No. 153, Original

In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

STATE OF CALIFORNIA,
Defendant.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF OF WEST VIRGINIA, KANSAS, TENNESSEE, AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

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INTERESTS OF *AMICI CURIAE*[1] AND SUMMARY OF ARGUMENT

California's decision to ban state-funded travel to 11 States strikes at the heart of federalism. One of several cases raising similar issues in recent years, this action asks foundational questions about how States relate to each other as co-sovereigns—even when they advance diametrically opposed policy preferences. Resolution is needed to reverse a growing trend of balkanization and to ensure instead that the States remain economically interconnected laboratories of democracy with respect for each other's duly enacted laws.

The States of West Virginia, Kansas, Tennessee, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, and Utah respectfully submit this brief as *amici curiae* in support of Texas. Many of the *amici* States appear with Texas on California's discriminatory list. Two have barred state-funded travel to California or warned reprisal if California does not reverse course. Others have no direct stake in this action—yet—but are concerned they may join Texas's ranks if California should take issue with their own religious-liberty laws. And all share grave concern about one State using its economic power to pressure policy change in other States that are democratically accountable to their own residents and

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[1] Pursuant to Supreme Court Rule 37.4, an *amicus* timely notified the parties of *amici*'s intent to file this brief.

deserve comity as co-sovereigns in our constitutional order.

Amici write to emphasize that this case is critical to preserving the federalism principles on which our nation was built. Without a ruling from this Court, California and other States will be emboldened to ramp up pressure on their fellow States' internal affairs. Efforts like these are especially troubling where, as here, they involve economic sanctions akin to those used by warring nations. See Elizabeth Rosenberg *et al.*, The New Tools of Economic Warfare: Effects and Effectiveness of Contemporary U.S. Financial Sanctions 55 (2016) (explaining economic sanctions as tool of warfare).

Specifically, *amici* States argue this case warrants exercising the Court's original jurisdiction because of the direct affront to 11 States' dignity it represents and the seriousness of the federalism issues it presents for the country as a whole. Copycat and retaliatory travel bans further underscore the need for intervention, as do the growing trend of other laws imposing de facto extraterritorial legislation on other States.

Amici also stress the consequences of not hearing this case. Allowing California's action to stand would damage the economies of the target States and the nation—halting state-funded travel from the most populous State in the Union to 11 others is no blip on the economic radar. This is also the right case to resolve because it raises important issues about the

nature of religious liberty and the steps States can take to protect rights of conscience.

Finally, *amici* States explain that Texas is entitled to relief on the merits because California's law infringes the dormant Commerce Clause and the First and Fourteenth Amendments. The Court should bring certainty to this important area of interstate relations by taking up the bill of complaint and invalidating California's travel ban.

REASONS FOR GRANTING THE MOTION

I. THIS CASE RAISES ISSUES WITH GRAVE CONSEQUENCES FOR FEDERALISM, THE NATIONAL ECONOMY, AND INDIVIDUAL LIBERTY.

The Court has interpreted its original jurisdiction as "obligatory only in appropriate cases." *California* v. *Texas*, 457 U.S. 164, 168 (1982) (quotation omitted). There is little doubt jurisdiction is appropriate here: "[S]eriousness and dignity" are woven throughout Texas's claim that California has deployed economic weaponry in an effort to override the policy judgments of 11 of its fellow, co-sovereign States. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972). In this dispute between States there is likewise no other court with "jurisdiction over the named parties." *Id.*; see 28 U.S.C. § 1251(a); *Texas* v. *New Jersey*, 379 U.S. 674, 677 n.1 (1965). Because guidance is critical to stem the flow of this and similar laws that put our economy and the principles of our federalist regime at risk, the Court should take up the case.

A. California's Travel Ban Damages The Promise Of Federalism On Which Our Nation Was Built.

1. When adopting the Articles of Confederation after the Revolutionary War, the original 13 States included no safeguards against burdening interstate commerce. See Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789, 245-57 (1950). The Founders quickly recognized that the system was dysfunctional and needed reform. Thus, one of the key drivers of the Constitutional Convention was undoing the "Balkanization" that "plagued" the Confederation-era States. *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-26 (1979) (citation omitted). The Framers also feared that leaving unchecked the States' tendency "to aggrandize themselves at the expense of their neighbors" would lead to factions—the ultimate poison for the Union. The Federalist No. 6, at 54 (A. Hamilton) (Signet ed. 2003) (quotation omitted). And as they well knew, the "most common and durable source" of factions is economic inequality. The Federalist No. 10, at 74 (J. Madison).

The new Constitution accordingly built on the premise that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.G. Seelig*, 294 U.S. 511, 523 (1935). Its solution was at least twofold: unity in interstate trade, with respect for the States' sovereignty within their own borders.

With respect to the first aim, the States ceded authority to Congress under the Constitution to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; see The Federalist No. 42, at 264-65 (J. Madison). The Commerce Clause reflects that the States "are not separable economic units"—and that operating otherwise through state protectionism would lead to conflict. *H.P. Hood & Sons, Inc.* v. *De Mond*, 336 U.S. 525, 538 (1949); see also The Federalist No. 7, at 60 (A. Hamilton).

The dormant Commerce Clause, which prevents States from burdening interstate commerce, is an important part of that strategy. See *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2460 (2019) (describing "removing state trade barriers" through dormant Commerce Clause as "a principal reason for the adoption of the Constitution"). The doctrine prevents States from legislating extraterritorially by impeding trade. Critically, it strikes a balance between limiting actions that discriminate against fellow States on the one hand, and maintaining "the autonomy of the individual States within their respective spheres" on the other. *Healy* v. *Beer Inst.*, 491 U.S. 324, 335-36 (1989); see also Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law & Legislation*, 84 Notre Dame L. Rev. 1057, 1093 (2009) (explaining that the Constitution's commerce provisions operate by "confining each state to its proper sphere of authority").

This balance is evident more broadly throughout the Constitution as well. Creating a system that made States co-sovereigns with the federal government *and each other* required States to give some of their individual power to Congress, see *Alden* v. *Maine*, 527 U.S. 706, 743 (1999), but not to cede "power or supervision over [their] internal affairs [to] another State." *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975). Each State thus retained its authority over "the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 289 (J. Madison). And the only way to make that retained power meaningful was to zealously guard against state legislative power creeping across borders. This is why laws in our country "have no force of themselves beyond the jurisdiction of the state which enacts them." *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892); see also *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 160-61 (1914).

Several constitutional provisions protect this conception of state sovereignty. States lack personal jurisdiction to hale other States' residents into their courts, for example, absent demonstrated connection to the forum State. See, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1781 (2017). This rule "respect[s] the interests of other States" to exercise their "own reasoned judgment" over conduct within their borders. *BMW, Inc.* v. *Gore*, 517 U.S. 559, 571 (1996); *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 422 (2003).

Similarly, the Full Faith and Credit Clause requires a State to recognize "public acts, records and judicial proceedings of every other state," U.S. Const. art. IV, § 1—even if the State "disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits." *V.L.* v. *E.L.*, 136 S. Ct. 1017, 1020 (2016) (per curiam). Agreeing in this way to respect the judgments of other States helped make the individual States "integral parts of a single nation." *Milwaukee Cty.* v. *M.E. White Co.*, 296 U.S. 268, 277 (1935). The Extradition Clause pushes in the same direction too, mandating States give defendants over to another State even if they believe "that what the fugitive did was not wrong or that rendition would be unfair." Allan Erbsen, *Horizontal Federalism*, 93 Minn. L. Rev. 493, 546 (2008).

Underlying each of these provisions is the principle of state comity, or requiring a State to "recognize, and sometimes defer to, the laws, judgments, or interests of another." Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 Notre Dame L. Rev. 1309, 1309 (2015). Each provision gets at the same goal of respect for the policy judgments made by the democratically accountable leaders of the several States, even if the people or leaders of *another* State vehemently disagree. They also make clear that States can make policy choices for their own residents, but "may not impose those policy choices on the other states." Margaret Meriwether Cordray, *The Limits of State Sovereignty & the Issue of Multiple Punitive Damages Awards*, 78 Ore. L. Rev. 275, 292 (1999) (citing *BMW,*

Inc., 517 U.S. at 568-73). And they all strive for the same result: "[P]romot[ing] harmony" and preventing "friction between the States." Joseph F. Zimmerman, Horizontal Federalism: Interstate Relations 104 (2011).

2. The Court should take up Texas's bill of complaint because California's travel ban undermines the principles each one of these constitutional provisions enshrines. California seeks to legislate extraterritorially: It disagrees strongly with the decisions of States to provide specific statutory protections for freedom of conscience that collide with California's preferred policies. And it uses the powerful tool of economic coercion to pressure targeted States to conform to its point of view. Thus, although the context has changed since the pre-Constitution days of predatory and protectionist economic policies, the tactic is the same: one State using its economic muscle to gain an advantage over others—at current count, 11 others.

It is irrelevant that California's motive is moral superiority rather than economic gain. Regardless of intent, California's blatant attempt to export its law to other States risks precisely the "kind of parochial entrenchment on the interests of other States" that the Constitution aims "to prevent." *Thomas* v. *Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) (Stevens, J., opinion announcing judgment of the Court). The travel ban is an affront to the sovereignty of Texas and 10 other States because it usurps their authority to

make reasoned policy judgments on behalf of the citizens to whom they are accountable.

Indeed, California's lack of political accountability makes the travel ban all the more egregious. The "political restraints" that might ordinarily push against California's travel ban are likely to be ineffective here, where the challenged law "is of such a character that its burden falls principally upon those without the state." *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 92 (1984) (quotation omitted).

The travel ban thus erodes foundational principles of how States interact with each other pursuant to the respect our federalism demands, and uses the very weapon—economic force—that the Founders feared would lead to factions and balkanization. Deference to States' sovereignty within their own borders is critical to ensuring "citizens the liberties that derive from the diffusion of sovereign power." *Shelby Cty., Ala.* v. *Holder*, 570 U.S. 529, 543 (2013). And it is "beyond peradventure" that an economic law "directly affect[ing]" another State "implicates serious and important concerns of federalism in accord with the purpose [of the Court's] original jurisdiction." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451 (1992) (citation omitted).

3. What is more, the threat looms beyond California's law. In 2015, Connecticut's Governor issued an executive order that, similar to the travel ban, bars most "state funded or state sponsored travel" to States that "have enacted legislation to protect religious freedom, but do not prohibit

discrimination for classes of citizens." Conn. Exec. Order No. 45 (Mar. 30, 2015). On the other side of the issue, States California targets have started to bite back: Tennessee passed a resolution in 2017 disclaiming "California's attempt to influence public policy in our state," predicting that California's action will "lead to economic warfare among [the] states," and warning that if the ban persists, Tennessee leaders may "consider strong reciprocal action." S.J. Res. 111, 110th Leg., Reg. Sess. (Tenn. 2017). And earlier this year, Oklahoma placed a "moratorium" on "all non-essential travel to the State of California for all employees and officers of agencies that is paid for, in whole or in part, by the State of Oklahoma." Okla. Exec. Order No. 2020-02 (Jan. 23, 2020).

The Constitution's State Treaty Clause and Compact Clause recognize that "some types of formal commitments between states to aggregate their power are intolerable because they pose a severe threat to state equality." Erbsen, 93 Minn. L. Rev. at 535. These growing forces on both sides of the issue are not the same as formal alliances, of course, but they pose similar concerns. At a minimum, because factions are a severe threat to "national stability," Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 Mich. L. Rev. 57, 72 (2008) (citations omitted), the Court should intervene *before* these alliances become too big to ignore. If "the peoples of the several states" must truly "sink or swim together," *Baldwin*, 294 U.S. at 523, the Court should hear this case to ensure we all stay in the same boat.

Further, California's travel ban is part of a larger trend of laws that seek to impose policy preferences on other States through economic sanctions:

- Montana and Wyoming are currently seeking leave to file a bill of complaint against Washington. They face harsh economic consequences—blocked access to a Washington port for exporting coal—because they have not adopted Washington's preferred environmental policies. See Pls.' Mot. For Leave To File A Bill of Complaint at 7-16, *Montana* v. *Washington*, (Jan. 21, 2020) (No. 152, Original).
- Massachusetts prohibits selling eggs and meat in the Commonwealth if the animals were not housed according to Massachusetts's standards even if raised in other States. Mass. Gen. Laws ch. 129 App. §§ 1-3. Although 13 States challenged this attempt to impose animal-welfare standards on the rest of the country as the price of admission to in-state markets, the Court declined to hear the case. *Indiana* v. *Massachusetts*, 139 S. Ct. 859, 859 (2019) (per curiam).
- California also regulates out-of-state farmers seeking to sell eggs in California. Cal. Health & Safety Code §§ 25990-25996. A bipartisan group of 12 States challenged this affront to managing their internal affairs free from economic reprisal, but again, the Court did not entertain the suit. *Missouri* v. *California*, 139 S. Ct. 859, 859 (2019) (per curiam).

The common denominator in these cases is one State using its economic pull to foment policy change beyond its borders. As such, they underscore that the problems the travel ban poses are not isolated, and they are not going away. Indeed, the travel ban's supporters also considered banning importation of goods from target States—a method much like the animal-welfare statutes—which further highlights the connection between cases like these. Pl.'s App. 20.

These cases thus show the variations of balkanization that will continue to occur—and will likely blossom into ever more creative areas, all posing serious harm to the Union—unless this Court intervenes. While this case presents *additional* facets of the problem that make it an especially compelling candidate for review, *infra* Part I.C., decisive action to resolve the common federalism questions at its core has the added benefit of cutting off the trend before it gets even more out of hand. In any event, it seems clear that resolving these issues will be necessary sooner or later; the gravity of the federalism concerns at stake pushes for now.

B. The Economic Consequences Of This Case Warrant Resolving The Bill Of Complaint.

California's travel ban—and the principles that animate it—have significant consequences for the targeted States, those that may be next, and the country as a whole. Using economic pressure as a tool to drive policy change among the States is dangerous enough in the abstract. It is even more concerning

where the offending laws carry heavy price tags in the real world. The California travel ban and the copycat and retaliatory actions it sparked do exactly that.

First, the travel ban harms the targeted States. State-funded, out-of-state travel is undoubtedly a significant revenue source for destination States. Data for this type of travel is hard to come by. Nevertheless, publicly available information from five States in recent years shows that they averaged $1.09 per resident in annual funding for out-of-state travel: Using the consumer price index to adjust all figures to 2019 dollars and then-current state population numbers,[2] Iowa spent $6,207,691 for out-of-state travel in 2016—$1.98 per resident.[3] Oregon allocated $5,114,526—$1.32 per resident—in 2011.[4] In 2015, Nevada allocated $0.51 per resident, or $1,471,574,[5] and Michigan's budget included $0.43 per resident at

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[2] Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019, U.S. Census Bureau, https://bit.ly/3dZddEr; CPI Inflation Calculator, Bureau of Labor Statistics, https://bit.ly/2Xjlz3Z.

[3] Office of Governor Terry E. Branstad, State of Iowa Budget Report Fiscal Year 2018-2019, https://bit.ly/2JUystb.

[4] Harry Esteve, *Recession doesn't slow travel on the public's dime by Oregon government officials*, The Oregonian, Dec. 18, 2011, https://bit.ly/2xi3Yyv.

[5] Office of Governor Brian Sandoval, State of Nevada Executive Budget 2017-2019 (Jan. 2017), https://bit.ly/3do3DdX.

$4,314,577.[6] And last year Arizona expended $8,636,600—$1.20 per resident—on travel to other States.[7]

Extrapolating from this sample set with its average $1.09 per resident, nationwide spending on state-funded, out-of-state travel could total over $350 million each year. Given California's proportional share of the population, see Annual Estimates of the Resident Population, *supra* note 2, its budget could account for $43 million of that amount. And using population as a rough proxy for how often California funds trips to the different States, banning travel to 11 States—which together represent 23% of the country's population, *id.*—could mean those States' economies lose out on $9.9 million per year.

Further, these projections underestimate the true economic effect of the ban because they represent losses in terms of direct travel expenses only. They do not account for other, even harder-to-quantify losses, such as conferences that organizers may have held in Birmingham or Houston, but moved to Denver or Portland to ensure that California participants can attend. The Association of University Radiologists and Association of Professional Researchers for

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[6] Justin A. Hinkley, *State worker travel costs falling, but more leaving state*, Lansing St. J., Aug. 22, 2016, https://bit.ly/2QH87mi.

[7] Office of Governor Doug Ducey, State of Arizona Executive Budget: State Agency Budgets Fiscal Year 2021 (Jan. 2020), https://bit.ly/3abugAV.

Advancement, for example, both canceled events in Louisville because of California's travel ban, which cost the city approximately $2 million.[8] The American Counseling Association likewise canceled a meeting in Nashville that would have attracted 3,000 visitors and brought in $4 million in travel-related tax revenue. *Id.*

Similarly, the economic-multiplier effect demonstrates that businesses that benefit from state-funded travel spend even more money, further enriching the destination States' economies. See Woodrow W. Ware III, *Lord of the Reels: Can Georgia Learn from Canada's Success to Rescue Its Film Industry?*, 34 Ga. J. Int'l & Comp. L. 519, 529 (2006) (citations omitted). Jobs are created too: One study showed that 30 jobs are created for every $1 million in travel-related expenditures. Joshua Wiersma *et al.*, *Variations in Economic Multipliers of the Tourism Sector in New Hampshire*, Proceedings of the 2004 Northeastern Recreation Research Symposium 102, 106 (2005).

Thus, whatever the true amount of lost travel revenue and related economic growth each year, it is evident that the travel ban is no mere symbolic gesture. California's moral disapproval costs the targeted States millions each year.

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[8] Rebecca Beitsch, *Supposedly Symbolic, State Travel Bans Have Real Bite*, Pew (Aug. 15, 2017), https://bit.ly/2xXJhIj.

Second, although the 11 States currently on California's list bear the brunt of the economic harm, the rest of the country feels its consequences, too. It is uncontroversial to observe that our national economy becomes "increasingly interconnected" every year. *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 17 (2015) (Kennedy, J., concurring). This is why the ripple effects of losses in one State are often felt hundreds of miles away. As one example, Hurricane Katrina hit the Gulf Coast and not Hawaii or Montana, but it caused nationwide economic damage even so. See Eduardo Porter, *Hurricane Katrina: Economic Impact; Damage to Economy Is Deep and Wide*, N.Y. Times, Aug. 31, 2005, at C1.

The ban also limits knowledge exchange among the States. America is a diverse nation and each State has comparative advantages over the others. Those advantages are often viewed through the lens of consumer goods—Texas sending some of its oil to New Hampshire in exchange for maple syrup, for instance—but the concept is not so limited. Comparative advantages in knowledge also benefit the entire country. See Robert Pindyck & Daniel Rubinfeld, Microeconomics 584 (1996). A travel ban like California's short-circuits those exchanges by halting trips to the Eastern District of Texas to exchange ideas about patent law, trips to Alabama for on-the-ground research on the Selma to Montgomery march—or trips to Topeka for a panel on balancing antidiscrimination laws with religious freedom, for that matter. See Neslihan Aydogan & Thomas P. Lyon, *Spatial Proximity and Complementarities in the*

Trading of Tacit Knowledge, 22 Int'l J. Indust. Org. 1115 (2004); Ajay Agrawal, *How Do Spatial and Social Proximity Influence Knowledge Flows? Evidence from Patent Data*, 64 J. Urban Econ. 258 (2008).

Third, these costs will likely balloon further if the Court does not step in. California has added new States to its do-not-travel list since the ban was first enacted, and there are many other States with religious-freedom laws similar to those that attracted California's ire in the target States.[9] And as discussed above, California is not the only State to limit destinations for state-funded travel. Whether through more States taking California's lead (perhaps emboldened by lack of judicial review), or else increased retaliation as Oklahoma has done and Tennessee threatened, costs from state-funded travel bans will very likely increase until the Court brings the practice to an end.

C. The Bill Of Complaint Raises Important Issues Of Religious Liberty.

This case also warrants resolution because it involves critically important questions of religious

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[9] See, *e.g.*, Ariz. Rev. Stat. §§ 41-1493.01, 41-1493.03, 41-1493.04; Ark. Code Ann. §§ 9-28-405(d)(2)(A)(i), 16-123-404; Conn. Gen. Stat. § 52-571b; Fla. Stat. § 761.03; Idaho Code § 73-402; 775 Ill. Comp. Stat. 35/15; Ind. Code § 34-13-9-8; La. Stat. Ann. § 13:5233; Mich. Comp. Laws §§ 400.5a, 710.23g, 722.124e, 722.124f; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. § 28-22-3; N.D. Cent. Code § 50-12-07.1; 71 Pa. Cons. Stat. § 2404; 42 R.I. Gen. Laws § 42-80.1-3; Va. Code Ann. §§ 57-2.02, 63.2-1709.3.

liberty and the States' ability to protect freedom of conscience within their own borders. This is the right context to intervene because the Court has the chance to resolve both the economic issues discussed above and these separately recurring questions.

Our constitutional structure encourages each State to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). States' "subnational nature" makes this approach particularly effective because their legislators act with "more robust democratic accountability" than their federal counterparts. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1353 (2006). And the areas California's travel ban targets are among those where the laboratory theory matters greatly—questions of law and policy on which the country is still working toward consensus and individuals have strongly held, frequently divergent views.

Of course, serving as laboratories of democracy means that while States can (and do) protect rights in areas important to their constituents beyond the federal "constitutional floor," they cannot go *below* that baseline. *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997) (citation omitted). This means that to the extent the travel ban is an implied argument that the laws of Texas and 10 other States violate the Constitution, the proper line of defense is the courts—not fellow States. Holding to this distinction is

important in a politically charged arena like the intersection of rights of conscience and antidiscrimination law. Letting some States exercise a de facto veto on others because of their economic power shortchanges the national conversation at a time when more voices are needed, not fewer. And it undercuts the rights of residents in less populous States: Tyranny of the majority is a threat among States no less than within them.

California's travel ban showcases the danger in letting a large State unduly pressure the choices of its neighbors concerning religious freedom in at least two ways.

First, it reveals a hostility to religion that is very likely unconstitutional itself. In its analysis of the travel ban bill, the California Assembly Committee on the Judiciary speculated that religious-freedom protections could be "the last gasp of a decrepit worldview." Pl.'s App. 26. An individual testifying in favor of the bill argued that "religion has been used again and again as a tool to justify discrimination." Pl.'s App. 42. And while paying lip service "to religious freedom generally," one of the bill's sponsors lamented that "we've started to see religious organizations start to use their religion as code to discriminate against different people." Pl.'s App. 44. The Court recently held that the First Amendment bars government action based on "clear and impermissible hostility toward" "sincere religious beliefs." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). It would

be particularly concerning for the Court to stay its hand where, at minimum, there is serious question whether California's travel ban grew from similar animus.

Second, the travel ban expressly targets laws "modeled after the federal Religious Freedom and Restoration Act" that cover a wide variety of contexts. Pl.'s App. 14. In a press release adding Texas to the list of disfavored States, California Attorney General Becerra specifically mentioned Texas's law protecting faith-based child welfare services.[10] Other States made the list for not paying for sex-reassignment surgery (Iowa) or because of how they allocate restrooms (North Carolina). Compl. 6 n.3. Still others face reprisal because of rights-of-conscience protections for students (Kentucky and Kansas), religious organizations (Mississippi), or counselors and therapists (Tennessee). Compl. 6. These are all fiercely debated areas of policy where we might expect a variety of solutions expressed through different state legislatures. Resolving this case could thus provide needed clarity for the 11 States currently on California's list, as well as for many others that may be considering legislation in any of these areas.

In short, the Court should grant Texas's motion because unless their laws run afoul of the Constitution, the people of Texas, Alabama, Iowa,

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[10] Press Release, Attorney General Becerra, *Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel* (June 22, 2017), https://bit.ly/39T0AYf.

Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Tennessee deserve to have sensitive issues of religious freedom resolved by the legislators who answer to *them*—not to the people of a State hundreds of miles away.

II. TEXAS IS ENTITLED TO THE RELIEF IT SEEKS.

The Court should also act on Texas's bill of complaint because Texas is right on the merits.

First, California's travel ban violates the Commerce Clause's "negative command, known as the dormant Commerce Clause." *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). This doctrine typically prevents a State from "jeopardizing the welfare of the Nation as a whole" by "placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'ns, Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quotation and brackets omitted). The somewhat unusual nature of this situation, however—placing burdens on commerce *leaving* the State—does not change the outcome. California discriminates against interstate commerce by barring state-funded travel to 11 States with laws California opposes. The Constitution does not permit that result.

To begin, a State cannot prefer some out-of-state businesses over others. See *Smith* v. *Turner*, 48 U.S. 283, 313 (1849) ("[I]f Congress, who have the power of

regulating the commerce of the country, . . . have no power to [prefer one State over another], surely a State which has no power to regulate commerce . . . can give no such preference."). Yet California favors out-of-state businesses in 38 States over those in the 11 States subject to its ban. Further, the travel ban discriminates on its face against interstate commerce, calling out specific States that are ineligible (except in limited circumstances) for California's state-travel funds. Regulations that "discriminate on their face against out-of-state entities" in this manner are "virtually *per se* invalid." *Am. Trucking Ass'ns,* 545 U.S. at 433; *Ore. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Indeed, facially discriminatory laws can be salvaged only if they "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 338 (2008) (quotation omitted). Here, however, the travel ban lacks an adequate "putative local benefit," *id.* at 339-40, because trying to force change in far-away States is outwardly focused, not local.

The travel ban is thus pure market coercion; a message to other States that they must adopt California's worldview before receiving state-funded travelers. This is an unconstitutional, extraterritorial use of California's police powers that offends the dignity of California's "sister States and exceed[s] the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977). Texas is therefore

entitled to relief on its claim that California's travel ban violates the Commerce Clause.

Second, the travel ban is in significant tension with the First Amendment's free exercise guarantee. As discussed above, California's retaliatory actions stem from impermissible hostility to religion. State governments have "no role in deciding or even suggesting whether the religious ground" an individual or entity advances is "legitimate or illegitimate." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. But as Texas details in the proposed complaint, Compl. 5-7, the record behind the travel ban is rife with derisive statements and comments questioning the sincerity of religiously motivated conduct. Two years ago the Court struck down an action where the Colorado Civil Rights Commission characterized religion "as merely rhetorical—something insubstantial and even insincere." *Masterpiece Cakeshop,* 138 S. Ct. at 1729. Similar religious animosity here places the travel ban on similarly shaky ground.

California's ban also pressures Texas and other States to abandon religious-freedom policies that are not only permitted under the Constitution, but may be required. Thus, for many of the laws California targets, the ban may be an impermissible attempt to force another State to go *below* the constitutionally mandated floor. The First Amendment's Religion Clauses were proposed in response to England "narrow[ing] the acceptable range of clerical opinion within the Church." Michael W. McConnell,

Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2133 (2003). This danger was not limited to internal church affairs; "political authorities" had attempted to set the appropriate "balance" between what they deemed "the dangers of sectarian narrowness" for society and "those of broad-minded emptiness." *Id.* Drafted against this backdrop, the First Amendment's Religion Clauses embody a strong emphasis on ensuring "that the people's religions must not be subjected to the pressures of government for change." *Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962).

Many of the laws California targets are consistent with—or even required by—these principles. Take Texas's law for example, which grants right-of-conscience protection to child-welfare agencies. This law safeguards faith-based organizations' religious liberty by ensuring they can provide child-welfare services to the most vulnerable members of society consistent with their religious beliefs and without fear of repercussion. In other words, the law eliminates pressure from the government to abandon sincerely held religious beliefs. It should be "no part of the business of government" to force faith-based organizations to set aside aspects of faith they consider essential as the price of providing services in Texas. *Engel*, 370 U.S. at 425. It is deeply troubling for another State to pressure Texas—along with 20% of its fellow States—to do precisely that.

* * *

For these and the additional reasons detailed in the bill of complaint, Texas's claims are worthy of review. California may not be required to adopt the positions of the 11 States the travel ban critiques, but neither is it free to impose its will on them. In an era of increased polarization throughout society, it is especially critical to preserve the States' equal footing and to ensure that important conversations like these take place within the framework the Constitution set forth. The Court should take this opportunity to clarify the relationship between the States as co-sovereigns working in good faith to represent their constituents and to promote the public good.

CONCLUSION

The Court should grant Texas's motion.

Respectfully submitted.

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