No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF CALIFORNIA

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

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MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

The State of Texas moves the Court for leave to file the accompanying Bill of Complaint. In support of its motion, the State asserts that its claims arise under the United States Constitution; its claims are serious and dignified; and there is no alternative forum to provide adequate relief. For the reasons more fully stated in the accompanying Brief in Support, the Motion for Leave to File a Bill of Complaint should be granted.

Respectfully submitted.

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FEBRUARY 2020

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STATE OF TEXAS, PLAINTIFF

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STATE OF CALIFORNIA

BILL OF COMPLAINT

The State of Texas, by and through its Attorney General, Ken Paxton, brings this suit against Defendant the State of California, and for its claims for relief states:

1. In its push to establish what it sees as a "legacy of 'forward thinking,'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring), California has enacted and is enforcing economic sanctions against Texas, Texas citizens, and Texas businesses. California has targeted Texas and its residents because Texas protects the religious freedom of faith-based child welfare providers within its borders. California considers laws protecting religious freedom to be the "last gasp of a decrepit world view." A.26.[1] In California's so-called forward thinking, it is not enough to burden religion in California; it must go further and coerce other States to increase burdens on religion within their own borders.

[1] *A._* refers to the accompanying Appendix.

2. "But it is not forward thinking" for a State to use discrimination against citizens and businesses of other States as "an instrument for fostering public adherence to an ideological point of view" that many citizens "find unacceptable." *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (alteration omitted). And it is not forward thinking to revive the economic Balkanization that our Constitution is designed to stamp out.

3. California's sanctions against Texas and Texans are born of religious animus and violate the Constitution's Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1; Interstate Commerce Clause, *id.* art. I, § 8, cl. 3; and guarantee of Equal Protection, *id.* amend. XIV, § 1.

4. Texas seeks a judgment declaring California's economic sanctions against Texas and Texans unconstitutional and ordering California to remove Texas from its travel ban list.

FACTUAL BACKGROUND

I. Texas Protects Faith-Based Child Welfare Providers in Texas.

5. In *Employment Division v. Smith*, 494 U.S. 872 (1990), "the Court drastically cut back on the protection provided by the Free Exercise Clause," *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in the denial of certiorari), holding that the First Amendment does not compel exemptions from neutral and generally applicable laws, even when those laws impede the exercise of religion.

6. "*Smith* remains controversial in many quarters." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights*

Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

7. In response to *Smith*, Congress adopted, nearly unanimously, the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb et seq.). RFRA evinced Congress's near-unanimous judgment that religious objectors should be exempt from generally applicable laws unless the exemption would harm a compelling government interest. *See* 42 U.S.C. §§ 2000bb-2000bb–1.

8. As originally enacted, RFRA applied to the States, RFRA, Pub. L. No. 103-141, § 5(1), and thus required the States to provide religious exemptions to most generally applicable laws, 42 U.S.C. § 2000bb–1.

9. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that RFRA's application to the States exceeded Congress's enumerated powers.

10. Since *City of Boerne*, many States have echoed Congress's sentiment in RFRA and exempted religious objectors from generally applicable laws.

11. Texas is one of those States. In 2017, the Texas Legislature enacted H.B. 3859, which allows faith-based child welfare providers to serve the children of Texas while adhering to sincerely held religious beliefs in order "to maintain a diverse network of service providers and families to accommodate children of diverse cultural backgrounds and beliefs to meet the needs of children in the child welfare system." Senate Research Center, Bill Analysis: H.B. 3859, at 1 (May 16, 2017), *available at* https://perma.cc/G96B-Z94Z; *see* Tex. Hum. Res. Code §§ 45.001 et seq.

II. California Imposes Economic Sanctions on Texas and Other States that Respect Religious Freedom.

12. In 2016, California's Legislature enacted A.B. 1887, which prohibits state-funded or state-sponsored travel to a State that, after June 26, 2015, has enacted a law that (1) has the effect of voiding or repealing existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression; (2) authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression; or (3) creates an exemption to antidiscrimination laws to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. A.6-9 (codified at Cal. Gov't Code § 11139.8).

13. California's travel ban expressly targets the citizens and businesses of States, like Texas, that "offer[] more protection for religious freedom" than California believes is required by the First Amendment. A.16. The quintessential example cited by the California Legislature is a law that would protect "a wedding photographer who objected to same-sex marriage" on religious grounds from being forced "to provide photographic services for a same-sex wedding." A.11; *cf. Masterpiece Cakeshop*, 138 S. Ct. at 1723.

14. California's travel ban is grounded in animus towards religion.

15. The California Legislature expressly found that other States rely on "religious freedom" as a "justification for discrimination." A.6.

16. At a hearing on the travel ban, a representative from one of A.B. 1887's sponsors[2] called religion the "old ways," complained that "religion has been used again and again as a tool to justify discrimination," and described religious persons' invocation of religious freedom as merely a "backlash" against this Court's holding that the Constitution requires States to recognize same-sex marriages. A.42 (Testimony of Kate Kendall).

17. Later, Assemblyman Phil Ting, a co-author of A.B. 1887, accused "religious organizations" of using "their religion as code to discriminate against different people." A.44.

18. This Court relied on similar statements in *Masterpiece Cakeshop* to conclude that the Colorado Civil Rights Commission had likely engaged in religious discrimination against cake artist Jack Phillips. *See* 138 S. Ct. at 1729-32. And, as in *Masterpiece Cakeshop*, "[t]he record shows no objection to these comments from other" members of the committee. *Id.* at 1729.

19. To disparage religious beliefs "as merely rhetorical—something insubstantial and even insincere"—is

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[2] "Where other states, and the U.S. Congress, use the term 'sponsor' to mean the legislators who carry the bill, in California the term refers to [an] outside party; the legislator who introduces the bill is called the 'author.'" Karen De Sá, *How Our Laws Are Really Made*, Contra Costa Times (July 11, 2010), 2010 WLNR 14282430. As a frequent sponsor explains, "[t]he bill language is . . . the result of a collaboration between the co-sponsors and the legislator who is carrying the bill." ACLU N. Cal., *Legislation: Advancing the Rights of All Californians* (Sept. 22, 2015), https://perma.cc/D7NY-2RT4.

inappropriate for any body charged with enacting "fair and neutral" laws. *Ibid.*

20. The Attorney General of California is responsible for determining which States are subject to California's travel ban. *See* A.9.

21. California has so far applied its travel ban to eleven States: Alabama, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas.

22. California has targeted each of these States, except Iowa and North Carolina, because they have sought to protect religious freedom.[3]

23. Alabama, Oklahoma, South Carolina, South Dakota, and Texas all committed the same offense—protecting the religious freedom of faith-based child welfare providers. *See* Press Release, Attorney General Becerra, California Will Restrict State-Funded and State-Sponsored Travel to South Carolina (Apr. 2, 2019), https://perma.cc/4UTF-EVGH (citing H-4950 ¶ 38.29, 2017-2018 Leg., 122d Gen. Assemb. (S.C. 2018) (enacted)); Press Release, Attorney General Becerra,

[3] California banned travel to Iowa because the State declines to provide Medicaid coverage for gender-reassignment surgery. *See* Press Release, Attorney General Becerra, California Will Restrict State-Funded and State-Sponsored Travel to Iowa (Sept. 13, 2019), https://perma.cc/4Y2Q-CSNU. California banned travel to North Carolina because the State enacted a law that required state agencies to maintain separate-sex bathrooms and changing facilities and prohibited certain local anti-discrimination ordinances. *See* Press Release, Attorney General Becerra, North Carolina Remains on List of Restricted States (Apr. 12, 2017), https://perma.cc/C3LA-LQLP.

California Will Restrict State-Funded and State-Sponsored Travel to Oklahoma (June 1, 2018), https://perma.cc/UF3Q-C9N5 (citing S.B. 1140, 56th Leg., 2d. Reg. Sess. (Okla. 2018) (codified at Okla. Stat. tit. 10A, § 1-8-112 (2018))); Press Release, Attorney General Becerra, Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel (June 22, 2017), https://perma.cc/L62K-3V58 (citing H.B. 24, 2017 Leg., Reg. Sess. (Ala. 2017) (codified at Ala. Code § 26-10D-5 (2017)); S.B. 149, 2017 Leg., Reg. Sess. (S.D. 2017) (enacted); H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017) (codified at Tex. Hum. Res. Code §§ 45.001 et seq.)).

24. Kentucky and Kansas's offense was protecting the religious freedom of students in colleges and K-12 schools. *See* June 22, 2017 Press Release, *supra* (citing S.B. 17, 2017 Leg., Reg. Sess. (Ky. 2017) (codified at Ky. Rev. Stat. §§ 158.183, 158.186, 158.188, 164.348 (2017))).

25. Mississippi's offense was preventing the government from discriminating against religious organizations based on their traditional beliefs about marriage. *See* Cal. Dep't of Justice, *Frequently Asked Questions (FAQs) - AB 1887: Why Are the States on the Travel Prohibition List?*, https://perma.cc/M8T5-F7RG (citing H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (codified at Miss. Code §§ 11-62-1 et seq. (2016))).

26. Tennessee's offense was protecting the religious freedom of counselors and therapists. *See ibid.* (citing S.B. 1556, 2016 Leg., 109th Gen. Assemb. (Tenn. 2016) (codified at Tenn. Code §§ 63-22-301, 63-22-302, 63-22-110(b)(3) (2016))).

27. "[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions . . . with the intent of changing . . . lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

28. Yet the express aim of California's travel ban is to punish the citizens and businesses of the target States to pressure those States "to change their laws" to provide fewer protections for religious freedom. A.22. As one of A.B. 1887's sponsors described, the aim of the law is "to send a message to these states that there is a cost to passing laws that" California dislikes. Mark Zeigler, *Aztecs Working Around State Ban on Travel*, San Diego Union-Trib., 2018 WLNR 7734318 (Mar. 13, 2018); *accord, e.g.*, Megana Sekar, *California and UCLA Restrict Travel to Oklahoma in Response to Anti-LGBTQ Law*, Daily Bruin (June 4, 2018), https://perma.cc/SWD6-YGV6 ("Low [the bill's author] said AB 1887 aims to . . . discourage [States] from passing such laws.").

III. California's Economic Sanctions Have the Intended Effect of Harming the Targeted States.

29. The California Legislature acknowledged that the primary impact of the ban would be on "businesses operating within" the targeted States, such as "hotels, restaurants, taxicab companies, and airlines," with "secondar[y] [e]ffect[s] [on] the state governments by the tax revenue that the business activities generate." A.38.

30. As intended, the direct and indirect effects of the travel ban are, respectively, to harm the businesses in the targeted States and to deprive the targeted States

of associated tax revenue. *See, e.g.*, Rebecca Beitsch, *Supposedly Symbolic, State Travel Bans Have Real Bite*, Stateline (Aug. 15, 2017), https://perma.cc/3XNR-YY95; Beth Musgrave, *Louisville Mayor Says City Lost Two Conventions Because of California Travel Ban*, Lexington Herald-Ledger (June 29, 2017), 2017 WLNR 20045126; Joshua Fechter, *California Travel Ban to Texas over LGBT Adoption Bill Could Spell Trouble for Tourism Industry*, MySanAntonio (June 25, 2017), https://perma.cc/A8AD-JKRW; *see also* Alan Blinder, *Travel to Texas? Not on California's Dime, You Don't*, N.Y. Times (July 19, 2017), https://perma.cc/PV9A-2EWQ ("Texas has more on the line than most places. Some 10 percent of the nation's trade shows are held in the state, and its three largest cities—Dallas, Houston and San Antonio—are popular meeting sites."). *Cf.* A.37 (noting that California state employees had "over 10,000 'out-of-state person trips' in 2015").

31. For example, shortly after Becerra added Texas to California's travel ban list, several students from California Polytechnic State University had to cancel plans to attend the National Organization of Minority Architects' annual conference in Houston, Texas, because they could no longer secure school funding. Hayley Sakae & Nikki Petkopoulos, *Ban on State-Funded Travel to States with Laws that Discriminate Against the LGBTQ Community Turns One Year Old*, Mustang News (Jan. 16, 2018), https://perma.cc/7Q3T-MEF7. And scholars from California public universities were unable to attend the Association for Women in Mathematics' 2019 Research Symposium in Houston, Texas. *See* Ass'n for Women in Mathematics, *California Travel*

Ban and the AWM Research Symposium (Mar. 19, 2019), https://perma.cc/976U-DAPA.

IV. States Targeted by California's Economic Sanctions Begin to Retaliate.

32. Initially, the response of the targeted States was restrained. But now this conflict is escalating, and other States are retaliating.

33. In 2017, Tennessee's Legislature passed and Tennessee's governor signed Senate Joint Resolution 111, excoriating "California's attempt to influence public policy in our state," which the resolution likened to "Tennessee expressing its disapproval of California's exorbitant taxes, spiraling budget deficits, runaway social welfare programs, and rampant illegal immigration." S.J. Res. 111, 110th Leg., Reg. Sess. (Tenn. 2017). As the Tennessee resolution observed, "this type of ban, the result of legitimate disagreements about government policy, is neither persuasive nor productive for either party and will lead to economic warfare among states, as one sovereign entity attempts to tell an equally sovereign entity how to conduct its affairs." *Ibid.* The Tennessee resolution warned that "if states such as California persist in banning travel to Tennessee as a punitive action for this body conducting its constitutionally mandated duties as its members see fit, our state leaders should consider strong reciprocal action in banning state-sponsored travel to those misguided states." *Ibid.*

34. In 2018, the Tennessee Legislature went one step further, banning state-funded travel for "lawmakers' attendance at a legislative conference" in Los Angeles. Andy Sher, *Legislators Strike Back at California*

Ban on State-Funded Travel to Volunteer State, Chattanooga Times (Mar. 16, 2018), 2018 WLNR 8221967.

35. Just last month, Oklahoma upped the ante. The Governor of that State issued an Executive Order imposing a "moratorium" on all state-funded travel to California. Okla. Exec. Order No. 2020-02 (Jan. 23, 2020). From Oklahoma's perspective, California "banned travel to the State of Oklahoma in an effort to politically threaten and intimidate Oklahomans for their personal values." Press Release, Office of Okla. Governor, Stitt Issues Executive Order Banning State-Funded Travel to California (Jan. 23, 2020), https://perma.cc/T687-ZBA5. Oklahoma was "eager to return the gesture." *Ibid.*

36. As the *Los Angeles Times* recognized, "divisions among states are growing sharper, whether the topic is abortion rights, immigration or environmental protection. Using those disagreements to call for sanctions against each other is ultimately more destructive than helpful. And by kicking off interstate boycotts, California is inviting retribution." Editorial, *The State's Misguided Boycott*, L.A. Times (Jan. 17, 2017), 2017 WLNR 1566801.

37. Before resorting to self-help, and to restore norms that have long governed the States' relationships with each other, Texas turns to this Court. Only this Court can decide conclusively whether California has violated the Constitution or whether instead the economic warfare that California has launched comports with the Constitution and may be replicated elsewhere.

TEXAS'S CLAIMS AGAINST CALIFORNIA

38. Nothing requires California to fund interstate travel. But when California chooses to do so, it must not invidiously discriminate against other States and those States' citizens and businesses. California's travel ban cannot survive because it interferes "both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). Texas thus requests that this Court declare California's travel ban unconstitutional and order California to remove Texas from its travel ban list.

39. The Court has exclusive and original jurisdiction over this suit under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28, Section 1251(a), of the United States Code.

40. Texas has standing in its capacity as a sovereign to address California's interference with Texas's maintenance of its legal code, *see Maine v. Taylor*, 477 U.S. 131, 137 (1986), as a State based on its loss of tax revenue, *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992), and as *parens patriae* seeking redress of harm to its citizens and businesses, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

41. The full scope of the financial effects of California's travel ban is difficult to measure. But there can be no doubt that California's travel ban targets Texas and has inflicted continuing financial harm. That is all that Article III requires to show standing. *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (holding that any loss in federal funds confers stand-

ing); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (rejecting premise that "a small incremental step, because it is incremental, can never be attacked in a federal judicial forum"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992) (explaining that if a plaintiff "challenging the legality of government action" is "an object of the action . . . at issue . . . , there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it"). And laws like California's must be evaluated on the effect of every State following suit—enacting economic sanctions against each other in response to policy disagreements. *See Healy*, 491 U.S. at 336.

42. In any event, California's travel ban is just the first step in establishing a "comprehensive economic boycott" of States that protect religious freedom—or any constitutional liberty California considers inconsistent with its brand of "forward thinking." *See* A.39.

43. During consideration of A.B. 1887, legislators expressed concern that the travel ban did not go far enough, with some asking, "If the premise of this bill is state funds should not be spent in" the targeted States, "why would the state ban state-funded travel but still spend a presumably much greater amount spent on procuring goods from the same state?" A.20. And similarly, "If the purpose of the bill is truly to have a meaningful economic [i]mpact, why not prohibit [the state employees' pension fund] and [the state teachers' pension fund] from investing in those states?" A.38; *see also* A.43 (Judiciary Committee Chairman Mark Stone at the A.B. 1887 hearing, stating that "California is a very major player economically and providing to the extent

that we can, sanctions that actually work by preventing some of the relationships and investments from California into those areas would be, I would think, much more effective").

44. The author of A.B. 1887, Assemblyman Evan Low, assured his colleagues that the travel ban is merely one "step" in targeting states with laws that "appear contrary to the values expressed in California law." A.17. In response to his colleagues' concerns about the travel ban's limited effect, he noted that expanding sanctions is "a conversation certainly we'd be delighted to have." A.43.

45. Confirming that expansion is inevitable, San Francisco recently enacted a law that "forbids the city from" funding travel to, or "contracting with companies headquartered in[,] states with restrictive abortion laws." Nicholas Iovino, *San Francisco Bans City-Paid Travel to States that Restrict Abortion*, Courthouse News Serv. (July 24, 2019), https://perma.cc/HW2L-GC6W.

46. The threat to the unity of the States should California expand its policy, or other States emulate that policy, is real and must be addressed.

Count I – Privileges and Immunities Clause

47. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

48. As Justice Field wrote for a unanimous Court in *Paul v. Virginia*: "It was undoubtedly the object of the [Privileges and Immunities Clause] to place the citizens of each State upon the same footing with citizens of other States . . . . [I]t inhibits discriminating legislation

against them by other States . . . . It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." 75 U.S. (8 Wall.) 168, 180 (1868). In sum, the Clause constitutionalized "a norm of comity" between the States and "was intended to arrest th[e] centrifugal tendency" of competing States "with some particularity." *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975).

49. "The Privileges and Immunities Clause, by making [State citizenship or residence] an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Id.* at 662.

50. By banning the expenditure of state travel funds on services in Texas, California's travel ban "locat[es] a special burden" on citizens and businesses of Texas for no other reason than that they are citizens and businesses of Texas. *Ibid.* California's behavior is precisely what the Privileges and Immunities Clause seeks to stamp out.

51. California's travel ban falls "within the purview of the Privileges and Immunities Clause" because "[t]he opportunity to seek" customers for one's business "is sufficiently basic to the livelihood of the Nation"; this is true "even though the [travel is] funded in whole . . . by the [State]." *United Bldg. & Constr. Trades Council v. Mayor & Council*, 465 U.S. 208, 221-22 (1984) (quotation marks omitted); *see also Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978) (treating citizens' "means of a livelihood" as "'fundamental' under the Privileges and Immunities Clause"); *Toomer v. Witsell*,

334 U.S. 385, 403 (1948) ("[C]ommercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause.").

52. California's travel ban could survive only if Texas's citizens and businesses "constitute a peculiar source" of the "local evils" at which the travel ban "is aimed." *United Bldg. & Constr.*, 465 U.S. at 222-23 (quotation marks omitted).

53. But California has not aimed the travel ban at *any* local evil; its express purpose is to change laws *outside California*. It cannot survive scrutiny.

Count II – Interstate Commerce Clause

54. "When victory [in the Revolution] relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. . . . This came to threaten at once the peace and safety of the Union." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quotation marks omitted).

55. "The Constitution . . . was framed upon the theory 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." *Id.* at 532 (quotation marks omitted).

56. "The few simple words of the Commerce Clause—'The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .'—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among

the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).[4]

57. "The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Id.* at 326; *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459-61 (2019).

58. "[I]f a state law discriminates against . . . nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose." *Tenn. Wine*, 139 S. Ct. at 2461 (quotation marks omitted).

59. California's travel ban, which facially discriminates against commerce in Texas, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337.

60. California's travel ban cannot survive this scrutiny. First, it has *no* local purpose; California expressly designed the ban to effect change in *other States'* laws. Second, its purpose is not legitimate, as it is infected

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[4] "The Privileges and Immunities Clause originally was not isolated from the Commerce Clause, now in the Constitution's Art. I, § 8. In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article. Their separation may have been an assurance against an anticipated narrow reading of the Commerce Clause." *Baldwin*, 436 U.S. at 379-80 (citations omitted).

with animus towards religion. Third, there are any number of ways for California to express its disdain for religion or its disapproval of other States' laws without burdening interstate commerce—for example, official speeches, legislative resolutions, or amicus briefs. *See, e.g.*, Brief for the States of California, et al., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 721989; S. Res. 14, 1909-1910 Leg., Reg. Sess. (Cal. 1909) (condemning state laws permitting bigamy).

61. By aiming economic sanctions at Texas, California's travel ban violates the Interstate Commerce Clause's fundamental principle—"that our economic unit is the Nation" and "its corollary that the states are not separable economic units." *H.P. Hood & Sons*, 336 U.S. at 537-38.

62. In discussing the reach of the Commerce Clause, the United States has argued that "[i]f Massachusetts" used its spending powers to target "companies that do business in Texas, . . . in order to induce a change in the internal policies of Texas, there could be little doubt that Massachusetts would violate the Commerce Clause." Brief for the United States as Amicus Curiae Supporting Affirmance, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 194805, at *27. The United States reasoned further that because "[t]he Interstate Commerce Clause was intended to prevent 'economic Balkanization' and retaliation by one State against another," "[i]t would be inconsistent with those overriding purposes of the Commerce Clause to sustain a state statute that singles out companies because they do business in another State." *Ibid.*

63. As the United States' argument suggests, the fact that California is using state funds to express its animus towards religion and discriminate against Texas commerce does not alter this conclusion.

64. Although the Court has identified a "narrow exception to the dormant Commerce Clause for States in their role as 'market participants,'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589 (1997), it has never extended the market-participant exception to a statute that discriminates against companies that do business in another State as a means to influence that other State's internal policies.

65. In fact, this Court's precedent precludes applying the market-participant exception to California's travel ban. The Court has held that when, as here, a State uses its participation in a market to reach beyond the immediate parties with which the government transacts business (to influence another State's policies, for example), it is no longer "functioning as a private purchaser of services." *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986). "[F]or all practical purposes, [California's travel ban] is tantamount to regulation." *Ibid.*; *accord, e.g.*, *Bldg. & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 228-29 (1993); *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93-99 (1984) (plurality op.).

Count III – Equal Protection Clause

66. By discriminating against Texas citizens and businesses solely because they are Texas citizens and businesses, California's travel ban also violates the Constitution's guarantee of equal protection. U.S. Const. amend. XIV, § 1. Texas is harmed directly and as

parens patriae by California's discrimination against Texas citizens and businesses. *See supra*, ¶¶ 29-31; *Craig v. Boren*, 429 U.S. 190, 194-97 (1976).

67. "In the equal protection context, . . . if [California]'s purpose" in enacting the travel ban "is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

68. But expressing animus towards religion is not a legitimate governmental purpose. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729-32. Neither is punishing the citizens and businesses of a sister State to pressure that State to change a law that has nothing to do with the targeted citizens and businesses. *Compare W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981) (explaining that placing pressure on a sister State to eliminate barriers on interstate commerce is a legitimate purpose "[u]nless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2") (quotation marks omitted), *with supra* ¶¶ 47-65.[5]

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[5] Thus, the guarantee of equal protection serves to protect citizens and businesses from discriminatory economic regulation even where the Privileges and Immunities and Interstate Commerce Clauses do not apply. For example, in *Metropolitan Life Insurance Co.*, the plaintiff corporation challenged a state insurance law that discriminated against out-of-staters. 470 U.S. at 872. The Privileges and Immunities Clause does not protect corporations. *See Paul*, 75 U.S. (8 Wall) at 179. And the McCarran-Ferguson Act allows States to burden interstate commerce in the insurance field. This Court nonetheless held the state law

PRAYER FOR RELIEF

WHEREFORE, the State of Texas respectfully requests that this Court issue the following relief:

A. Declare that A.B. 1887 is invalid because it violates the United States Constitution's Privileges and Immunities Clause, U.S. Const. art. IV, § 2, cl. 1.

B. Declare that A.B. 1887 is invalid because it violates the United States Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

C. Declare that A.B. 1887 is invalid because the law violates the United States Constitution's Equal Protection Clause, U.S. Const. amend. XIV, § 1.

D. Issue preliminary and permanent injunctions ordering Defendant to take down its travel ban list or remove Texas from that list.

E. Grant such other relief as the Court deems just and proper.

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unconstitutional because the State's bare desire to discriminate against out-of-state insurance businesses was not a legitimate purpose and thus could not survive rational-basis scrutiny. *See Metro. Life Ins. Co.*, 470 U.S. at 880.

Respectfully submitted.

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF CALIFORNIA

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

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INTRODUCTION

The State of Texas has done what every sovereign has the power to do—craft laws that it believes promote the wellbeing of its citizens. Texas passed H.B. 3859 to protect individuals and organizations that provide welfare services to the children of Texas. To enable those providers to keep supporting children across the State, H.B. 3859 forbids the State and its political subdivisions to discriminate against providers based on their sincerely held religious beliefs.

The State of California apparently disagrees with that goal and seeks to impose its mores nationwide. It has taken the radical step of using economic tools of war to police and punish eleven other States, including Texas, for exercising their sovereign power to legislate. In response to Texas's decision to pass local legislation, California banned all state-funded or state-sponsored travel to Texas. It has done the same thing for Alabama, Iowa, Kansas, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Tennessee.

California's travel ban is an affront to the sovereignty of Texas—as well as the ten other States that California has blacklisted. It threatens the finely wrought structure of our federal government by Balkanizing States that are meant to be United. And it harms untold numbers of citizens—in Texas and elsewhere—who have lost the opportunity to furnish goods and services to their Californian neighbors.

The sovereign interests at stake, the possibility of tit-for-tat retaliation, and the concrete economic harm to individual citizens and their governments all make this an appropriate case for the exercise of this Court's

original jurisdiction. The Framers may have imagined that this Court would exercise that jurisdiction "sparingly." *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992). But they could never have imagined it would refuse to hear a case like this one, presenting those very jealousies that prompted the Constitutional Convention.

The motion for leave to file a bill of complaint should be granted.

STATEMENT

I. Texas Enacts H.B. 3859 to Allow Faith-Based Child Welfare Providers to Serve the Children of Texas While Also Adhering to Their Sincerely Held Religious Beliefs.

This Court observed many years ago that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Today, however, the people of this country still disagree over how to protect Americans' religious convictions in an increasingly pluralistic society. As predicted in *Obergefell v. Hodges*, this Court's holding that the Constitution creates a right to same-sex marriage has brought many "hard questions" of religious freedom to the fore. 135 S. Ct. 2584, 2625-26 (2015) (Roberts, C.J., dissenting).

In *Employment Division v. Smith*, this Court held that the Free Exercise Clause does not exempt religiously motivated conduct from generally applicable laws. 494 U.S. 872, 878-79 (1990). In the wake of that decision, Congress sought to provide by statute what this Court's interpretation of the First Amendment could not—the right to religious exemptions except where the government has a compelling interest. *See* Religious Freedom Restoration Act of 1993 (RFRA),

Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb et seq.); *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730-31 (2014). Four years later, this Court held that RFRA could not be applied to the States. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Many States, however, chose to apply something like RFRA to themselves. Since *City of Boerne*, twenty-one States have adopted laws raising the protections for religious citizens above *Smith*'s constitutional floor.[1] Many other States have provided similarly heightened protections through judicial decisions interpreting their state Constitutions.[2] Meanwhile others have contented themselves with the federal constitutional minima. *See* Jeffrey S. Sutton, *51 Imperfect Solutions* 206-07 (2018).

Texas enacted H.B. 3859 as part of this ongoing national debate over religious protection—and a local debate over how to best serve children in need. In October 2016, the Commissioner of the Texas Department of Family and Protective Services (DFPS) sent a letter to the leaders of the State's executive and legislative branches. He informed them that "Texas children remain at risk" because DFPS was understaffed and suffered from a high turnover among caseworkers. *See* Letter from Commissioner H.L. Whitman, Jr. 1 (Oct. 20, 2016), https://bit.ly/2ya6ELK. The Commissioner

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[1] *See* Nat'l Conference of State Legislatures, *State Religious Freedom Restoration Acts* (May 4, 2017), https://perma.cc/7MER-64YR.

[2] *See, e.g.*, *Huffman v. State*, 204 P.3d 339, 344 (Alaska 2009); *State v. Adler*, 118 P.3d 652, 661 (Haw. 2005); *Rupert v. City of Portland*, 605 A.2d 63, 65-66 (Me. 1992); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-36 (Mass. 1994).

said that he planned to hire more than 800 additional employees. *Id.* at 2-4. But he recognized that more workers would not eliminate the risk to Texas children. "For protection efforts to ever truly take root," he said, "engaging the faith community must be etched into our blueprint for success." *Id.* at 1.

To that end, DFPS created a new position to increase the religious community's involvement "in activities to promote child abuse prevention, prevent removals of children from families, promote and support foster care, and increase permanency." *Id.* at 4. It also hosted a summit to encourage the religious community to aid DFPS in its mission of serving children and families. *See* Press Release, Office of Tex. Governor, First Lady Cecilia Abbott Addresses DFPS Faith Leader Summit (Nov. 2, 2016), https://perma.cc/QHZ5-U5VZ.

DFPS's goal was "to maintain a diverse network of service providers that offer a range of foster capacity options and that accommodate children from various cultural backgrounds." Tex. Hum. Res. Code § 45.001. Lawmakers, however, recognized that legal barriers could discourage religious individuals and organizations from participating in child welfare programs by forcing them to provide services that conflict with sincerely held religious beliefs. If otherwise willing service providers opted not to participate at all, that would mean fewer resources available for children throughout Texas.

H.B. 3859 is the solution. It provides that the State and its affiliates "may not discriminate or take any adverse action against a child welfare services provider" for refusing to provide certain services based on religious convictions. *Id.* § 45.004. A service provider "may not be required to provide any service that conflicts

with the provider's sincerely held religious beliefs." *Id.* § 45.005(a). The law defines "child welfare services provider" to include individuals and organizations that provide services ranging from facilitating adoption or foster care to providing housing and other physical needs. *Id.* § 45.002(3)-(4).

But the law is careful to ensure that religious objections do not prevent children and families from obtaining the care that they need. To that end, it requires those who decline to provide certain services to refer children and families to other providers "who provide the service being denied." *Id.* § 45.005(c). That furthers H.B. 3859's goal of ensuring the largest possible pool of service providers in Texas without limiting a single child's access to necessary services.

Alabama, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Dakota, and Virginia have all passed similar laws to serve the children of their States while respecting the religious convictions of those who serve them.[3]

II. California Imposes Economic Sanctions, Banning State Travel to Texas and Ten Other States.

California legislators see States' protection of religious liberty as "the last gasp of a decrepit worldview." A.26. So, in 2016, California enacted A.B. 1887. That law prohibits state-funded or state-sponsored travel to any State that, after June 26, 2015, has enacted a law that

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[3] *See* Ala. Code § 26-10D-5; Kan. Stat. § 60-5322; Mich. Comp. Laws § 722.124e(2)-(4); Miss. Code § 11-62-5(2)-(3); N.D. Cent. Code § 50-12-07.1; Okla. Stat. tit. 10A, § 1-8-112; S.D. Codified Laws § 26-6-38; Va. Code § 63.2-1709.3.

(1) "has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression"; (2) "authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression"; or (3) "creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression." Cal. Gov't Code § 11139.8(b)(1).

From the very beginning, the law's purpose has been clear—to "respond[to state laws] modeled after the federal Religious Freedom Restoration Act." A.14. California's travel ban expressly targets the citizens and businesses of States, like Texas, that "offer[] more protection for religious freedom" than California finds appropriate. A.16.

It did not matter to California that many of her sister States have passed RFRA laws or that those laws were modelled on bipartisan federal legislation. Whatever the scope of those laws, "they would seem to be at odds with California's" values. A.14, 16-17. So California leveraged "its relationship with other states," to "send[] a strong message that such laws are not acceptable to the State of California." A.14, 23.

The California Legislature codified its belief that "religious freedom" is merely "a justification for discrimination." Cal. Gov't Code § 11139.8(a)(4). And it offered a quintessential example of a law that it would find "not acceptable"—a law protecting "a wedding photographer who objected to same-sex marriage" on religious grounds from being forced "to provide photographic services for a same-sex wedding." A.11; *cf.*

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). Those choices are telling.

Other statements during legislative debate, "[c]haracterizing" religious beliefs "as merely rhetorical—something insubstantial and even insincere," *Masterpiece Cakeshop*, 138 S. Ct. at 1729, confirm that animus toward religion was a driving force behind A.B. 1887. A sponsor of the travel ban called religion the "old ways," complained that "religion has been used again and again as a tool to justify discrimination," and described religious persons' invocation of religious freedom as merely a "backlash" against this Court's holding that States must extend the institution of marriage to include same-sex couples. A.42 (Testimony of Kate Kendall). Later, Assemblyman Phil Ting, a co-author of A.B. 1887, accused "religious organizations" of using "their religion as code to discriminate against different people." A.44. "The record shows no objection to these comments" by legislators. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

These statements betray the same animosity and hostility toward religion that this Court admonished in *Masterpiece Cakeshop* before it invalidated the Colorado Civil Rights Commission's sanction against Jack Phillips. *See id.* at 1729-32. What was true before the Commission in Colorado is true before the Assembly in California. The State's legislators take an oath to "support and defend the Constitution of the United States." Cal. Const. art. XX, § 3. They have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

A.B. 1887 tasks California's Attorney General with implementing this scheme by compiling a list of disfavored States to which state-sponsored travel is forbidden. The law says that "[t]he Attorney General shall develop, maintain, and post on his or her Internet Web site a current list of states that" fall within its ambit. Cal. Gov't Code § 11139.8(e)(1). California agencies and employees must then consult the Attorney General's list "in order to comply with the travel and funding restrictions imposed." *Id.* § 11139.8(e)(2).

California's Attorneys General have done just what the law requires. After A.B. 1887 became law, then-Attorney General Kamala Harris added the first wave of States to the travel ban list: Kansas, Mississippi, North Carolina, and Tennessee. *See* Compl. ¶¶ 22, 24-26. In June 2017, Attorney General Becerra doubled the number of targets, adding Alabama, Kentucky, South Dakota, and Texas. *See* Compl. ¶¶ 23-24. In 2018, he added Oklahoma to the list. *See* Compl. ¶ 23. The next year, he added South Carolina and Iowa as well. *See* Compl. ¶ 22-23.

California has now banned travel to eleven States. In each instance, California singled out the target State's decision to pass legislation with which it disagrees as the basis for banning California-funded travel. For example, California targeted Texas, its citizens, and its businesses, based solely on the State's decision to protect faith-based child welfare providers: California added Texas to the list because "HB 3859 was enacted on June 15, 2017." Press Release, Attorney General Becerra, Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel (June 22, 2017), https://perma.cc/L62K-3V58.

III. The Travel Ban Inflicts the Very Harm It Was Designed to Inflict by Reducing Travel to, and Expenditures in, the Blacklisted States.

California designed its travel ban to pressure the targeted States "to change their laws" by punishing their citizens and businesses. A.22; *see* Compl. ¶ 28.

The law seeks to impose that pressure by taking customers away from "businesses operating within" the targeted States, such as "hotels, restaurants, taxicab companies, and airlines." A.38. Without the travel ban, countless commercial transactions—flights, cab rides, hotel stays, and meals in nearby restaurants—would have materialized within the targeted States. The travel ban ensures that many of them never do. Thus, the law also imposes "[e]ffect[s] [on] the state governments by [reducing] the tax revenue that the business activities generate." *Ibid.*

The travel ban works exactly the harm California hoped it would. It harms businesses and individuals in Texas and elsewhere who otherwise would have provided goods and services to California visitors. And it harms the targeted States, which are deprived of the tax revenue those exchanges would have generated.

Start with Texas. The National Organization of Minority Architects (NOMA) scheduled its 2017 annual conference in Houston, Texas. Students who were members of NOMA's campus chapter at California Polytechnic State University had planned to attend as members had in years past. But "none of the club members were able to" do so after Attorney General Becerra added Texas to California's target list; they could no longer secure school funding. Hayley Sakae & Nikki Petkopoulos, *Ban on State-Funded Travel to States with Laws that Discriminate Against the LGBTQ*

Community Turns One Year Old, Mustang News (Jan. 16, 2018), https://perma.cc/6UYN-VGUR.

Another conference in Houston, Texas, tells a similar story. The Association for Women in Mathematics held its 2019 Research Symposium at Rice University. California's travel ban prevented many scholars from public universities in California from participating. The Association at first sought to help pay the way for California "members from underrepresented groups." But after a backlash, it reversed course and apologized for "undermin[ing] the spirit and the fiscal purpose of the California policy." Ass'n for Women in Mathematics, *California Travel Ban and the AWM Research Symposium* (Mar. 19, 2019), https://perma.cc/437V-G8K6.

Other States have felt the impact of California's travel ban, too. *See, e.g.*, Teresa Watanabe & Rosanna Xia, *California's Travel Ban Against Anti-LGBT States Is Keeping Athletes from Games and Students from Conferences*, L.A. Times (Feb. 21, 2017), https://perma.cc/LGD9-8V73; Peter Hancock, *California Travel Ban on Kansas Affecting KU Basketball*, Lawrence Journal-World (Feb. 3, 2017), https://perma.cc/HH6G-V8YX; Adam Ashton, *From Football to Taxes: How California's Ban on Travel to Bathroom-Bill States Will Play Out in 2017*, Sacramento Bee, 2016 WLNR 39198467 (Dec. 22, 2016).

The harm inflicted in each of these cases is real. Perhaps one advocacy group that supports California's travel ban put it best: "There are hotel rooms no longer being used, restaurants those state employees will no longer eat in, shops they'll no longer browse, and tourist sites they'll no longer visit in their downtime." Samantha Allen, *Do Travel Bans Really Advance LGBT*

Equality?, Daily Beast (Apr. 11, 2017), https://perma.cc/SYN5-BHPQ.

IV. Texas Brings this Action Under this Court's Original Jurisdiction in the Face of Growing Hostility Between the States.

One obvious consequence of California's travel ban was possible retaliation from the States that California has blacklisted. Shortly after California added Texas to its list, one state representative tweeted: "I hope [Governor Gregg Abbott] will let us reciprocate during the special session." Dustin Burrows (@Burrows4TX), Twitter (June 22, 2017, 7:31 PM), https://perma.cc/3L8U-SMWE. So far, Texas has stayed its hand.

Understandably, other States have not. In 2017, Tennessee's Legislature reacted by passing a joint resolution that excoriated "California's attempt to influence public policy in our state." S.J. Res. 111, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017). The Tennessee Legislature stopped short of retaliating with a full-scale ban of its own. But it concluded that it "may be forced to take reciprocal action" if California "persists in banning travel" to Tennessee. *Ibid.* And it directed that a copy of its resolution "be sent electronically to each member of each state legislative body in the nation, *so they may also consider taking action* against this type of blackmail." *Ibid.* (emphasis added).

The next year, the Tennessee Legislature acted. The Speakers of the House and Senate barred "any member or staff travel, [and] any other financial expenditure," for attending the National Conference of State Legislatures (NCSL) 2018 Annual Summit in Los Angeles, California. *See* Letter from Randy McNally & Beth Harwell to NCSL 1 (Mar. 15, 2018), *available at* https://perma.cc/ZM39-VHGD. The Speakers noted

that it was "California, not Tennessee, which set this chain of events in motion" and that "Tennessee will begin approving travel to California" as soon as "California rescinds its ban." *Id.* at 2. In response to this decision, the Senator who sponsored Joint Resolution 111 said he "hope[d] other states follow suit." Andy Sher, *Legislators Strike Back at California Ban on State-Funded Travel to Volunteer State*, Chattanooga Times Free Press (Mar. 16, 2018), https://perma.cc/HCZ5-PND5.

Just last month the conflict escalated, as Oklahoma banned all state travel to California. Okla. Exec. Order No. 2020-02. In response to California's "effort to politically threaten and intimidate Oklahomans" with the travel ban, Oklahoma decided to "return the favor." Press Release, Office of Okla. Governor, Stitt Issues Executive Order Banning State-Funded Travel to California (Jan. 23, 2020), https://perma.cc/T687-ZBA5.

Further conflict is brewing. Some believe the travel ban is not harsh enough and have urged California to tighten the thumbscrews on her sister States. *See, e.g.*, Cyd Zeigler, *California's 'Travel Ban' to Anti-LGBTQ States Is a Political Trick*, LGBTQ Nation (Apr. 5, 2019), https://perma.cc/BV24-5Q2Y. Just this past summer, the City of San Francisco expanded its own travel and contracting ban. Compl. ¶ 45. Even the Legislature that passed A.B. 1887 seemed to suggest it did not go far enough. The California Assembly's Committee on the Judiciary wondered: "[W]hy would the state ban state-funded travel but still spend a presumably much greater amount spent on procuring goods from that same state?" A.20.

If this cycle of retaliation continues, it will leave a country divided into red and blue States: The former

spend money only in other red States; the latter spend money only in the blue ones. Rather than contribute to this division, Texas invokes the mechanism that our federal Constitution prescribes for resolving conflicts like this one. It brings this suit under the Court's original jurisdiction seeking declaratory and injunctive relief.

ARGUMENT

The Constitution grants this Court original jurisdiction over suits between two States. U.S. Const. art. III, § 2, cls. 1-2. Federal law makes that jurisdiction "original *and exclusive*." 28 U.S.C. § 1251(a) (emphasis added); *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Normally this Court has "no . . . right to decline the exercise of jurisdiction which is given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Chief Justice Marshall, at least, thought that any other approach "would be treason to the constitution." *Ibid.*

Even so, this Court has determined that its authority to decide disputes between two States is discretionary. *Massachusetts v. Missouri*, 308 U.S. 1, 18-19 (1939). It has carefully guarded that jurisdiction to avoid overwhelming its appellate docket, *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 498-99 (1971), and fashioning federal common law out of thin air, *Missouri v. Illinois*, 200 U.S. 496, 520 (1906). Put another way, this Court's exercise of original jurisdiction is "obligatory only in appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

In deciding whether to exercise jurisdiction, this Court looks to (1) the interest at stake and (2) the availability of alternative means to resolve the dispute. To clear the first hurdle, a would-be plaintiff State must show that the State's interest is "serious"—the kind of

dispute that "would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77. To clear the second, the State must show that there is no alternative forum "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois*, 406 U.S. at 93.

Although some Justices have questioned this Court's discretionary approach, *see Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting), the Court need not revisit it here because this case is an "appropriate" one for the "obligatory" exercise of discretion, *Illinois*, 406 U.S. at 93-94.

First, Texas's claims implicate sovereign and quasi-sovereign interests of the utmost "seriousness and dignity." *Id.* at 93. California has used a classic tool of war—economic sanctions—for the express purpose of targeting Texas's sovereign power to legislate. Founding-era history, historical experience, law-of-war principles, and this Court's precedent all show that sovereigns have long considered economic sanctions a basis for war. Here those sanctions have hurt Texas citizens and businesses, all with a view to hurting Texas itself.

Second, there is no alternative forum for resolving this dispute. This Court does not require States to take "diplomatic," extra-judicial action to resolve disputes like this. Rather, Article III's grant of original jurisdiction aims to prevent States from facing off across the negotiating table. And private parties could not resolve the dispute in the State's stead even if they tried. Individual Texans will have trouble detecting and tracing concrete harm in the first place. Even if they succeeded in doing so, sovereign immunity would bar their suits at

the door. And private parties could not raise the full scope of issues that Texas raises here.

Finally, Texas's claims do not require this Court to tread new ground. Existing caselaw under the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause provide readymade rules of decision. California's conduct is invalid under all of them.

I. The Seriousness and Dignity of Texas's Claims Warrant the Exercise of this Court's Original Jurisdiction.

The interests at stake here cannot be gainsaid. California has deployed economic sanctions against fellow States. That has long been recognized as a legitimate basis for war between independent nations. But California's ends make its chosen means even worse. Through A.B. 1887, California targeted Texas's sovereign interest in setting public policy in Texas through duly enacted laws. And as intended, the sanctions imposed by California have inflicted concrete pecuniary harm on Texas and its citizens.

a. This Court has said many times that "the model case for [the] invocation of [its] original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983).

But "what inducements could the States have, if disunited, to make war upon each other?" The authors of *The Federalist* thought there was an obvious answer: Along with disputes over territory and contracts between States, the "[c]ompetitions of commerce would be another fruitful source of contention." The Federalist

No. 7 (Alexander Hamilton). "The infractions of these [economic] regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals *and wars*." *Ibid.* (emphasis added).[4]

This concern—that economic regulations would lead to conflict—is rooted in reality: After emerging from the Revolutionary War, "commercial warfare between states began." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949). The driving force behind "the movement which ultimately produced the Constitution" was a desire to address this singular threat to "the peace and safety of the Union." *Ibid.*; *see also* James Madison, *Vices of the Political System of the United States* (Apr. 1787) (decrying "[t]he practice of many States in restricting the commercial intercourse with other States").

Historical experience confirms the Founders' fears. From Ancient Greece to the present day, economic sanctions barring commerce have long been grounds for war. In 432 BC, the Delian League—with Athens at the helm—imposed a trade embargo against Megara. That effectively barred Megara from trading with all Greek city-states encircling the Aegean Sea. In response, Lacedæmon sent emissaries to Athens with a warning: "[W]ar might be prevented," said the Spartans, "by the revocation of the Megarian decree." Thucydides, *The Peloponnesian War* I.139 (Richard Crawley trans.,

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[4] This Court's cases exercising its original jurisdiction map neatly onto those categories—territory, contract, and commerce. *See, e.g.*, *New Jersey v. Delaware*, 552 U.S. 597 (2008) (territory); *Kansas v. Colorado*, 514 U.S. 673 (1995) (contract); *Wyoming*, 502 U.S. 437 (commerce).

1982) (c. 404 B.C.E.). Pericles mocked this threat as "a trifle," and the Athenians refused to lift the trade ban. *Id.* at I.140, 145. But war came just the same. Economic sanctions spawned thirty years of battle between Attica and the Peloponnese.[5]

Fast forward more than 2,000 years to World War II. It is well documented that economic sanctions were one of the considerations that led Imperial Japan to launch its surprise attack on Pearl Harbor. *See* Paul J. Saunders, Opinion, *When Sanctions Lead to War*, N.Y. Times (Aug. 21, 2014), https://perma.cc/66TA-P4TR. On July 25, 1941, President Roosevelt froze Japanese assets in the United States. Roland H. Worth, Jr., *No Choice But War: The United States Embargo Against Japan and the Eruption of War in the Pacific* 63 (2014). A week later, he barred the shipment of oil to most destinations outside "the Western Hemisphere." *Id.* at 82. Because these sanctions threatened Imperial Japan's vision of subjugating all of Asia under its empire, Japan launched its sneak attack in the early morning hours of December 7th. "[W]ar was the ultimate stake and war was the certain result." *Id.* at 205.

Law-of-war principles show why economic sanctions—and other kinds of injuries—have served as a basis for war. If Nation A seizes a ship belonging to Nation B, Nation B may choose to go to war, but not merely because ships are valuable. The real provocation is

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[5] Alexander Hamilton had this history in mind when he detailed "the defects of our present system." He likened the States under the Articles of Confederation to "[t]he leagues among the old Grecian republics [which] were continually at war with each other." Letter from Alexander Hamilton to James Duane (Sept. 3, 1780); *accord* The Federalist No. 18 (James Madison).

the invasion of a sovereign interest—the slight to sovereignty occasioned by a pretension to dictate another nation's affairs. That is why the scope of any war could extend beyond vindicating the initial injury that prompted hostilities. *See* Cornelius Van Bynkershoek, *A Treatise on the Law of War* 4 (Peter Stephen Du Ponceau trans., 1810) (1737). Nation B, after losing a single ship, could reduce all of Nation A to rubble. *Ibid.*

This Court has not had frequent occasion to discuss the law of war and economic sanctions. But what it has said points in the same direction. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 225-26 (1984) (recognizing that the President's power to impose economic embargoes under the Trading With the Enemy Act was a "means of dealing with . . . times of war"); *Georgia v. Pa. R.R.*, 324 U.S. 439, 450 (1945) (noting "diplomacy and war" were "[t]he traditional methods available to a sovereign for the settlement of" trade and commercial disputes); *The Venus*, 12 U.S. (8 Cranch) 253, 286 (1814) (noting a hostile embargo was "of course tantamount to an actual state of war"). Economic sanctions are tools of war that traditionally justify a belligerent response.

California has chosen to use those tools against fellow States in the Union. *See, e.g.*, Alan Greenblatt, *Some States Are Treating Others Like Foreign Countries*, Governing (Sept. 2017), https://perma.cc/3QWJ-FLF6. California has imposed a "restriction[] on the import or export of goods, materials, capital, or services into or from a specific [State] . . . for political . . . reasons." *Embargo*, Black's Law Dictionary 635 (10th ed. 2014). That is a classic "tool of economic warfare," used to "compel[] a country to change its behaviour." George Shambaugh, *Embargo*, Encyclopædia Britannica (2019), https://perma.cc/PJ2G-9XR7.

It is no response that some nations *choose* not to respond with war when faced with economic sanctions. A nation may choose that course for any number of reasons. The important question is whether economic sanctions would provide a recognized basis for hostilities. On that question, founding-era thought, historical practice, law-of-war principles, and this Court's precedents all point to the same conclusion.

It is also no response to suggest that California's travel ban has not crippled the Texas economy. An aggressor's act need not create an existential threat to justify war. When faced with seemingly less consequential complaints, for example, this Court did not content itself to say that "oysters are just oysters." *See Florida v. Georgia*, 138 S. Ct. 2502, 2509 (2018).

An act amounts to *casus belli* when it purports to dictate another sovereign's affairs. California has done that here. That its chosen instrument may be petty rather than powerful does not make it any less an attack that would justify an independent nation in taking up arms.

In any case, this Court has stressed the importance of assessing a plaintiff State's injury in light of possible escalation. *See, e.g.*, *Wyoming*, 502 U.S. at 453-54 (refusing "to key the exercise of this Court's original jurisdiction on the amount in controversy" in light of the possible effects if other "State[s] adopted similar legislation"). *Cf.* The Federalist No. 22 (Alexander Hamilton) (noting "[t]he interfering and unneighborly regulations of some States," if left unchecked, "would be multiplied and extended"). California has purported to exercise sweeping power here. "If one state has [that power], all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."

Pennsylvania v. West Virginia, 262 U.S. 553, 599 (1923).

That possibility has begun to materialize. Tennessee has already responded by banning some state-sponsored travel to California and urging other States to join her. Just last month, Oklahoma banned all state-sponsored travel to California. *Supra* at 11-12. Meanwhile, others have encouraged California to ratchet things up by boycotting "goods" from targeted States. A.20.

b. "[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions . . . with the intent of changing . . . lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). But that is just what California has done. Worse yet, California has used tools of economic warfare to attack a uniquely sovereign function. Texas, like every other sovereign State, has an interest in enacting laws to govern activity within its borders without interference. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) ("the power to create and enforce a legal code" is one "easily identified" example of sovereign interest). Blackstone put it this way: "By the sovereign power . . . is meant the making of laws." 1 William Blackstone, *Commentaries* *49; *see Sovereign Power*, Black's Law Dictionary 1611 ("[t]he power to make and enforce laws").

California, then, has trained its fire on Texas's "sovereign power" by keying its travel ban to Texas's decision to enact certain laws. A.B. 1887 bars "state-funded or state-sponsored travel to a state that, after June 26, 2015, *has enacted a law that*" does any of the various things California disapproves of. Cal. Gov't Code § 11139.8(b)(1)-(2) (emphasis added). And it obligates

the California Attorney General to implement this scheme by focusing on the targeted State's decision to exercise its sovereign power to legislate. That is what happened here. California added Texas to the ban list because "HB 3859 was enacted on June 15, 2017." *Supra* at 8. California is thus openly "infringing on the policy choices of other States." *Gore*, 517 U.S. at 572.

This attack on sovereignty is twofold—it tries to dictate who may and may not enter Texas's markets, and it does so to dictate which laws Texas should and should not enact.

The result is an attack on federalism itself. H.B. 3859 concerns an important issue the States are currently debating. Our federal structure is supposed to create a "laboratory" for democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). California's travel ban aims to undermine that federalism principle by cutting short our national experiment over religious freedoms.

c. The travel ban has inflicted other injuries as well. Texas has a quasi-sovereign, *parens patriae* interest in the "economic well-being" of its citizens, whom California has harmed in a concrete way. *Alfred L. Snapp*, 458 U.S. at 602, 605. Math scholars and Cal Poly students, among others, would have come to Texas and engaged in commerce. Because of California's actions, however, they have not. California successfully deprived Texans of revenue that they would have generated absent the travel ban. *Supra* at 9-11.

This Court has entertained original jurisdiction challenges like this one, requesting declaratory and injunctive relief based on commercial harm to the public. *See, e.g.*, *Wyoming*, 502 U.S. 437 (challenging statute requiring in-state utilities to use a quota of in-state

coal); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (challenging statute that effectively taxed out-of-state, but not in-state, gas); *Pennsylvania*, 263 U.S. 350 (challenging statute restricting the interstate sale of natural gas).

These cases show additional reasons why Texas has standing to sue, on top of the injuries to its sovereign interests described above. Texas is entitled to "special solicitude" in asserting this quasi-sovereign interest in the economic well-being of Texans. *Massachusetts v. EPA*, 549 U.S. 497, 520 & n.17 (2007).

By inflicting diffuse pecuniary injury on Texans, California has also inflicted a pecuniary injury on Texas itself. A lost transaction for a Texas business means lost sales tax revenue for the State. That injury may not be as offensive as the outright affronts to sovereignty detailed above, but it supplies a prototypical injury in fact for standing. *See Wyoming*, 502 U.S. at 445, 447; *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *see also South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (recognizing importance of State's interest in tax revenue).

California cannot object that these injuries to Texas and its citizens are not traceable to the travel ban because they rest on intervening third-party conduct. There is no question that would-be travelers have cancelled travel to Texas and other States solely because of the travel ban.

In any event, this Court recently (and unanimously) rejected that objection to standing in the census case. There the Court held that New York had standing to challenge the Department of Commerce's decision to add a citizenship question to the 2020 census, even though the State's theory of harm rested on intervening

third-party conduct and even though that hypothesized conduct would be unlawful. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). The "predictable effect of Government action" sufficed. *Id.* at 2566.

The same is true here. Texas is not "speculati[ng]" that California's choice to withhold state funds may lead to cancelled trips. *Id.* at 2566. Each link in the causal chain is connected: California *has* withdrawn funds from State agencies; state employees and students *have* cancelled trips they had planned to take; Texas hotels, restaurants, and retail stores *have* missed out on financial transactions; and Texas *has* lost associated sales tax revenue. Texas's "tax revenues are directly linked to the [purchase of goods and services in Texas] and have been demonstrably affected by" A.B. 1887. *Wyoming*, 502 U.S. at 450.

II. Texas Has No Alternative Means to Resolve this Dispute.

Only this Court can address the important issues presented here. Texas cannot negotiate the problem away. And no one else can effectively pursue Texas's interests in a different forum.

a. California may suggest that Texas could fix the problem—and remove itself from California's blacklist—simply by repealing H.B. 3859. That only highlights the gravity of the injury California has inflicted. Texas need not "amend[]" its own laws to California's liking. *Austin v. New Hampshire*, 420 U.S. 656, 666-67 (1975) ("[W]e do not think the possibility that Maine could shield its residents from New Hampshire's tax [by amending its laws] cures the constitutional defect of the discrimination in that tax. In fact, it compounds

it."). And insofar as California's actions violate the Constitution, Texas cannot bless a constitutional violation by another member of the Union. *See, e.g.*, *New York v. O'Neill*, 359 U.S. 1, 6 (1959).

Or perhaps California thinks Texas could negotiate a solution that obviates the need for this Court to intervene. At times, this Court has suggested States at loggerheads have some obligation to try to resolve their differences before invoking this Court's jurisdiction. *See, e.g.*, *Louisiana v. Texas*, 176 U.S. 1, 18 (1900). But elsewhere this Court has recognized that the whole point of its original jurisdiction is to provide "a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923). After all, "Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019).[6]

Precedent suggests another reason why Texas's suit is not premature: If Texas waited to sue or permitted someone else to sue instead, there is a risk that any decision in that litigation could preclude Texas from making arguments later. For example, in *Ohio v. Kentucky* this Court barred Ohio from objecting to a river bound-

[6] Ironically, California's travel ban would likely prevent its own employees from travelling to Texas to discuss any diplomatic resolution face to face. Plus, this dispute does not lend itself to the type of give-and-take negotiation typical of interstate compacts. Those compacts often resolve disputes over how to "equitably" or "fairly" apportion water. *E.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 101 (1938). This dispute is different.

ary based on an earlier decision in litigation between Kentucky and Virginia. 410 U.S. 641, 645-47 (1973). Even though res judicata did not technically bar Ohio's claim, this Court held that claim was nevertheless "foreclosed by acquiescence." *Id.* at 648.

b. Not only is now the right time, but Texas is also the right party. Individual Texans could not sue California in a different forum. True, California's travel ban has harmed untold numbers of Texans whose California customers reneged on their plans to visit Texas or never made plans to begin with. But an alternative forum exists only where that forum (1) may provide "appropriate relief," (2) has "jurisdiction over the named parties," and (3) may litigate the "issues tendered." *Illinois*, 406 U.S. at 93. None of those requirements is met here.

First, private Texas plaintiffs may be unable to obtain "appropriate relief." *Ibid.* In most cases, it will be impossible for them to learn just how California has injured them with its travel ban or sue to stop future injuries.

Consider the examples of math scholars and Cal Poly students cancelling their trips to Houston, Texas. *Supra* at 9-10. Those cancellations inflicted real injuries on Texas businesses. But *which* ones? Which restaurants would the Cal Poly students have chosen to eat at? Which hotel would the math scholars have chosen to stay at? Which souvenir store might they have meandered into on their walk to and from the hotel? This is not simply a case in which the costs of litigation undermine a party's "economic incentive" to vindicate an injury. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). For individual Texans and their businesses, there is no doubt that *some* have suf-

fered financial injury, but exactly which ones is difficult to ascertain. *See Wyoming*, 502 U.S. at 452 n.10.

Even if it were possible for a private plaintiff to discover an injury flowing from A.B. 1887, any discoverable injury likely already occurred. But past harm cannot justify injunctive or declaratory relief. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-96 (2009); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Texas, however, is the object of the travel ban, suffers ongoing sovereign and pecuniary harms, and knows that *some* Texans face imminent harm.

That is why this Court has permitted States to stand in as *parens patriae* to represent their citizens where "the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights." *Louisiana*, 176 U.S. at 19.

Second, even if individual Texans could ascertain their injuries, sovereign immunity would bar them from establishing jurisdiction over California. Texas citizens could not sue California in Texas courts. *Hyatt*, 139 S. Ct. at 1492. They could not sue California in California's own courts. *Alden v. Maine*, 527 U.S. 706, 730 (1999). Nor could they sue California in federal courts. U.S. Const. amend. XI. There simply would be no other court with "jurisdiction over the named parties." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam).

A private suit against California's Attorney General would not provide a workaround. The *Ex parte Young* exception applies only where a party seeks to "prevent [a state officer] from doing that which he has no legal

right to do." 209 U.S. 123, 159 (1908). Sovereign immunity continues to bar suit where a party requests relief that "cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949). Here, it would not be enough to order California to stop enforcing A.B. 1887 because state agencies have an independent obligation to comply with the law. Cal. Gov't Code § 11139.8(e)(2). Effective relief would require ordering the State to take "affirmative action" by removing Texas from the travel ban list or removing that list altogether.

In any case, plaintiff States may not simply "plead away" this Court's original and exclusive jurisdiction by naming a State official as defendant. *E.g.*, *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017); *Connecticut v. Cahill*, 217 F.3d 93, 105 (2d Cir. 2000) (Sotomayor, J., dissenting). The same should be true when a private plaintiff attempts to repackage State grievances as private claims: An individual cannot serve as the nominal party for a State defendant; an individual likewise cannot serve as the nominal party for a State plaintiff. *See North Dakota*, 263 U.S. at 374-75 (State could not serve as nominal party for individual). This dispute is between Texas and California, and Texas is the most appropriate party to defend its sovereignty.

To be sure, this Court has permitted non-sovereign parties to circumvent sovereign immunity where an original jurisdiction case is already under way. *See, e.g.*, *Alabama v. North Carolina*, 560 U.S. 330, 354-58 (2010) (permitting interstate commission to assert claims against North Carolina after other States brought suit);

Arizona v. California, 460 U.S. 605, 614 (1983) (permitting Indian tribe to intervene to assert claims the United States first raised against States). But it has never permitted a private party to "commence[]" a suit that sovereign immunity would normally bar because a sovereign could have brought it. U.S. Const. amend. XI; *see Alabama*, 560 U.S. at 361 (Roberts, C.J., concurring in part and dissenting in part).

Finally, even assuming individual Texas plaintiffs could ascertain precisely how California has injured them, and even if some other court could exercise subject matter jurisdiction over those parties, that case would not involve "the issues tendered" here. *Arizona*, 425 U.S. at 797. Individual citizens of Texas cannot fully represent Texas's interest in its sovereignty. And they would "represent[] only a part of the citizens of [Texas]." *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam). One benefit of this Court's original jurisdiction is avoiding piecemeal "evaluat[ion of] all the separate interests within" the State. *Ibid.* Only Texas can present all of these issues in one fell swoop as plaintiff. *See Wyoming*, 502 U.S. at 451-52.

That is why this Court routinely bars private parties from intervening in original actions where the challenged action causes diffuse harm. *See South Carolina v. North Carolina*, 558 U.S. 256, 278-81 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (collecting cases). California's travel ban surely harms individual Texans. But it is not "imposed only on discrete parties." *Id.* at 283. Individual Texans are collateral damage in California's attack on Texas. This case implicates an interest held uniquely by a State as a State and "a general interest shared by all citizens of the State." *Ibid.*

III. Well-Settled Constitutional Principles Provide Clear Rules of Decision—and California's Travel Ban Flouts All of Them.

This Court has sometimes worried about the difficulty of fashioning rules of decision in this enclave of federal common law. *See Missouri*, 200 U.S. at 520. That concern has no place here. "[N]otwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications." *Pennsylvania*, 262 U.S. at 596. Unlike the search for "equity" in an apportionment case, this case submits to clear rules, and clear answers, under the Constitution. Either California's law comports with the Constitution—and other States may permissibly retaliate—or it does not.

And because this case presents purely legal questions, Texas's claims do not require additional record development or the elucidation of state law. *Cf.* Brief for the United States as Amicus Curiae at 6, 17-19, *Arizona v. California*, No. 22O150 (U.S. Dec. 9, 2019). To resolve this case, the Court need not even appoint a Special Master. Briefing and argument would suffice. The ease with which this case may be resolved—over the period of a few months, without discovery—further counsels in favor of this Court's review.

a. The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The Clause bars States from "discriminat[ing] against out-of-state residents on matters of fundamental concern." *United Bldg. & Constr. Trades Council v. Mayor & Council*,

465 U.S. 208, 220 (1984). This Court has held that merchant services,[7] commercial shrimping,[8] construction work,[9] the practice of law,[10] and "all other common callings" count as matters of fundamental concern.

A straightforward application of these principles resolves this case. The Texans affected by California's law seek to pursue a "common calling," whether in hospitality, entertainment, tourism, or dining. And California has discriminated against them in their pursuits of those callings. California permits state-sponsored travel (and the expenditure of funds) inside California and other States, but not in the targeted States. Indeed, hurting businesses in the targeted States is the key to the law's operation: A.B. 1887 prohibits state-sponsored travel to the targeted States specifically "*to prevent the use of state funds* to benefit a state that does not adequately protect civil rights" as California sees them. A.19 (emphasis added).

States may not "discriminat[e] against out-of-state residents" within their own borders, *United Bldg. & Constr.*, 465 U.S. at 220, by restricting the ability of out-of-state individuals to participate in commerce, *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). What a State cannot do within its own borders it certainly cannot do without them: States cannot restrict out-of-state individuals' ability to participate in commerce within *another State's borders*. *See Quong Ham Wah Co. v. Indus. Ac-*

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[7] *Ward v. Maryland*, 79 U.S. 418, 430 (1870).

[8] *Toomer v. Witsell*, 334 U.S. 385, 397 (1948).

[9] *United Bldg. & Constr.*, 465 U.S. at 221.

[10] *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280-81 (1985).

count Comm'n, 255 U.S. 445, 447-48 (1921) (declining to entertain privileges-and-immunities challenge to extra-territorial law because California Supreme Court had interpreted it to cover both in-state and out-of-state residents); *accord Healy v. Beer Inst., Inc.*, 491 U.S. 324, 343 (1989) (invalidating state pricing statute with "extraterritorial effect").

This Court has already said that California may not burden the economic pursuits of Texans in California; there is no way California can do the same thing to Texans *in Texas*. *See Gore*, 517 U.S. at 572-73 ("Alabama does not have the power" to "impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.").

b. The Commerce Clause states that "Congress shall have Power To . . . regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has long read the Clause as imposing a dormant "restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Some dormant commerce clause challenges involve complicated economic inquiries. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Others do not: "State laws discriminating against interstate commerce on their face are virtually *per se* invalid." *Camps Newfound/Owatanna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997).

Again, a straightforward application yields a straightforward answer. The economic activity at issue—furnishing goods and services to out-of-state visitors—qualifies as interstate commerce. *Id.* at 573-74. And California's travel ban discriminates against that commerce "on its face" by permitting state-sponsored travel to some States but not others. As the United States has argued, "[i]f Massachusetts" used its spend-

ing powers to target "companies that do business in Texas, . . . in order to induce a change in the internal policies of Texas, there could be little doubt that Massachusetts would violate the Commerce Clause." Brief for the United States as Amicus Curiae Supporting Affirmance, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 194805, at *27.

It hardly helps that California may not have designed its travel ban to favor Californians. *See Hughes*, 441 U.S. at 337 (discussing "the evil of protectionism"). That only shows why A.B. 1887 would flunk strict scrutiny analysis: California cannot show "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" if it is calculated only to hurt the targeted States. *Or. Waste Sys., Inc. v. Dep't of Enviro. Quality*, 511 U.S. 93, 101 (1994). The Commerce Clause guards against all kinds of "invidious restraints." *Pennsylvania*, 262 U.S. at 596. California has no more power to discriminate *among* channels of interstate commerce than to discriminate *against* interstate commerce as a whole.

Nor can California dodge the Commerce Clause by invoking the market-participant exception, which permits a State to favor its own residents when it is merely participating in—rather than regulating—a market. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). California is not favoring its own citizens, it is *disfavoring* citizens of targeted States. And even if a market participant, "[t]he State may not impose conditions . . . that have a substantial regulatory effect *outside of that particular market*." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (plurality op.) (emphasis added). California's "condition" here (mandating lower religious liberty protections for child wel-

fare providers) has nothing to do with the operative market (interstate provision of goods and services). Thus, A.B. 1887 "is tantamount to regulation." *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 289 (1986); *accord Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227-29 (1993).

c. The Equal Protection Clause independently bars California's attempt to influence other States' policies by inflicting economic punishment on those States' citizens. U.S. Const. amend. XIV, § 1. "Equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause also would be concerned." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). For laws like A.B. 1887, this Court ordinarily asks whether the law "bears a rational relation to a legitimate state purpose." *Id.* at 875.

A.B. 1887 cannot survive even rational basis review. A desire to discriminate against out-of-state actors is not a legitimate state interest. *Id.* at 881. Nor is the bare desire to express "moral disapproval." *Lawrence v. Texas*, 539 U.S. 558, 582-83 (2003) (O'Connor, J., concurring in the judgment). Nor, moreover, is religious animus. *Masterpiece Cakeshop*, 138 S. Ct. at 1729-32.

CONCLUSION

On October 7, 1785, George Washington wrote to an old brother-in-arms, James Warren, about the state of their fledgling country. "The war," Washington noted, had indeed "terminated most advantageously for America, and a fair field is presented to our view." But Washington worried: "[T]he confederation appears to me to be little more than a shadow without the substance." Commerce was the source of his fear; but it was also the solution. "[T]he only binding cement" that could hold

the nation together was economic exchange between the States. Otherwise, "they will be quite a distinct people." That warning rings true today. California's decision to utilize commerce as a tool of war to divide the States rather than to bind them together strikes at the cornerstone of our Union. For now, A.B. 1887 is unprecedented. This Court should ensure it stays that way, by using the original jurisdiction the Constitution provides for addressing and remedying disputes just like this.

Respectfully submitted.

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APPENDIX

APPENDIX

SELECTED PROVISIONS OF TEXAS HUMAN RESOURCES CODE

§ 45.001. Legislative Intent.

It is the intent of the legislature to maintain a diverse network of service providers that offer a range of foster capacity options and that accommodate children from various cultural backgrounds. To that end, the legislature expects reasonable accommodations to be made by the state to allow people of diverse backgrounds and beliefs to be a part of meeting the needs of children in the child welfare system. Decisions regarding the placement of children shall continue to be made in the best interest of the child, including which person is best able to provide for the child's physical, psychological, and emotional needs and development.

§ 45.002. Definitions.

In this chapter:

(1) "Adverse action" means any action that directly or indirectly adversely affects the person against whom the adverse action is taken, places the person in a worse position than the person was in before the adverse action was taken, or is likely to deter a reasonable person from acting or refusing to act. An adverse action includes:

(A) denying an application for, refusing to renew, or canceling funding;

(B) declining to enter into, refusing to renew, or canceling a contract;

(C) declining to issue, refusing to renew, or canceling a license;

(D) terminating, suspending, demoting, or reassigning a person; and

(E) limiting the ability of a person to engage in child welfare services.

(2) "Catchment area" means a geographic service area for providing child protective services or child welfare services.

(3) "Child welfare services" means social services provided to or on behalf of children, including:
(A) assisting abused or neglected children;
(B) counseling children or parents;
(C) promoting foster parenting;
(D) providing foster homes, general residential operations, residential care, adoptive homes, group homes, or temporary group shelters for children;
(E) recruiting foster parents;
(F) placing children in foster homes;
(G) licensing foster homes;
(H) promoting adoption or recruiting adoptive parents;
(I) assisting adoptions or supporting adoptive families;
(J) performing or assisting home studies;
(K) assisting kinship guardianships or kinship caregivers;
(L) providing family preservation services;
(M) providing family support services;
(N) providing temporary family reunification services;
(O) placing children in adoptive homes; and
(P) serving as a foster parent.

(4) "Child welfare services provider" means a person, other than a governmental entity, that provides, seeks to provide, or applies for or receives a contract, subcontract, grant, subgrant, or cooperative

agreement to provide child welfare services. The person is not required to be engaged exclusively in child welfare services to be a child welfare services provider.

(5) "Governmental entity" means:

(A) this state or a municipality or other political subdivision of this state;

(B) any agency of this state or of a municipality or other political subdivision of this state, including a department, bureau, board, commission, office, agency, council, and public institution of higher education; or

(C) a single source continuum contractor in this state providing services identified under Section 264.126, Family Code.

§ 45.003. Applicability.

(a) This chapter applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority.

(b) This chapter applies to an act of a governmental entity, in the exercise of governmental authority, granting or refusing to grant a government benefit to a child welfare services provider.

§ 45.004. Child Welfare Services Providers Protected.

A governmental entity or any person that contracts with this state or operates under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider:

(1) has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs;
(2) provides or intends to provide children under the control, care, guardianship, or direction of the provider with a religious education, including through placing the children in a private or parochial school or otherwise providing a religious education in accordance with the laws of this state;
(3) has declined or will decline to provide, facilitate, or refer a person for abortions, contraceptives, or drugs, devices, or services that are potentially abortion-inducing; or
(4) refuses to enter into a contract that is inconsistent with or would in any way interfere with or force a provider to surrender the rights created by this chapter.

§ 45.005. Secondary Services Providers and Referrals.

(a) A child welfare services provider may not be required to provide any service that conflicts with the provider's sincerely held religious beliefs.
(b) A governmental entity or any person that operates under governmental authority to refer or place children for child welfare services shall:
    (1) ensure that a secondary child welfare services provider is available in that catchment area to provide a service described by Subsection (a) to a child; or
    (2) if there is an insufficient number of secondary services providers willing or available in that catchment area to provide that service, provide

for one or more secondary services providers in a nearby catchment area.

(c) A child welfare services provider who declines to provide a child welfare service as authorized by this section shall:

(1) provide to the person seeking the service written information directing the person to:

(A) the web page on the department's Internet website that includes a list of other licensed child welfare services providers; or

(B) other information sources that identify other licensed child welfare services providers who provide the service being denied;

(2) refer the applicant to another licensed child welfare services provider who provides the service being denied; or

(3) refer the applicant to the department or to a single source continuum contractor to identify and locate a licensed child welfare services provider who provides the service being denied.

A.B. 1887

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 11139.8 is added to the Government Code, to read:

§ 11139.8.

(a) The Legislature finds and declares all of the following:

(1) California is a leader in protecting civil rights and preventing discrimination.

(2) California's robust nondiscrimination laws include protections on the basis of sexual orientation, gender identity, and gender expression, among other characteristics.

(3) Religious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom.

(4) The exercise of religious freedom should not be a justification for discrimination.

(5) California must take action to avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people.

(6) It is the policy of the State of California to promote fairness and equality and to combat discrimination.

(b) A state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of

California, the Board of Regents of the University of California, or the California State University, and the Legislature shall not do either of the following:

(1) Require any of its employees, officers, or members to travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.

(2) Approve a request for state-funded or state-sponsored travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against

same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.

(c) Subdivision (b) shall not apply to travel that is required for any of the following purposes:

(1) Enforcement of California law, including auditing and revenue collection.

(2) Litigation.

(3) To meet contractual obligations incurred before January 1, 2017.

(4) To comply with requests by the federal government to appear before committees.

(5) To participate in meetings or training required by a grant or required to maintain grant funding.

(6) To complete job-required training necessary to maintain licensure or similar standards required for holding a position, in the event that comparable training cannot be obtained in California or a different state not affected by subdivision (b).

(7) For the protection of public health, welfare, or safety, as determined by the affected agency, department, board, authority, or commission, or by the affected legislative office, as described in subdivision (b).

(d) The prohibition on state-funded travel described in this section shall continue while any law specified in subdivision (b) remains in effect.

(e)

(1) The Attorney General shall develop, maintain, and post on his or her Internet Web site a current list of states that, after June 26, 2015, have enacted a law that voids or repeals, or has the effect of voiding or repealing, an existing state or local protection against discrimination on the basis of sexual orientation, gender identity, or gender expression, or have enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.

(2) It shall be the responsibility of an agency, department, board, authority, or commission described in subdivision (b) to consult the list on the Internet Web site of the Attorney General in order to comply with the travel and funding restrictions imposed by this section.

California Assembly Committee on the Judiciary, Analysis of A.B. 1887 (Mar. 12, 2016)

Date of Hearing: March 15, 2016

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1887 (Low) – As Amended March 10, 2016

SUBJECT: STATE GOVERNMENT: DISCRIMINATION: TRAVEL

KEY ISSUES:

1) SHOULD STATE AGENCIES BE PROHIBITED, EXCEPT AS PROVIDED, FROM REQUIRING EMPLOYEES TO TRAVEL TO STATES THAT DISCRIMINATE OR PERMIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION?

2) SHOULD STATE AGENCIES BE PROHIBITED, EXCEPT AS PROVIDED, FROM APPROVING REQUESTS FOR STATE-FUNDED OR STATE-SPONSORED TRAVEL TO STATES THAT DISCRIMINATE OR PERMIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION?

SYNOPSIS

Last year Indiana Governor Mike Pence signed a Religious Freedom Restoration Act (RFRA), which would potentially allow businesses to refuse service to persons

on the basis of sexual orientation, if to do so would offend the religious scruples of the individual or business. To use a much cited example, a wedding photographer who objected to same-sex marriage could under Indiana Law refuse to provide photographic services for a same-sex wedding. According to the National Conference of State Legislatures, 21 states have enacted some form of RFRA legislation, with Indiana and Arkansas being the most recent. Although there is some debate over how widely these laws are actually invoked, some legal commentators contend that the U.S. Supreme Court decision in Burwell v. Hobby Lobby *(2014), which permitted a for-profit business to deny contraception coverage on religious grounds, could lead to more laws and more people invoking them. Yet, however extensive or effective such laws may be, the author and sponsors contend that California, a leader in preventing discrimination against the LGBT community, should not support such states. California's Unruh Civil Rights Act prohibits all business establishments "of any kind whatsoever" from discriminating on the basis of sexual orientation, gender identity, and gender expression. Given the values expressed in California law, the author and sponsors believe it would be inappropriate to allow state funds to support states with discriminatory laws that are contrary to those codified values. As a step in this direction, this bill would prohibit state agencies from requiring employees to travel to states that discriminate against the LGBT community, or that permit such discrimination by private entities. In addition, the bill would prohibit state agencies from approving requests for travel funds to such states, meaning that if employees, or commission or board members, voluntarily travel to such*

states on professional or work-related matters, they could not receive reimbursement for that travel. The bill is co-sponsored by Equality California and the National Center for Lesbian Rights. There is no registered opposition. As noted in the analysis, however, there a number of practical questions that still need to be addressed, and the author may wish to consider further amendments should the bill pass out of this Committee.

SUMMARY: Prohibits state agencies from requiring state employees to travel to states that discriminate, as specified, and prohibits state agencies from approving state-funded travel to such states, except as provided. Specifically, **this bill**:

1) Prohibits any state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of California or the California State University, from doing either of the following:

    a) Require its employees, officers, or members to travel to any state having laws that sanction or require discrimination on the basis of sexual orientation, gender identity, or gender expression.

    b) Approve a request for state-funded or state-sponsored travel to a state having laws that sanction or require discrimination on the basis of sexual orientation, gender identity, or gender expression.

2) Specifies that the prohibition created by this bill does not apply to travel that is necessary for the enforcement of California law, to meet prior contractual obligations, or for the protection of public

health, welfare, or safety.

EXISTING LAW:

1) Provides that any state officer or employee of any state agency may confer with other persons, associations, or organizations outside of the state wherever it may be of assistance in the conduct of state business. Permits, to the extent that funds are authorized and available, reimbursement for actual and necessary expenses for travel outside of the state as authorized. Specifies that this section does not apply to legislators or their staff. (Government Code Section 11032.)

2) Provides, under the Unruh Civil Rights Act, that all persons within this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, are entitled to the full and equal accommodations, advantages, facilities, or services of all business establishments of every kind whatsoever. Defines "sex" to include gender identity and gender expression. (Civil Code Section 51.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the National Conference of State Legislatures (NCLS) website, as of late 2015, twenty-one states had enacted some form of Religious Freedom Restoration Act (RFRA), with Indiana and Arkansas being the most recent. Some legal commentators contend that the U.S. Supreme Court decision in

Burwell v. Hobby Lobby (2014), which permitted a for-profit business to deny contraception coverage on religious grounds, may have paved the way for such laws. These laws, some of which were modeled on the 1993 federal RFRA – which was held not to apply to the states in 1997 – vary in many respects. While some appear to implicitly authorize businesses to discriminate on religious grounds, others simply declare that any law that infringes upon a person's religious liberty must be held to a "strict scrutiny" standard of review. (http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx; *see also* "How Hobby Lobby Paved the Way for Indiana's 'Religious Freedom' Bill," *Washington Post* March 27, 2015; "Reading Hobby Lobby in Context," *New York Times* July 19, [2014].) However, whatever variations may exist in the several state RFRA laws, they would all seem to be at odds with California's strong anti-discrimination laws. The anti-discrimination measures are not only set forth in the Unruh Civil Rights Acts; a number of other statutes prohibit various forms of discrimination based on any of the classifications set forth in the Unruh Civil Rights. The author and sponsors believe that California's commitment to anti-discrimination laws should extend to its relationship with other states.

Recent Historical Background: As noted, the state laws to which this bill responds were originally modeled after the federal Religious Freedom Restoration Act (RFRA) in 1993. The federal RFRA was itself a response to the U.S. Supreme Court's decision in *Employment Division v. Smith* (1990) 494 U.S. 872. Prior to the *Smith* decision, the Supreme Court had issued a number of decisions holding that, under the Free Exercise clause of the First Amendment, government poli-

cies would need to accommodate the rights of religious observant persons, unless there was a "compelling state interest" for not accommodating religious concerns. Most of the cases that came before the Court considered questions like the following:

Could a state agency require an employee to take work on his or her Sabbath as a condition of obtaining unemployment benefits. Could a state, under its compulsory education law, require the Amish to send their children to school beyond the eighth grade when their religion enjoined against it? Could a military dress code prevent a Jewish soldier from wearing a yarmulke?

Although the Court did not always rule in favor of religious freedom, it only upheld restrictions on religious freedom where it found a "compelling state interest." (*Sherbert v. Verner* (1963) 374 U.S. 398; *Wisconsin v. Yoder* (1972) 406 U.S. 205; *Goldman v. Weinberg* (1986) 475 U.S. 503.) However, the *Smith* decision, written by the late Justice Scalia, reversed this trend, holding that the state did not need to show a compelling interest in denying unemployment benefits to two drug counselors who were fired for ingesting peyote as part of a religious ritual. Justice Scalia held that the religiously observant must comply with all "laws of general applicability" and, seemingly at odds with prior case law, held that the government did not need to show a compelling state interest so long as the law applied generally and was not animated by hostility to religion. (Justice O'Connor wrote a concurring opinion. She would have continued to require a compelling state interest, but found that in this case enforcing state drug laws was indeed a compelling state interest.) Congress responded to the *Smith* decision with the federal RFRA. The "restoration" in its title referred to restoration of "strict

scrutiny" in Free Exercise cases – that is, a state must show a compelling state interest in order to infringe upon a religious practice, even if that practice would otherwise violate a law of general applicability or disqualify the religiously observant from a state benefit.

City of Boerne *and the Evolution of State RFRA laws*: In 1997, the U.S. Supreme Court held, among other things, that the federal RFRA did not apply to actions of the several states. (*City of Boerne v. Flores* (1997) 521 U.S. 507.) Several states responded by enacting their own versions of RFRA. While the *Smith* ruling may have held that the Free Exercise clause of the First Amendment does not require a compelling state interest to compel compliance with laws of general applicability, the state RFRA laws go beyond the First Amendment, offering more protection for religious freedom, as they are entitled to do, than the First Amendment requires. Specifically, these laws provide that no state law, ordinance, or rule shall "substantially burden" a person's exercise of religion – even if the burden results from a rule of general applicability – unless the government can demonstrate that the law, ordinance, or rule is "in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." (*See e.g.* Indiana SB 101, enacting Section 1.IC 34-13-9 of the Indiana Code.) However, the recent statutes enacted in Indiana and Arkansas go beyond past laws by defining the "person" protected to include, not only an individual or a non-profit religious organization, but to also include "a partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, or an unincorporated association." (*Id.,* Section 7, paragraph 3.)

One implication of laws like those in Indiana, therefore, is that a private business could invoke religious reasons in order to refuse service to any person, notwithstanding laws of general applicability that prohibit business establishments from discriminating against people on the basis of certain protected characteristics, including race, gender, disability, or sexual orientation, among others. The genesis of the recent spate of state RFRA legislation has apparently been in response to recent rulings, including most notably by the U.S. Supreme Court, that prohibit states from banning same-sex marriage. Supporters of the state RFRA laws contend that even though the state may not ban same-sex marriage, private businesses should not be required to participate in ways that they find religiously objectionable. Although the favorite example cited by supporters of such laws is the wedding photographer, the language of the Indiana statute is potentially much broader than that, depending upon how a court construes a "substantial burden." Requiring a photographer to not only attend, but play a significant role in, a wedding that he or she finds objectionable might constitute such a burden. Some supporters of the Indiana law contend that other examples, such as a restaurant refusing to serve a gay couple, would not likely satisfy "substantial burden" requirement. However, the exact reach and limits of recent state RFRA laws is necessarily speculative, given that the Indiana law, for example, has only been in effect for about one year.

California Anti-Discrimination Laws: Whatever the scope of state RFRA laws, the most recent of them appear contrary to values expressed in California law. California's two most significant anti-discrimination laws – the Unruh Civil Rights Act (Civil Code Section

51) and the California Fair Employment and Housing Act (Government Code Sections 12900-12996) – prohibit discrimination on a number of grounds, including most significantly for purposes of this bill, sexual orientation, gender identity, and gender expression. According to the author and sponsors, California has been a leader in protecting the civil rights of, and preventing discrimination against, the LGBT community. California's Unruh Civil Rights Act, for example, prohibits all business establishments "of any kind whatsoever" from discriminating on the basis of sexual orientation, gender identity, and gender expression.

The author and sponsors believe it would be inappropriate, given the values expressed in our laws, to allow state funds to support states with discriminatory laws. As a step in this direction, therefore, this bill would prohibit state agencies from requiring employees to travel to states that discriminate against the LGBT community, or to any state that permits such discrimination by private entities. Specifically, this bill does two things. First, this bill would prevent any state agency, department, board, or commission – including those of the University of California and the California State University – from requiring any employee to travel to any state "with a law in effect that sanctions or requires discrimination on the basis of sexual orientation, gender identity, or gender expression." Second, this bill would also prohibit any state agency from approving a request for travel to any such state. While the first provision aims to prevent a state agency from *requiring* a state employee to travel to an objectionable state, the second provision would prevent a state agency from funding travel where an employee may have voluntarily traveled to an objectionable state for a work-related, but not

necessarily required, activity. The latter example would affect, for example, academics that voluntarily travel to another state to present a paper at a conference but are not actually *required* to attend a conference, let alone attend a conference in that particular state. The academic could, of course, attend this conference; but he or she would not be reimbursed for it.

In sum, the purpose of the bill is apparently twofold: (1) to prevent compelling an employee to travel to an environment in which he or she may feel uncomfortable; and (2) to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people. The bill exempts from the above restrictions any travel that is necessary for the enforcement of California law, to meet prior contractual obligations, or for the protection of public health, welfare, or safety. Presumably, the last exemption would permit the state, for example, to send first responders in the event of some natural or manmade disaster. Finally, due to the bill's placement in Government Code, the "state agencies" subject to this bill would not include the Legislature, Legislative members, or legislative staff, who presumably could travel to objectionable states at public expense.

***Other State and Local Actions**:* Although the Committee is not aware of *legislation* in other states that has bans on state-funded travel, a number of states and localities have, by executive order, taken such steps. For example, shortly after Governor Pence signed the Indiana law, the Governors of Connecticut, New York, and Washington banned state-funding for travel to Indiana by executive order. Similarly, at about the same time,

the mayors of San Francisco and Seattle banned city-funded travel to Indiana.

Potential Problems of Scope and Implementation: While the Committee supports the author's intent to prevent the use of state funds to enrich states that tolerate discrimination against the LGBT community, the bill raises considerable questions about its potential scope and practical implementation.

Why Limit to Travel? It is not clear to the Committee how often state agencies require state employees to travel to other states as a condition of their employment, or how often boards or commissions require their appointed or elected members to travel to other states as part of their prescribed duties. For example, the Committee learned that employees of the Department of Transportation visit other states, including Indiana, that build certain goods that are purchased by the state, including vehicles and material used to build the state's transportation infrastructure. It is not entirely clear whether federal, state, or private money is used to fund these trips. Yet, however funded, this bill would prohibit the Department of Transportation from requiring employees to travel to Indiana and other states with RFRA laws. Presumably the employee could voluntarily to travel to that state, but that employee would not be entitled to reimbursement for travel expenses from the state. This example, however, raises a more fundamental question. If the premise of this bill is that state funds should not be spent in states that deny civil rights, why would the state ban state-funded travel but still spend a presumably much greater amount spent on procuring goods from that same state?

How Will a State Agency Determine which States are covered? Although the author's background materials make it clear that the bill is intended to target states with RFRA laws – and NCSL has identified 21 such states – the language of the bill is less precise. The bill instead prohibits state-funded travel to any state "with a law in effect that sanctions or requires discrimination on the basis of sexual orientation, or gender identity, or gender expression." Will the enactment of a RFRA statute be sufficient evidence that the state sanctions or requires discrimination against LGBT persons? Is it possible that a state could lack a RFRA statute but still have other laws (or a lack of laws) that tolerate discrimination? Will the state agency be required to investigate a state's policies beyond the existence or non-existence of a RFRA statute, or will some state authority, such as the Attorney General, be required to maintain an up-to-date list that state agencies, boards, and commissions would consult? Oddly, a literal reading of this bill would allow a state agency to approve travel funds to a state that discriminates on some other basis, such as race, religion, disability, language, marital status, or immigration status – all of which are nonetheless protected categories under California law.

Must the Objectionable State be the Final Destination? The Committee received an inquiry from a state entity as to whether an employee could fly to an objectionable state even though that state was not the final destination. Specifically, how would this bill affect an employee who must travel to Washington D.C. but who flies to Washington Dulles International Airport, which is in Virginia – a state with a RFRA statute? Would this flight be reimbursable? Would the employee be reimbursed for money spent at the airport, at a Virginia gas

station, or at any establishment in Virginia on the way to the District of Columbia? (Incidentally, the District of Columbia, as a federal entity, is subject to the federal RFRA; but since it is not a state, it would not be subject to this bill.) To be sure, these specific issues could be easily resolved, but they illustrate how a seemingly simple restriction might create many practical, and unanticipated, problems of implementation.

Is Restricting Travel the Best Way to Facilitate Change? This bill is apparently premised on the assumption that allowing state-funded travel to states with discriminatory laws is somehow a reflection of our state's support for those laws. But is this necessarily the case? For example, suppose a law professor at the University of California presented a paper at the Indiana University Law School, and assume further that the paper advocated for the expansion of LGBT rights. Under this bill that professor could not be reimbursed for his or her travel. One could argue that this is as it should be, as there is no reason to extend to professors funds that are not available to other state employees. And it would be inappropriate, and quite possibly unconstitutional, to condition travel funds on the content of a presentation. But this example illustrates a larger question: Is preventing travel to other states, and the accompanying interactions with the residents of those states, the best way to encourage those states to change their laws? Is it possible that creating more opportunities for interaction and the exchange of ideas will be a more effective means of bringing about change than prohibiting those interactions and exchanges?

Should this bill pass out of this Committee, the author may wish to consider these issues as the bill moves forward.

ARGUMENTS IN SUPPORT: While the author concedes that religious freedom "is a very important value in our state and across the nation," protection of religious freedom should not be a justification for allowing discrimination. Specifically, the author notes the passing and signing of Indiana's Religious Freedom Restoration Act (RFRA). The author notes that the act "received national backlash from LBGTQ and civil liberties groups because the bill allowed individuals or businesses to discriminate based on sexual orientation, gender identity and gender expression." The author writes that:

> California has one of the strongest civil protection laws in the country, the Fair Employment and Housing Act and the Unruh Civil Rights Act. Our laws do not allow government entities or organizations that offer services to the public to discriminate or treat people differently. As a leader in protecting civil rights and preventing discrimination, California should not be funding states with discriminatory state laws. States with RFRA equivalent laws put LGBTQ individuals at great risk. AB 1887 will ban state-funded travel to states with laws that discriminate on the basis of sexual orientation, gender identity, or gender expression, sending a strong message that such laws are not acceptable to the State of California.

The Consumer Attorneys of California (CAOC) argue that recent RFRA laws in states like Indiana allow "individuals and businesses to discriminate based on sexu-

al orientation, gender identity, and gender expression." Such laws, CAOC contends, "put LGBTQ individuals at risk." CAOC believes that AB 1887 will send a message that laws such as those enacted in Indiana and elsewhere "are not acceptable to California."

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (co-sponsor)
National Center for Lesbian Rights (co-sponsor)
Consumer Attorneys of California

Opposition

None on file

Analysis Prepared by: Thomas Clark / JUD. / (916) 319 2334

California Assembly Committee on the Judiciary, Analysis of A.B. 1887 (Apr. 1, 2016)

Date of Hearing: April 5, 2016

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 1887 (Low) – As Amended March 30, 2016

As Proposed to be Amended

SUBJECT: STATE GOVERNMENT: DISCRIMINATION: TRAVEL

KEY ISSUES:

1) SHOULD STATE AGENCIES, SUBJECT TO CERTAIN EXCEPTIONS, BE PROHIBITED FROM REQUIRING, OR FUNDING, STATE EMPLOYEE TRAVEL TO STATES WITH LAWS DISCRIMINATE, AS SPECIFIED, ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION?

2) SHOULD THE CALIFORNIA ATTORNEY GENERAL CREATE, MAINTAIN, AND UPDATE A LIST OF STATES THAT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, OR GENDER EXPRESSION, SO THAT STATE AGENCIES MAY CONSULT THAT LIST IN ORDER TO COMPLY WITH THE REQUIREMENTS OF THIS BILL?

SYNOPSIS

Since the United States Supreme Court's 2015 ruling upholding marriage equality, a number of states, at least partly in reaction to that decision, have passed laws with the intent or effect, or both, of rolling back laws that protect same-sex couples and LGBT persons more generally from discrimination. Last year the Governor of Indiana signed a law that would have permitted businesses, in the name of religious freedom, to deny services to same-sex couples or other LGBT persons. Most recently, North Carolina adopted a law that effectively overturned local ordinances prohibiting discrimination on the basis of gender identity and gender expression. These laws have faced stiff and immediate opposition, not only from the LBGT community, but also from substantial sectors of the business and corporate community. Indiana amended its law in response to such business pressure; Georgia's Governor vetoed an anti-LGBT law; and most recently, although the North Carolina Governor signed anti-LGBT legislation, the North Carolina Attorney General announced that his office would not defend the legislation if challenged. Several major businesses and professional sports associations have condemned these laws for discriminating against their LGBT managers and employees. Whether these state laws represent a future trend or the last gasp of a decrepit worldview remains to be seen. The author and co-sponsors of this bill believe that California, a leader in preventing discrimination against the LGBT community, should register its opposition to these laws by effectively imposing a ban on state-funded travel to states that have recently enacted discriminatory laws, or undid anti-discrimination laws. When this bill was initially pre-

sented to the Committee, some members expressed concern that the bill did not clearly identify the states to which the bill would apply, and that it would be unrealistic for an individual state agency to make a determination each time that it had to make a travel decision. As proposed to be amended today in Committee, the bill will require the Attorney General to create and update a list of states to which the measure will apply. The bill is co-sponsored by Equality California and the National Center for Lesbian Rights. There is no registered opposition.

SUMMARY: Prohibits state agencies from requiring state employees to travel to states that discriminate on the basis of sexual orientation, gender identity, or gender expressions, and prohibits state agencies from approving state-funded travel to such states, except as provided. Specifically, **this bill**:

1) Prohibits any state agency, department, board, authority, or commission, including an agency, department, board, authority, or commission of the University of California or the California State University, from doing either of the following:

    a) Require any of its employees, officers, or members to travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that

creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression.

b) Approve a request for state-funded or state-sponsored travel to a state that, after June 26, 2015, has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression, or has enacted a law that authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender

2) Specifies that the prohibition created by this bill does not apply to travel that is necessary for the enforcement of California law, to meet prior contractual obligations, or for the protection of public health, welfare, or safety.

3) Requires the California Attorney General to develop, and keep current, a list of states that, after June 26, 2015, enacts a law that voids or repeals, or has the effect of voiding or repealing, an existing state or local protection against discrimination on the basis of sexual orientation, gender identity, or gender expression, or enacts a law that authorizes or requires discrimination on the basis of sexual

orientation, gender identity, or gender expression, including any law that creates an exemption to anti-discrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. It shall be the responsibility of an agency, department, board, authority, or commission as described, to consult this list on the Attorney General's website in order to comply with the travel and funding restrictions imposed by this bill.

EXISTING LAW:

1) Provides that any state officer or employee of any state agency may confer with other persons, associations, or organizations outside of the state wherever it may be of assistance in the conduct of state business. Permits, to the extent that funds are authorized and available, reimbursement for actual and necessary expenses for travel outside of the state as authorized. Specifies that this section does not apply to legislators or their staff. (Government Code Section 11032.)

2) Provides, under the Unruh Civil Rights Act, that all persons within this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, are entitled to the full and equal accommodations, advantages, facilities, or services of all business establishments of every kind whatsoever. Defines "sex" to include gender identity and gender expression. (Civil Code Section 51.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the National Conference of State Legislatures (NCLS) website, as of late 2015, twenty-one states had enacted some form of Religious Freedom Restoration Act (RFRA), with Indiana and Arkansas being the most recent. Some legal commentators contend that the U.S. Supreme Court decision in *Burwell v. Hobby Lobby* (2014), which permitted a for-profit business to deny contraception coverage on religious grounds, may have paved the way for such laws. These laws, some of which were modeled on the 1993 federal RFRA – which was held not to apply to the states in 1997 – vary in many respects. While some appear to implicitly authorize businesses to discriminate on religious grounds, others simply declare that any law that infringes upon a person's religious liberty must be held to a "strict scrutiny" standard of review. (http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx; *see also* "How Hobby Lobby Paved the Way for Indiana's 'Religious Freedom' Bill," *Washington Post* March 27, 2015; "Reading Hobby Lobby in Context,["] *New York Times* July 19, [2014].) However, whatever variations may exist in the several state RFRA laws, they would all seem to be at odds with California's strong anti-discrimination laws. The anti-discrimination measures are not only set forth in the Unruh Civil Rights Acts; a number of other statutes prohibit various forms of discrimination based on any of the classifications set forth in the Unruh Civil Rights. The author and sponsors believe that California's commitment to anti-discrimination laws should extend to its relationship with other states.

Recent Historical Background: As noted, the state laws to which this bill responds were originally modeled after the federal Religious Freedom Restoration Act (RFRA) in 1993. The federal RFRA was itself a response to the U.S. Supreme Court's decision in *Employment Division v. Smith* (1990) 494 U.S. 872. Prior to the *Smith* decision, the Supreme Court had issued a number of decisions holding that, under the Free Exercise clause of the First Amendment, government policies would need to accommodate the rights of religious observant persons, unless there was a "compelling state interest" for not accommodating religious concerns. Most of the cases that came before the Court considered questions like the following: Could a state agency require an employee to take work on his or her Sabbath as a condition of obtaining unemployment benefits. Could a state, under its compulsory education law, require the Amish to send their children to school beyond the eighth grade when their religion enjoined against it? Could a military dress code prevent a Jewish soldier from wearing a yarmulke? Although the Court did not always rule in favor of religious freedom, it only upheld restrictions on religious freedom where it found a "compelling state interest." (*Sherbert v. Verner* (1963) 374 U.S. 398; *Wisconsin v. Yoder* (1972) 406 U.S. 205; *Goldman v. Weinberg* (1986) 475 U.S. 503.) However, the *Smith* decision, written by the late Justice Scalia, reversed this trend, holding that the state did not need to show a compelling interest in denying unemployment benefits to two drug counselors who were fired for ingesting peyote as part of a religious ritual. Justice Scalia held that the religiously observant must comply with all "laws of general applicability" and, seemingly at odds with prior case law, held that the government did

not need to show a compelling state interest so long as the law applied generally and was not animated by hostility to religion. (Justice O'Connor wrote a concurring opinion. She would have continued to require a compelling state interest, but found that in this case enforcing state drug laws was indeed a compelling state interest.) Congress responded to the Smith decision with the federal RFRA. The "restoration" in its title referred to restoration of "strict scrutiny" in Free Exercise cases – that is, a state must show a compelling state interest in order to infringe upon a religious practice, even if that practice would otherwise violate a law of general applicability or disqualify the religiously observant from a state benefit.

City of Boerne *and the Evolution of State RFRA laws*: In 1997, the U.S. Supreme Court held, among other things, that the federal RFRA did not apply to actions of the several states. (*City of Boerne v. Flores* (1997) 521 U.S. 507.) Several states responded by enacting their own versions of RFRA. While the *Smith* ruling may have held that the Free Exercise clause of the First Amendment does not require a compelling state interest to compel compliance with laws of general applicability, the state RFRA laws go beyond the First Amendment, offering more protection for religious freedom, as they are entitled to do, than the First Amendment requires. Specifically, these laws provide that no state law, ordinance, or rule shall "substantially burden" a person's exercise of religion – even if the burden results from a rule of general applicability – unless the government can demonstrate that the law, ordinance, or rule is "in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." (*See*

e.g. Indiana SB 101, enacting Section 1.IC 34-13-9 of the Indiana Code.) However, the recent statutes enacted in Indiana and Arkansas go beyond past laws by defining the "person" protected to include, not only an individual or a non-profit religious organization, but to also include "a partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, or an unincorporated association." (*Id.*, Section 7, paragraph 3.)

One implication of laws like those in Indiana, therefore, is that a private business could invoke religious reasons in order to refuse service to any person, notwithstanding laws of general applicability that prohibit business establishments from discriminating against people on the basis of certain protected characteristics, including race, gender, disability, or sexual orientation, among others. The genesis of the recent spate of state RFRA legislation has apparently been in response to recent rulings, including most notably by the U.S. Supreme Court, that prohibit states from banning same-sex marriage. Supporters of the state RFRA laws contend that even though the state may not ban same-sex marriage, private businesses should not be required to participate in ways that they find religiously objectionable. Although the favorite example cited by supporters of such laws is the wedding photographer, the language of the Indiana statute is potentially much broader than that, depending upon how a court construes a "substantial burden." Requiring a photographer to not only attend, but play a significant role in, a wedding that he or she finds objectionable might constitute such a burden. Some supporters of the Indiana law contend that other examples, such as a restaurant refusing to serve a gay couple, would not likely satisfy "substantial burden" re-

quirement. However, the exact reach and limits of recent state RFRA laws is necessarily speculative, given that the Indiana law, for example, has only been in effect for about one year.

California Anti-Discrimination Laws: Whatever the scope of state RFRA laws, the most recent of them appear contrary to values expressed in California law. California's two most significant anti-discrimination laws – the Unruh Civil Rights Act (Civil Code Section 51) and the California Fair Employment and Housing Act (Government Code Sections 12900-12996) – prohibit discrimination on a number of grounds, including most significantly for purposes of this bill, sexual orientation, gender identity, and gender expression. According to the author and sponsors, California has been a leader in protecting the civil rights of, and preventing discrimination against, the LGBT community. California's Unruh Civil Rights Act, for example, prohibits all business establishments "of any kind whatsoever" from discriminating on the basis of sexual orientation, gender identity, and gender expression.

The author and sponsors believe it would be inappropriate, given the values expressed in our laws, to allow state funds to support states with discriminatory laws. As a step in this direction, therefore, this bill would prohibit state agencies from requiring employees to travel to states that discriminate against the LGBT community, or to any state that permits such discrimination by private entities.

Specifically, this bill does two things. First, this bill would prevent any state agency, department, board, or commission – including those of the University of California and the California State University – from re-

quiring an employee, officer, or member to travel to a state with discriminatory laws, or from approving any state funding for travel to such states. The purpose of the bill is apparently twofold: (1) to prevent a state agency from compelling an employee to travel to an environment in which he or she may feel uncomfortable; and (2) to prevent the use of state funds to benefit a state that does not adequately protect the civil rights of certain classes of people. The bill exempts from the above restrictions any travel that is necessary for the enforcement of California law, to meet prior contractual obligations, or for the protection of public health, welfare, or safety. Finally, due to the bill's placement in Government Code, the "state agencies" subject to this bill would not include the Legislature, Legislative members, or legislative staff, who presumably could travel to objectionable states at public expense. However, the author has indicated to the Committee that he is willing to extend these travel restrictions to legislators and legislative staff as well.

Proposed Amendments Address Committee's Prior Concerns: The Committee originally heard a presentation of this bill on March 15. At that time, several Committee members raised questions about how the bill would work in practice, especially as to how an agency would determine which states would be subject to the ban. As a result of this discussion, a vote and any further discussion on the matter was postponed. Although the intended targets of this bill seem fairly straightforward when one has the luxury of watching media reports on legislation as it is unfolding, the author and sponsors agree that not all state laws are the same and their intent is not always immediately apparent from the text. In other words, determining the

states to which the bill applies will require at least some consideration of context and legislative history. The Committee believes that it would be highly impractical to expect state agencies to conduct this kind of research and analysis each time they must make a decision on whether to send an employee out-of-state or approve an employee's request for out-of-state travel funding. Moreover, it is quite possible that different state agencies could come to different conclusions as to which states discriminated in a manner described by the bill. North Carolina, which preempts local ordinances that prohibit LGBT discrimination with a state law that fails to prohibit LGBT discrimination, would seem a likely candidate. But would the amendments made to the Indiana law be sufficient to take it off the list? In other words, attorneys employed by the different state agencies might reasonably come to different legal conclusions, as attorneys are wont to do.

Therefore, as proposed to be amended, this bill will require the California Attorney General to use its expertise to develop, and update, a list of states to which the bill reasonably applies. Not only will assigning this task to a single agency create uniformity across state agencies, a single agency with considerable legal expertise will be able to examine both the text and, if necessary, the legislative history. The Attorney General will be required to post this list on its website, and state agencies shall be responsible for consulting this list in establishing policies concerning state-funded travel.

A Bigger Question: Why Limit to Travel? It is not clear to the Committee how often state agencies require state employees to travel to other states as a condition of their employment, or how often boards or commis-

sions require their appointed or elected members to travel to other states as part of their prescribed duties. According to a preliminary response from the Department of General Services (DGS), however, many agencies, especially in the executive branch, occasionally send employees to other states. For example, according to DGS, there were over 10,000 "out-of-state person trips" in 2015. This does not mean that 10,000 employees traveled out of state on official state business last year. Rather, each day that an employee spends out-of-state is one "person trip," so a group of employees traveling on a single trip for several days would be recorded as multiple person-trips. Because the DGS database does not indicate the *reason* for each trip, it is impossible to say how many of these trips would have been covered by the exemptions in this bill – that is, how many of the trips were necessary for the enforcement of California law, to meet prior contractual agreements, or for the protection of public health, welfare, or safety. Many of the executive orders issued by mayors and governors have called for a ban on "non-essential" travel. Such bans might not prohibit any travel at all if the mere fact of the government's willingness to subsidize the travel with taxpayer dollars is an indication that the travel is somehow "essential."

But whatever the exact number, and however many of the trips would be covered by exemptions, travel expenses would seem to constitute a small portion of the total amount of money that California spends or invests in other states – thereby greatly limiting the impact of the bill. For example, the Committee learned that employees of the Department of Transportation visit other states, including Indiana, where certain goods purchased by California are manufactured, including buses.

Employees apparently travel in order to inspect production sites and meet with manufacturers in developing manufacturing specifications. Some of this travel is apparently funded by the federal government when the state purchases are linked to a federal program. Yet, however funded, this bill would prohibit the Department of Transportation from requiring employees to travel to the covered states, unless the travel is deemed an obligation of the contract that the state has with the manufacturer.

The above example, however, raises a more fundamental question. If the premise of this bill is that state funds should not be spent in states that discriminate against LGBT persons, why would California ban state-funded travel but still spend a presumably much greater amount on procuring goods from that same state? If the purpose of the bill is truly to have a meaningful economic compact, why not prohibit CalPERS and CalSTRS from investing in those states? One of the co-sponsors has indicated to the Committee that prohibiting these larger investments would mostly harm business enterprises operating within the state, not the governments of those states. And the co-sponsors contend that those businesses are often their allies in bringing pressure to bear upon the government to change its policies. However, the same could be said of restrictions on state-funded travel. State-funded travel benefits hotels, restaurants, taxicab companies, and airlines more than it benefits the state, with the state reaping only the tax revenues associated with those activities. So both large and small expenditures affect the businesses operating within those states, and only secondarily affect the state governments by the tax revenue that the business activities create. But by any reck-

oning, the bill seems designed to have the least, not the most, economic impact on the targeted states.

The Committee certainly recognizes political reality, and that more substantial measures, like prohibiting CalPERS investments, would create more controversy and opposition that could likely lead to the bill's defeat. However, the author and co-sponsors, and indeed the Legislature, may at some point need to evaluate how much it is worth to take a principled stand. Prohibiting travel, with exemptions for essential functions, is easier than a more comprehensive economic boycott. But a principled stand with negligible sacrifice is not much of a principled stand.

ARGUMENTS IN SUPPORT*:* While the author concedes that religious freedom "is a very important value in our state and across the nation," protection of religious freedom should not be a justification for allowing discrimination. Specifically, the author notes the passing and signing of Indiana's Religious Freedom Restoration Act (RFRA). The author notes that the act "received national backlash from LBGTQ and civil liberties groups because the bill allowed individuals or businesses to discriminate based on sexual orientation, gender identity and gender expression." The author writes that:

> California has one of the strongest civil protection laws in the country, the Fair Employment and Housing Act and the Unruh Civil Rights Act. Our laws do not allow government entities or organizations that offer services to the public to discriminate or treat people differently. As a leader in protecting civil rights and preventing discrimination, California should not be funding

> states with discriminatory state laws. States with RFRA equivalent laws put LGBTQ individuals at great risk. AB 1887 will ban state-funded travel to states with laws that discriminate on the basis of sexual orientation, gender identity, or gender expression, sending a strong message that such laws are not acceptable to the State of California.

The Consumer Attorneys of California (CAOC) argue that recent RFRA laws in states like Indiana allow "individuals and businesses to discriminate based on sexual orientation, gender identity, and gender expression." Such laws, CAOC contends, "put LGBTQ individuals at risk." CAOC believes that AB 1887 will send a message that laws such as those enacted in Indiana and elsewhere "are not acceptable to California."

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (co-sponsor)
National Center for Lesbian Rights (co-sponsor)
ACLU
BAYMEC
Consumer Attorneys of California
Rainbow Chamber

Opposition

None on file

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334

Transcript Excerpts From March 15, 2016, Hearing on A.B. 1887 Before The California Assembly Committee On The Judiciary

* * *

CHAIRMAN STONE: Welcome Mr. Low. This takes us to Item No. 2, AB1887. You may begin when you're ready.

MR. LOW: Thank you very much Mr. Chair and members for allowing me to present at this bill. Essentially this bill, uh, would do two things. Uh, prevent *** travel to states that discriminate and also prohibits reimbursements for state employees who request, uh -- uh, financial support for travel to these states. Initially, the -- the thought behind this was the observation of particularly what was happening in Indiana last year. And this, um, didn't want to shoot from the hip on this issue. Rather, taking a look at it in totality subsequent to last year we saw a number of states passing similar discriminatory laws and therefore thought it was appropriate for the State of California to take a position to demonstrate our capacity for civil rights and to make it an inclusive society versus exclusion. And so, uh, with me today I have members speaking in support as well. Kate Kendall and also Joe with Equality California.

* * *

MS. KENDALL: Good morning members of the committee. It is a pleasure to be here this morning. My name is Kate Kendall. I am executive director of an organization called the National Center of Lesbian Rights. We're an LGBT civil rights organization based in San Francisco. And I am here to speak in favor of

Representative Low's legislation. And what I want to talk about in just a couple of minutes is really take this to the 30,000-foot level rather than the weeds of RFRA laws. Religious Freedom Restoration Act Laws have existed first at the federal level and then at the state for a number of years. But the reason we're having this conversation today is that this country is in the middle of a backlash. A backlash to the Supreme Court's ruling a year ago actually making real the promise of the Constitution that the 14th Amendment guarantee of equal protection under the laws applies to everyone. And now the freedom to marry for all couples is the law of the land.

That landscape has now created a very familiar backlash and this is true in every civil rights story and every civil rights chapter. There are gains and then there is a reaction. And the Leadership Council on Civil Rights [sic] issued a report earlier this year that outlined that in those backlash chapters, the story of how we make gains in this country and how we push back and the we continue to make gains, religion has been used again and again as a tool to justify discrimination. To justify the old ways of excluding entire categories of people from a newfound recognition of the promise of equality under our constitution. And so now we find that LGBT people are exactly in that very familiar civil rights narrative.

And so what I would suggest is that it is time to understand that where history is headed, to have California be on the right side of history by sending a message that religion should not be used to discriminate.

* * *

CHAIRMAN STONE: * * * Alright. So I understand the approach here. I'm afraid I tend to find this approach largely symbolic with some issues and -- and I am glad to be able to recommend do pass as amended and I assume you've taken the amendments that were offered and thank you.

* * *

Why not then actually go to the heart of this and prevent [California state pension funds] from investing in resources in or in companies in those States[?] That would have a bigger impact. I think that if we do prevent travel some of those states might be happy because they're not going to be subjected to California's perspective and California's leadership on a lot of these issues.

California is a very major player economically and providing[,] to the extent that we can, sanctions that actually work by preventing some of the relationships and investments from California into those areas would be, I would think, [be] much more effective. Why didn't you take that route?

MR. LOW: Um, certainly there is a conversation in thinking in that way too and in similar capacities whether that be a divesting of fossil fuels or any other areas of international, uh -- uh, trades. That has been a conversation certainly we'd be delighted to have additional conversations with you as such should that be an interest of yours as well.

* * *

CHAIRMAN STONE: Mr. Ting and welcome by the way.

MR. TING: Thank you.

CHAIRMAN STONE: Yes.

MR. TING: What a great first day on the [judiciary] committee. Um, well, I just wanted to, uh, issue my strong support I'm obviously a co-author on this bill. I think this bill is, um, very measured. Very targeted.

* * * I think this bill is there to protect our workers because if we did have LGBT workers that were forced to go to Indiana, uh, we wouldn't want them having to live in separate accommodations, having to sit in separate restaurants, having to sit in separate stores. I think it's very important to send that strong message.

I know that because we are, uh, moving into somewhat unchartered territory that is challenging to specifically identify exactly how we are gonna do this, but I think it's very important to send a strong message that we won't tolerate discrimination for Californians or subject them to discrimination.

Um, it's a big challenge because we have this balance between religious freedom which is something that's sacrosanct in our Constitution and something that's sacrosanct in our country.

Religious freedom in and of itself is something that we obviously need to protect. However, we've started to see religious organizations start to use their religion as code to discriminate against different people.

I think it's also important that we stand up for all Californians to insure that they don't have to face that sort of discrimination. So I think this bill is a measured approach in that direction. I'm very proud to support it, proud to co-author and just thank you for caring.

* * *

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JENNIFER FERRIS
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THE STATE OF TEXAS)
COUNTY OF TRAVIS)

Before me, Jacob Pennington, on this day personally appeared JENNIFER FERRIS, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office on this 17th day of July, 2019.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
My Commission Expires: 8/15/22