No. 163, Original

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF CALIFORNIA AND
FRANCHISE TAX BOARD OF CALIFORNIA,

Defendants.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

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December 31, 2025

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF

STATEMENT OF INTEREST[1]

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of the Motion for Leave to File a Bill of Complaint ("Motion") filed by Florida in No. 22O163 and urges the Court to grant the Motion. The College supports granting leave to file the Bill of Complaint to review the constitutional questions presented regarding fair apportionment and factor representation, which bear on predictability and uniformity in multistate taxation. The College does not take a position of the merits of Florida's requested remedy, nor does the College take a position on California's use of a single-sales apportionment formula, which this Court has previously upheld. The interest of the College lies solely in encouraging the Court to hear Plaintiff's case and issue a decision that ensures that the Court's established norms for assessing the fairness of a state's apportionment formula for multistate businesses are not violated, do not result in extraterritorial taxation, and are fairly related to the activities performed in the taxing state—thus preserving predictability and uniformity for taxpayers and avoiding national barriers to interstate commerce.

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1. No counsel for any party authored this brief in whole or in part, and no person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the College provided timely notice of the College's intent to file this brief to counsel of record for the parties.

The Court should exercise its original jurisdiction to resolve this controversy, where Florida directly challenges California's apportionment regime on the grounds that California's "Special Rule" severs the constitutionally required relationship between the tax base and in-state activities and imposes extraterritorial taxation.[2] This involves the constitutional balance of power between states, not merely a dispute involving private tax administration, making it uniquely appropriate for the Court's original jurisdiction for several reasons.

First, the Constitution places controversies "between two or more States" within the Court's original jurisdiction. Because only this Court may exercise coercive authority over a sister state, no forum other than this Court can address this issue.

Second, the issues presented are not fact-bound disputes over the application of the apportionment formula to a single taxpayer with its own unique facts. Florida challenges the structural features of California's taxing regime that, by design, exclude substantial occasional sales from the apportionment factor while including the corresponding gains in the tax base, thereby arguably creating a fundamental mismatch between the income taxed and the business activity performed within California. That challenge—directed at the architecture of a state's tax system—falls squarely within the Court's responsibility to articulate constitutional limits that guard against interstate economic distortion.

2. The issue of whether original jurisdiction is mandatory or discretionary is not before the Court.

Third, the dispute presents a nationally significant question on which state supreme courts are divided. Some states have held that income included in the apportionable tax base must be represented in the apportionment formula to satisfy constitutional requirements; other states have rejected this principle. This conflict has grown more pronounced as states increasingly experiment with apportionment rules. The Court's clarification is needed to prevent inconsistent state doctrines from producing the economic balkanization that the Commerce Clause disfavors.

Fourth, should the Court grant Florida's Motion for Leave to File a Bill of Complaint, the case presents precisely the type of interstate controversy that benefits from the Court's traditional use of a special master. The question of whether a state's apportionment scheme bears a rational relationship to in-state values may require development of a factual record, including analysis of how the state's exclusions affect the apportionment percentage and the tax attributed to extraterritorial activities. The Court has long appointed special masters to evaluate similar questions in original-jurisdiction matters involving interstate economic or sovereign conflicts.

In particular, the dispute implicates technical and data-intensive questions regarding how California's tax base, apportionment factor, and "Special Rule" operate in practice. Assessing whether the exclusion of substantial occasional sales from the sales factor severs the constitutionally required relationship between a state's apportionment formula and the income being taxed may require economic modeling of apportionment effects and expert testimony regarding how value is generated across jurisdictions. A special master can ensure that each party to the case receives an evenhanded opportunity to present evidence, challenge economic assumptions, and articulate how the apportionment method affects interstate commerce. This structured process will facilitate a balanced presentation of the complex state tax principles at issue. This Court has long recognized that such factual clarity is indispensable in interstate taxation disputes brought under its original jurisdiction.

Finally, the use of a special master will promote efficiency, consistency, and judicial economy. The constitutional questions presented have national implications and arise against a backdrop of divergent state approaches. A special master's report can identify and contextualize those divergences, and a structured approach ensures that the Court's eventual decision rests on a well-developed factual foundation and provides the clarity needed.

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of tax law;

- To stimulate development of skills and knowledge through participation in continuing legal education programs;

- To provide additional opportunities for input by tax professionals in development of tax laws and policy; and

- To facilitate scholarly examination of tax policy issues.

The College is composed of approximately 700 Fellows who are recognized for their contributions to the field of tax law. It is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College. This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

SUMMARY OF ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

1. This Court's precedents are clear that, "a state may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164 (1983). While states have great flexibility in fashioning formulas for apportioning the income or property of a multistate enterprise, any such "formula must bear a rational relationship, both on its face and in its application, to . . . values connected with the taxing State." *Norfolk & W. Ry. Co.* v. *Missouri St. Tax Comm'n*, 390 U.S. 317, 325 (1968). Notwithstanding the flexibility inherent in a rational relationship standard, any such formula must result in fair apportionment.

Fairness, in part, requires that the "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp. of Am.* at 169 (1983).

Florida challenges California's business income apportionment method, specifically its use of a single-sales factor apportionment formula combined with its "Special Rule" that excludes the gross receipts[3] of certain substantial, occasional sales from the sales factor while nonetheless treating the corresponding net gain as apportionable taxable income for California purposes.[4] Florida alleges that this scheme is inherently arbitrary and violates the Commerce, the Import-Export, and the Due Process Clauses of the U.S. Constitution because the effect of the scheme is to sever the relationship between the apportionable tax base (which includes net gains from substantial occasional sales) and the formula for apportioning the tax base (which does not). As noted by this Court in *Container Corp.*, 463 U.S. at 182, "[s]ome methods of formula apportionment

3. "Gross receipts" is defined as gross amounts realized. Cal. Code Regs. tit. 18, § 25134(a)(1)(A).

4. Cal. Code Regs. tit. 18, § 25137(c)(1)(A) provides that, if "substantial" gross receipts arise from an occasional sale of property held or used in the regular course of a taxpayer's business (such as a factory, patent, or affiliate's stock), the gross receipts are excluded from the sales factor. The apportionable tax base includes net gain (amount realized minus adjusted basis) from asset dispositions treated as business income. Cal. Code Regs. tit. 18, § 25120.

are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated."

2. The Bill of Complaint provides an opportunity for this Court to address the states' increasing efforts to design formulas and "special rules" that may attribute a disproportionate share of multistate gain to those states under the auspices of *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978). The highest courts of multiple states are divided on whether this Court's requirement of a rational relationship between the income which the State seeks to tax and the activity occurring within the state requires that net gain included in the apportionable tax base be represented in the apportionment factor. Florida's challenge raises issues as to how California's use of its "Special Rule" in the context of single-sales factor apportionment interacts with established principles governing apportionment of business income.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

I. Constitutional Standards Govern State Apportionment Methods.

A. The Due Process and Commerce Clauses Require Fair Apportionment and a Reasonable Relationship.

"The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008). Specifically, "[t]he Due Process Clause[5] "demands that there exist some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing State." *Id.* at 24 (cleaned up). The Due Process Clause mandates that a state's income tax must be based on a "rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.* v. *Comm'r of Taxes of Vt.*, 445 U.S. 425, 436 (1980).[6] This requirement is intended to prevent a state from "project[ing] the taxing power of the state plainly beyond its borders." *Norfolk & W. Ry. Co.* v. *Miss. State Tax Comm'n*, 390 U.S. 317, 325 (1968) (quoting *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning*, 310 U.S. 362, 365 (1940) (quotation marks omitted)). It also serves to protect the specific taxpayer from an "unreasonable" or "arbitrary result in its case." *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978).

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5. U.S. Const. amend. XIV, § 1.

6. In *Mobil Oil*, the majority expressly declined to decide whether Vermont's apportionment formula fairly attributed dividend income to the State and declined to decide the constituent elements of a fair apportionment formula for such income. 445 U.S. at 434–35. Justice Stevens's dissent squarely raised the factor-representation problem, arguing that "unless the sales, payroll, and property values connected with the production of income by the payor corporation are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause [the taxing state's] income to be overstated." *Id.* at 460 (Stevens, J., dissenting). This fundamental issue has remained unresolved.

The Commerce Clause,[7] also "forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco*, 553 U.S. at 24 (emphasis added, citations omitted). For a state or local tax imposed on interstate activities to withstand constitutional scrutiny under the Commerce Clause, the seminal decision of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), requires that: (1) the taxpayer have a substantial nexus to the taxing jurisdiction; (2) the tax not discriminate against interstate commerce; (3) the tax be fairly apportioned; and (4) the tax imposed bear a reasonable relationship to the benefits derived. This *amicus* brief focuses on the fair apportionment and the reasonable relationship prongs of the *Complete Auto* test.

The fair apportionment prong requires that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Cent. Greyhound Lines, Inc. of N.Y.* v. *Mealey*, 334 U.S. 653, 663 (1948) (New York "gross receipts tax" must be "fairly apportioned" to business done in New York); *Tenn. Gas Pipeline Co.* v. *Urbach*, 750 N.E.2d 52, 58 (N.Y. 2001) ("The central purpose of fair apportionment is to ensure that each State taxes only its fair share of an interstate transaction and to minimize the likelihood that an interstate transaction will be improperly burdened by multiple taxation.") (internal citation and quotation marks omitted).

To satisfy the constitutional test of fair apportionment, a state income tax must be both internally and externally

7. U.S. Const. art. I, § 8, cl. 3.

consistent. Particularly relevant here, the "external consistency" test looks to "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). External consistency means that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container Corp.*, 463 U.S. at 169. The "internal consistency" test is met if identical taxes imposed by every State would not unduly burden interstate commerce. *Jefferson Lines*, 514 U.S. at 175. The College acknowledges that if every state were to impose an identical "Special Rule," the internal consistency test would be met; however, the same cannot be said as to the external consistency test.

The reasonable relationship prong requires that the tax imposed by the state demonstrates a sense of how the income was generated. In *MeadWestvaco*, this Court summarized this limitation by stating that the prong requires "a rational relationship between the tax and the values connected with the taxing State" and prohibits "unfairly apportioned taxation." 553 U.S. at 24.

Florida alleges that California's tax scheme severs this "rational relationship" between the tax base and the taxpayer's in-state activities, when the "Special Rule" excludes from the definition of a "sale" those "occasional" sales by a taxpayer that the Franchise Tax Board has, by regulation, determined to be "substantial," without regard to whether the excluded receipts represent activities generating value within or outside of California.

Nonetheless, these same receipts are classified as regular business income included in the tax base and subject to California apportionment.[8] This Court's decision in *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000), provides analogous precedent for determining that California's apportionment scheme violates the reasonable relationship prong of *Complete Auto*. There, California limited a taxpayer's deduction for unitary business interest expense by the amount of its nonunitary income—income California could not constitutionally tax. *Id.* at 463. This Court unanimously held the limitation unconstitutional, finding it was "not a reasonable allocation of expense deductions to the income that the expense generates" but rather "impermissible taxation of income outside the State's jurisdictional reach" in violation of the Due Process and Commerce Clauses. *Id.* at 468. Because the statute "measure[s] the [limitation] by precisely the amount of nonunitary income," it effectively imposed a tax on income outside the state's constitutional reach. *Id.* at 459.

Florida alleges that California's "Special Rule" operates similarly to the regime in *Hunt-Wesson*: by

8. "Sales" mean "all gross receipts"—the gross amounts realized, not reduced by basis. Cal. Code Regs., tit. 18 Code § 25120; Cal. Code Regs., tit. 18 § 25134. A sale is "substantial" if its exclusion results in a 5% or greater decrease in the sales factor denominator. Cal. Code Regs., tit. 18 § 25137(c)(1)(A)1. A sale is "occasional" if "the transaction is outside of the taxpayer's normal course of business and occurs infrequently." Cal. Code Regs., tit. 18 § 25137(c)(1)(A)2. Critically, these same sales are simultaneously deemed to be "in the regular course of the taxpayer's trade or business" and the net gain from these sales are included in the apportionable tax base. Cal. Code Regs., tit. 18 § 25120(a).

excluding substantial occasional sales from the sales factor while including the net income from those sales in the apportionable tax base, California inflates the apportionment percentage. The effect is to tax a greater share of income. This, argues Florida, suggests that California impermissibly taxes extraterritorial values.

B. The Commerce and Due Process Clauses Require States to Restrain from Imposing Barriers to Interstate Commerce and Respect Limitations on State Sovereignty.

While respecting state tax sovereignty, the Commerce and Due Process Clauses prohibit a state from imposing an income tax that "tax[es] value earned outside of its borders." *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). Fundamentally, there must be "a 'minimal connection between the interstate activities and the taxing State,' . . . and there must be a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business." *Allied-Signal, Inc.* v. *Dir., Div. of Tax'n*, 504 U.S. 768, 772 (1992) (citations omitted).

When California's "Special Rule" is applied in the context of the State's single-sales factor apportionment formula, the gross receipts from substantial occasional sales of operational assets, whether real, tangible or intangible property, held or used in the regular course of the taxpayer's trade or business are excluded from the sales factor while the net gain from those same dispositions is included in apportionable business income. The result further strains the relationship between California's "apportioned share" of a taxpayer's income and the activities that gave rise to the income being taxed, *see Jefferson Lines*, 514 U.S. at 185, and threatens the economic balkanization among states that the Commerce Clause was designed to prevent. *See Comptroller of the Treasury of Md.* v. *Wynne*, 575 U.S. 542, 565 (2015).

While recognizing that inclusion of such "substantial" gains in the sales factor may not produce a *precise* value attributable to California, the *absence of any representation* of such gains in the apportionment factor through application of the Special Rule arguably does not comport with this Court's established notions of fairness and results in an improperly apportioned tax on interstate commerce. *See J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 310–11 (1938) (tax on income without proper consideration of the location of the property sold was unconstitutional); *Miller Bros. Co.* v. *State of Md.*, 347 U.S. 340, 342 (1954) (where no jurisdiction to tax certain property exists, the imposition of a tax on such property would be ultra vires and void). In *Goldberg* v. *Sweet*, 488 U.S. 252 (1989), this Court emphasized that "the central purpose behind the apportionment requirement is to ensure that each "State taxes only its fair share of an interstate transaction," and must provide a means by which to ensure that the taxing power of a State does not extend beyond its borders. *Id.* at 261.

Indeed, this Court has long made clear that states cannot regulate or control actions that occur wholly outside the state. *E.g.*, *Nat'l Pork Producers Council* v. *Ross*, 598 U.S. 356 (2023). Competition among the states will come at the cost of state sovereignty and the consistent and predictable administration of interstate commerce. *See Wynne*, 575 U.S. at 563. States are precluded from applying "a state statute to commerce that takes place wholly outside of the State's borders." *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). When reviewing a state statute affecting interstate commerce, the burden imposed cannot be excessive in relation to the benefits received from the state. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Such considerations apply to state taxes on interstate commerce as well.

C. *Moorman* Does Not Shield Review of California's Special Rule.

California will likely invoke this Court's decision in *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978) for the proposition that states have broad flexibility in choosing apportionment formulas. But *Moorman* does not govern here. That case involved Iowa's choice to use a single-factor sales formula rather than the three-factor formula (of property, payroll, and sales previously sanctioned by this Court that Illinois used). *Id*. at 269–70. The constitutional challenge was to Iowa's selection of a single-factor sales formula—a choice between competing apportionment methodologies. *Id.* at 272–73.

The instant case presents a fundamentally different question. California has chosen a single-sales factor formula but then excludes specific sales from the single-sales factor while including the net gain from those sales in the apportionable tax base to which the factor is applied. This *is not* a choice between competing apportionment methodologies as in *Moorman*; it is a mathematical alteration that potentially severs the rational relationship between formula and income that this Court's precedent requires. As this Court emphasized in *Norfolk*, "[a]ny formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State. *Norfolk*, 390 U.S. at 325.

Guidance is needed on whether California's "Special Rule" violates this core requirement by excluding substantial sales from the single-sales apportionment formula while including the net gain from those sales within the apportionable tax base. *Moorman*'s flexibility extends to choosing among formulas, not to undermining the internal coherence of the chosen formula through selective exclusions that potentially inflate the State's apportionment percentage. *Moorman* addressed formula choice, not formula application.

II. Other States Have Similar Regimes, and This Court's Clarification of Limits on States' Power to Tax Is Needed.

A. Divergence Among State Courts Demonstrates the Need for Guidance.

The state courts that have considered the impact of including substantial gain earned elsewhere in the apportionable tax base, without inclusion of the same in the apportionment factor, are in conflict. In *Tambrands, Inc.* v. *State Tax Assessor*, 595 A.2d 1039 (Me. 1991), Maine sought to include in the apportionable tax base certain dividends received by the taxpayer from foreign subsidiaries without including any part of the subsidiaries' activity in that state's apportionment formula. The Maine Supreme Judicial Court struck down the tax and held that excluding the business activity of the foreign affiliates in the apportionment formula created an impermissible distortion. ("[T]he income taxable by Maine under the Assessor's formula does not truly reflect Tambrands' connection with Maine and fails to meet the test of fairness required by the due process clause." *Id.* at 1044 (citations omitted)).

The highest court in Rhode Island reached the same conclusion. In *Homart Dev. Co.* v. *Norberg*, 529 A.2d 115 (R.I. 1987), the taxpayer received income from several partnerships in addition to earning income from its operations throughout the United States. Like Maine, Rhode Island included the partnership income in the company's apportionable tax base but excluded the partnership income factors when calculating the apportionment ratio. The Rhode Island Supreme Court held that this created "a manifestly inherent distortion of the amount of business activity conducted in this state," considering that the partnerships did no business in Rhode Island. *Id.* at 120.

Wisconsin is similar. Consider *American Tel. & Tel. Co.* v. *Dep't of Revenue*, 422 N.W.2d 629 (Wis. Ct. App.), *review denied*, 428 N.W.2d 554 (Wis. 1988). Observing that the taxpayer's apportionable income included $500 million from Wisconsin operations and $3 billion of intangible income from subsidiaries—most of which did no business in the state—the Wisconsin Court of Appeals held that the state's exclusion of the intangible-income factors from the apportionment formula "does not reflect a reasonable sense of how AT&T's income is generated and taxes values earned outside the borders of Wisconsin, contrary to . . . the due process and commerce clauses of the United States Constitution." *Id.* at 551.

Meanwhile, the state courts of last resort in Maryland and Tennessee require factor representation but only in the context of subsidiary dividend income. *See NCR Corp.* v. *Comptroller of Treasury*, 544 A.2d 764 (Md. 1988) (now the Maryland Supreme Court) and *H.J. Heinz Co., L.P.* v. *Chumley*, No. M2010-00202-COA-R3CV, 2011 WL 2569755 (Tenn. Ct. App. June 28, 2011).

In contrast, courts in Minnesota and New Mexico question whether the Constitution requires that income in the tax base is constitutionally required to be included in the formula used to apportion that income. *See NCR Corp.* v. *Comm'r of Revenue*, 438 N.W.2d 86 (Minn. 1989), and *NCR Corp.* v. *Tax'n and Revenue Dep't*, 856 P.2d 982 (N.M. App. 1993). The Massachusetts Supreme Judicial Court has correctly noted that Justice's Stevens's dissent in *Mobil Oil* "has never been adopted by the Supreme Court." *Gillette Co.* v. *Comm'r of Revenue*, 425 Mass. 670, 682 n. 8 (1997).

The above underscores the doctrinal split that exists among the states, to which a decision by this Court would bring needed clarity.

B. The Special Rule Arguably Magnifies This Conflict.

Cases such as *Vectren Infrastructure Services Corp.* v. *Dep't of Treasury* present the high-water mark of state-court divergence on factor representation—and illustrates why guidance is urgently needed. *Vectren Infrastructure Servs. Corp.* v. *Dep't of Treasury*, 512 Mich. 594 (2023), *cert. denied sub nom. MMN Infrastructure Servs., LLC* v. *Michigan Dep't of Treasury*, 144 S. Ct. 427 (2023).

In *Vectren*, the taxpayer sold substantially all its business assets in a transaction treated as an asset sale under 26 U.S.C. § 338(h)(10). Michigan included the gain in its apportionable tax base but excluded the gross proceeds from the sales apportionment factor.[9] Under this rule, the taxpayer's Michigan apportionment factor thereby increased from approximately 15% to approximately 70%, and its tax liability increased from roughly $400,000 to $2.3 million.

The Michigan Court of Appeals—twice—unanimously concluded that applying the statutory formula to these facts would violate the Commerce Clause. The Michigan Supreme Court reversed in a divided 4-3 decision. The divergent outcomes reflect a broader national uncertainty in the application of constitutional limits upon apportionment principles. While internal and external consistency are the constitutionally mandated benchmarks for fair apportionment, courts apply those concepts inconsistently when a state taxes income while excluding the underlying transaction's receipts from the apportionment factor.

The absence of a ruling from this Court on factor representation furthers this uncertainty. Florida's examples in its Bill of Complaint, pp.12–13 (mathematically demonstrating the overreach that may occur under the "Special Rule"), present an appropriate case for this Court to address the issue. Guidance would mitigate subsequent taxpayers seeking leave from this Court to challenge

9. Mich. Comp. Laws § 208.1303.

California's and similar state rules based on divergent factual circumstances.[10]

By excluding business gains from the apportionment formula, California arguably fails to consider the business activities giving rise to the income as well as the activities conducted outside of the State.[11] The case presents this Court with the opportunity to address if a state can include substantial gain in its apportionable tax base while simultaneously denying factor representation to the activity generating that gain.

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10. Florida correctly notes that California permits the presumption of validity to be challenged under well-established constitutional principles. Typically, a taxpayer must show by "clear and cogent evidence" that the formula produced an arbitrary result. The imposition of the "Special Rule" places a presumption burden on the taxpayer while arguably allowing the State to ignore the constitutional limits established by this Court.

11. Leading academic commentators have recognized that the asymmetry between the apportionable tax base and the apportionment formula is constitutionally suspect. E.g., Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶ 9.15[2] (3d ed. 1998); Professor Richard Pomp, Report of the Hearing Officer, Multistate Tax Compact Article IV [UDITPA] Proposed Amendments, p. 104 (Oct. 25, 2013) ("[I]t would be sheer serendipity if apportioning the gain in the year of sale without including the gross receipts [in the factor] would reach the correct answer"). And that makes sense. Whether it be subsidiary earnings, dividends, intangible income, or proceeds from an asset sale, if a state includes that income in a company's apportionable taxable base, then the state's apportionment formula should also generally account for that value so that out-of-state income can be appropriately apportioned.

This Court has long recognized the Constitution's limitations on a state's power to tax. The Bill of Complaint provides this Court with the opportunity to clarify the fundamental constraints on the states' taxing power to ensure that barriers to interstate commerce do not impede the growth of America's commerce and the prosperity of its citizens. The Court needs to clarify the constitutional limits of the allowed flexibility in apportionment standards when a state excludes receipts from its apportionment formula yet includes the related net gain in the apportionable tax base.

CONCLUSION

For these reasons, the College respectfully requests that the Court grant Florida's Motion for Leave to File a Bill of Complaint and exercise its original jurisdiction to resolve this important interstate dispute.

Respectfully submitted,

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December 31, 2025