No. _____

In The
Supreme Court of the United States

ONLINE MERCHANTS GUILD,

Petitioner,

v.

NICOLAS MADUROS, Director,
California Department of Tax & Fee Administration,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The text of the Tax Injunction Act only prevents federal courts from hearing claims that would enjoin the "assessment, levy, or collection" of state taxes, 28 U.S.C. § 1341, so this Court has twice held that the Act does not strip federal jurisdiction over claims challenging government demands for information. *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015); *CIC Servs., LLC. v. Internal Rev. Serv.*, 141 S. Ct. 1582, 593 U.S. ___ (2021). Here, the Online Merchants Guild challenges the lawfulness of California's demands that non-resident merchants who sold goods online through Amazon provide information to register for a California "seller's permit" or face "imprisonment for 16 months, two years, or three years." The Ninth Circuit held that this Court's precedents do not control, and the Tax Injunction Act strips federal jurisdiction, because the merchants who received the demands were putative "taxpayers" instead of "third parties."

The first question presented is: whether the Tax Injunction Act applies differently based on whether the plaintiff is a putative taxpayer or a "third party."

2. As an alternative holding, the Ninth Circuit ruled that the comity doctrine supported discretionary abstention. Under this Court's precedents, federal courts may not abstain if the plaintiff lacks an adequate remedy for their federal injury in state court. Unlike the states generally, California courts are prohibited by state law from entertaining claims challenging information

QUESTIONS PRESENTED—Continued

demands; California courts may only hear refund requests. The Ninth Circuit held that "remedy" is sufficient.

The second question presented is: whether plaintiffs who cannot challenge tax information demands in state court have an adequate remedy to challenge those demands in state court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Online Merchants Guild has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

Online Merchants Guild v. Nicolas Maduros, Director, California Department of Tax & Fee Administration, Case No. 2:20-at-00954, Eastern District of California, Sacramento Division. Judgement entered October 13, 2021.

Online Merchants Guild v. Nicolas Maduros, Director, California Department of Tax & Fee Administration, 21-16911, Court of Appeals for the Ninth Circuit. Judgment entered November 9, 2022. Petition for rehearing denied January 3, 2023.

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The Tax Injunction Act only strips federal jurisdiction over claims that directly seek to enjoin acts of "assessment, levy or collection." *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015); *CIC Servs., LLC v. Internal Rev. Serv.*, 141 S. Ct. 1582, 593 U.S. ___. The claims at issue in this case do not; instead, they directly seek to enjoin information demands, like the claims *Direct Marketing Association* and *CIC Services* allowed to proceed.

But the Ninth Circuit limited this Court's precedents to their facts, holding that the Tax Injunction Act strips jurisdiction over claims challenging information demands if the plaintiff is a putative taxpayer rather than a "third-party." But neither the text of the Act nor the Court's decisions interpreting the Act drew such a distinction. This distinction also puts the cart before the horse; a state could unilaterally evade federal review of unconstitutional information demands by declaring—even incorrectly—that the person from whom it seeks information is a "taxpayer."

The decision below undermines the Court's precedents, raises separation of powers and due process concerns, and has significant real-world consequences—not just for the hundreds of thousands of affected individuals in this case, but for any putative taxpayer made the subject of a demand for information who wishes to vindicate federal rights in federal court. The decision below also conflicts with the decision of a federal district court that heard parallel claims and

concluded, in light of *Direct Marketing Association* and *CIC Services*, that the Tax Injunction Act does not apply to claims challenging "registration demands, not any formal act of taxation." *Online Merchs. Guild v. Hassell*, No. 1:21-CV-369, 2021 U.S. Dist. LEXIS 101240, *14 (M.D. Pa. May 28, 2021).

This case also raises an important question about remedies for federal rights when state law prohibits plaintiffs from raising certain federal claims. The Tax Injunction Act, and its common law predecessor the comity doctrine, preserve federal jurisdiction when state courts do not provide an adequate remedy for the federal rights in question. After all, it is extremely unusual in our system for an injured party to be barred from court entirely.

California conceded below that the claims at issue "cannot be brought" in state court. California state courts may not hear claims challenging information demands or order any relief as to such demands; they may only entertain claims for tax refunds and may only order tax refunds as a remedy. The upshot is that the affected individuals cannot vindicate their specific federal rights in California's courts. California's restricted regime is an outlier, and the state pointed to no comparable system elsewhere in which plaintiffs cannot seek prospective review of government demands for information. In fact, in the parallel case referenced above, the district court abstained on comity grounds precisely because Pennsylvania allows plaintiffs "meaningful review" to challenge informational

requests before incurring criminal exposure. *Hassell*, 2021 U.S. Dist. LEXIS 101240, *18.

The Ninth Circuit nonetheless found that California provided an adequate remedy for information demands by offering refunds. The court seized on language from *Grace Brethren Church* about the adequacy of California's regime, while disregarding this Court's express admonition that "*Grace Brethren Church* [] cannot fairly be read as resolving, or even considering," the distinction between government demands for information and for money. 575 U.S. at 1 n.1.

Left to stand, the Ninth Circuit's decision undoes this Court's recent decisions, rewrites the Tax Injunction Act, and endorses a "remedial" system under which substantial federal rights go unprotected in both state and federal court.

The Court should grant certiorari.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 52 F.4th 1048 and reproduced at pages 1–11 of the appendix. The Ninth Circuit's order denying rehearing is reproduced at page 20 of the appendix. The district court's order is unreported but available at 2021 U.S. Dist. LEXIS 198069 and 2021 WL 4777096 and is reproduced at pages 12–19 of the appendix.

JURISDICTION

The Ninth Circuit issued its opinion November 9, 2022. The Ninth Circuit denied the Online Merchant Guild's timely-filed petition for rehearing on January 3, 2023. On March 14, 2023, Justice Kagan granted the Online Merchants Guild's application to extend the deadline to petition for a writ of certiorari to May 3, 2023. This petition is timely filed pursuant to Supreme Court Rule 13.1. Jurisdiction is proper under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, 28 U.S.C. § 1341, reads as follows: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

a Factual Background

Petitioner, the Online Merchants Guild, is a small trade association and "'common voice' for hundreds of small business owners who have built new enterprises from scratch." Pet.App.62–63. Relevant to this case, the Online Merchants Guild's members supply goods to Amazon on consignment; Amazon markets and sells those goods as part of its Fulfilled by Amazon program,

which makes up the lion's share of what consumers buy from Amazon. Pet.App.107–10.

Defendant-Appellee Maduros, who was named in his official capacity, is the Director of the California Department of Tax & Fee Administration (CDTFA or California), which administers California's sales tax system. Pet.App.63–64.

This case arises from CDTFA's treatment of sales taxes on goods Amazon offers as part of the Fulfilled by Amazon program. Pet.App.64–66. From approximately 2012 through 2019, California did not require Amazon to collect sales taxes on Amazon FBA sales. Pet.App.68–74. Beginning in 2019, Amazon did start collecting those sales taxes. According to California's Treasurer, the "[n]umber one" reason CDTFA gave Amazon a pass from sales tax collection was that "the governor's office has been trying to woo Amazon into putting a headquarters here. I've been pushing [for Amazon to collect taxes] and they haven't wanted to do anything up front." Pet.App.73. Similarly situated brick-and-mortar merchants did not get the same benefit. Ultimately, California forwent some billions in sales tax revenue by allowing Amazon not to collect it. Pet.App.69–74. Below, California declined to contest the plausibility of those allegations.

In 2019, CDTFA contacted "hundreds of thousands of third-party merchants on Amazon who were informed by [CDTFA] that *they* should have been collecting taxes on sales to California residents as far back as 2012" and demanding that those merchants register

for seller's permits. Pet.App.78. Most of those affected merchants reside outside California. Pet.App.74, 94, 101. California's theory of regulatory authority is the following: Amazon maintains a vast network of warehouses around the country to position goods for quick shipment to consumers. Amazon chooses where to store inventory that merchants supply. And if Amazon unilaterally chose to store goods in a California warehouse—even as long ago as 2012—the merchant is deemed to be subject to the state's full regulatory authority and unentitled to constitutional protections for non-residents. *But see*, *e.g.*, *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2093, 2099 (2018) (explaining that, for Commerce Clause purposes, dollar thresholds limit states' reach to larger businesses better able to shoulder the compliance burden, and that the traditional due process minimum contacts standard also constrains state taxing authority).

As part of California's registration efforts, CDTFA officials warn merchants that if they "choose not to voluntarily comply to obtain a sellers permit," they could be "guilty of a felony," fined thousands of dollars, and "imprison[ed] for 16 months, two years, or three years." Pet.App.79, Pet.App.145–46, Pet.App.166–67. Registration takes the form of signing up via an online portal and providing general information about the business, not information about specific sales. *See* CDTFA, New Business Application, https://onlineservices.cdtfa.ca.gov/_/#8. Registration for a seller's permit on CDTFA's website may trigger additional reporting obligations, audits and, eventually, demands for taxes back to 2012.

Pet.App.153–54, 168–69. Since Online Merchants Guild members would not have tax receipts Amazon did not collect from Amazon customers at the point-of-sale years ago, the money to satisfy collection demands would need to come out of Online Merchants Guild members' pockets. Pet.App.204–05.

The Online Merchants Guild alleged that registration will lead to "significant" "compliance costs" above and beyond retroactive taxation and concern that its members "will become subject to additional burdens by the agency," which may lead members to refrain from interstate e-commerce activity. Pet.App.58–105. As members testified by affidavits attached to the complaint, compelled registration would lead to compliance and regulatory burdens that will swamp the average small business (especially when other states follow California's lead). Pet.App.177–89. Accumulating regulatory obligations to states requires an understanding of the state's tax-collection and accounting rules and other matters, which means hiring professional assistance in an area without clear rules of the road. Pet.App.180. Forced registration with California also makes it more difficult for small enterprises to grow. Pet.App.177–89, Pet.App.199–201. For example, non-resident businesses who operate below California's "*Wayfair* threshold" have minimal tax-collection and compliance obligations, befitting their small size. Pet.App.180–81, 194–96. But if having a single item stored in a California Amazon warehouse converts a non-resident into a California business, the smallest kitchen-table operation has the same burdens as the

largest multi-state enterprises. Pet.App.180–81. In some cases, the effect is to lock merchants into Amazon's ecosystem because Amazon (now) handles tax collection obligations that would otherwise fall to the merchant. *Id.* California did not dispute the materiality of those burdens below.

b. Procedural History

The Online Merchants Guild filed suit in 2020 in the Eastern District of California, challenging various aspects of California's actions on federal grounds. Relevant here, the Online Merchants Guild challenged CDTFA's registration demands as violating the Internet Tax Freedom Act (Pet.App.100–02), the Commerce Clause (Pet.App.97–98), and the Due Process Clause (Pet.App.93–94). In general terms, the Online Merchants Guild contended that California lacked personal jurisdiction authority over its members based solely on Amazon's unilateral decisions about where to store goods within the company's vast logistics network. The Online Merchants Guild also contended that, by departing from the traditional regulatory framework in which the store (Amazon) rather than the upstream supplier registers with the taxing agency, California was violating the Internet Tax Freedom Act and Commerce Clause doctrine prohibiting discriminatory and unduly burdensome regulations on out-of-state sellers. As the Online Merchants Guild alleged, Amazon was a powerful in-state interest, while the Guild's members were outsiders who lacked political or economic power in California. Pet.App.93–94, 97–98,

and 100–02. The Online Merchants Guild also brought claims challenging other aspects of CDTFA's actions, which raise different jurisdictional and merits issues, but on appeal limited its claims to California's registration demands and associated criminal penalty threats.

California acknowledged that the Online Merchants Guild's claims challenging the state's information demands "cannot be brought in California courts." *E.g.*, Pet.App.49; *accord Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1101–02 (2014) (California courts may only hear refund claims and may only award refunds). California nonetheless moved to dismiss for lack of jurisdiction.

The district court dismissed the case on Tax Injunction Act and, alternatively, comity grounds. Pet.App.12–19. The Ninth Circuit affirmed. The Ninth Circuit distinguished this Court's decision in *Direct Marketing Association* because, in the court's view, the Tax Injunction Act applies differently based on whether the plaintiff is a putative taxpayer or a "third-party." The court also determined that California provides an adequate remedy to challenge information demands, despite the state's concession that those demands cannot be challenged in state court. The Ninth Circuit denied rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. This case raises important jurisdictional questions with practical significance for taxpayers.

This case raises two important but targeted questions about federal jurisdiction, which relate directly to this Court's recent decisions, and which affect hundreds of thousands of small businesses (and other taxpayers, for that matter). Those questions will not be resolved without this Court's guidance.

Direct Marketing Association and *CIC Services* confirmed, contrary to prior practice, that the Tax Injunction Act (and its federal-tax counterpart, the Anti-Injunction Act) do not apply to claims challenging information demands. But if the decision below stands, the very parties most likely to receive such demands and seek to challenge them—putative taxpayers—are subject to a different rule; their claims will remain barred from federal court, even though neither the Court's decisions nor the text of the statute says any such thing.

This case is no less important than *Direct Marketing Association* and *CIC Services*, and it raises the same concerns for separation of powers and "clear boundaries in the interpretation of jurisdictional statutes" so that parties can litigate their disputes in the proper court system. 575 U.S. at 12. This case also comes with the added element of ensuring fidelity to the Court's interpretation of jurisdictional statutes.

More broadly, a mainstay of this Court's jurisprudence is ensuring that the lower courts observe the boundaries of federal jurisdiction on both sides of the riverbank. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (emphasizing the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them" by Congress); *TransUnion LLC v. Ramirez*, ___ U.S. ___, 141 S. Ct. 2190 (2021) (emphasizing the federal courts' "proper—and properly limited—role in a democratic society") (cleaned up).

And from a practical perspective, the questions in this case affect the rights of hundreds of thousands of Americans now and possibly any American from whom the government demands information in the future if there is some connection to possible future taxation of that individual. It is no small matter that this case may "just" affect subjects of California regulation. California is the largest state, often inspires policy initiatives, is not known for regulatory modesty, and has asserted authority over hundreds of thousands of residents of other states.

There are also important institutional interests on the side of taxing authorities. They too need clear jurisdictional rules when their actions are challenged in court.

For these reasons, the questions presented are worthy of consideration. And as explained below, the resolution of those questions below was flawed.

II. The Ninth Circuit's decision departs from the Court's recent precedents.

The place to begin is the statutory text and how this Court has construed it. The Tax Injunction Act strips federal jurisdiction in a limited way: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Act is not a catch-all, divesting federal jurisdiction in every case touching on taxation.

As the Court explained in *Direct Marketing Association*, the "three terms [assessment, levy, or collection] refer to discrete phases of the taxation process," and the Tax Injunction Act only applies to claims directly challenging those discrete phases. *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 8 (2015). By contrast, claims directed to phases that "precede" taxation fall outside the Tax Injunction Act. *Id*. at 11. Specifically, claims seeking to enjoin "enforcement of [] notice and reporting requirements," *id.*, including demands that parties register with or provide information to tax officials later to be used in pursuing taxation, *id.* at 12 n.1, are outside the Act.

Turning to the term "restrain," the Court rejected an amorphous interpretation that could strip jurisdiction over any claim the government could chain to taxation. The lower court in *Direct Marketing Association* had held that the Tax Injunction Act applied when the

information demanded could "facilitate collection of taxes." 575 U.S. at 12. But this Court determined that Congress chose to use "restrain" "on a carefully selected list of technical terms—'assessment, levy, collection—not on an all-encompassing term, like 'taxation.'" *Id*. Thus, "to give 'restrain' the broad meaning selected by the Court of Appeals" in *Direct Marketing Association*—revived by the Court of Appeals below—"would be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.'" *Id*. The Court rejected that broad view because it would create "surplusage" in the statute, would contradict equity practice, under which the courts "did not refuse to hear every suit that would have a negative impact on States' revenues," and would contravene the "the rule that jurisdictional rules should be clear." *Id*. at 13–14 (cleaned up).

Holding fast to the text Congress enacted, the Court also rejected an amorphous effects-based test. "Enforcement of [] notice and reporting requirements may improve [a State's] ability to assess and ultimately collect its sales and use taxes from consumers, but the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute, but also with [the Court's] rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Id*. at 11; *see also id.* at 14 (holding that the

Act does not apply to claims that would "merely inhibit" acts of assessment, levy, or collection by downstream effects).

When the Court next took up the matter (in the context of the parallel Anti-Injunction Act), the Court described the jurisdictional test as "a cinch" when applied to an informational demand rather than a demand for money; the jurisdictional bar "would not apply and the suit could proceed." *CIC Servs.*, 141 S. Ct. at 1588. "That is so even if the reporting rule will help the [tax agency] bring in future tax revenue," such as by "identifying [taxable] transactions." *CIC Servs.*, 141 S. Ct. at 1588 (citing *Direct Mktg. Ass'n*, supra). Simply put, a "suit directed at ordinary reporting duties can go forward." 141 S. Ct. at 1588.

Like the text of the Act itself, the Court's reasoning was not dependent on the identity of the party seeking the injunction. The tax advisor-plaintiffs in *CIC Services* were surely aligned with their taxpayer clients, and the Court's opinion repeatedly framed the jurisdictional test in terms of the "taxpayer's complaint," and the relief "the taxpayer or advisor . . . wants." *E.g.*, *id*. at 1589, 1592. The Court specifically rejected a "motive" test that would have subjectively "prob[ed] an individual taxpayer's innermost reasons for suing." 141 S. Ct. at 1589. Instead, consistent with the "ordinary meaning" of the statutory text, the Court opted for objective analysis of the "relief requested—the thing sought to be enjoined." *Id*. (cleaned up). Not who was seeking the injunction or why.

Similarly, the merchants in *Direct Marketing Association* were not themselves the putative taxpayers, but they obviously had a subjective interest in preserving what was—prior to *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018)—their ability to make practically tax-free sales. But the merchants' subjective commercial interest in bringing suit did not matter—only the text of the statute did.

To be sure, both decisions featured concurrences indicating that some Justices might have considered the question differently had taxpayers brought suit. *See CIC Servs.*, 141 S. Ct. at 1594 (Sotomayor, J., concurring) ("[T]he answer might be different if CIC Services were a taxpayer," in part because the regulatory burdens would be "less expens[ive]" for a taxpayer than for tax advisors); *Direct Mktg. Ass'n*, 575 U.S. at 19 (Ginsburg, J., concurring) (observing that the question might be understood differently if it involved "claims suitable for a refund action"). But those views do not necessarily cut in favor of giving the Act an extra-textual gloss to apply differently to taxpayers, and in any event the opinions for the Court reasoned from the text of the statute and gave no indication the words would mean something different had the litigants been taxpayers.

In short, the Court has construed the Tax Injunction Act by reference to its text, which does not depend on the identity of the plaintiff (or, for that matter, potential downstream effects from an informational demand). Under traditional rule-of-law principles, the application of an identity-neutral statute does not then

depend on the identity of the litigant—there is one rule for everyone subject to the law. Not to mention, had Congress wished to enact a unique jurisdiction-stripping test just for the single largest category of foreseeable plaintiffs—taxpayers—it obviously could have done so, but did not.

Against all those considerations, the decision below limited this Court's opinions to their facts. According to the Ninth Circuit, *Direct Marketing Association*'s interpretation of the Tax Injunction Act cannot apply when the plaintiff is the "actual taxpayer," since enjoining the demand might inhibit the government's ability to later assess taxes. Pet.App.9. In other words, contrary to what this Court said, the Ninth Circuit concluded that the Tax Injunction Act *does* apply to information demands, at least to taxpayers, if the information would facilitate tax collection. But the Court has specifically held that "it did not matter [in *Direct Marketing Association*] that the [challenged] reporting requirements would facilitate collection of taxes," such as by "identifying residents who owed sales taxes." *CIC Servs.*, 141 S. Ct. at 1589.

The Ninth Circuit's limitation of this Court's case was error, and the practical effects are significant because it walls this Court's decisions off from the single largest group of potential litigants—putative taxpayers themselves. The decision below also adds an extratextual gloss of the type the Court expressly rejected in favor of the words Congress enacted. And it obscures the "clear" jurisdictional test the Court was aiming for. 575 U.S. at 14. The decision below also conflicts with

that from a district court in a parallel case, which easily concluded that the Tax Injunction Act does not apply to a claim "challeng[ing] only the [Pennsylvania Department of Revenue's] registration demands, not any formal act of taxation." *Online Merchs. Guild v. Hassell*, No. 1:21-CV-369, 2021 U.S. Dist. LEXIS 101240, *14 (M.D. Pa. May 28, 2021).

The Ninth Circuit's error warrants review before it compounds further.

III. The Ninth Circuit's approach to the adequacy of state remedies necessary to permit comity abstention is contrary to this Court's approach and is insufficiently protective of federal rights.

The Court should also grant review to consider the question whether, to be adequate for abstention purposes, a state court remedy must actually allow the plaintiff to raise their claims.

Like the Tax Injunction Act, the comity doctrine preserves federal jurisdiction when state courts do not provide an adequate remedy for the right in question. As the Court has put it, the "Federal rights of the persons [must] otherwise be preserved unimpaired" before a federal court considers whether to abstain. *Direct Mktg. Ass'n*, 575 U.S. at 15 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 422 (2010)). The adequacy analysis for comity "is identical" to that for the Tax Injunction Act. *A.F. Moore & Assocs. v. Pappas*, 948 F.3d 889, 896 (7th Cir. 2020) (Barrett, J.) (citing *Fair*

Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 n.8 (1981)).

Traditionally, the law requires a tight fit between rights and remedies. Rights and remedies are not considered "'in gross': a plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, ___ U.S. ___, 138 S. Ct. 1916, 1934 (2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

Ensuring that remedies match the injury is especially important where, as here, criminal penalties are on the table. *CIC Services* explained, for instance, that the risk of "criminal punishment" for disobeying reporting obligations "is not the kind of thing an ordinary person risks, even to contest the most burdensome regulation," so "criminal penalties [] practically necessitate a pre-enforcement, rather than a refund, suit." 141 S. Ct. at 1592; *accord Lynn v. West*, 134 F.3d 582, 594 (4th Cir. 1998) (recognizing that a "criminal penalty raises different constitutional concerns that outweigh the state's interest in the orderly administration of taxes").

And just this Term in *Axon Enterprise, Inc. v. Federal Trade Commission*, 215 L.Ed.2d 151 (U.S. 2023), the Court dealt at length with the importance of syncing up the "nature of the claims" and the judicial remedy available. There, the plaintiffs objected to in-house agency proceedings, and the Court determined that post-proceeding review would "come too late to be meaningful" because the challenged government action was

"impossible to remedy once the proceeding was over." Slip Op. at 13.

Below, California acknowledged that claims challenging registration demands "cannot be brought in California courts." Pet.App.49. That ought to have disposed of any argument for applying the Tax Injunction Act or the comity doctrine. When a court cannot hear claims based on a right, the right at stake obviously cannot be remedied in that forum. That is why the Seventh Circuit, in *A.F. Moore*, found it "simple" to reject comity abstention when the state conceded that the plaintiffs "cannot make their equal protection case in state court." *A.F. Moore*, 948 F.3d at 889.

Similarly, the district court that considered parallel claims in Pennsylvania abstained on comity grounds precisely because "litigants challenging . . . informational requests have historically obtained meaningful review in the Commonwealth's courts." *Hassell*, 2021 U.S. Dist. LEXIS 101240, *18. California is the outlier, flatly prohibiting claims other than refund requests and prohibiting pre-enforcement review of government demands collateral to taxation. *Cf., e.g.*, *Tully v. Griffin*, 429 U.S. 68, 75 (1976) (holding that New York's remedies were adequate because injunctive relief in court was available "when the claim is that the tax is unconstitutional").[1]

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[1] As a general matter, the states allow pre-enforcement review of allegedly unconstitutional tax-related government demands. *See*, *e.g.*, *Clarendon Assocs. v. Korzen*, 306 N.E.2d 299, 301 (Ill. 1973) (Illinois courts may issue injunctive relief prior to

The Ninth Circuit nonetheless read this Court's decision in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), to mean that California's refund-only system can remediate a claim based on an unlawful demand for information. Pet.App.9–11. *Grace Brethren Church* principally held that California's post-payment refund system offers an adequate remedy to challenge putatively unconstitutional taxation. 457 U.S. at 414–17. Well on its way to dismissing for lack of jurisdiction, the Court also rejected the petitioners' objection that they "may be subject to some recordkeeping and reporting requirements . . . pending" the resolution of their refund claim. *Id.* at 416. The Ninth Circuit interpreted that statement to mean that this Court squarely held that a refund-only system can remediate distinct informational injuries.

But the Ninth Circuit did not account for what this Court said in *Direct Marketing Association*: "nowhere in their brief to this Court did the plaintiffs in *Grace Brethren Church* separate out their request to enjoin the tax from their request for relief from the recordkeeping and reporting requirements. . . . *Grace Brethren*

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payment where, *inter alia*, "the tax is unauthorized by law"); *DeMoranville v. Comm'r of Rev.*, 927 N.E.2d 448, 452 n.7 (Mass. 2010) ("[H]istorically we have permitted declaratory relief even in the face of tax statutes specifying that the administrative remedies were exclusive."); *BP Communs. Alaska v. Central Collection Agency*, 737 N.E.2d 1050, 1056 (Ohio Ct. App. 2000); *Ranger Realty Co. v. Hefty*, 152 So. 439, 441 (Fla. 1933); *Haggerty v. Dearborn*, 51 N.W.2d 290, 295–96 (Mich. 1952); *Tiller v. Excelsior Coal & Lumber Corp.*, 65 S.E. 507, 508 (Va. 1909) ("The jurisdiction of a court of equity to enjoin the collection of an illegal tax is well recognized in this State.").

Church thus cannot fairly be read as resolving, or even considering, the question presented in this case"—*i.e.*, the jurisdictional distinction between tax collection and other discrete actions. 575 U.S. at 1, n.1. *Direct Marketing Association*, as well as *CIC Services*, depend on that distinction between tax collection and informational demands. And from a practical perspective, refunds are not designed to redress, and do not redress, being unlawfully coerced into registration and collection in the first instance.

This case, unlike *Grace Brethren Church*, also involves jail time—"imprisonment for 16 months, two years, or three years," as California put it to merchants. Pet.App.145–48, 166–67. "[C]riminal penalties [] practically necessitate a pre-enforcement, rather than a refund, suit." *CIC Servs.*, 141 S. Ct. at 1592. That is true not just in the taxation context, but also in the law more broadly. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) ("Where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

The federal rights at stake also highlight the importance of prospective review. The Online Merchants Guild brings a claim under the Internet Tax Freedom Act, which requires states to treat e-commerce and brick-and-mortar businesses similarly for tax-collection purposes; most relevant here, states may not "impose[] an obligation to *collect* or pay the tax on a different person or entity than in the case of transactions involving similar property . . . accomplished

through other means." ITFA § 1105(2)(A)(iii), codified at 47 U.S.C. § 151, Note (emphasis added). If California unlawfully makes merchants collect taxes from consumers, that injury cannot realistically be undone after the fact, at least not without significant wasted administrative costs. And violating the ITFA by wrongly collecting taxes from consumers can lead to significant liability exposure. *See In re AT&T Mobility Wireless Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 962 (N.D. Ill. 2011) (certifying a billion-dollar settlement class where defendant allegedly wrongly collected taxes in violation of the ITFA).

Similarly, if California lacks personal jurisdiction authority over the Online Merchants Guild's members to compel them to register in the first instance, that ought to be addressed on the front end, as personal jurisdiction challenges typically are. In sum, the nature of the rights at issue matters to the remedy inquiry, and what may be adequate for tax demands is not adequate for other injuries. The Online Merchants Guild acknowledges the importance of reliable tax flows for the operation of government, but tax-related rights—which are at the core of the Due Process Clauses—should not get second-class treatment. Especially where, as here, the rights in question involve information demands, not tax demands as such.

And although jurisdiction does not depend on the merits, the Online Merchants Guild's claims are more than colorable. After the Pennsylvania district court abstained, the Online Merchants Guild refiled its claims in Pennsylvania's Commonwealth Court, an

intermediate appellate court with original jurisdiction over challenges to agency action. That court ruled *en banc* that Pennsylvania's informational demands exceeded the Commonwealth's personal jurisdiction authority. *Online Merchs. Guild v. Hassell*, 282 A.2d 871 (Pa. Commw. Ct. 2022).

The Court should reaffirm that distinct rights and remedies must be evaluated distinctly, for comity as for other jurisdictional purposes. Doing so would not require the Court to revisit any of its other treatment of when state law remedies are adequate to protect taxpayer rights to challenge actual tax demands. But it would ensure that the law's treatment of the issue is coherent.

IV. This case provides a good vehicle to consider the questions presented.

This case is a good vehicle for the questions presented because the operative facts are simple and undisputed: the claims at issue directly challenge informational demands, not acts of assessment, levy, or collection, and California courts cannot hear a challenge to information demands. The questions presented turn solely on the implications of those facts in light of a discrete body of precedent and principle. In short, the questions presented are focused and cleanly presented.

The questions presented are likely to recur—there is no shortage of government demands for information—but the Court need not wait for other circuits

to weigh in differently. The decision below conflicts with a highly similar parallel case, resolved at the district court level, and with (at least) the Seventh Circuit's approach to the adequacy of remedies—if plaintiffs cannot raise a claim in state court, the forum is not adequate. Further percolation is unlikely to distill the issues further, and this Court is already in a good position to interpret the meaning of its own recent unanimous decisions. All told, there is not much if anything to be gained from further development of these issues in the lower courts, particularly at the expense of jurisdictional error.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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