court never has permitted a State to challenge federal agency action directly in this Court, instead consistently deferring to Congress's forum choices. That restraint should guide the Court here. *Supra* pp. 5, 6-7.

E. Exercising Original Jurisdiction Would Harm The Procedures Congress Prescribed

This Court would benefit from lower-court assessments of threshold legal questions, such as whether the CWA applies to Alaska and any proposed mining project.[8] The Court's primary function is "to perform

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[8] *Amici* National Mining Association et al. ("NMA") present no compelling reason why the lower courts cannot adjudge this question. They argue (at 18-19) that the Court should take original jurisdiction to avoid the case being decided by a particular appellate court (the Ninth Circuit), because *amici* disagree with that court's resolution of a *separate* CWA case involving Alaska. *See Akiak Native Cmty. v. EPA*, 625 F.3d 1162 (9th Cir. 2010).

as an appellate tribunal." *E.g.*, *Wyandotte*, 401 U.S. at 498; *see Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022) ("We are a court of review, not of first view.") (cleaned up). Permitting the proceedings Congress contemplated to run their course will aid the Court in performing that function.[9]

Alaska's participation in those proceedings is further reason to reject its gambit to scramble that process now. During extensive EPA proceedings, Alaska and PLP filed comments arguing that the proposed mine would not cause significant environmental harm to Bristol Bay's salmon habitat. *See*, *e.g.*, Alaska Comments at 23, EPA-R10-OW-2022-0418 (Sept. 6, 2022), bit.ly/3WnCMWn; PLP Comments at 4-9, EPA-R10-OW-2022-0418 (Sept. 6, 2022), bit.ly/3pOGI6c. EPA disagreed.

Unhappy with EPA's decision, Alaska now seeks to avoid the process Congress created for challenging it. Allowing Alaska to bypass the congressionally prescribed step of filing an APA action in district court would invite other States to do likewise, all to the detriment of sound process and this Court's scarce resources. States frequently participate in federal administrative proceedings, *supra* pp. 5-6, which would be upended

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Amici's disagreement with one appellate court decision hardly justifies this Court's appellate review, let alone the exercise of original jurisdiction.

[9] Proceedings before the Corps regarding PLP's request for a § 404 permit are ongoing. *See* Administrative Appeal Decision, U.S. Army Corps of Eng'rs, POA-2017-271 (Apr. 24, 2023), bit.ly/3pT7ryO. The Court has declined jurisdiction, even over cases *between* States, where, as here, "a number of official bodies are already actively involved in regulating the conduct" at issue. *Wyandotte*, 401 U.S. at 502 (declining jurisdiction where one court and two water-resources commissions were addressing the dispute).

(and potentially manipulated) if participants knew States could withdraw and file suit here.[10] *See North Dakota*, 257 U.S. at 490 (declining original jurisdiction because parallel proceedings would "subject[] [private party] to the risk of two irreconcilable commands – that of the [federal agency] enforced by a decree on the one side and that of this court on the other").

II. ALASKA CANNOT JUSTIFY EXPANDING THE SCOPE OF THIS COURT'S ORIGINAL JURISDICTION

A. Alaska Fails To Show It Lacks Adequate Forums

1. Alaska argues (at 32) that it lacks an adequate forum because no *single* court may hear its claims together. Alaska cites no instance of this Court accepting original jurisdiction based on a plaintiff's lack of a single forum capable of hearing all claims. Applying such a rule to suits against the United States would denigrate congressional statutes designating forums for particular types of claims. "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287

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[10] Acquiescing to Alaska's gambit would prejudice parties unable to intervene in a state-initiated original action or press their claims in the forums Congress designated while that action is pending. *See Nevada*, 412 U.S. at 538 (declining original jurisdiction over water dispute "where the individual users of water . . . who ordinarily would have no right to intervene in an original action in this Court would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court") (citation omitted); *see South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) (precluding municipality from intervening in original action).

(1983). Congress's conditions, including specifying forums to hear various claims, merit equal deference when applied to state and private plaintiffs. *Supra* pp. 6-7. Other parties challenging EPA CWA § 404(c) determinations regarding mining projects have followed Congress's directions, including when that required proceeding in both district court and the CFC. *See*, *e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 713 (D.C. Cir. 2016) (affirming rejection of APA challenges); *UAC* Compl., *supra*.

Alaska asks (at 32) this Court to override Congress's considered selection of forums to avoid "piecemeal litigation." But Congress provided that the CFC "shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court." 28 U.S.C. § 1500. Congress thereby channeled claims against the government for injunctive relief and money damages into two separate courts and *prohibited* such claims from being litigated simultaneously when "based on substantially the same operative facts." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311-12, 315 (2011) (citing 28 U.S.C. § 1500). Congress's scheme warrants this Court's deference, considering Alaska can bring suit only thanks to Congress's waivers of sovereign immunity in the Tucker Act and the APA. *See*, *e.g.*, *Louisiana*, 123 U.S. at 34-37; *Minnesota*, 305 U.S. at 388; *see also NAM*, 583 U.S. at 130-31.

2. Alaska erroneously contends (at 32) that it risks losing its claims by litigating them in the forums Congress designated. The bar in 28 U.S.C. § 1500 to litigating overlapping suits in district court and claims court simultaneously "operates '*only* when the suit shall have been commenced in the other court before the claim was filed in [the Claims Court].'" *Resource Invs., Inc. v. United States*, 785 F.3d 660, 669

(Fed. Cir. 2015) (quoting *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965)) (brackets in *Resource Invs.*). The six-year statute of limitations on Alaska's contract and takings claims will not run while Alaska litigates its APA claim in district court, provided it files suit in the claims court first. *See id.* at 669-70 (no statute-of-limitations problem arises if litigant files takings claim in claims court before filing other claims in district court under "first-to-file rule").

This Court's decision in *Tohono O'Odham Nation* is not to the contrary. There, the plaintiff filed in the CFC *after* filing in district court. *See* 563 U.S. at 324 n.5 (Sotomayor, J., concurring in the judgment) ("As the majority notes, the validity of the Court of Claims' holding in [*Tecon*] is not presented in this case.") (citation omitted).

3. *Amici* NMA argue (at 12, 15-17, 20-21) that this Court should exercise original jurisdiction to short-circuit what otherwise will be "lengthy proceedings in the district court and Ninth Circuit." They cite no support for the proposition that original jurisdiction can (or should) be available to shorten litigation timelines.

The mine developers argue that a need for "domestic copper" justifies abandoning the normal review process. Northern Dynasty Minerals et al. Br. 10-13, 23-24. But they omit that the "primary market" for copper from the Pebble Mine will be in Asia, not the United States,[11] a fact EPA considered.[12]

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[11] *See* Northern Dynasty Minerals Ltd., *NI 43-101 Technical Report Update and Preliminary Economic Assessment* 255 (Aug. 21, 2023), bit.ly/49lUpfs.

[12] See EPA, Consideration of Potential Costs Regarding the Clean Water Act Section 404(c) Final Determination for the Pebble Deposit Area, Southwest Alaska 70 (Jan. 2023) (Pebble

In any event, litigants challenging agency action can invoke safeguards to address exigent circumstances. As NMA recognizes (at 20), Alaska obtained a preliminary injunction when challenging a prior EPA determination regarding the Pebble Mine. *Amici* offer no reason why such routine mechanisms are inadequate.

B. Alaska Seeks An Unwarranted Expansion In The Court's Original Jurisdiction

Alaska cites no case in which a State brought an original action against the United States seeking either monetary damages under a takings or contract theory or injunctive relief from federal agency action under the APA. It mistakenly relies on State versus State cases implicating Congress's designation of this Court as the "exclusive" forum for such disputes. 28 U.S.C. § 1251(a). Alaska seeks to expand original jurisdiction over cases against the United States to include APA challenges and claims for monetary damages, with no limiting principle.

First, Alaska's argument (at 34-35) that original jurisdiction is "mandatory" conflates actions between States with actions against the United States. *Only* in cases *between* States did Congress grant the Court "original and exclusive" jurisdiction. 28 U.S.C. § 1251(a). *Supra* p. 7 n.2. The cases Alaska cites (at 34-35), in which some Justices advocated treating "exclusive" jurisdiction in State versus State cases as compulsory, were not suits against the United States. Jurisdiction in cases against the United States always has been discretionary, and this Court has deferred to Congress's forum choices. *Supra* pp. 6-7.

Mine's output would "represent[] approximately 0.2 to 0.3% of U.S. total copper demand"), bit.ly/3MwMjXy.

Second, Alaska's reliance (at 22-23, 32) on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), and *Maryland v. Louisiana*, 451 U.S. 725 (1981), fails for similar reasons. Those were Commerce Clause challenges to taxes States imposed on other States. In exercising original jurisdiction, this Court stressed that no other forum could adjudicate one State's endangerment of another State's constitutional interests. *See Wyoming*, 502 U.S. at 451-53; *Maryland*, 451 U.S. at 744-45. By contrast, the relief Alaska seeks is available in district court for APA relief and the CFC for money damages. *Supra* pp. 8-11.

Finally, Alaska relies (at 18) on cases between States in which the Court considered the "'seriousness and dignity'" of the claims asserted by the complaining State. *Mississippi*, 506 U.S. at 77 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). But the Court did so because "[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." *Id.* Alaska's claims do not fit that model because Congress provided federal forums to resolve them. Alaska cites no support justifying its unwarranted expansion of this Court's original jurisdiction over cases against the United States.

Previous original actions between a State and the United States, including those cited by Alaska (at 23), were disputes over title to land. *See*, *e.g.*, *Utah v. United States*, 403 U.S. 9 (1971) (shorelands); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982) (oceanfront land); *Alaska v. United States*, 545 U.S. 75 (2005) (submerged lands). Alaska's case is not. *Supra* p. 12 & nn.6-7.

C. Alaska Fails To Show Its Claims Are Exceptional And Warrant Original Jurisdiction

1. Recognizing that this case is unlike other State v. United States original actions, Alaska unpersuasively argues (at 1, 19-23) that an exception is warranted based on Alaska's supposedly "unique property rights."

Alaska's contract and APA claims are premised on EPA's purported violation of Alaska's statehood act and the Cook Inlet Land Exchange. *See* Compl. ¶¶ 175-177, 179 (contract claim), ¶¶ 182, 184-185 (APA claim). Alaska argues that, in Section 6(i) of its statehood act and the Cook Inlet Land Exchange's incorporation of that Section, the United States *uniquely* promised that land granted to Alaska "shall include mineral deposits" and that the "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." Alaska Statehood Act § 6(i), 72 Stat. 342; *see* Act of Jan. 2, 1976, Pub. L. No. 94-204, § 12(d)(1), 89 Stat. 1145, 1152-53.

Prior to Alaska statehood, however, a 1927 federal statute granted interests in mineral lands to *more than a dozen* other States using the same language. *See* Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. §§ 870-871); *Administering State Mineral Lands – What is the State's Trust Responsibility?*, 35 RMMLF-INST 3, § 3.04[2] & n.87 (1989).[13] Alaska's similar interest, therefore, is hardly "unique."

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[13] These States were Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. *See Administering State Mineral Lands* § 3.04[2] & n.87.

2. The other purportedly unique sovereign interests Alaska invokes do not warrant departing from this Court's normal considerations governing original jurisdiction in cases against the United States. Alaska argues that resource development on state land is exempt from generally applicable federal environmental law. *See* Br. 26-28; *see also* Alaska Indus. Dev. & Export Auth. Br. 5, 10-11. But the cases Alaska cites hold the opposite. *Sturgeon v. Frost*, 577 U.S. 424 (2016), and its follow-on case, *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) ("*Sturgeon II*"), confirmed that, in Alaska, "state . . . lands[] *of course* . . . remain subject to all the regulatory powers . . . exercised by the EPA, Coast Guard, and the like." *Sturgeon II*, 139 S. Ct. at 1087 (emphasis added). The gravamen of Alaska's claim is that EPA's decision to limit mining in Bristol Bay was arbitrary and capricious. That administrative-law dispute belongs in district court in the first instance, as Congress determined. *Supra* pp. 8-9.

Alaska's reliance (at 19) on cases like *Sackett v. EPA*, 598 U.S. 651 (2023), is misplaced. Those cases were *not* original actions. They simply recited the general background principle that "[r]egulation of land and water use lies at the core of traditional state authority." *Id.* at 679-80. That principle does not give Alaska license to skip over the ordinary process for challenging EPA's exercise of CWA authority. To the contrary, *Sackett* and prior cases confirm that such challenges should proceed where Congress prescribed before this Court's appellate review.

III. IF THE COURT GRANTS LEAVE, IT SHOULD RESOLVE LEGAL CHALLENGES TO ALASKA'S CLAIMS ON A MOTION TO DISMISS

When the Court has accepted original jurisdiction, it has recognized that legal challenges are best resolved on a motion to dismiss. This practice protects the Court (and a Special Master, if appointed) from unnecessarily expending substantial resources on cases that are doomed as a matter of law. *See*, *e.g.*, *Mississippi v. Tennessee*, 595 U.S. 15 (2021) (dismissing complaint after accepting jurisdiction where Mississippi sought legally foreclosed remedy); *New Hampshire v. Maine*, 532 U.S. 742 (2001) (dismissing complaint after accepting jurisdiction based on judicial estoppel).

Should the Court accept jurisdiction, it should follow that procedure. Substantial challenges to the legal merits of Alaska's claims are likely to result in their dismissal. Those include such important issues as whether the CWA applies to the Bristol Bay region (or whether Alaska's statehood act trumps the CWA) and whether the mineral-lease provisions of Alaska's statehood act are part of an enforceable "contract" or "compact." The Court should resolve such questions expeditiously because, if resolved against Alaska, they could result in dismissal (or narrowing) of its claims.

CONCLUSION

Alaska's motion for leave to file its bill of complaint should be denied.

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