No. 22O153, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF CALIFORNIA

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

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INTRODUCTION

Texas passed H.B. 3859 to protect religious individuals and organizations that provide welfare services to the children of Texas. "Concerned by" laws like that, Response Br. 3, California enacted A.B. 1887 and prohibited state-sponsored travel to Texas and ten other States. As intended, California's travel ban harmed the blacklisted States and their citizens. Some States retaliated with bans of their own. Rather than escalate matters, Texas brought this original action.

California nevertheless insists this case does not warrant the exercise of original jurisdiction. But California's response largely hinges on a single, flawed premise—that States may do whatever they want with their money. A simple hypothetical demonstrates otherwise.

Imagine a law that, just like A.B. 1887, prohibits the use of state funds for state-sponsored travel in other States. But this law is keyed to a different trigger: State employees may not spend state dollars in hotels or restaurants owned or operated by Asian proprietors. *Cf.* Cal. Const. of 1879, art. XIX, § 3 (repealed 1952) (barring employment of Chinese for any "public work"). Surely California would not argue that the Constitution has nothing to say about that law because a "State's control over its own public fisc is a core aspect of state sovereignty." Response Br. 6.

How a State chooses to spend its own money *is* subject to constitutional limits. The limits that matter here are the Privileges and Immunities Clause, Commerce Clause, and Equal Protection Clause. California's attempt to bully other States into revising their own legal codes to assuage California's "[c]oncern[s]," Response

Br. 3, violates all three provisions. And there are no alternative fora for resolving this dispute.

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

ARGUMENT

This case presents the quintessential inter-State dispute that justifies the "obligatory" exercise of discretion. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). California has deployed a uniquely sovereign weapon (economic warfare) against a uniquely sovereign function (passage of laws). In the process, it has also harmed Texas's quasi-sovereign interest in protecting Texans. No other plaintiff and no other court could effectively resolve this dispute because standing and immunity obstacles will bar the way.

Although Texas need not prove its entire case at this stage, the underlying claims are meritorious. A.B. 1887 violates long-settled constitutional principles. California's efforts to show otherwise either misunderstand this Court's precedent or highlight how unprecedented A.B. 1887 truly is.

I. Texas's Sovereign and Quasi-Sovereign Interests Are Serious.

California's affronts to Texas's interests are "serious[]" and "would amount to *casus belli* if the States were fully sovereign." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

a. California has deployed economic sanctions, long a basis for war, against her fellow States. The Founders feared that kind of action so much that it prompted them to call the Constitutional Convention. Opening Br. 15-17. Historical experience proved to them that economic sanctions may lead to war. The leading 18th cen-

tury treatise on the law of war confirms why. *See* Cornelius Van Bynkershoek, *A Treatise on the Law of War* 4 (Peter Stephen Du Ponceau trans., 1810) (1737).

California makes no serious attempt to address this sovereign interest head-on. In fact, it admits that, if Texas's "characterization" is right, not only would original jurisdiction be appropriate, but A.B. 1887 "would likely be invalid." Response Br. 10. Nevertheless, California assures the Court—in a single sentence and without any citation—that A.B. 1887 simply is "not a trade embargo." *Ibid.* Why? California doesn't say.

At the end of the day, California "restrict[s]" the flow of commerce into Texas "for political . . . reasons." *Embargo*, Black's Law Dictionary 635 (10th ed. 2014). And its goal in doing so is to "compel[] [Texas] to change its behaviour." George Shambaugh, *Embargo*, Encyclopædia Britannica (2019), https://perma.cc/PJ2G-9XR7; *see* Compl. ¶ 28. That remains true even though California has not completely barred all trade into Texas. By suggesting less severe economic sanctions are not economic sanctions at all, California mistakes a "difference in degree" for a "difference in kind." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988).

Even if the sanctions California has employed are minimal, Texas has explained that this Court focuses on possible escalation. Opening Br. 19-20. If one State has the power California claims here, then "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). California does not even mention—much less discuss—the retaliatory measures its actions have already engendered in Tennessee and Oklahoma, Compl. ¶¶ 32-36, or the calls

from others urging California to take even more drastic measures, Opening Br. 12.

b. In addition to using a sovereign weapon, California has attacked a sovereign function—lawmaking. *See* 1 William Blackstone, *Commentaries* *49; *Sovereign Power*, Black's Law Dictionary 1611. Texas, just like every other State, has a sovereign interest in passing laws to govern activity within its borders without interference. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). California "may not impose economic sanctions . . . with the intent of changing" Texas's laws. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). But California admits it has targeted Texas and other States for just that reason. Response Br. 3, 5.

California says its decision to blacklist fellow States is simply "federalism in operation." Response Br. 10. But Federalism is about permitting each State to experiment with different policies "within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). California misunderstands the famous "laboratory" metaphor as an invitation to instruct *others* how to run *their* labs. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Attempting to hijack other States' policy choices is the antithesis of federalism. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1492-1500 (1987).

c. Texas also has a quasi-sovereign interest in the "economic well-being" of its citizens, *Alfred L. Snapp*, 458 U.S. at 602, 605, whom California has undoubtedly harmed, Opening Br. 9-10. This Court has entertained original actions based on commercial harm to the public before in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992),

Maryland v. Louisiana, 451 U.S. 725 (1981), and *Pennsylvania v. West Virginia*, 263 U.S. 350 (1923).

Once again California attempts argument-by-assertion. It says the harms Texans have suffered here are "no[t] similar" to the harms suffered in those cases. Response Br. 12. But California does not elaborate. Perhaps it thinks the magnitude of the economic impact in those cases was greater. But in *Wyoming*, this Court refused "to key the exercise of [its] original jurisdiction on the amount in controversy" because of the possible impact if other "State[s] adopted similar legislation." 502 U.S. at 453-54.

What is more important is what California does *not* say. It does not dispute Texas's central claim that: 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* lost financial transactions; and Texas *has* lost associated tax revenue.

The only pushback California offers is that Texas "has made no effort to substantiate" its loss of tax revenue. Response Br. 9. But no additional substantiation is needed. The purpose of A.B. 1887 is to deprive Texas of tax revenue. *See* Compl. ¶ 29. Texas taxes sales and hotel occupancy. Tex. Tax Code §§ 151.051, 156.052, 351.003, 352.003. In 2015, it collected more than $500 million in hotel tax revenue alone. Gerard MacCrossan & Joyce Jauer, *The Hotel Occupancy Tax*, Tex. Comptroller of Public Accounts (June 2016), https://perma.cc/3NSS-G3UT. Because California does not dispute the causal chain recited above, it is clear that Texas's tax revenues "have been demonstrably affected by" A.B. 1887, *Wyoming*, 502 U.S. at 450, and Texas has stand-

ing, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019).

d. California's remaining responses conflate arguments about a qualifying interest with arguments about standing and the merits. Texas never claimed that the loss of tax revenue justifies invoking original jurisdiction. Response Br. 12 n.14. That pecuniary harm just confirms Texas has suffered "a prototypical injury in fact for standing." Opening Br. 22. And whether the market-participant exception applies has nothing to do with whether the interests at stake are serious. Response Br. 15. The Spartans would not have been placated if the Athenians had assured them that Athens was imposing its embargo only in its capacity *as a market participant*. *See* Opening Br. 16-17.

II. No Other Plaintiff and No Other Court Can Effectively Resolve this Dispute.

Original jurisdiction before this Court is the only adequate means for resolving this inter-State dispute. Now is the right time. Texas is the right plaintiff. And this is the right court.

California seeks to impose an exhaustion requirement when it insists that Texas or private plaintiffs at least "attempt" or "try" to bring a district court action first. Response Br. 14 & n.17. This Court has never required a State to attempt—or, worse still, wait for *others* to attempt—to bring a district court suit just to prove it would fail. In fact, this Court has penalized States for waiting to bring an original action. *See, e.g.*, *Ohio v. Kentucky*, 410 U.S. 641, 645-48 (1973).

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. Those requirements are not met here because private plaintiffs would lack standing and sovereign immunity would bar suit. *See Wyoming*, 502 U.S. at 452 n.10.

Individual Texans surely have been and continue to be harmed by California's actions. But it may be impossible to know how. Future injuries will be difficult to identify. And past injuries (assuming they could be identified) will not justify prospective relief. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-96 (2009). That is precisely why States may sue as *parens patriae* when "the wrongs complained of are such as affect the public at large." *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

California recognizes this problem. So, it points to trade associations and associational standing. Response Br. 13. That adds nothing because an associational plaintiff must still "identify" members, *Summers*, 555 U.S. at 499, who have standing "in their own right," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). That brings us back where we started. Even businesses hosting trade shows and conventions may not know *why* certain attendees cancelled. They certainly will not know about attendees whose plans never materialized because of the travel ban. California's solution is no solution at all. *Louisiana*, 176 U.S. at 19.

Separately, sovereign immunity would bar any private suit, and *Ex parte Young* would not provide a workaround. Opening Br. 26-27. Ordering the Attorney General to refrain from implementing A.B. 1887—*i.e.*, "Do not add new States"—would not provide meaningful relief. California officials have an independent duty to abide by the existing list: Every "agency, department, board, authority, or commission" has a statutory

obligation "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." Cal. Gov't Code § 11139.8(e)(2). Because the list is posted, A.B. 1887 governs state officers' conduct. California does not dispute that.

Effective relief would therefore require ordering California's Attorney General to take affirmative acts to remove Texas from the list or remove the list altogether. But ordering the Attorney General to modify or remove the list would have significance only *as an official act*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), exactly what *Ex parte Young* prohibits, 209 U.S. 123, 159-60 (1908).

The most California can muster is a footnote suggesting "[i]t is not at all clear" these principles would bar a private suit. Response Br. 14 n.16. In fact, it is clear as day. So clear that California is forced to argue that *Larson* is no longer good law. But any decisions in which this Court overlooked affirmative injunctions without addressing *Larson* are "drive-by jurisdictional rulings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Plus, cases like the one California cites involved orders ancillary to a district court's exercise of jurisdiction. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255-56 (2011). Of course federal courts can order sovereigns, as litigants, to appear for a hearing and produce documents.

This Court has never overruled *Larson*. Nor should it—because *Larson* makes good sense of *Ex parte Young*'s "fiction." *Id.* at 255. An officer who does what state law does not authorize by acting *ultra vires* ceases to be a state official and can be ordered to stop. *Ex parte Young*, 209 U.S. at 159-60. But an officer who is

ordered to take official action *intra vires* is ordered to do so *because* he is a state official. He therefore retains his "official or representative character." *Id.* at 160.

Even if this Court is inclined to revisit that rule, lower courts have no authority to do so. *See Johnson v. Mathews*, 539 F.2d 1111, 1124 (8th Cir. 1976) ("If footnote 11 [of *Larson*] is to be limited or restricted, that obligation rests with the Supreme Court."). They must apply *Larson*'s rule. *See, e.g.*, *Jacobson v. Fla. Sec'y of State*, 2020 WL 2049076, at *13 (11th Cir. 2020); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001). If a private plaintiff filed a suit like this one, *Larson* would bar it.

Finally, California invites Texas to ignore Congress's decision to grant "exclusive" jurisdiction to this Court, 28 U.S.C. § 1251(a), and to sue California in federal district court instead. California says that "[w]hether such an action may proceed is a question that has engendered some disagreement." Response Br. 14-15 n.17. But not on this Court. *See Mississippi*, 506 U.S. at 77-78 (describing § 1251 as "uncompromising").

III. Texas's Claims Are Meritorious.

California faults Texas for "giv[ing] remarkably little attention to the [merits of its] claims." Response Br. 9. The parties, however, are debating only whether this Court should entertain the bill of complaint. In any case, the merits are straightforward. This Court need not appoint a special master. California does not suggest that Texas's claims require record development or the elucidation of state law. The ease of resolving this case further counsels in favor of review.

a. The Privileges and Immunities Clause prohibits one State from discriminating against citizens of anoth-

er State in pursuit of their common callings. California does not dispute that hurting Texans who have chosen to pursue callings in hospitality, entertainment, tourism, and dining is key to A.B. 1887's operation. *See* Compl. ¶¶ 28-29; A.19. That silence is damning.

Instead, California responds that this Court's cases applying the Privileges and Immunities Clause have traditionally involved States discriminating against out-of-state residents *within* the host State. Response Br. 19-20. But States have no more authority outside their borders than they have inside. *See, e.g.*, *Gore*, 517 U.S. at 572-73. Observing that this challenge is unprecedented proves only that A.B. 1887 is unprecedented constitutional overreach. Limits on original jurisdiction should not become an invitation for States to conceive novel ways to infringe on their neighbors' rights.

b. The Commerce Clause prohibits state laws that facially discriminate against interstate commerce. Opening Br. 31-32. As California appears to recognize, A.B. 1887 does that by facially discriminating against out-of-state economic activity. *See* Response Br. 15 (A.B. 1887 "might very well be invalid").

That is why California spends its briefing trying to fit into an *exception* to these principles. California believes that the "market participant" exception applies whenever "a State imposes restrictions on its own spending." Response Br. 15. This Court's cases, however, make clear that the exception applies only when the State's spending is germane to its participation in a particular market. Opening Br. 32-33 (collecting cases). When, as here, a State uses its spending to affect behavior outside the market, it is a regulator subject to the Commerce Clause. *Wis. Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 289 (1986). California does not (be-

cause it cannot) suggest its spending is designed to affect the provision of travel services offered to Californians travelling on the State's dime. California is targeting a Texas child-welfare law that has zero relation to travel services.

c. A.B. 1887 is likewise unlawful under the Equal Protection Clause, even though the injuries it inflicts overlap with commercial-type injuries. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). A.B. 1887 "bears [no] rational relation to a legitimate state purpose." *Id.* at 875. That law is rooted in religious animus as well as a desire to discriminate against out-of-state actors and express moral disapproval.

California asks this Court to turn a blind eye to anti-religious statements made during A.B. 1887's passage because they may not reflect the views of the entire State Assembly. Response Br. 22-23 & n.25. But the same could have been said about the multi-member body at issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). As in that case, California cannot point to a single legislator who disapproved of those bigoted statements. *Id.* at 1729-30. Finally, California assures the Court that A.B. 1887 "is not a protectionist measure." Response Br. 23. That only confirms A.B. 1887 is calculated to harm others without benefiting Californians—hardly a legitimate purpose. Opening Br. 33.

CONCLUSION

The Court should grant the motion for leave to file a bill of complaint. Because California has not disputed any factual assertion or called for record development, the Court should order full merits briefing and set this case for oral argument. Sup. Ct. R. 17.5. A special mas-

ter is unnecessary. *See, e.g.*, *United States v. Texas*, 339 U.S. 707, 720 (1950).

Respectfully submitted.

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