No. 150, Original

In the Supreme Court of the United States

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the motion for leave to file a bill of complaint should be denied.

STATEMENT

1. a. Under California law, a limited liability company (LLC) is "a hybrid business entity" that "combines aspects of both a partnership and a corporation." *City of Los Angeles* v. *Furman Selz Capital Mgmt.*, L.L.C., 17 Cal. Rptr. 3d 139, 142 (Cal. Ct. App. 2004). "The essence of an LLC is the co-existence of partnership tax status with corporate-like limited liability." *Fashion Valley Mall, LLC* v. *County of San Diego*, 98 Cal. Rptr. 3d 327, 330 n.1 (Cal. Ct. App. 2009) (citation omitted). "[U]nless it elects otherwise, an LLC is a pass-through entity for tax purposes, akin to a partnership," in which "[p]rofits are not taxed at the entity level but are instead passed through to members and

taxed on an individual basis, thus avoiding the double-taxation aspect" of the corporate form. *Northwest Energetic Servs., LLC* v. *California Franchise Tax Bd.*, 71 Cal. Rptr. 3d 642, 649 (Cal. Ct. App. 2008), as modified on denial of reh'g (Mar. 3, 2008). But like a corporation, an LLC has "a legal existence separate from its members" and provides them "with limited liability to the same extent enjoyed by corporate shareholders." *Furman Selz Capital Mgmt.*, 17 Cal. Rptr. 3d at 143.

The management and control of an LLC depend on the terms of "the parties' operating agreement and articles of incorporation." *Swart Enters., Inc.* v. *Franchise Tax Bd.*, 212 Cal. Rptr. 3d 670, 679 (Cal. Ct. App. 2017). In a "member-managed" LLC, "[t]he management and conduct of the [LLC] are vested in the members," and each member "has equal rights in the management and conduct of the [LLC]'s activities." Cal. Corp. Code § 17704.07(b)(1)-(2) (West Supp. 2019). In a "manager-managed" LLC, "any matter relating to the activities of the [LLC] is decided exclusively by the managers." *Id.* § 17704.07(c)(1) (West Supp. 2019). While members "have the ability to remove the manager with a majority vote, they have no right to control the management and conduct of the LLC's activities." *Swart*, 212 Cal. Rptr. 3d at 679 (citing Cal. Corp. Code § 17704.07(c)(4)-(5) (West 2014)).

b. Any LLC "doing business" in California is subject to a minimum franchise tax of $800 "for the privilege of doing business in th[e] state." Cal. Rev. & Tax. Code §§ 17941(a), 23153(d)(1) (2019 Cal. Legis. Serv. ch. 421, §§ 1-2 (A.B. 308)) (West). "Doing business" is defined to mean "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." *Id.*

§ 23101(a).[1] The statute specifically provides that a taxpayer "do[es] business" in California if it is organized or commercially domiciled in the State, or if it exceeds specific thresholds for sales, property ownership, or payment of compensation there. *Id.* § 23101(b)(1)-(4). The governing regulation states that "'doing business'" "includes," *inter alia*, "the purchase and sale of stocks or bonds," but does not include "[t]he mere receipt of dividends and interest by a corporation and the distribution of such income to its shareholders." Cal. Code Regs. tit. 18, § 23101(a) and (b) (2019). The California Court of Appeal has held that an out-of-state business is not "doing business" in California based solely on its ownership of a .2% "passive" interest in a manager-managed LLC that is itself "doing business" in California, where the manager-managed LLC was established before the taxpayer's investment. *Swart*, 212 Cal. Rptr. 3d at 679-682.

c. The Franchise Tax Board (Board) "is a California agency charged with enforcement of that State's personal income tax law," including the doing-business tax. *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 5 (1983); see Cal. Rev. & Tax. Code § 19501. Under California law, taxes are due at the time a taxpayer files a return. Cal. Rev. & Tax. Code § 19001. If the Board determines that a return discloses less than the amount due (or if the taxpayer fails to file a return), the Board mails "notice to the taxpayer of the deficiency proposed to be assessed." *Id.* § 19033; see *id.* § 19087.

A taxpayer who disagrees with a proposed assessment may file a written protest with the Board before

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[1] Where no year is provided, citations are to the West 2015 version of the California statute.

paying any tax. Cal. Rev. & Tax. Code § 19041. "If a protest is filed," the Board "shall reconsider the assessment of the deficiency" and provide an oral hearing upon request. *Id.* § 19044(a). If the taxpayer remains dissatisfied following the Board's decision, the taxpayer may appeal to the Office of Tax Appeals. *Id.* §§ 19045-19047.[2] An assessment does not become final until the conclusion of proceedings before the Office of Tax Appeals (or, if the taxpayer does not seek administrative review, when the deadline for seeking such review has passed). *Id.* §§ 19042, 19045, 19048.

When an assessment becomes final, the Board issues a notice of tax due and a demand for payment. Cal. Rev. & Tax. Code § 19049. If the taxpayer fails to pay the tax, the Board may invoke its collection authority under Cal. Rev. & Tax. Code §§ 18670 and 18670.5. As relevant here, those provisions authorize the Board to issue a notice to the taxpayer's bank, requiring that the bank withhold from assets of the taxpayer the amount of "any tax, interest, or penalties due," and "transmit the amount withheld" to the Board. *Id.* §§ 18670(a), 18670.5(a). Upon receiving such a notice, the taxpayer's bank must "comply * * * without resort to any legal or equitable action in a court of law or equity," and "is not liable" to the taxpayer for "any amount required" to be withheld. *Id.* § 18674(a). If, however, the bank fails to comply with a collection notice, it "shall be liable for th[e] amounts" identified by the Board. *Id.* § 18670(d).

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[2] The relevant statutory provisions refer to the Board of Equalization, but recent legislation transferred appellate review to the Office of Tax Appeals. See Cal. Gov't Code § 15670 (West Supp. 2019); Cal Rev. & Tax. Code § 20(b) (West Supp. 2019).

Once a tax has been paid, the taxpayer (including a member of an LLC) may bring a refund action in California state court. Cal. Rev. & Tax. Code § 19382; see *Swart*, 212 Cal. Rptr. 3d at 673 (considering post-payment challenge by LLC member); *California Taxpayers Ass'n* v. *Franchise Tax Bd.*, 118 Cal. Rptr. 3d 667, 676 (Cal. Ct. App. 2010) (Section 19382 "applies generally to income taxpayers, including corporate taxpayers."); see also Cal. Const. Art. XIII, § 32 (limiting judicial review of tax cases to post-payment refund actions). California law requires that, before filing suit, the taxpayer must present a refund claim to the Board, but the taxpayer need not appeal to the Office of Tax Appeals. Cal. Rev. & Tax. Code § 19382.

2. In February 2019, the State of Arizona filed a motion in this Court for leave to file a bill of complaint against the State of California. Arizona alleges that the Board has applied the doing-business tax to Arizona-based LLCs based solely on their "[p]assive investment in a [California] corporation or LLC," and that such application violates the Due Process Clause, U.S. Const. Amend. XIV (Compl. ¶ 147; see Compl. ¶¶ 142-150) and the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3 (Compl. ¶¶ 151-168). Arizona further alleges that the Board's collection procedures violate the Due Process Clause (Compl. ¶¶ 169-179) and the Fourth Amendment (Compl. ¶¶ 180-190). Arizona claims (Compl. ¶¶ 130-133) that it has suffered "sovereign injur[ies]" from the Board's "incursions" into Arizona to collect the tax, and that "California's actions frustrate Arizona's ability" to regulate banks within its territory. Arizona further claims (Compl. ¶¶ 134-135) proprietary injury flowing from lost tax revenues, and injuries to its quasi-sovereign interests (Compl. ¶¶ 136-141).

In opposition to the motion, California contends that this case does not warrant an exercise of this Court's original jurisdiction (Br. in Opp. 10-22), that Arizona's claims "could not practicably be resolved in aggregate form in an original jurisdiction action," and that, in any event, those "claims fail" (*id.* at 22).

DISCUSSION

The motion for leave to file a bill of complaint should be denied because this is not an appropriate case for the exercise of this Court's original jurisdiction, which the Court has repeatedly stated should be exercised only "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citation omitted). Arizona does not assert the types of interests that would warrant such an exercise, and the issues Arizona seeks to present can be adequately raised and litigated by Arizona entities that are actually subject to the tax. In addition, Arizona's Due Process and Commerce Clause claims would more appropriately be considered on developed factual records concerning affected entities and with the benefit of authoritative interpretations of the relevant statutes by the California courts. Arizona's Fourth Amendment claim also does not warrant an exercise of this Court's original jurisdiction because it similarly seeks to advance personal rights and does not otherwise warrant an exercise of original jurisdiction.

1. a. The Constitution includes within this Court's original jurisdiction "all Cases * * * in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that this Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13,

1 Stat. 80-81; see also Stephen M. Shapiro et al., *Supreme Court Practice* § 10.1, at 618-621 (10th ed. 2013). But although that jurisdiction is exclusive, the Court has "interpreted the Constitution and [Section] 1251(a) as making [its] original jurisdiction 'obligatory only in appropriate cases,'" *Mississippi*, 506 U.S. at 76 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)), and therefore "as providing [the Court] 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court,'" *ibid.* (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

In exercising that discretion, this Court has "said more than once" that its original jurisdiction should be invoked only "'sparingly,'" observing that original jurisdiction "'is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi*, 506 U.S. at 76 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992), and *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)). The Court therefore has expressed "reluctance to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); see *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931) ("[T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.").

b. Arizona (Br. in Support 36) and its amici (Researchers Amici Br. 5-7) invite the Court to reconsider its well-established conclusion—reaffirmed several times over more than 40 years—that the exercise of original jurisdiction in controversies between States under

28 U.S.C. 1251(a) is discretionary. This Court recently declined a similar invitation, see *Missouri* v. *California*, 139 S. Ct. 859 (2019), and it should do so here as well. The Court's interpretation of Article III and the statute is grounded in the historical understanding that original jurisdiction over suits between States arose from the "'extinguishment of diplomatic relations between the States,'" and was therefore intended by "the framers of the Constitution" to be available only when absolutely necessary. *Louisiana* v. *Texas*, 176 U.S. at 15 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890)). The Court's interpretation is also supported by structural limits on the court's ability "to assume the role of a trial judge," *South Carolina* v. *North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part); the Court's duty to attend to its appellate docket, see *City of Milwaukee*, 406 U.S. at 93-94; and the doctrine of *stare decisis*, see *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

2. This is not one of the rare cases that warrants the exercise of this Court's original jurisdiction. In deciding whether to exercise jurisdiction, the Court considers "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim,'" and whether there exists an alternative forum "in which the issue[s] tendered" to the Court "'may be litigated.'" *Mississippi*, 506 U.S. at 77 (citations omitted). Both factors weigh against the exercise of jurisdiction here.

a. This Court has explained that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (quoting *Texas*, 462 U.S. at

571 n.18). The Court has agreed to exercise that jurisdiction "most frequently" to consider disputes "sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* § 10.2, at 622 (collecting cases). The Court "has also exercised original jurisdiction in cases sounding in contract, such as suits by one state to enforce bonds or other financial obligations of another state," or "to construe and enforce an interstate compact." *Ibid.*

Arizona's asserted interests do not fall into any of those categories. Instead, Arizona contends that California's assessment and collection of its $800 doing-business tax from Arizona-based LLCs (1) infringes Arizona's sovereign interests in the recognition of its borders and its ability to regulate Arizona banks; (2) "inflict[s] proprietary harm to Arizona's treasury by converting otherwise-taxable income into a non-taxable deduction" (Br. in Support 17); and (3) injures Arizona's quasi-sovereign interests in securing the benefits of federalism and the economic well-being of its residents. See *id.* at 15-18. None of those asserted interests justifies the exercise of this Court's original jurisdiction.

i. Arizona first contends (Br. in Support 15, 17) that by assessing and collecting the doing-business tax from Arizona residents, California engages in "perpetual, low-grade" "cross-border incursions into Arizona." Arizona is correct that States have a sovereign interest in the "maintenance and recognition of [their] borders." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). But Arizona has not identified any case suggesting that one State's taxation of another State's residents violates that interest—much less that

it amounts to the type of grievous violation of sovereignty that would support the exercise of original jurisdiction. To the contrary, this Court has recognized that "[a]s our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders," including "clash[es] over the application of state laws concerning taxes," and it has rejected the argument that it should be the "principal forum for settling such controversies." *Arizona* v. *New Mexico*, 425 U.S. 794, 798 (1976) (per curiam) (quoting *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971)).

Arizona relatedly asserts (Br. in Support 17) that California's collection efforts frustrate "Arizona's ability to regulate banks located in its borders." This Court, however, has declined to exercise original jurisdiction in cases based on asserted regulatory conflicts where the plaintiff State fails to "show[]" that the States' regulatory regimes are "mutually exclusive." *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939). Arizona points to no regulation that it cannot enforce due to California's collection of its doing-business tax.

ii. Arizona next contends (Br. in Support 16-17) that California's taxation of Arizona residents causes it to suffer "proprietary harm" in the form of lost tax revenue. In particular, Arizona alleges (Compl. ¶ 66) that when an Arizona-based LLC pays the California doing-business tax, Arizona loses tax revenues because that payment is a "deductible business expense under Arizona law."

This Court rejected a similar theory of injury in *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam). There, Pennsylvania sought to file a complaint against New Jersey, and Maine, Massachusetts, and

Vermont sought to file a complaint against New Hampshire, alleging that the defendant States' taxes "diverted [income tax] from [the plaintiff States'] respective treasuries." *Id.* at 663; see *id.* at 662. Although the Court had already held the New Hampshire tax unconstitutional, see *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), it denied the States leave to file their complaints. *Pennsylvania*, 426 U.S. at 664. The Court explained that the injuries to the plaintiff States' fiscs were not "direct[]" but rather "result[ed] from decisions by their respective state legislatures" to offer credits for income taxes paid to other States. *Id.* at 663-664.

Arizona contends (Reply Br. 8 n.6) that *Pennsylvania* is distinguishable because it involved a "tax *credit*" while Arizona law allows "*deductions*." But Arizona does not explain why that difference should matter. Whatever the precise mechanism, any injury to Arizona's treasury is caused by operation of an Arizona law that reduces the amount of tax owed to the State. "Nothing required" Arizona to offer this deduction to its residents, "and nothing prevents" it "from withdrawing" that benefit. *Pennsylvania*, 426 U.S. at 664.[3]

Nor is Arizona correct (Br. in Support 16-17; Reply Br. 8-9) that this case is more similar to *Wyoming* v. *Oklahoma* than it is to *Pennsylvania*. In *Wyoming*, the challenged statute required Oklahoma's utilities—which previously had "purchased virtually 100% of their coal requirements from Wyoming sources"—to instead

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[3] Arizona's reliance (Reply Br. 8 n.6) on *Texas* v. *United States*, 809 F.3d 134, 157-159 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271 (2016), is misplaced. That case concerned whether a particular injury provided Texas with standing to sue the United States—not whether it would be a sufficient basis for this Court's exercise of original jurisdiction.

purchase at least 10% of their coal from Oklahoma. 502 U.S. at 440, 445; see *id.* at 442-444. This Court held that Wyoming's challenge presented "an appropriate [case] for the exercise of [its] original jurisdiction" because the Oklahoma statute "directly affect[ed] Wyoming's ability to collect severance tax revenues" on its coal. *Id.* at 450-451. By contrast, here, Arizona's alleged injury is indirect: California's doing-business tax affects its tax revenues only because it has chosen to provide a deduction from taxable income for the amount its residents pay to California. And contrary to the situation in *Wyoming*, California's tax does not specifically target Arizona residents. See *id.* at 443-444.

Arizona's reliance on *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), is similarly misplaced. See Br. in Support 16. There, the Court exercised original jurisdiction over a challenge by nine States and the federal government to a Louisiana law imposing a tax on gas produced on federal lands offshore and brought into Louisiana for processing. *Maryland*, 451 U.S. at 728, 731, 734, 736 n.12. The Court explained that the plaintiff States were "directly affected in a 'substantial and real' way" because they were "substantial consumers of natural gas," and the tax was "clearly intended to be passed on to the ultimate consumer," *id.* at 736-737. Here, Arizona acknowledges that it does not pay the California tax. See, *e.g.*, Br. in Support 22.

iii. Finally, neither of Arizona's asserted "quasi-sovereign" interests justifies an exercise of this Court's original jurisdiction. Br. in Support 18 (citation omitted).

Arizona first contends that the assessment and collection of California's doing-business tax from Arizona-based LLCs "denie[s] Arizona its 'rightful status within

the federal system,'" and denies its residents "the benefits" thereof. Br. in Support 18 (quoting *Snapp*, 458 U.S. at 607). The government, however, is aware of no case in which this Court has held that a State may invoke the Court's original jurisdiction simply by raising such generalized federalism concerns. *Snapp* was not such a case, as it arose in district court. See 458 U.S. at 598-599. And to the extent Arizona suggests that a Commerce Clause challenge necessarily presents "a claim of sufficient 'seriousness and dignity'" to warrant exercise of this Court's original jurisdiction (Br. in Support 16 (quoting *Wyoming*, 502 U.S. at 451); see *id.* at 18), that is incorrect. The Court has repeatedly denied motions to file bills of complaint that alleged a violation of the Commerce Clause. See, *e.g.*, *Missouri* v. *California*, 139 S. Ct. 859; *Arizona*, 425 U.S. at 795-798. Indeed, if merely pleading a Commerce Clause claim justified exercise of this Court's original jurisdiction, the Court would face the "quandary" of "opt[ing] either to pick and choose arbitrarily among similarly situated litigants or to devote truly enormous portions of [the Court's] energies to" original matters. *Wyandotte*, 401 U.S. at 504.

Arizona also relies on its "quasi-sovereign interest" in the economic well-being of its residents. Br. in Support 18 (quoting *Snapp*, 458 U.S. at 607). Arizona has not, however, demonstrated that any economic injury to Arizona taxpayers "affects [its] general population * * * in a substantial way," *Maryland*, 451 U.S. at 737, much less that such injury is on par with that in prior cases in which this Court has exercised original jurisdiction. Arizona asserts that "an estimated 13,333 Arizona-based LLCs" are "subject to the California 'doing business' tax based solely on passive investments in

California-Operating LLCs." Compl. ¶ 65. Assuming that number is accurate, Arizona's claim is not comparable to those over which this Court has previously exercised original jurisdiction.[4] For example, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), the complaint alleged that the challenged West Virginia provision would "largely curtail or cut off the supply of natural gas" from West Virginia to the plaintiff States, injuring the "many" "public institutions and government agencies" that used such gas, "imperil[ing] the health and comfort" of the plaintiffs' citizens, and "halt[ing] or curtail[ing] many industries" within those States. *Id.* at 581, 583-585; see *id.* at 591; see also, *e.g.*, *Maryland*, 451 U.S. at 744 (challenged tax was "intended to be and is being passed on to millions of consumers in over 30 States").[5]

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[4] It is unclear whether Arizona's estimate is accurate, since it may include LLCs that would not be subject to California's doing-business tax under the governing judicial and administrative decisions. See *Swart Enters., Inc.* v. *Franchise Tax Bd.*, 212 Cal. Rptr. 3d 670, 679-682 (Cal. Ct. App. 2017) (holding that a "quintessential passive investor" with a .2% share of a California LLC could not "be deemed to be 'doing business' in California" solely on that basis); *In re Jali, LLC*, No. 18073414 (Cal. Off. Tax App. July 8, 2019), slip op. 5 (explaining that application of the tax depends on "a fact-intensive inquiry").

[5] Arizona suggests that the alleged impact of the California tax compares favorably to the "787 temporary job opportunities" at issue in *Snapp*. Reply Br. 9 (citation omitted). But *Snapp* was not an original jurisdiction case, and the Court acknowledged that "[t]here may indeed be special considerations that call for a limited exercise of [its] jurisdiction" in original cases, which "may not apply to a similar suit brought in federal district court." 458 U.S. at 603 n.12. In addition, *Snapp* rejected as "too narrow" a focus on the number of job opportunities, in light of Puerto Rico's interest in protecting *all*

b. Original jurisdiction is unwarranted in this case for the additional reason that Arizona's claims can be—and have been—raised by other parties in California state court. See *Arizona*, 425 U.S. at 796-797; *Mississippi*, 506 U.S. at 76. As described above, see pp. 3-5, *supra*, taxpayers who are subject to California's doing-business tax based on their investments in California LLCs may challenge those taxes through state administrative procedures and, if unsuccessful, bring refund actions in California state court, asserting the same constitutional claims raised in Arizona's complaint.

Such taxpayers are the most natural plaintiffs, because they are directly affected by California's doing-business tax. And indeed, two currently pending class actions challenge the application of the tax to "out-of-state passive members" of California LLCs based on the Due Process and Commerce Clauses. See Second Am. Class Action Compl. ¶¶ 2, 30, *The Rasmussen Co.* v. *California Franchise Tax Bd.*, No. 16-554150 (Cal. Super. Ct. Apr. 9, 2019); Class Action Compl. ¶ 30, *Wein Realty, LLC* v. *California Franchise Tax Bd.*, No. CGC-19-576007 (Cal. Super. Ct. May 14, 2019). If those class actions succeed, Arizona's interests "will have been vindicated." *Arizona*, 425 U.S. at 797. If they fail, the taxpayers may seek review through this Court's ordinary certiorari process. Cf. *ibid.*

Arizona contends that such state-court actions "do not provide an adequate alternative forum" because a private-party suit "necessarily would be unavailable to Arizona itself, which therefore would not have its interests 'directly represented.'" Br. in Support 22-23 (citation omitted). But Arizona cannot bring a refund action

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of its "residents from the harmful effects of discrimination" "along ethnic lines." *Id.* at 609. Arizona alleges no similar interest here.

because "Arizona has not paid any taxes directly to California," *id.* at 22—underscoring that it is not the most natural plaintiff to challenge the doing-business tax to begin with. Moreover, the basis on which Arizona seeks to proceed is closely akin to raising claims as *parens patriae* for its citizens who are subject to the tax. See Reply Br. 9. But this Court in *Pennsylvania* rejected that theory, observing that if its original jurisdiction "could be invoked to resolve what are, after all, suits to redress private grievances, [its] docket would be inundated." 426 U.S. at 665. Instead, private suits are the proper way to vindicate such interests. In any event, this Court has found it sufficient that a private action would permit litigation of "the same constitutional issues" as would an original action, even if not pursued by the same party. *Arizona*, 425 U.S. at 796.

Nor do Arizona's other assertions (Br. in Support 22-23) regarding the purported insufficiency of state-court proceedings support an original jurisdiction action. Arizona suggests (*id.* at 22) that "the $800-tax is insufficient incentive for taxed entities to litigate these issues fully." But that is contrary to recent decisions like *Swart*, and the existence of pending class actions further demonstrates that taxpayers are able to file suits to protect their interests.

Arizona also argues (Br. in Support 22) that "requiring individuals to file suit in California state courts would perversely perpetuate the due process[]" and "personal jurisdiction" problems that it claims are associated with the doing-business tax. But regulated entities often challenge regulations in the courts of the State that has imposed them. In *Arizona*, for example, this Court denied leave to file a bill of complaint claim-

ing, *inter alia*, that application of a New Mexico tax "denies Arizona citizens due process," in light of a pending suit in New Mexico state court raising the same issue. 425 U.S. at 795.

Finally, Arizona suggests (Br. in Support 22; Reply Br. 11-12) that California courts are unwilling or unable to meaningfully address the claims at issue here. But the fact that California courts might seek to resolve taxpayers' claims on statutory rather than constitutional grounds (see Reply Br. 11) does not suggest that those courts provide an inadequate forum. See, *e.g.*, *Bond* v. *United States*, 572 U.S. 844, 855 (2014) (considering statutory argument first in light of the "'well-established principle * * * that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (citation omitted). To the extent Arizona contends (Br. in Support 22-23) that the Board has not properly applied the decision in *Swart*, it provides no basis for assuming that the Office of Tax Appeals and California courts are unable to address that concern in the first instance. Cf. *In re Jali, LLC*, No. 18073414 (Cal. Off. Tax App. July 8, 2019), slip op. 5 (rejecting the Board's "bright-line legal standard for distinguishing between an active and a passive ownership interest").

3. The nature of Arizona's claims also counsels against an exercise of this Court's original jurisdiction.

a. Arizona contends (Compl. ¶¶ 142-168) that California's assessment of its doing-business tax against certain Arizona businesses violates the Due Process Clause and the Commerce Clause, and it further argues (Compl. ¶¶ 169-190) that California's collection of the tax from those Arizona entities violates the Due Process Clause and the Fourth Amendment. But to the extent

the California law applies to particular Arizona residents, the impact of the law is directly upon them, not the State, and in this context the cited provisions of the Constitution—including the Commerce Clause, see *Dennis* v. *Higgins*, 498 U.S. 439, 447 (1991), and the Fourth Amendment, see *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978)—are personal to and more appropriately raised by those entities directly affected, not the State. Cf. *Pennsylvania*, 426 U.S. at 665 (rejecting Pennsylvania's claims regarding taxes collected by New Jersey from its residents under the Privileges and Immunities and Equal Protection Clauses because "both Clauses protect people, not States").

b. In addition, resolution of any Due Process and Commerce Clause claims regarding assessment of the doing-business tax against particular Arizona entities would benefit from a more developed factual record and an authoritative construction of the relevant state statutes and regulations by the California Supreme Court. Arizona's challenges to the tax's assessment hinge on its contention that "[m]ere passive ownership in a California-Operating LLC, without more, is insufficient" to satisfy either the "'minimum contacts'" requirement of the Due Process Clause, or the "'substantial nexus'" requirement of the Commerce Clause, as described in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Compl. ¶¶ 147, 148, 155, 158. On its face, the California statute would not appear to permit taxation solely on that basis. Instead, Section 17941 imposes the minimum franchise tax on any LLC "doing business in this state," Cal. Rev. & Tax. Code § 17941(a) (2019 Cal. Legis. Serv. ch. 421, § 1 (A.B. 308)) (West), defined to mean "*actively* engaging in any transaction for the purpose of financial or pecuniary gain or profit,"

id. § 23101(a) (emphasis added), or engaging in particular activities or transactions within the State, *id.* § 23101(b).

Insofar as the California statutes are interpreted to trigger the tax in some circumstances based on some share of passive ownership in an LLC that itself meets the statutory requirements, these circumstances have not been fleshed out. While the California Supreme Court has not authoritatively construed the text of the statute, the California Court of Appeal has expressly rejected the argument that "the term 'doing business' should be interpreted broadly to include" minor "passive investment[s]" in manager-managed LLCs. *Swart Enters., Inc.* v. *Franchise Tax Bd.*, 212 Cal. Rptr. 3d 670, 674 (Cal. Ct. App. 2017); see also *In re Jali*, slip op. 5. To the extent that the specific factual scenarios presented in Arizona's complaint, Compl. ¶¶ 67-118, are not covered by the reasoning in *Swart* and decisions such as *In re Jali* by the Office of Tax Appeals, that Office in the first instance and the California courts are best situated to determine, based on factual records developed in specific cases, whether the doing-business tax applies to those scenarios; if so, the California courts can proceed to consider whether such application complies with the Due Process and Commerce Clauses. See Br. in Opp. 7-8 & n.7; cf. *Supreme Court Practice* § 4.10, at 262 (noting, in the context of certiorari jurisdiction, this Court's "reluctan[ce] to grant review of cases turning on state statutes * * * where state decisions on the issues are nonexistent or are in confusion").

c. Arizona's challenges to California's collection of the doing-business tax likewise do not warrant exercise of this Court's original jurisdiction, quite apart from the other considerations discussed above supporting denial

of leave to file. As discussed above, if a taxpayer fails to pay a tax assessment that has become final, the Board may issue a notice to the taxpayer's bank, requiring that it withhold the amount of the tax and any penalties due and remit it to the Board. Cal. Rev. & Tax. Code §§ 18670 and 18670.5. That procedure is similar in certain respects to federal levy procedures, which permit the IRS to serve a notice of levy upon a custodian of a delinquent taxpayer's property, including the taxpayer's bank, and require (with limited exceptions) that within 21 days of service, the "bank * * * shall surrender * * * any deposits (including interest thereon)" of the taxpayer to the Internal Revenue Service. 26 U.S.C. 6332(a) and (c); see 26 U.S.C. 6332(d) (penalizing custodian's failure to comply).

i. Arizona first contends that California's collection procedure violates the Due Process Clause, because the bank deposits of Arizona residents are considered to be domiciled in Arizona, see Compl. ¶ 170, and California purportedly "lacks personal jurisdiction over th[ose] out-of-state funds," Br. in Support 32. As Arizona concedes, however (*ibid.*; see Compl. ¶ 173), that claim rises or falls with its argument that assessment of the tax itself violates due process—a contention more appropriately considered on developed factual records concerning Arizona entities subject to the tax. See pp. 18-19, *supra*.

Arizona further contends (Compl. ¶ 179) that the collection provisions contravene the Due Process Clause because banks cannot challenge withholding notices in court. But so long as "adequate opportunity is afforded for a later judicial determination of the legal rights [of the taxpayer], summary proceedings to secure prompt

performance of pecuniary obligations to the government have been consistently sustained." *Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931); see *id.* at 596-597; cf. *United States* v. *National Bank of Commerce*, 472 U.S. 713, 727 (1985) ("[A] bank served with a [federal] notice of levy has two, and only two, possible defenses for failure to comply with the demand: that it is not in possession of property of the taxpayer, or that the property is subject to a prior judicial attachment or execution."). Arizona provides no reason why that rule should not apply here.

ii. Arizona next contends (Compl. ¶¶ 180-190) that California's notices of withholding constitute "warrantless seizures" that violate the Fourth Amendment. In the context of the federal levy provisions, however, this Court has held that the Fourth Amendment "has no reference to civil proceedings for the recovery of debts," *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 285-286 (1856), unless the tax collection efforts violate the taxpayer's privacy, *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-358 (1977). Applying this principle, several courts of appeals have held that a levy on a taxpayer's funds deposited with a third-party financial institution does not implicate the Fourth Amendment. See, *e.g.*, *Lojeski* v. *Boandl*, 788 F.2d 196, 199-200 (3d Cir. 1986) (en banc); *Hutchinson* v. *United States*, 677 F.2d 1322, 1328 (9th Cir. 1982); see also *Sachs* v. *United States*, 59 Fed. Appx. 116, 119 (6th Cir. 2003) (no Fourth Amendment violation where IRS levied upon brokerage firm holding taxpayer's securities). This argument likewise provides no basis for an exercise of original jurisdiction.

CONCLUSION

For the foregoing reasons, the motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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