No. 22O151

In the Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

RICHARD SACKLER, THERESA SACKLER, KATHE SACKLER, JONATHAN SACKLER, MORTIMER D.A. SACKLER, BEVERLY SACKLER, ILENE SACKLER LEFCOURT, PURDUE PHARMA, INC., PURDUE PHARMA, L.P., THE PURDUE FREDERICK COMPANY, INC., PURDUE HOLDINGS L.P., PLP ASSOCIATES HOLDINGS L.P., BR HOLDINGS ASSOCIATES L.P., ROSEBAY MEDICAL COMPANY L.P., AND BEACON COMPANY,

Defendants.

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALASKA, LOUISIANA, NORTH DAKOTA, AND UTAH IN SUPPORT OF THE STATE OF ARIZONA'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
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
bflowers@ohioattorneygeneral.gov

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Other Authorities

STATEMENT OF AMICI INTEREST

The *amici* States have two interests in this case.

First, on the merits, the case will help ensure that those responsible for the opioid crisis are held to account. Every single day, in every single State, opioids are ending lives, destroying families, and orphaning children. In parts of Ohio, for example, opioid overdoses claim shocking numbers of lives. *See* Rick McCrabb, *Overdoses top killer in investigated cases*, Dayton Daily News (Feb. 20, 2015), online at https://tinyurl.com/y5llpuvx. At times, overdoses kill more people than all other causes of death combined. *See* Cameron Knight, *Overdoses killing more people in Butler County than all other causes of death combined*, Cincinnati Enquirer (June 28, 2017), online at https://tinyurl.com/yxpw34kh. The defendants in this case bear particular responsibility; they created a dependent customer base, through which they acquired vast wealth, by knowingly peddling false information about opioids' addictiveness. As a result, millions of Americans are dead or suffering.

Second, this case gives the Court a chance to restore the original meaning of Article III, which gives this Court *mandatory* original jurisdiction over suits filed by States against nonresidents. The Court's precedents have departed from this original meaning, thus depriving the States of the full benefit of the bargain they agreed to by joining the Union. With this case, the Court can correct course.*

---

* The *amici* States notified all parties of their intent to file this *amicus* brief more than ten days before its due date.

SUMMARY OF ARGUMENT

Arizona's brief ably explains why this Court *should* grant the Motion for Leave to File a Bill of Complaint. This *amicus* brief argues that the Court *must* grant the motion: the Court's original jurisdiction is mandatory, not discretionary.

Article III confers the "judicial Power" on the federal courts and allows them to exercise that power in certain categories of "Cases" and "Controversies," including "Controversies … between a State and Citizens of another State." Art. III, §2, cl.1. The same article vests *this Court* with original jurisdiction over cases "in which a State shall be Party." Art. III, §2, cl.2. This Court has long (and correctly) interpreted this language to confer original jurisdiction in only those cases to which the judicial Power extends "*because* a State is a party." *Cohens v. Virginia*, 6 Wheat. 264, 394 (1821) (emphasis added). (As opposed to cases, such as federal-question cases, in which the courts have jurisdiction without regard to the parties' identities.) The category of cases to which jurisdiction extends *because* a State is a party includes controversies "between a State and Citizens of another State."

The "judicial Power" extends to this controversy between a State (Arizona) and nonresidents (the defendants). And this Court unambiguously has original jurisdiction over this case "in which a State shall be Party." Art. III, §2, cl.2. Thus, the Court must entertain Arizona's suit unless it has discretion *not* to hear cases over which it has original jurisdiction.

The Court has no such discretion. Article III gives the courts no freestanding power "to decline the exercise of jurisdiction which is given." *Cohens*, 6

Wheat. at 404. Nor does it give this Court any power to decline jurisdiction specifically in cases arising under its original jurisdiction. Indeed, this Court has acknowledged that Article III, as originally understood, confers no such discretion. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496–97 (1971).

Notwithstanding this acknowledgment, the Court has claimed for itself the power to decline the exercise of jurisdiction. *Id.* at 498. "The Court's reasons for transforming its mandatory, original jurisdiction into discretionary jurisdiction have been rooted in policy considerations." *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting from denial of motion for leave to file complaint). For example, the Court has "cited its purported lack of 'special competence in dealing with' many interstate disputes and emphasized its modern role 'as an appellate tribunal.'" *Id.* (quoting *Wyandotte*, 401 U.S. at 498).

These arguments are unpersuasive. Most fundamentally, this Court cannot rewrite the Constitution whenever, in its view, doing so makes better policy. Regardless, the policy arguments fail on their own terms. For example, the Court's ability to appoint special masters, and the option to certify state-law questions to state courts, mitigate or eliminate any concern about this Court's "special competence" or its ability to function primarily as an "appellate tribunal." And even if this Court were to restore the mandatory nature of its original jurisdiction over disputes between States and nonresidents, it would face no serious risk of being flooded with litigation: In disputes between States and nonresidents, *only* the States can sue under this Court's original jurisdiction; the nonresidents have no power to sue the

States. *See* U.S. Const., 11th Am. Since States will usually prefer to proceed against nonresidents in their own courts if possible, they will rarely seek relief in this Court.

Because this Court's decisions claiming discretion to decline jurisdiction in original matters are contrary to the Constitution and poorly reasoned, and because they have engendered no reliance interests, they ought to be overruled. This case provides a good vehicle for doing so. Alternatively, this Court can avoid the question by simply granting Arizona's motion for leave to file a bill of complaint.

ARGUMENT

The Court should grant Arizona's motion for leave to file a bill of complaint for two reasons. The first is amply covered in Arizona's own brief: the defendants bear unique responsibility for the opioid crisis that is destroying lives, families, and communities across the country, and this Court is uniquely well situated to ensure those defendants are held responsible. *See* Ariz.Br.4–8, 19–23. Thus, the Court should hear this case *regardless* of whether it has discretion to decline the exercise of jurisdiction.

This *amicus* brief focuses on the second reason to grant Arizona's motion for leave to file a bill of complaint: the Constitution, by vesting this Court with *mandatory* original jurisdiction in suits between a State and nonresidents, requires the Court to decide this case. While some of this Court's cases say otherwise, those cases are wrong and ought to be overruled. This Court should either overrule them, or else avoid the issue by granting Arizona's motion for leave to file a bill of complaint.

I. Article III gives this Court mandatory original jurisdiction in cases brought by a State against a nonresident.

This Court's precedents claim a right to decline the exercise of jurisdiction in original matters. *See Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971). Those cases are wrong. Federal courts have no freestanding power to decline the exercise of jurisdiction. And this Court has no special power to decline the exercise of its original jurisdiction.

A. The federal courts have no freestanding power to decline jurisdiction.

Neither this Court nor any other federal court has a generally applicable power to decline to exercise jurisdiction. To the contrary, this Court recognized centuries ago that it had "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); *accord Nebraska v. Colorado,* 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting from denial of motion for leave to file complaint).

When Chief Justice Marshall wrote this categorical statement for the Court in *Cohens*, he accurately described the original understanding of Article III. The *amici* States are not aware of any evidence that anyone at or around the time of ratification understood federal courts as possessing a power to decline the exercise of jurisdiction.

What is more, Article III's design confirms the mandatory nature of its jurisdictional grants. Here is the relevant language, in full:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> 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.

Art. III, §2, cl.1–2.

If there were a freestanding power to decline the exercise of jurisdiction, it would have to be implicit in

the "judicial Power." Nothing else in this section even arguably could confer such discretion. But the section's structure confirms that the judicial power *does not* include the power to decline jurisdiction. To see why, begin with the fact that Section 2 specifies nine categories of "Cases" and "Controversies" to which "the judicial Power" extends. If the power to decline jurisdiction were inherent in the "judicial Power," then the courts would necessarily have the power to decline jurisdiction *in all nine* of these categories. Thus, if there is even one category that would be inconsistent with discretion to decline jurisdiction, the "judicial Power" cannot be read to confer such discretion.

There is one such category: disputes between two States. The founding generation deemed it "essential to the peace of the union" that this Court have original jurisdiction over disputes between the States. The Federalist No. 80, at 536 (A. Hamilton) (Cooke, ed., 1961). By conferring this jurisdiction, the Constitution ensures a neutral forum to keep "bickering and animosities" between the States from growing into "dissentions and private wars." *Id.* at 536–37; *see also Kansas v. Colorado*, 206 U.S. 46, 97 (1907); Joseph Story, *Commentaries on the Constitution of the United States* §1632, p.501 (1833). Indeed, "[o]ne of the most crying evils" of the Articles of Confederation was their failure to guarantee an adequate forum for peacefully resolving interstate disputes. *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838). The Framers gave this Court original jurisdiction over interstate disputes to correct that evil. *Id.* at 728–29; Robert Granville Caldwell, *The Settlement of Inter-State Disputes*, 14 Am. J. Int'l L. 38, 55–56 (1920). Given the importance of the Court's

role in mediating interstate disputes, it is hard to credit a reading of the "judicial Power" that would give this Court an option not to resolve these disputes. That militates strongly against reading the "judicial Power" as implicitly including the power to decline the exercise of jurisdiction.

To be clear, the principle that courts lack the power to decline the exercise of jurisdiction "does not eliminate," and the "categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief." *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 359 (1989). For example, the courts traditionally exercised discretion in deciding whether to award equitable relief, and the "judicial Power" presumably empowers federal courts to exercise this discretion. *Id.* Along the same lines, the "judicial Power" presumably incorporates other longstanding, discretionary, court-wielded powers, perhaps including the power to dismiss a case on *forum non conveniens* grounds. *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 all of this is perfectly consistent with reading the exercise of jurisdiction itself to be mandatory.

Even if these discretionary doctrines might be characterized as conferring some limited power to decline jurisdiction, *see Rogers v. Guar. Tr. Co.*, 288 U.S. 123, 130 (1933), they are exceptions that prove the rule. There is "nothing in our history or traditions" that "permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear cases simply at its pleasure." Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. at 575.

B. The Court has no special power to decline jurisdiction in cases brought by States against nonresidents.

The foregoing establishes that this Court has no generally applicable power to decline the exercise of jurisdiction. Does it have a narrower power to decline jurisdiction in cases filed by States against out-of-state citizens?

It does not. Again, there is no evidence that anyone at the time of the Framing understood Article III's jurisdictional grants to include such discretion. And again, there is no way to read Article III as empowering courts to decline jurisdiction in these cases, but not in others; either the "judicial Power" includes the power to decline jurisdiction or not.

Notwithstanding all this, the Court has claimed for itself the power to decline jurisdiction in State-filed cases arising under its original jurisdiction. *See Massachusetts*, 308 U.S. at 19; *Wyandotte*, 401 U.S. at 498. The Court's opinions *concede* 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. Nonetheless, the Court has "transform[ed] its mandatory, original jurisdiction into discretionary jurisdiction" based on "policy considerations." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from the denial of motion for leave to file complaint).

The most developed explanation of these policy concerns comes in *Ohio v. Wyandotte Chemicals Corporation*, where the Court justified its rewriting of Article III in the following terms: "it seems evident to us that changes in the American legal system and the development of American society have rendered

untenable, as a practical matter, the view that this Court must" do what Article III requires. *Wyandotte*, 401 U.S. at 497. Based on these "practical" concerns, the Court announced 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.

This pure-policy approach to constitutional interpretation, under which the Court can read into the Constitution whatever "it seems evident" would make good sense, *id*. at 497, has largely gone by the wayside. Today, most reject the notion that the Court ought to creatively interpret the Constitution with an eye toward "policy consequences," *United States v. Davis*, 139 S. Ct. 2319, 2335 (2019), so that the Constitution says whatever a majority of this Court thinks "it *ought* to" say, *Morrison v. Olson*, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting). And today, most would agree that the Court best promotes "the principal polices underlying" the Constitution by doing what the Constitution says to do.

In any event, *Wyandotte*'s policy-driven approach fails on its own terms. It gives three policy justifications for deeming mandatory jurisdiction impractical and none holds up under scrutiny.

1. Restoring Article III's original meaning will not overburden the Court.

Wyandotte reasoned that the Court's original jurisdiction had to be mandatory because of "the frequency with which States and nonresidents clash over the application of state laws." 401 U.S. at 497. In other words, if jurisdiction were mandatory, the Court would be forced to take on more than it could handle.

This fear is unfounded. As an initial matter, the Court has two important tools at its disposal for managing the original docket if it becomes too burdensome. First, the Court may certify state-law questions to state courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Second, it can (and generally does) appoint a special master to manage the litigation. *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). Both tools can significantly limit the time the Justices of this Court must spend on original cases.

Moreover, *Wyandotte*'s fear of too-frequent litigation seems to assume that States will often seek to resolve their disputes with nonresidents in the Supreme Court. That assumption is surely false. In the vast majority of cases, States will prefer to resolve these cases in *their own* courts. They will seek out this forum only when there is a good reason to do so—and thus, the question whether to accept jurisdiction is most likely to arise in cases implicating

"the principal policies underlying the Article III jurisdictional grant." *Wyandotte*, 401 U.S. at 499.

Further, States alone have the power to initiate original actions between States and nonresidents. In other words, while the States can sue nonresidents in this Court, nonresidents may not sue the States. This is a critical point that *Wyandotte*'s analysis obscures. *See* Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 254 n.160 (1985). It is worth pausing to develop this a bit more.

Article III gives this Court original jurisdiction over cases "in which a State shall be Party." Art. III, §2, cl.2. This phrase refers to those cases "in which jurisdiction is given, *because* a State is a party," as opposed to cases in which the Court has jurisdiction without regard to the parties' identities. *Cohens*, 6 Wheat. at 394 (emphasis added); *accord Georgia v. Pa. R. Co.*, 324 U.S. 439, 464 (1945); *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *California v. S. Pac. Co.*, 157 U.S. 229, 257–58 (1895). For example, and relevant here, the grant of original jurisdiction extends to controversies "between a State and Citizens of another State." Art. III, §2, cl.2. But that category includes only those cases in which the *plaintiff* is a State. While the text is susceptible of a broader reading, the founding generation read the jurisdictional grant against a common-law background in which sovereigns were immune from suit without consent. *See Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493–94 (2019). Thus, the founding generation understood these provisions as extending the "judicial Power" *only* to cases initiated by States themselves. *See* The Federalist No. 81, at 548–49 (A. Hamilton) (Cooke, ed., 1961); *Welch v. Tex. Dep't of*

Highways & Pub. Transp., 483 U.S. 468, 483–84 (1987). Indeed, it is doubtful whether the Constitution would have been ratified had the Federalists not succeeded in convincing the public that this is what Article III meant. *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1863–70 (2010); Kurt Lash, *The Lost History of the Ninth Amendment* 98–102 (2009).

The Court bucked this original understanding in *Chisholm v. Georgia*, holding that this Court's original jurisdiction over controversies "between a State and citizens of another State" included suits filed by nonresidents. 2 Dall. 419 (1793). But the People quickly responded by ratifying the Eleventh Amendment to prevent any future Court from repeating *Chisholm*'s error. Today, the Constitution could not be clearer that the State-versus-nonresident category includes only suits in which the States are plaintiffs. It says: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., 11th Am.

This Court's cases permitting Congress to abrogate the States' sovereign immunity do not affect this conclusion, because none of those cases permits Congress to extend the "judicial Power" to cover new categories of cases and controversies. Those cases rest on Section Five of the Fourteenth Amendment, which says: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This language, the Court has said, allows Congress to abrogate sovereign immunity, allowing private citizens to sue States for violations of the Four-

teenth Amendment—including violations of those parts of the Bill of Rights that the Fourteenth Amendment incorporates against the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *accord United States v. Georgia*, 546 U.S. 151, 158–59 (2006); *but see* John Harrison, *State Sovereign Immunity and Congress's Enforcement Powers*, 2006 Sup. Ct. Rev. 353 (2006) (arguing that Section Five, properly understood, does not empower Congress to abrogate state sovereign immunity).

Critically, however, none of the Court's cases permit Congress to amend the Constitution by expanding the "judicial Power" to new categories of cases and controversies. Instead, they allow Congress to abrogate sovereign immunity in cases to which the "judicial Power" extends already. After all, every suit brought under a federal law passed to enforce the Fourteenth Amendment (or any other amendment, for that matter) is a case "arising under … the Laws of the United States." Art. III, §2, cl.1; *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1623–26 (2002). The judicial Power extends to those suits already—all Congress has to do to make the State suable is abrogate sovereign immunity. (As an aside, this Court has held that the States waived any sovereign immunity they had in bankruptcy cases when they joined the Union. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 (2006). Even if *Katz* could be characterized as a case about *congressional* abrogation of sovereign immunity, it would still establish only that Congress can abrogate sovereign immunity in cases to which the judicial power extends already, since bankruptcy cases arise under "the Laws of the United States." Art. III, §2, cl.1.)

In contrast, allowing citizens to sue States under the State-versus-nonresidents provision would require *extending* the "judicial Power" to make it reach such suits even when they are initiated *against* a State. *See above* 12–13. This Court's cases nowhere suggest that Congress has any power to amend the Constitution in this manner. In other words, its cases do not stand for the proposition that Congress can pass a law to make the "judicial Power" broader than it is already. *See* Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. at 1623–26.

The upshot is that reverting to the original meaning of Article III would not empower nonresidents to sue States under this Court's original jurisdiction. Regardless, *even if* the judicial power extended to suits against the States under this Court's original jurisdiction, that would not threaten to overburden the Court. Nonresidents would be able to sue the States only in the rare circumstance where the State waived, or Congress abrogated, state sovereign immunity. That relatively small subset of cases—which really would include only the even-smaller subset of cases in which nonresidents *chose* to sue in this court—would not risk overburdening the Court.

2. Other courts' comparative advantages do not justify making original jurisdiction discretionary.

Wyandotte further argued that this Court's original jurisdiction ought to be regarded as discretionary because, in many cases, some other court is more capable of resolving the underlying issues. In the Court's words: "We have no claim to special compe-

tence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issue of federal law." *Wyandotte*, 401 U.S. at 497–98.

Once again, this concern is overblown in light of this Court's ability to appoint a special master and its power to certify state-law questions to state courts. In any event, this argument is a *non sequitur*. Federal courts rarely have "special competence" in dealing with issues that arise in diversity cases, yet no one contends that this would justify the *lower* courts in refusing to entertain such cases. If lower courts can handle these "numerous conflicts" presenting "no serious issue of federal law," *id.*, so can this Court.

Wyandotte further claimed that this Court is "ill-equipped for the task of factfinding." *Id.* at 498. Once again, the special-master option makes this concern unreasonable. In all of the many original jurisdiction cases this Court agrees to hear, it appoints a special master and manages to resolve factual disputes without having to hold a trial at One First Street.

3. Adhering to the Constitution will not hamper this Court's ability to fulfill its constitutional role.

Finally, *Wyandotte* argued that "for every case in which" the Court "might be called upon to determine the facts and apply unfamiliar legal norms," it "would unavoidably be reducing the attention [it] could give to those matters of federal law and national import as to which" this Court is "the primary overseer[]." *Id.* at 498.

Of course, the fact that the Constitution gives this Court original jurisdiction over all cases brought by a State against a nonresident suggests that these cases *are* of sufficient "national import" to justify the Court's attention. The fact that a State thinks it *needs* this Court's original jurisdiction in any given case suggests the same.

Regardless, this concern assumes a flood of litigation filed directly in the Supreme Court. As explained above, that is exceptionally unlikely to occur. And the option to appoint special masters will allow the Court to deal with those matters that are filed, without having to divert much attention away from "those matters of federal law and national import." That is especially so because the Court today hears only about half as many cases as it did during 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).

II. *Stare decisis* does not justify retaining the rule that the Supreme Court has discretion to decline review.

This Court does not overturn its decisions unless there are good reasons for doing so. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). But there are plenty of good reasons for overturning the Court's cases claiming discretion to decline the exercise of original jurisdiction.

First, *stare decisis* "is at its weakest" in the constitutional context, because this Court's constitutional "interpretation[s] can be altered only by constitutional amendment or by overruling" earlier decisions. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The

question whether this Court has discretion not to exercise its original jurisdiction arises under the Constitution. And the case implicates an *important* constitutional issue, because it directly implicates whether the States—the sovereigns that united to form this country—are getting the full benefit of their constitutional bargain. *See Hyatt*, 139 S. Ct. at 1499. When this Court's "decisions prohibit 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).

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 illustrated above, *Wyandotte*'s reasoning is indefensible; it elevates policy preferences over the Constitution's text, and fails even on its own policy-based terms.

Third, this is not a case in which 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 to original jurisdiction, it is hard to see how anyone or 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 enough, 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 the precedent is nonetheless unworkable from the perspective of States, which

cannot meaningfully assess their chances of obtaining Supreme Court review in original matters. *See Wayfair*, 138 S. Ct. at 2098 (unclear tests do not give rise to serious reliance interests). That is true even in cases, such as those arising between two States, where the Supreme Court is the *only* forum in which parties can seek review. *See Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting from denial of motion for leave to file complaint); *California v. West Virginia*, 454 U.S. 1027 (1981) (Stevens, J., dissenting from denial of motion to file leave for complaint).

* * *

This Court can avoid overruling its precedents regarding the power to decline jurisdiction by granting Arizona's motion for leave to file a bill of complaint. If the Court is unwilling to do that, it should set for argument the question whether it has any constitutional authority to deny review, and restore Article III's original meaning.

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
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.

SEPTEMBER 2019

Additional Counsel

KEVIN G. CLARKSON
Attorney General
Alaska

JEFF LANDRY
Attorney General
Louisiana

WAYNE STENEHJEM
Attorney General
North Dakota

SEAN REYES
Attorney General
Utah