No. 153, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

ON MOTION FOR LEAVE TO FILE
A BILL OF COMPLAINT

BRIEF IN OPPOSITION

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STATEMENT

1. California law protects against discrimination in many forms, including discrimination aimed at lesbian, gay, bisexual, and transgender persons. The State has, for example, long barred employment and housing discrimination on the basis of sexual orientation or gender identity.[1] Since 2005, the state public-accommodations statute has recognized the right of all persons to "full and equal . . . services in all business establishments of every kind whatsoever," "no matter what their . . . sexual orientation" or "gender identity."[2] In more recent years, the State has continued to expand legal protections for members of the LGBT community.[3]

California also has a long history of prohibiting religious-based discrimination and safeguarding religious freedoms. The state Constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference." Cal. Const. art. I, § 4. And the Legislature has adopted specific protections by statute, such as by prohibiting employers from requiring healthcare professionals to participate in abortion services if they have a religious objection to

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[1] *See* Cal. Gov't Code §§ 12940, 12955; 2004 Cal. Stat. 5445, 5451, 5453; 1999 Cal. Stat. 4228; 1992 Cal. Stat. 4399.

[2] Cal. Civ. Code § 51(b), (e)(5); *see* 2005 Cal. Stat. 3513, 3514 (incorporating definition of "sex" under Cal. Gov't Code 12926 (2005)).

[3] *See, e.g.*, 2018 Cal. Stat. 5654, 5655 (amendment to uniform parentage statute to ensure that the law "treats same-sex parents equally"); 2016 Cal. Stat. 5536 (requiring public single-occupancy bathrooms to be gender neutral).

the procedure.[4] Indeed, in some respects, California law is more protective of religious liberty than federal law. Under the California Workplace Religious Freedom Act, for example, employers must accommodate employee religious practices, including dress and grooming, unless doing so would cause "significant difficulty or expense"—a more demanding standard than the one imposed by Title VII.[5]

Although the 50 States have arrived at a broad consensus opposing discrimination based on religion, race, sex, or national origin, there has been less agreement among the States about discrimination against LGBT individuals. In California and elsewhere, policymakers have deliberated over how to protect LGBT individuals from discrimination while also safeguarding the free exercise of religion. *Cf.* Texas Br. 2-3. Some States, including California, have adopted policies barring certain discriminatory practices in the context of business activity or participation in public programs—practices that they view as harmful and contrary to state policy—even where persons or businesses claim that such enforcement would impinge on their religious beliefs.[6] Other States have taken a different approach, authorizing persons and businesses to deny certain services to LGBT persons

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[4] Cal. Health & Safety Code § 123420.

[5] Cal. Gov't Code §§ 12926(u), 12940; 2012 Cal. Stat. 3345; *see, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (discussing Title VII standard).

[6] *See, e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal.4th 1145, 1156-1157 (2008); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-59 (N.M. 2013).

on the ground that providing the services would be contrary to their religious beliefs.[7]

Concerned by the latter approach, the California Legislature enacted A.B. 1887 in an effort to ensure that the State's own expenditure of public funds reflects the State's policy judgment on this important issue. The statute recognizes that "[r]eligious freedom is a cornerstone of law and public policy in the United States, and the Legislature strongly supports and affirms this important freedom." Cal. Gov't Code § 11139.8(a)(3). At the same time, the Legislature determined that the "exercise of religious freedom should not be a justification for discrimination," *id.* § 11139.8(a)(4), and that California should "avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people," *id.* § 11139.8(a)(5).

A.B. 1887 prohibits state agencies from approving "state-funded or state-sponsored travel to a state that, after June 26, 2015, has enacted a law that voids or repeals . . . existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression" or that "authorizes or requires discrimination" on that basis, including by "creat[ing] an exemption to antidiscrimination laws." Cal. Gov't Code § 11139.8(b)(2).[8] The statute

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[7] *See, e.g.*, 2016 Miss. Laws 427, 428-429 (allowing businesses to deny certain services based upon religious beliefs that "[m]arriage is or should be recognized as the union of one man and one woman" and that "male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth").

[8] The Attorney General has never sought to enforce A.B. 1887 to prohibit any activity other than the state funding of travel to

contains several exceptions, including for travel required for "[e]nforcement of California law," "[l]itigation," or "protection of public health, welfare, or safety." *Id.* § 11139.8(c). It directs the Attorney General to develop and maintain a list of States that have enacted a law triggering the restriction on state-funded travel. *Id.* § 11139.8(e).

2. Texas enacted H.B. 3859 in 2017. The stated intent of the Texas Legislature was for "[d]ecisions regarding the placement of children . . . to be made in the best interest of the child" and "to allow people of diverse backgrounds and beliefs to be a part of meeting the needs of children." Tex. Hum. Res. Code § 45.001. The statute forbids Texas agencies, local governments, and certain private parties from taking "any adverse action" against a foster-care or adoption agency that "decline[s] to provide [or] facilitate . . . services that conflict with . . . the provider's sincerely held religious beliefs." *Id.* § 45.004(1); *see id.* § 45.002(3). It defines "adverse action" broadly to include "any action that directly or indirectly adversely affects" the foster-care or adoption agency or "is likely to deter a reasonable person from acting or refusing to act." *Id.* § 45.002(1).

H.B. 3859 does not apply to a foster-care or adoption agency that "decline[s] to provide, facilitate, or

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qualifying States, and is not aware of any applications of the statute beyond that scope. *Cf.* University of California, Office of the President, Central Travel Management, *Frequently Asked Questions Regarding AB 1887 Requirements*, https://tinyurl.com/u29an5f ("AB 1887 prohibits the use of state funds to pay for travel to a state on the Attorney General's list, except where one of the statutory exceptions applies. It does not affect travel that is paid for or reimbursed using non-state funds.").

refer a person for child welfare services on the basis of that person's race, ethnicity, or national origin." Tex. Hum. Res. Code § 45.009(f). But it does protect agencies that discriminate on the basis of sexual orientation or gender identity. *See id.*[9] For example, it would not protect an agency that declines to provide adoption services to an interracial couple on religious grounds; it would, however, protect an agency that declines to provide the same services to a same-sex couple on religious grounds.

After examining H.B. 3859, California's Attorney General determined that, in practical effect, the statute authorized discrimination based on the sexual orientation or gender identity of LGBT parents and children. *See* Cal. Gov't Code § 11139.8(b)(2).[10] As required by A.B. 1887, the Attorney General added Texas to the list of States subject to the restriction on state-funded travel. *See id.* § 11139.8(e)(1); Compl. ¶¶ 21, 23.

3. Texas moved in this Court for leave to file a bill of complaint challenging A.B. 1887. It seeks to advance three constitutional claims. First, Texas

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[9] *See also* Tex. S. Jour., 2017 Reg. Sess. No. 61 (statement of Sen. Rodríguez) ("Although [foster-care providers] are receiving public funds to care for these vulnerable children, these providers will now be given broad latitude to refuse to provide certain services," including "to place a child with an LGBTQ family."); Letter from Child Welfare League of America, et al., to the Senate of the State of Texas (May 17, 2017), https://tinyurl.com/vdxp9pn (expressing similar concerns).

[10] *See* Press Release, Attorney General Xavier Becerra, *Alabama, Kentucky, South Dakota and Texas Added to List of Restricted State Travel* (June 22, 2017), https://tinyurl.com/r5wlfpy (noting that H.B. 3859 "allows foster care agencies to discriminate against children in foster care and potentially disqualify LGBT families from the state's foster and adoption system").

alleges that A.B. 1887 violates the dormant Commerce Clause by "permitting state-sponsored travel to some States but not others." Br. 31. Second, it claims that the statute violates the Privileges and Immunities Clause by "burden[ing] the economic pursuits of Texans . . . in Texas." *Id.* (emphasis omitted). Finally, it contends that A.B. 1887 "cannot survive . . . rational basis review," and thus violates the Equal Protection Clause, because it is predicated on "religious animus." *Id*. at 33.

ARGUMENT

Texas asks this Court to exercise its original jurisdiction to consider three constitutional claims challenging A.B. 1887. In evaluating whether to take that extraordinary step, this Court examines both the nature of the claims and the availability of alternative forums in which the claims can be resolved. Here, the claims that Texas advances principally address purported injuries to "Texas hotels, restaurants, and retail stores." Br. 23. But Texas fails to identify any persuasive reason why those businesses (or their trade associations) could not pursue an action for injunctive relief presenting the same claims. In any event, while the proposed complaint implicates a serious policy issue concerning how state sovereigns balance anti-discrimination principles against the need to protect religious liberty, the actual claims that Texas seeks to litigate lack any foundation as a matter of constitutional law.

A.B. 1887 is not a "trade embargo" or "travel ban." Br. 1, 16. It does not bar any commerce or prohibit any travel into or out of California; it instead limits what out-of-state travel California will pay for. A State's control over its own public fisc is a core aspect of state sovereignty, and this Court has long treated

similar government-spending measures as "market participant" activity that is immune from scrutiny under the dormant Commerce Clause. Nor does the statute violate the Privileges and Immunities Clause, which prohibits a State from discriminating against non-residents when they come *into* that State. A.B. 1887's restriction on funding out-of-state travel does nothing to disfavor non-residents within California. Finally, Texas's claim that A.B. 1887 is founded on "religious animus," Br. 33, and therefore fails rational basis review under the Equal Protection Clause, is untenable. A.B. 1887 reaffirms California's commitment to religious liberties while ensuring that the State spends its own funds in a manner consistent with the balance that it has struck between protecting religious freedom and guarding against discrimination. The fact that California has balanced these sometimes competing concerns differently from Texas does not demonstrate that California acted irrationally or with animus toward religion.

1. This Court's "original jurisdiction is of so 'delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). Original actions require this Court to "exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). They also tax the Court's resources and limit its ability to address questions of national importance arising in cases that have proceeded through the lower courts in the ordinary course. *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-499 (1971).

Accordingly, the Court has "said more than once that [its] original jurisdiction should be exercised only

'sparingly.'" *Mississippi*, 506 U.S. at 76. The "threatened invasion of rights" must be "of serious magnitude." *New York*, 256 U.S. at 309. The State seeking to initiate the original proceeding "must allege . . . facts that are clearly sufficient to call for a decree in its favor." *Alabama v. Arizona*, 291 U.S. 286, 291-292 (1934). And jurisdiction "will not be exerted in the absence of absolute necessity." *Id.* at 292.

Moreover, "[o]riginal jurisdiction is for the resolution of *state* claims, not private claims." *South Carolina v. North Carolina*, 558 U.S. 256, 277 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part); *see Pennsylvania v. New Jersey*, 426 U.S. 660, 664-665 (1976) (per curiam). In other words, it is generally reserved for claims of a uniquely sovereign character, such as claims "concerning boundaries . . . [and] interstate lakes and rivers." Shapiro et al., *Supreme Court Practice* § 10.2, p. 10-7 (11th ed. 2019) (collecting cases).

The Court has distilled these principles into two factors that it considers in determining whether an original suit is appropriate for its resolution. First, the Court examines "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim.'" *Mississippi*, 506 U.S. at 77. Second, it considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Texas's proposed bill of complaint fails to meet these standards.

2. To begin with, Texas does not advance any claim of the type necessary to invoke the Court's original jurisdiction.

a. It is Texas's obligation to allege "facts that are clearly sufficient to call for a decree in its favor" under

existing constitutional standards. *E.g.*, *Alabama*, 291 U.S. at 291. But Texas gives remarkably little attention to the claims it seeks to litigate, *see* Br. 29-33; and, as addressed below, they are not remotely meritorious, *see infra* pp. 15-23.

There are also serious questions about whether and to what extent Texas has standing to pursue those claims. This Court has already foreclosed States from bringing claims on "their own behalf" under the "Privileges and Immunities Clause and the Equal Protection Clause" in an original action. *Pennsylvania*, 426 U.S. at 664-665. As to the claims based on those constitutional protections, then, Texas must be relying on a theory of *parens patriae* standing or third-party standing, which would be predicated on asserted harms to private parties. *See* Compl. ¶ 66; Br. 21. But Texas has not made the type of showing required to support standing under either theory.[11] And to the extent that Texas seeks to invoke the Court's jurisdiction based on an assertion of "concrete pecuniary harm [to] Texas" itself, Br. 15, it has made no effort to substantiate that injury.

b. Texas instead focuses on the argument that its claims "implicate sovereign and quasi-sovereign interests" of a serious character. Br. 14; *see id.* at 15-

[11] Third-party standing would require Texas to demonstrate that it "has a 'close' relationship with the person who possesses" the purported constitutional right and that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). The *parens patriae* doctrine would require Texas to show, at a minimum, that A.B. 1887 "affects the general population of [Texas] in a substantial way," *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981), and that the State "is not merely litigating as a volunteer the personal claims of its citizens," *Pennsylvania*, 426 U.S. at 665; *see generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-608 (1982).

23. It primarily contends that A.B. 1887 is equivalent to a "trade embargo," *id.* at 16, of the type that has "long been recognized as a legitimate basis for war," *id.* at 15; *see id.* at 16-18 (discussing pre-World War II freeze on Japanese assets and economic sanctions between Greek city-states). If that characterization were accurate, original jurisdiction might well be warranted, and the statute would likely be invalid. *See infra* p. 15. But A.B. 1887 is not a trade embargo. Indeed, it does not forbid any travel or commerce into or out of California. It only limits the circumstances in which the State will pay for travel out of public coffers.

Texas nonetheless argues that A.B. 1887 intrudes on its sovereignty by "target[ing]" Texas, Compl. ¶ 1, and "dictat[ing] which laws Texas should and should not enact," Br. 20-21; *see also* Br. of West Virginia *et al.* 8-9. That argument misunderstands A.B. 1887's operation and effect. A.B. 1887 expresses disapproval of certain policy choices that California views as discriminatory and harmful, and it takes steps to "avoid supporting or financing" such policies. Cal. Gov't Code § 11139.8(a)(5). California's statute obviously did not deter Texas from adopting H.B. 3859; and Texas does not make any serious argument that California's choice about how to spend its own resources will cause Texas to abandon H.B. 3859. States in our Union often disagree, sometimes vigorously. Neither California nor Texas can make the other conform to its preferred policy views. But each is surely entitled to criticize and decline to subsidize the other's contrary policies. That is not an "attack on federalism." Br. 21. It is federalism in operation.

Indeed, the greater threat to state sovereignty is presented by the attempt to constrain California's

autonomy over decisions regarding how to spend its own funds. A State's administration of its own public fisc is a core aspect of its sovereignty. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 751 (1999) ("[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process."). One of the "essential perquisites of sovereignty" is a state's "ability to set its own agenda" and "to control its own internal machinery." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60-61 (1994) (O'Connor, J., dissenting).[12] This Court appropriately makes decisions about whether to invoke its original jurisdiction with respect for state sovereignty in mind. *See Alabama*, 291 U.S. at 292; *South Carolina*, 558 U.S. at 267. And the bill of complaint here seeks to interfere with California's sovereign prerogatives over its own resources.

Moreover, for all the talk of sovereign interests, Texas's arguments show that the interests it seeks to protect are primarily private ones. Texas is concerned that "Texas hotels, restaurants, and retail stores have missed out on financial transactions." Br. 23 (emphasis omitted); *see id.* at 20-22, 25-26. That is not the kind of uniquely sovereign injury that normally warrants original jurisdiction.[13] And the three cases

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[12] *See also, e.g.*, *United Bldg. & Constr. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 223 (1984); *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 & n.10 (1980); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

[13] The Court has frequently declined to exercise original jurisdiction in the face of allegations that private economic actors within the plaintiff States were burdened by another State's laws or regulations. *See, e.g.*, *Arizona v. California*, 140 S. Ct. 684 (2020); *Missouri v. California*, 139 S. Ct. 859 (2019); *Arizona v. New Mexico*, 425 U.S. 794, 795-798 (1976) (per curiam); *Alabama*, 291 U.S. at 288-292.

Texas cites as examples of the Court exercising original jurisdiction "based on commercial harm to the public" (Br. 21-22) are not at all like this one. In *Pennsylvania v. West Virginia*, 262 U.S. 553, 584, 591-592 (1923), the Court considered a ban on the export of natural gas from West Virginia, which threatened to "imperil the health and comfort of thousands" of out-of-state consumers—and to "curtail or cut off" the gas supply to "various public institutions and schools" operated by the plaintiff States, "expos[ing] thousands of dependents and school children to serious discomfort, if not more." In *Wyoming v Oklahoma*, 502 U.S. 437, 444-445 (1992), the Court addressed an import restriction on coal, which led Oklahoma utilities to order ten percent less coal from Wyoming on an annual basis. And in *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981), it examined a tax on natural gas exports that increased gas prices for "millions of consumers in over 30 States." Texas identifies no similar harms here.[14]

3. Texas also fails to show the absence of an alternative forum in which the claims pleaded in its complaint can be resolved. *See, e.g.*, *Mississippi*, 506 U.S. at 76-77; *Alabama*, 291 U.S. at 292. Indeed, although Texas asserts that "no one else can effectively pursue" the stated claims "in a different forum," Br. 23, its brief suggests just the opposite.

Any of the "taxicab companies," "hotels, restaurants, and retail stores" that have "missed out on financial transactions," Br. 9, 23, and thereby suffered

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[14] Texas also alleges that A.B. 1887 will lead to diminished state tax revenues. Br. 22. It asserts that this "supplies a prototypical injury in fact for standing" purposes, but it does not contend that any such loss in tax revenues would amount to an "affront[] to sovereignty" of the type that might justify an original action. *Id.*

a "concrete pecuniary harm," *id*. at 15, would seem to be a natural plaintiff to assert the constitutional claims at issue here. The "students" and "scholars from California public universities" who are unable to "secure school funding" to attend annual conferences in Texas, Compl. ¶ 31; Br. 9-10, would also be in a position to assert Texas's core claim.[15]

Texas contends (Br. 25-26) that businesses would be unable to identify the future injury necessary to establish standing. It acknowledges, however, that many regular trade shows, conventions, and conferences are held in the State. *See, e.g.*, Compl. ¶ 30 ("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.") (internal quotation marks omitted). If Texas is correct in describing the degree of injury to businesses resulting from A.B. 1887's restrictions on state-funded travel to those recurring events, *see, e.g.*, Br. 23, then presumably a business involved in organizing or serving such an event could establish a cognizable prospective injury. Even if that were not feasible, one of Texas's large, multi-member trade associations could file suit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (discussing associational standing); *e.g.*, Tex. Hotel & Lodging Ass'n, https://texaslodging.com/about/ ("largest hotel association in the nation with over 3,700 members").

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[15] Although California residents presumably could not bring claims based on the privileges and immunities or equal protection rights of Texans, Texas provides no reason why they would be unable to allege the dormant Commerce Clause claim that lies at the heart of Texas's proposed complaint.

Texas also argues (Br. 26-27) that sovereign immunity would bar any suit to enjoin A.B. 1887 brought in federal district court. But it does not identify any persuasive reason why a plaintiff could not sue the relevant state officials to enjoin the enforcement of Government Code Section 11139.8(b)(2) with respect to the prospective travel. *See, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *Ex parte Young*, 209 U.S. 123, 159 (1908).[16] At a minimum, individuals or businesses who are allegedly suffering an ongoing and "concrete pecuniary harm" (Br. 15) should at least attempt to pursue their claims in a federal district court before this Court takes the "delicate and grave" step of evaluating those claims in an original action between two States. *Mississippi*, 506 U.S. at 76 (internal quotation marks omitted).[17]

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[16] It is not at all clear that "[e]ffective relief" in such a case "would require ordering the State to take 'affirmative action'" as opposed to "ordering the cessation of the conduct complained of." Br. 27 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 291 n.11 (1949)). Nor is it clear that the *Ex parte Young* doctrine would prohibit a plaintiff from seeking an injunction requiring the appropriate state official to "remov[e] Texas from the travel ban list or remov[e] that list altogether," as Texas suggests. Br. 27; *see, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255-256 (2011) (upholding *Ex parte Young* injunction "requiring the production of . . . records"); *Vann v. Kempthorne*, 534 F.3d 741, 751-752 (D.C. Cir. 2008) (concluding "that the continuing force of *Larson*'s footnote 11 is not free from doubt" and that, "[w]hatever the *Larson* Court meant when it referred to 'affirmative action,' . . . this dicta does not limit the force of *Ex parte Young* in the case at hand").

[17] To the extent that Texas can establish a cognizable injury with respect to any of its claims, *see supra* p. 9, it too could try to obtain injunctive relief against California state officials in its own

4. Finally, the claims Texas seeks to litigate are without merit—and certainly are not "clearly sufficient to call for a decree in its favor." *Alabama*, 291 U.S. at 291.

a. To begin with, Texas fails to state a claim under the dormant Commerce Clause. Br. 31-33. Texas describes A.B. 1887 as a "trade embargo," akin to historic measures that served as a "basis for war," Br. 16, 17, and alleges that it "facially discriminates against commerce in Texas," Compl. ¶ 59; *see also id.* ¶¶ 54-61; Br. 18-19, 31; *supra* p. 10. If that were an accurate description, the statute could "be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose." *E.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019). And it might very well be invalid. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) ("A discriminatory law is 'virtually *per se* invalid.'"). But the description is entirely inaccurate.

A.B. 1887 is not a trade embargo; it is a limited restriction on California's own spending for out-of-state travel. Where a State imposes restrictions on its own spending, it acts as a market participant—not as a regulator—and is exempt from dormant Commerce Clause scrutiny. *See Hughes v. Alexandria Scrap*

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district court action. Whether such an action may proceed is a question that has engendered some disagreement in the lower courts, as Texas acknowledges. Br. 27; *see generally* Shapiro et al., *Supreme Court Practice* § 10.6, p. 10-25 n.29 (11th ed. 2019) (discussing circuit authority). But Texas offers no compelling reason why it should not attempt to litigate that question in the lower courts before invoking the original jurisdiction of this Court. *See, e.g.*, *Louisiana v. Mississippi*, 516 U.S. 22, 23-24 (1995) (discussing denial of leave so that plaintiff State could exhaust possible district court alternative); *California v. Texas*, 457 U.S. 164, 164-165 (1982) (per curiam) (same).

Corp., 426 U.S. 794, 807-809 (1976). That result "makes good sense": "considerations of state sovereignty" require allowing a State considerable latitude to "determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436, 438, 439 n.12 (1980) (internal quotation marks omitted).

This Court has applied the market participant exception to uphold, for example, a subsidy program favoring in-state businesses, *Hughes*, 426 U.S. at 809, and a hiring preference favoring local residents for jobs on construction projects paid for with government funds, *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 206 (1983). Like those laws, A.B. 1887 directs how the government spends "its own funds." *Id.* at 214. California has acted as "a market participant and [is] entitled to be treated as such under" the dormant Commerce Clause. *Id.*

Texas contends that the market participant exception is inapplicable here because A.B. 1887 has a "substantial regulatory effect." Br. 32-33 (internal quotation marks omitted). The same could have been said in each of the Court's market participant cases. In *White*, for example, the Court acknowledged that the spending measure could have "a significant impact" on affected construction firms. 460 U.S. at 208-210. In *Hughes*, the Court noted evidence indicating that the challenged subsidy had caused a "precipitate decline" in business for affected out-of-state interests. 426 U.S. at 801, 803 n.13.[18] But those

[18] *See also Reeves*, 447 U.S. at 433, 444-445 (decision to bar sales to non-residents from state-owned cement factory denied non-resident businesses a ready source of cement, which, for example, "forced [the petitioner] to cut production by 76%").

effects did not render the laws unconstitutional, because the States' participation in the market did not create any "burden which the Commerce Clause was intended to make suspect." *Hughes*, 426 U.S. at 808.

Texas also invokes (Br. 32) the plurality opinion in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), but that case involved a statute quite unlike A.B. 1887.[19] That statute leveraged Alaska's ownership of forests to demand that anyone purchasing timber from the State agree to hire local businesses to process the timber in the State. *Id.* at 98. The plurality reasoned that the State had crossed the line from market participation into regulation because it was "govern[ing] the private, separate economic relationships of its trading partners." *Id.* at 99. A.B. 1887 does not impose any restrictions on the "private, separate" choices of any recipients of California funding. State employees and other Californians remain free to engage in any personal travel they wish; A.B. 1887 restricts what travel the State will fund.[20]

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[19] The controlling opinion in *South-Central* concluded only that the case should be remanded for the court of appeals to consider application of the market participant exception and *Pike* balancing in the first instance. 467 U.S. at 101 (Powell, J., concurring in part and concurring in the judgment); *see generally Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[20] For the same reason, A.B. 1887 is unlike a hypothetical statute barring state agencies from contracting with "'companies that do business in Texas.'" Br. 31-32 (quoting Brief for the United States as Amicus Curiae, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), 2000 WL 194805, at *27). Such a statute would go beyond controlling how state funds are used. It would restrict the ability of the covered companies to use any of their assets—whether or not obtained through transactions with the State—to do business in Texas.

The other cases relied on by Texas in support of its dormant Commerce Clause theory (Br. 32-33) addressed preemption claims. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-367 (2000), the Court struck down a measure prohibiting recipients of state-government contracts from doing business in Burma. The measure conflicted with a federal statute that was intended "to provide the President with flexible and effective authority over economic sanctions against Burma." *Id.* at 374. In *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 284 (1986), the Court invalidated a statute making businesses ineligible for state contracts if they had previously violated federal labor laws. By "flatly prohibiting state purchases from repeat labor law violators," the scheme "conflict[ed] with the [National Labor Relations] Board's comprehensive regulation of industrial relations." *Id.* at 288-289; *see also Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227-230 (1993) (applying *Gould*). Those cases are inapposite because Texas does not contend that A.B. 1887 is inconsistent with any federal statute.[21]

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[21] Though not in the section of its brief addressing the dormant Commerce Clause, Texas invokes (Br. 31) one additional dormant Commerce Clause case, *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989). But this Court has never applied *Healy* to a market participant measure such as A.B. 1887. In any event, A.B. 1887 does not violate *Healy*'s bar on "directly control[ling] commerce occurring wholly outside the boundaries of a State." *Id.* at 336; *see Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).

b. Texas next argues that A.B. 1887 violates the Constitution's guarantee that 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. The Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It establishes a "norm of comity" for the treatment of "citizens of one State coming within the jurisdiction of another." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).[22] For example, this Court has recognized violations of the Privileges and Immunities Clause where a State unjustifiably: charged a higher fee to out-of-state professionals for a license to work in the State, *see Toomer*, 334 U.S. at 387; barred employers from hiring non-residents looking for work in the State, *Hicklin v. Orbeck*, 437 U.S. 518, 526-527 (1978); and prohibited non-residents from seeking medical treatments in the State that were available to state residents, *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

A.B. 1887 does not involve "the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent." *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982). It does not deny any privileges or immunities to Texans who "venture[ ] into" California, *Toomer,* 334 U.S. at 395, or impose any "disabilit[y] of alienage" whatsoever on Texas residents in California, *Paul v. Virginia*, 75 U.S. 168, 180 (1868). It simply restricts the use of California's public funds for travel *from* California *to* Texas and

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[22] *See also, e.g.*, *McBurney v. Young*, 569 U.S. 221, 227 (2013); *Saenz v. Roe*, 526 U.S. 489, 501-502 (1999); *United Bldg.*, 465 U.S. at 217; *Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982); *Hicklin v. Orbeck*, 437 U.S. 518, 524-525 (1978).

other qualifying States. *See* Cal. Gov't Code § 11139.8(b)(2).

Texas nonetheless argues that A.B. 1887 is unconstitutional because it has the "extraterritorial" effect of "burden[ing] the economic pursuits of . . . Texans *in Texas*." Br. 31. Texas appears to acknowledge, however, that this Court has never invalidated a law under the Privileges and Immunities Clause on that theory. *See id.* The only case Texas cites for this argument that actually involved the Privileges and Immunities Clause is *Quong Ham Wah Co. v. Industrial Accident Commission of California*, 255 U.S. 445, 449 (1921), which was "[d]ismissed for want of jurisdiction"—and thus did not address or resolve any constitutional questions.[23]

Rather than asking the Court to apply "[e]xisting case law under the Privileges and Immunities Clause," Br. 15, Texas is inviting the Court to adopt and apply a brand new legal theory. That is not an adequate basis for invoking this Court's original jurisdiction. *See, e.g.*, *Alabama*, 291 U.S. at 291 (requiring putative plaintiff to state claim that is "clearly sufficient to call for a decree in its favor"). Nor is there any need to give new extraterritorial scope to the Privileges and Immunities Clause. Other constitutional doctrines already address burdens on interstate travel, *see Saenz v. Roe*, 526 U.S. 489, 500-501 (1999), and the alleged extraterritoriality of state laws, *see,*

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[23] The California Supreme Court decision in *Quong Ham Wah*, 184 Cal. 26 (1920), did not turn on extraterritorial effects. It held that, because California provided an in-state forum for workers-compensation claims by state residents injured while working outside the State, the Privileges and Immunities Clause required the State to open that forum to certain non-California residents injured outside the State. *See id.* at 34-38.

e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-572 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

Texas's claim under the Privileges and Immunities Clause suffers from other defects as well. Virtually all of the harms Texas alleges appear to be felt by incorporated businesses, such as "hotels, restaurants, and retail stores." *E.g.*, Br. 23; *see supra* pp. 11, 12-13. As Texas acknowledges, however, the Privileges and Immunities Clause "has been interpreted not to protect corporations," *Tenn. Wine & Spirits*, 139 S. Ct. at 2460-2461; *see* Compl. ¶ 68 n.5. Moreover, while the fact that a State is "expending its own funds" might not remove a challenged law "completely from the purview of the" Privileges and Immunities Clause, it is "certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute[] . . . violates the" Clause. *United Bldg.*, 465 U.S. at 221. A.B. 1887, which ensures that state resources are spent in a manner consistent with California's deeply held values, falls within the "considerable leeway" that the Constitution affords to a State in "setting conditions on the expenditure of funds it controls." *Id.* at 223 (internal quotation marks omitted).

c. Finally, Texas's equal protection claim is also meritless. While the Equal Protection Clause imposes heightened scrutiny on laws discriminating against a "suspect class," it otherwise allows a legislative "classification or distinction . . . so long as it bears a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks omitted). Texas acknowledges that A.B. 1887 is subject to rational-basis review, but contends that the statute lacks a "legitimate end" because it reflects

"religious animus" and "discriminate[s] against out-of-state actors." Br. 33. Texas is wrong in both respects.

A.B. 1887 is not motivated by anti-religious animus. To the contrary, the statute reaffirms that "[r]eligious freedom is a cornerstone of law and public policy in the United States." Cal. Gov't Code § 11139.8(a)(3). Texas objects (Br. 6) to the Legislature's declaration that the "exercise of religious freedom should not be a justification for discrimination." Cal. Gov't Code § 11139.8(a)(4).[24] But Texas cannot dispute the legitimacy of that general principle: Texas itself chose not to extend H.B. 3859's protections to adoption and foster-care agencies that discriminate on the basis of "race, ethnicity, or national origin"—even if such discrimination is motivated by sincere religious beliefs. Tex. Hum. Res. Code § 45.009(f); *supra* p. 5. Every sovereign must strike a balance between protecting religious freedom and protecting against discrimination. It does not amount to anti-religious animus for California to strike a different balance from Texas, or to adopt a policy that is more protective of the rights of LGBT individuals. As this Court recently observed, it is "unexceptional that [a State] can protect gay persons, just as it can protect other classes of individuals." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018); *see id.* ("Our society has come to the recognition that gay persons . . . cannot be treated as social outcasts or as inferior in dignity and worth.").[25]

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[24] In selectively quoting from that provision, Texas mischaracterizes the text. *See* Br. 6 ("The California Legislature codified its belief that 'religious freedom' is merely 'a justification for discrimination.' Cal. Gov't Code § 11139.8(a)(4).").

[25] Texas cites two statements from the statute's legislative

Nor does A.B. 1887 fail rational-basis review because it treats "out-of-state actors" differently. Br. 33; *see* Compl. ¶ 68 & n.5. If that were true, many of the laws this Court has upheld in cases applying the dormant Commerce Clause or the Privileges and Immunities Clause would have been invalid. *See, e.g.*, *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 378-391 (1978) (rejecting privileges and immunities and equal protection challenges to law that charged discriminatory hunting fees to non-residents); *supra* pp. 16-17. The case Texas principally relies on in support of this argument, *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985), struck down a discriminatory tax that was "designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." A.B. 1887 is not a protectionist measure like the one invalidated in *Ward*. It is a rational exercise of the State's sovereign prerogative to avoid spending its own resources in ways that are inconsistent with its deeply held values.

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history as evidence of animus. *See* Compl. ¶¶ 16-17; Br. 6-7. But the unambiguous statutory text reflects and reaffirms the Legislature's commitment to religious liberty. *See* Cal. Gov't Code § 11139.8(a)(3). And the quoted statements do not establish any contrary legislative intent. One was made by a private party in testimony before a legislative committee. The other was made by a member of the State Assembly, who said that "[r]eligious 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." Br. App. A.44. He also underscored the need for the government to strike an appropriate "balance" between guarding against "discrimination" and protecting "religious freedom," which is "sacrosanct in our country." *Id.*

CONCLUSION

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

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