No. 150, Orig.

In the Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

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

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California's opposition conjures phantom complexity to make the core issues of this case seem hopelessly complicated and fact-bound. They aren't. Instead, California's violations of the U.S. constitution are stark, egregious, and bereft of factual nuance. And they warrant this Court's acceptance of jurisdiction.

For example, a central issue presented here is whether the mere fact of investment in a California company is *alone* sufficient "minimum contacts" to permit out-of-state taxation. The legal rulings of the California Franchise Tax Board ("Board") are clear that the Board believes it is. Indeed, the Board's Legal Ruling 2014-01 explains in black-and-white terms *four times* in *four different examples* that the "doing business" tax may be imposed on businesses that "*ha[ve] no activities or factor presence in California other than through its membership in [an] LLC*[.]" Complaint Ex. A (Situations 3-6; Members F, H, J, & L) (emphasis added). And that pure investment-only rationale is precisely what Arizona challenges here.

That issue is both legally and factually simple, and crisply presented: this Court in *Shaffer v. Heitner* squarely held that such investment alone is *not* sufficient "minimum contacts" to satisfy due process. 433 U.S. 186, 213 (1977); Br.24-25. California contends (at 23) that the rule of *Shaffer* is actually "an individualized and highly contextual one." But seemingly *every* lower court that has applied *Shaffer* has had no difficulty in recognizing its holding as *categorical*. *See*, *e.g.*, Complaint ¶147

(citing multiple cases applying *Shaffer*'s categorical rule to LLCs).

To be sure, adding a slight amount of factual complexity makes the legal violations even clearer. In *Shaffer*, the defendants who were haled into court were directors of the corporation and thus necessarily involved in management. 433 U.S. at 215-16. But the opposite is true here: the quintessential nature of a manager-managed LLC is that the members are *legally precluded* from exercising managerial control. The due process violations here are thus even starker.

Beyond its factual-complexity scarecrow, California offers a remarkably meager defense of the constitutionality of its actions, which contravenes this Court's precedents and stands on positions that belie reality. For example, California's stunning belief that its Seizure Orders constitute a form of "voluntary compliance"—a characterization it remarkably advances *four times* (at 29-30, 32), notwithstanding those orders' explicit threats of sanctions for non-compliance, Br.9, 15-16—is not only demonstrably erroneous, but also deeply illustrative of how aggressive California's taxation policies have become. Similarly, contrary to California's suggestion (at 32), a privacy interest is not required for an unlawful *seizure* claim. *Infra* at 7.

Ultimately, this case is strikingly similar to both *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) and *Maryland v. Louisiana*, 451 U.S. 725 (1981). The claims presented here are at least as serious, and alternative fora at least as unavailable. This Court should similarly accept jurisdiction here.

I. ***Constitutional Violations.*** California's defense of the constitutionality of its Extraterritorial Assessments and Seizures is remarkably flimsy. And the clarity of those constitutional violations underscores the seriousness of Arizona's claims.

Extraterritorial Assessments: Due Process. California's only defense (at 23) appears to be that the rule of *Shaffer* is "individualized and highly contextual." But *Shaffer*'s holding is categorical: investment alone is not sufficient "minimum contacts." *Supra* at 1-2. Lower courts have readily recognized as much, and this Court has reiterated that "*Shaffer* [held] that the mere presence of property in a State does not … support the exercise of jurisdiction[.]" *Rush v. Savchuk*, 444 U.S. 320, 328 (1980).[1] California thus appears to stand alone in its *sui generis* and highly-lucrative misreading of *Shaffer*. And even if the rule of *Shaffer* were factually intensive, California notably does not identify a *single* instance where it has ever found it lacked "minimum contacts" for an Extraterritorial Assessment authorized by state law—demonstrating its ample ability to exploit even nonexistent wiggle-room.[2]

Nor can there be any doubt that California is taxing based on mere investment alone: it has

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[1] *Accord GCIU-Employer Ret. Fund v. Coleridge Fine Arts*, 700 F. App'x 865, 869 (10th Cir. 2017); *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 229 n.9 (3d Cir. 2008).

[2] In contrast, *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) involved extensive purposeful availment, and satisfaction of the requirements for due process (as opposed to the Commerce Clause) was never in doubt. Nor does California dispute that "minimum contacts" for personal jurisdiction and taxation are effectively identical here. *See* Br.24.

candidly and repeatedly announced as much. *Supra* at 1. Here, Arizona seeks review of that explicit interpretation, which notably lacks *any* factual nuance.

California also protests (at 24-25) that "the Court would be hard-pressed to announce any clear rule to apply." But *Shaffer already* announced a clear rule: investment alone is not sufficient "minimum contacts." This case merely requires this Court to enforce that unambiguous standard against California's patent violations of it.

Extraterritorial Seizures: Due Process. California's primary defense of its Extraterritorial Seizures is the mere incantation (untethered from reality) that there are no seizures at all, or indeed *any* exercise of coercive state power. BIO 29-30. As if self-caricaturing its own brazenness, California repeatedly (at 29-30, 32) asserts that its Extraterritorial Seizures are a form of "voluntary compliance."

That is preposterous. California's Seizure Orders are backed by explicit threats of monetary penalties for non-compliance. Br. 9, 15-16. There is *nothing* "voluntary" about acquiescing to such coercive threats.[3] California's astonishing—and inadvertently revealing—inability to distinguish between "voluntary compliance" and coercive state

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[3] *See*, *e.g.*, *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 368 n.11 (1973) ("The payments… were obtained only by coercion… and thus they hardly can be said to have been voluntary."); Black's Law Dictionary (10th ed. 2014) (defining "Voluntary" as "[u]nconstrained by interference; not impelled by outside influence."); *id.* ("An act that must be voluntary… is not legally valid if done under coercion.") ("Coercion").

power, while presenting its tax collection procedures as being perfectly orderly, demonstrates how badly this Court's review is needed.

California compounds these due process concerns with literal denials of due process, issuing countless thou-shalt-not-go-to-court commands to banks. Br.33. Not to worry, California says, because California purports to immunize the banks from liability. BIO 30. But California's pretense that it can immunize banks from liability under federal and *Arizona* law further demonstrates its contempt for the sovereignty of other governments, since Arizona *should* be able to penalize the *de facto* theft of *its citizens'* bank deposits *located in Arizona*.

California finally resorts to some whataboutisms (at 30-31) by pointing out that Arizona (like the federal government and most states) requires pre-payment of taxes before a taxpayer judicial challenge. But that common practice has nothing to do with California's pervasive, warrantless, non-judicial, jurisdiction-less, and probable-cause-free seizures of moneys in *out-of-state* bank accounts.[4] Unlike California, Arizona does nothing of the sort.

Extraterritorial Assessments: Commerce Clause. California's "nexus" arguments fail because Extraterritorial Assessments violate due process. *Supra* at 3-4; Br.27.

As to the "fair relationship" requirement, California protests (at 26) that the "inquiry requires

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[4] *Clement Nat'l Bank v. Vermont*, 231 U.S. 120, 137 (1913), and *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351-352 (1977) are inapposite as the relevant bank deposits were located *within* the relevant sovereign's territory.

an assessment of the particular circumstances of each taxpayer." But California does nothing to contest Arizona's demonstration that California does not provide *any* benefits to the targets of Extraterritorial Assessments. *See* Br.31. No fact-intensive inquiry is required to conclude that charging $800 annually in return for *nothing* does not constitute a "fair relation between [the] tax and the benefits conferred[.]" *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 199 (1995).

As to the second and third requirements, California objects (at 28) that the State "cites no study or empirical data." But Arizona is merely seeking to file a *complaint*, and any expert reports and studies can be addressed by a special master *after* leave is granted. Nor does California effectively dispute that Arizona has adequately *alleged* the requisite violations. In any event, the discriminatory nature of the Extraterritorial Assessment is apparent from the face of California's actions. Br.29-30; *see also Oregon Waste Sys., Inc. v. Oregon DEQ*, 511 U.S. 93, 97 (1994) (invalidating facially discriminatory law even where lower court avoided factual development).[5]

Extraterritorial Seizures: Fourth Amendment. California repeats its absurd "voluntary compliance" argument (at 32), which fails as explained above. *Supra* at 4-5. It further contends that the Fourth Amendment is not implicated unless there is an "'intrusion into … privacy.'" BIO 32 (citation omitted). But this Court

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[5] *American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005), notably addressed flat fees for purely *intra*state activity—not *inter*state investment.

has unanimously held otherwise in a decision previously cited (Br.34). *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 60 (1992) (reversing Seventh Circuit's holding that seizures are not actionable under Fourth Amendment "absent interference with privacy or liberty"). Finally, California questions Arizona's standing to assert Fourth Amendment claims, citing *Rakas v. Illinois*, 439 U.S. 128 (1978). But *Rakas suppression of evidence*, where this Court has carefully balanced the social costs of that remedy against its deterrence value. *Id.* at 137-38. No such concerns are implicated here. And *Rakas* certainly did not consider whether a state may challenge the persistent and flagrant violation of its sovereign borders and the rights of its citizens. That admittedly is untrodden ground. But nothing in this Court's precedents suggests that Arizona must acquiesce in those blatant violations.

II. ***Seriousness and Dignity of Arizona's Claims.*** This factor is strongly supported by the clarity of California's constitutional violations, which California has done little to dispel. In addition, California's actions inflict injuries of sovereign, proprietary, and quasi-sovereign nature that support accepting jurisdiction here.

Sovereign Injuries. California posits (at 13) that Arizona is suffering no sovereign injury because this case involves only "pecuniary disputes regarding taxation of private parties." True, one-off violations of Arizona's borders would not warrant this Court's acceptance of jurisdiction. But far more is presented here: California is systematically violating Arizona's borders and sovereignty *thousands of times* each year. Complaint ¶65. The federal government would *never* tolerate equivalent conduct by other

nations—something California does not meaningfully dispute. This case thus presents a "model case for invocation of this Court's original jurisdiction[.]" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

Ultimately, California's position appears to be that no level of persistent flouting of Arizona's sovereignty through Extraterritorial Assessments and Seizures could ever give rise a valid claim in this Court (or indeed *any court*, *infra* at 10). That cannot possibly be the law, and California cites nothing to suggest that it is.

Moreover, California also does not provide any response to the State's demonstration that California's actions encroach upon Arizona's sovereign power to regulate banks and bank deposits in Arizona. *See* Br.17. That alone supports acceptance of jurisdiction here.

Proprietary Injuries. Arizona is suffering precisely the sort of harm to its treasury as was the case in *Wyoming*, which is controlling here. Br.17. California contends (at 14-15) that Arizona could avoid "self-harm" by repealing its policy of only taxing net income (*i.e.*, eliminating deductions for expenses and taxes). But Wyoming equally could have repealed its severance tax on coal, and yet it still had standing. 502 U.S. at 446-54.[6] (And by

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[6] Moreover, unlike the *specific* tax *credit* in *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976), Arizona has merely enacted a general policy of taxing only net (*i.e.*, real) income, rather than gross income, though allowance of *deductions*. That is hardly the sort of specific self-injury of *Pennsylvania*. *See Texas v. United States*, 809 F.3d 134, 157-59 (5th Cir. 2015), *aff'd by equally divided court* 136 S.Ct. 2271 (2016).

similar logic, Maryland could have avoided injury by ceasing its purchases of natural gas). California does not offer any manner of reconciling *Wyoming* with its arguments here.

Quasi-Sovereign Injuries. Arizona also has standing as *parens patriae*. California strikingly ignores (at 17) *Maryland*'s alternative holding (*i.e.* all of Section II.A.2) that *parens patriae* standing exists where "a great many [of a state's] citizens … are faced with increased costs aggregating millions of dollars per year." 451 U.S. at 739. Arizona has alleged precisely that: over 10,000 Arizona businesses are hit annually with over $10 million in illegal Extraterritorial Assessments. Complaint ¶65.

More generally, "[t]he operative question is whether the injury in question affects a 'sufficiently substantial segment of [Arizona's] population.'" Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 495 (2012) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)). And "*Snapp* itself involved [only] 787 temporary job opportunities for residents of Puerto Rico[.]" *Id.* (cleaned up). In contrast, this action likely involves *more than 10,000* injured Arizona businesses.

Pattern of Encroachments. California offers only a token defense (at 16 n.9) of its other violations of sister states' sovereignty. Br.18-20. And it tellingly does not even attempt to argue that it is a good neighbor, rather than an 800-pound gorilla all-too eager to throw its weight against smaller states (*i.e.*, all 49 of them).

Federal courts exist precisely so that "subjects that were decided by pure 'political power' before ratification now turn on federal 'rules of law.'" *California FTB v. Hyatt*, 139 S.Ct. 1485, 1498 (2019) (citation omitted). This Court's review is needed to ensure that California's taxing powers are properly constrained by the Constitution, rather than whatever California's might-makes-right approach might permit.

III. ***Availability of Alternative Fora.*** California notably does not deny that there is *no other forum* in which Arizona can file this action. BIO 19, 22. And it also does not contest that no other party could assert Arizona's sovereign injury claims. *See* Br.23. Thus, if any sovereign injury was caused by California's actions, this Court is the *sole tribunal* that could vindicate that harm. And because California's extensive violations of Arizona's sovereignty have caused exactly such injury, that alone should resolve the alternative-forum factor.

Notably, this Court granted leave in *Wyoming* even though there were no private suits for "reasons unknown" and stressed that "[e]ven if such action were proceeding, however, *Wyoming's interests would not be directly represented*." 502 U.S. at 452 (emphasis added). It is undisputed that Arizona's interests here can only be directly represented in this Court, and leave is similarly warranted here.

As to individual taxpayer actions, this case is controlled by *Maryland*. As there, "individual [taxpayers here] cannot be expected to litigate [the tax's] validity … given that the amounts paid by each [taxpayer] are likely to be relatively small." 451 U.S. at 739. And despite California's

protestations (at 20), $800 is simply not enough to expect individual taxpayers to bring a full-blown constitutional case.[7]

Indeed, although California has likely charged Extraterritorial Assessments over one million times since 2008,[8] it has resulted in only *one* precedential decision (*Swart*)—that notably ducked the constitutional issues—and which California has also adroitly distinguished/narrowed into near nothingness. Br.23.[9] That is roughly a 0.0001% rate of Extraterritorial Assessments leading to a precedential decision of any sort. History thus provides powerful evidence that individual taxpayer actions will *not* adequately resolve the issues presented here. And this Court in *Wyoming* found acceptance of jurisdiction "proper" where there were not "assurances … that a State's interests under the Constitution will find a forum for appropriate hearing and full relief." 502 U.S. at 452. Here it is doubtful that California state courts will reach the constitutional merits soon (or ever), and it is quite

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[7] *Arizona v. New Mexico* is distinguishable: there Arizona "failed to allege" any "impact on the rates paid by consumers" and there was another specific case "rais[ing] the same constitutional issues" to defer to. 425 U.S. 794, 796-98 (1976). Neither factor is present here. Nor should California's reliance (at 18) on purported sins of the grandfather (from *43 years ago*) be given serious consideration.

[8] This conservatively assumes that California's Extraterritorial Assessments in other states are nine times those in Arizona (although those 48 states are roughly 39 times as populous).

[9] *Bunzl Distrib. USA, Inc. v. FTB*, 27 Cal. App. 5th 986, 990 (2018) notably involved application of a different tax.

certain that Arizona will not receive *any* direct relief—let alone "full relief."

California also suggests (at 19-20) that taxpayers could bring a class-action, citing *In re FTB LLC Tax Refund Cases*, 25 Cal. App. 5th 369, 374 (2018). But that case actually demonstrates the inadequacy of California courts as alternative fora. It notably involves requests for refunds under *2008* appellate decisions holding a different LLC tax violated the Commerce Clause, which the Board *still* has not paid a decade later in *2018*, *id.* at 374—further underscoring California's recalcitrance in the face of adverse California state court decisions. And even though a class-action was filed in 2007, a class was not even certified until 2018. *Id.* at 374, 378. Under that model, Arizona taxpayers filing a class-action today would remain unpaid, and their class uncertified, *in 2029*. Moreover, California's suggestion that class-action litigation is available is utterly at odds with its repeated contention that the claims here "could not practicably be resolved in aggregate form." BIO 22, 23-26.

In addition, requiring Arizona taxpayers to file suit in California state court—even though California lacks "minimum contacts"/personal jurisdiction over them—is a perpetuation of the constitutional violations, not provision of an adequate alternative forum. Br.22. California responds that "this Court has never suggested that litigation of that sort is unfair to the claimants." BIO 20. But, respectfully, this Court's "minimum contacts" precedents are all about "'traditional notions of fair play and substantial justice.'" *Shaffer*, 433 U.S. at 203 (citation omitted). Mandating litigation in a forum lacking personal

jurisdiction over the parties is manifestly "unfair" *by definition*.

In addition, California's oft-repeated belief that its Seizure Orders effectuate only *voluntary* compliance underscores how completely the Board has slipped the leash of California state courts. *Supra* at 4-5. This Court should accept jurisdiction to provide some sorely needed guidance and correction.

Respectfully submitted,

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