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

SUPPLEMENTAL BRIEF OF THE STATE OF CALIFORNIA

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December 23, 2020

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INTRODUCTION

A.B. 1887 limits the use of California state funds to pay for travel to other States that have adopted laws authorizing or requiring "discrimination on the basis of sexual orientation, gender identity, or gender expression," or that have repealed "existing state or local protections against discrimination on" that basis. Cal. Gov't Code § 11139.8(b)(2). Texas has moved for leave to file a bill of complaint alleging three constitutional claims challenging that limitation. This supplemental brief responds to the invitation brief filed by the Acting Solicitor General expressing the views of the United States.

The United States agrees with California that sovereign governments are "responsible for determining" the most appropriate "balance between the prevention of discrimination and the protection of religious liberty." U.S. Br. 5; *see* Opp. 7, 22. And it does not appear to dispute the principle that a State's administration of its own public fisc is a core aspect of state sovereignty, or to question the general authority of States to decline to spend money in ways that would be inconsistent with their own policies and values. *See* Opp. 6-7, 10-11.

The United States nevertheless urges this Court to exercise its original jurisdiction based upon the "seriousness" of Texas's "claim[s]." U.S. Br. 4 (internal quotation marks omitted). But its brief does not even address two of the three claims advanced by Texas, and its arguments regarding the dormant Commerce Clause claim are at odds with this Court's precedents. Indeed, the United States ultimately resorts to proposing a new constitutional claim—that Texas has not advanced—as an alternative basis for granting

Texas's motion. Like Texas's proposed claims, however, that claim is meritless. And the United States does not identify any other persuasive reason for the Court to exercise original jurisdiction.

ARGUMENT

1. As the United States acknowledges, this Court "retains 'substantial discretion' over whether to allow a State to invoke" the Court's original jurisdiction. U.S. Br. 3 (quoting *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992)). That "'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi*, 506 U.S. at 76. The United States identifies no such necessity here.

a. The first factor bearing on whether an original action should proceed "'focus[es] on the "seriousness and dignity of the claim"'" advanced by the complaining State. U.S. Br. 4 (quoting *Mississippi*, 506 U.S. at 77). There is no doubt that the proposed complaint implicates serious policy issues concerning how state sovereigns balance anti-discrimination principles against the need to protect religious liberty. *See* Opp. 2-3, 6. The *legal claims* that Texas seeks to advance, however, are not sufficiently serious to justify an original action. *See id.* at 15-23. That is underscored by the fact that the United States offers a tepid defense of just one of Texas's three claims. *See* U.S. Br. 14.

Instead, the United States principally contends that original jurisdiction is warranted because A.B. 1887 burdens Texas's "fundamental sovereign interest" in "'creat[ing] and enforc[ing] a legal code.'" U.S. Br. 5. But California has not "refused to accept that Texas" is responsible for creating state law within

its sovereign boundaries, *id.*; nor has California interfered with how officials in Texas carry out that law. Rather, A.B. 1887 restricts how state agencies in California may spend funds from California's public fisc on out-of-state travel. That is presumably why neither the United States nor Texas invokes any of the constitutional doctrines that prohibit States from enacting laws with impermissible extraterritorial reach. *See* Opp. 20-21.

The United States also argues that Texas "has a quasi-sovereign interest" in acting as *parens patriae* to protect residents from harms caused by A.B. 1887. U.S. Br. 7. Even if Texas could establish *parens patriae* standing, however, that alone would not demonstrate that the Court should exercise its original jurisdiction. The Court has sometimes "exercise[d] original jurisdiction over a *parens patriae* action brought by one State against another." *Id.* at 6. But it has also recognized that the unique nature of its "original jurisdiction" may "call for a limited exercise of [that] jurisdiction"—even where a State might have *parens patriae* standing if it had sued "in federal district court." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 603 n.12 (1982). Moreover, in this case Texas has not yet established that it has Article III standing (let alone *parens patriae* standing) to secure a judgment in its favor or the ultimate relief it seeks. Opp. 9 & n.11; *see generally Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) ("Far from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant.").[1]

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[1] Texas's allegation of lost tax revenue (Compl. ¶¶ 29-30) appears to support Article III standing at the pleading stage. But it is not

Finally, the United States notes that this Court has occasionally exercised original jurisdiction to consider claims under the dormant Commerce Clause. U.S. Br. 8-9. That is true; far more often, however, the Court has denied leave to file original actions alleging such claims. *See* Opp. 11 n.13 (collecting examples); McKusick, *Discretionary Gatekeeping*, 45 Me. L. Rev. 185, 208-210 (1993) (same). Those denials show that an exercise of original jurisdiction is not appropriate where—as here—there is neither "clear[]" "economic protectionism" of the kind that is "'virtually per se'" invalid under the dormant Commerce Clause, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992), nor any indication that "thousands" or "millions" of people would suffer serious economic harm, *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923); *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

b. The United States also asserts that "[n]o alternative forum is available." U.S. Br. 10. As California has explained, however, there are alternative forums "in which the issue tendered can be resolved." *Mississippi*, 506 U.S. at 77; *see* Opp. 12-14. The United States emphasizes that no other "challenge to A.B. 1887 is pending," U.S. Br. 11, but that consideration is not enough by itself to warrant an exercise of original jurisdiction, *see, e.g.*, *Alabama v. Arizona*, 291 U.S. 286, 292 (1934). Indeed, Texas has not even

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yet "'supported adequately by . . . evidence'" to allow a final judgment in Texas's favor or the permanent injunction that Texas seeks. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). If the Court granted the pending motion, it would presumably need to appoint a special master (or employ some alternative fact-finding procedure) so that Texas could attempt to substantiate its generalized assertions of harm.

attempted to seek injunctive relief in district court against California officials, and this Court has previously required States to pursue potential district court alternatives before invoking the Court's original jurisdiction. *See, e.g.*, *Louisiana v. Mississippi*, 488 U.S. 990 (1988); *California v. Texas*, 437 U.S. 601 (1978); Opp. 14-15 n.17.[2]

As to potential private plaintiffs, the United States doubts that "a particular business could show that it will miss out on a sale or otherwise suffer injury as a result of California's refusal to fund" travel to Texas. U.S. Br. 12. The response to that concern lies in Texas's proposed complaint, which acknowledges that Texas is a "'popular meeting site[]'" for "'trade shows,'" "annual conference[s]," and conventions. Compl. ¶¶ 30, 31. When groups like the Association for Women in Mathematics host such an event for participants from California and other States, *see id.* ¶ 31, they typically collect attendance fees and reserve blocks of rooms at hotels, *see* Association for Women in Mathematics, 2019 Research Symposium, https://tinyurl.com/yy7mlzc7 (listing specific hotels that reserved rooms for symposium) (last visited Dec. 22, 2020). For such events, it should not be difficult for the conference organizer to demonstrate a loss of attendance fees or for designated hotels (or their trade association) to ascertain whether "a state-funded visitor from California would have . . . stayed" there "but for A.B. 1887." U.S. Br. 12.

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[2] Any such district court action would likely be filed in the Ninth Circuit, which has not yet addressed whether *Ex Parte Young* would "allow Texas to sue California officials." U.S. Br. 13. As the United States acknowledges, however, the Second Circuit has allowed such actions to proceed. *Id.*

The United States also questions whether the "students" and "scholars from California public universities" who are unable to "secure school funding" to attend conferences in Texas (Compl. ¶ 31) would be able to sue in light of "the doctrine of third-party standing." U.S. Br. 12. But that doctrine would not prohibit prospective California plaintiffs from bringing a dormant Commerce Clause claim—the only one of Texas's claims that the United States is willing to describe as "meritorious," *id.* at 14. This Court long ago established that plaintiffs may challenge their own State's statute under the dormant Commerce Clause without relying on third-party standing. *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286-287 (1997).

c. The prudential inquiry governing this Court's exercise of original jurisdiction is demanding for a reason. Original actions involve an "extraordinary" exercise of judicial power, through which this Court may "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* Opp. 7. Texas has failed to allege the kind of "'serious[]'" claims—or the absolute "'necessity'" for presenting them in this Court in the first instance—that would justify those consequences. *Mississippi*, 506 U.S. at 76, 77. Allowing this case to proceed notwithstanding that failure would surely encourage the filing of other putative original actions of similar (or even less) merit. *Cf. Texas v. Pennsylvania*, No. 155, Original (denied Dec. 11, 2020).

2. The United States also fails to identify any persuasive basis for holding A.B. 1887 unconstitutional.

a. Much of the merits discussion in the invitation brief focuses on a novel constitutional theory under the Full Faith and Credit Clause that "Texas's complaint does not refer to." U.S. Br. 19; *see id.* at 18-22. The United States proposes that the Court grant Texas's motion for leave to file in the hope that Texas will thereafter seek "to amend its complaint" to add this new claim. *Id.* at 19. But the United States cites no precedent supporting that unusual proposal, which appears to be in considerable tension with the Court's normal approach in this area.[3] A proper respect for regular procedure and sovereign authority would seem to compel the conclusion that Texas is the master of its own complaint; if Texas wants to pursue a Full Faith and Credit Clause claim in this Court, it should file a new motion for leave attaching a proposed bill of complaint that actually contains that claim. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

In any event, any such claim would be meritless. A.B. 1887 limits spending by the California government. It does not deny "Full Faith and Credit" to the "public Acts, Records, [or] judicial Proceedings" of Texas or any other State. U.S. Const. art. IV, § 1. It does not, that is, direct California courts to "'ignore obligations created under the laws or by the judicial proceedings'" of other States. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998). If a Texas court entered a judgment regarding H.B. 3859 (the Texas

[3] *See Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) ("[T]he solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, Rule 15(a)" "does not suit cases within this Court's original jurisdiction.")

statute that triggered limitations on state-funded travel), nothing in A.B. 1887 would forbid California courts from honoring that judgment. Or if a case somehow arose calling for a California court to apply H.B. 3859, A.B. 1887 would not block the court from doing so.

The United States asserts that A.B. 1887 "likely violates the Full Faith and Credit Clause" because it "evinces an obvious hostility to laws that California finds objectionable." U.S. Br. 18. But the Clause does not provide federal courts a license to strike down any state statute that can be characterized as reflecting "hostility" to another State's policies. The "very nature of the federal union of states" presupposes the potential for policy disagreement between States. *Pac. Emp. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). And States have fervently disagreed with one another from the founding era to the present day. *See, e.g.*, Resolutions of the House of Representatives of Pennsylvania to Kentucky, Feb. 9, 1799, *reprinted in* State Documents on Federal Relations 21 (1906) ("This House . . . protests against" an act of Kentucky "overwhelm[ing] with dismay the lovers of peace, liberty, and order."); 2019 Kan. Sess. Laws 1227 (condemning a New York statute as "violating the fundamental principles and values of the state of Kansas and of this nation").

The only decision invoked by the United States in support of its novel theory, *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), does not suggest that such interstate disagreement is constitutionally suspect. The holding in *Hyatt* was narrow: in undertaking a choice-of-law analysis, a State's courts may not apply a "special rule of law" benefiting that State's "own agencies" at the expense of the agencies

of its "sister States." *Id.* at 1282. A.B. 1887 requires nothing of the kind.

b. With respect to the dormant Commerce Clause, the United States argues that "A.B. 1887 falls outside the market-participant exception." U.S. Br. 17; *but see* Opp. 15-18. In support of that argument, it invokes its own amicus brief in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In that case, the Court considered a Massachusetts statute restricting state procurement from entities if they did business in Burma. The United States assumed that the market-participant exception applied to foreign commerce to the same extent as domestic commerce. *Crosby* Br. 26.[4] But it argued that the exception would not sustain the Massachusetts statute because it was "'regulatory' in nature." *Id.* Reasoning by analogy, the United States contended that "[i]f Massachusetts refused to do business with any 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." *Id.* at 27.

But this Court's ruling in *Crosby* did not endorse that reasoning, *see* Opp. 18, and California has already explained why A.B. 1887 differs materially from the hypothetical law described in the amicus brief, *id.* at 17 & n.20. A.B. 1887 does not impose any restrictions on the private choices of entities that do business with California; it merely refuses to fund official travel to Texas. And as the United States

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[4] As the United States noted, scrutiny of market-participant activity "'may well be more rigorous when a restraint on foreign commerce is alleged.'" *Crosby* Br. 22 (quoting *Reeves Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980)); *but compare* U.S. Br. 17 n.* (suggesting otherwise).

acknowledged in the same amicus brief it now invokes, the Constitution leaves "room for States to take action with respect to" their concerns about the policy of another sovereign. *Crosby* Br. 28. One such action—which the United States said would be permissible and not "regulatory" in nature—is for a State to "decline to send its own officials on trade missions" to the other sovereign's jurisdiction so long as the controversial policy remains in place. *Id.*

For similar reasons, the United States' reliance on the plurality opinion in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), is unpersuasive. Unlike the statute in that case, A.B. 1887 does not "govern the private, separate economic relationships of [the State's] trading partners." *Id.* at 99 (plurality); *see* Opp. 17. And *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986), is even more off point. It addressed preemption—not the dormant Commerce Clause. *See id.* at 290 (recognizing that a dormant Commerce Clause claim would present an "entirely different question"); *see also* 10 U.S. Op. Off. Legal Counsel 49, 59 (1986) ("We . . . do not believe that *Gould* sheds appreciable light on the scope of the market participation doctrine.").

To the extent that the United States suggests that A.B. 1887 is not subject to the market-participant exception because it has "potential[]" effects "outside [the] market" in which the State is acting, U.S. Br. 16, 17, that argument is contrary to this Court's precedent. In *Reeves Inc. v. Stake*, 447 U.S. 429 (1980), for example, the Court applied the market-participant exception notwithstanding potential effects outside of the market. The measure at issue limited sales from a state-owned cement factory to businesses domiciled

in South Dakota. *Id.* at 431-432. In so doing, the law encouraged out-of-state cement purchasers—which surely included businesses operating outside the cement market—to set up operations in South Dakota. *See id.* at 440 (recognizing that policies favoring local interests can induce out-of-state "'competitors'" to "'erect . . . facilit[ies] within [the] boundaries'" of the State offering the benefit). Similarly, the local-hiring policy in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 205-206 (1983), provided an incentive for individual workers to rent or buy residences within city limits. That too was a potential effect "outside [the] market." U.S. Br. 16.

c. Finally, the United States does not defend—or even mention—Texas's claims under the Privileges and Immunities Clause and the Equal Protection Clause. Those claims are plainly meritless. A.B. 1887 does not limit the rights and privileges of Texans who visit California. Opp. 19-21. Nor does it reflect animus towards religion or otherwise violate the Equal Protection Clause. *Id.* at 21-23. It simply allocates California's own sovereign resources in a manner reflecting the State's values and policy preferences.

CONCLUSION

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

Respectfully submitted,

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December 23, 2020