No. 22O163

IN THE
Supreme Court of the United States

FLORIDA,

Plaintiff,

v.

CALIFORNIA AND
FRANCISE TAX BOARD OF CALIFORNIA,

Defendants.

On Motion for Leave to File Bill of Complaint

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and amicus curiae briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Because *Amicus* has testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers and tax administration, *Amicus* has an institutional interest in this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* provided timely notice to counsel of record of the intent to file this brief.

SUMMARY OF ARGUMENT

California, New Jersey, and New York are targeting increased taxes on activity occurring outside of their borders. They have done this by warping the traditional formula that assigns interstate income to certain states for tax purposes and by sweeping out-of-state activity into the state with creative narrowing of a federal law restricting state taxes.

These unilateral revisions of the traditional apportionment formula and disregarding of nexus rules are designed to grab more than a fair share of taxes on interstate commerce, shift the tax burden to non-residents who cannot resort to the in-state political process to bring about repeal, and invade the sovereignty of sister states by reaching for income properly assigned to those other states.

Observers are closely watching litigation proceeding against these three states' moves, alleging violations of the Interstate Income Act of 1959, the Due Process Clause, the Commerce Clause, the Import-Export Clause, and the sovereignty of sister states. If courts let the actions by California, New Jersey, and New York stand, some states will follow their lead while other states will feel compelled to retaliate. For a state like Florida, however, which neither wants to mimic California policies nor impose punitive taxes on other states' businesses and individuals even as a retaliatory tool, it will be uniquely trapped into paying California's bills without any real remedy. This Court should take the opportunity to grant the motion for leave and halt this interstate tax war before it starts.

ARGUMENT

I. THIS CASE INVOLVES JUST THE FIRST OF SEVERAL INCREASINGLY BOLD STATE ACTIONS DESIGNED TO INVADE THE SOVEREIGNTY OF FELLOW STATES AND TAX MORE THAN THEIR FAIR SHARE OF INTERSTATE COMMERCE.

A. California, New Jersey, and New York Actions Distort Apportionment and Nexus Rules to the Detriment of Other States and Taxpayers Generally.

In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), this Court held that while states "have wide latitude in the selection of apportionment formulas," *id.* at 274, for allocating interstate business income for tax purposes among the various states, and that such selections are "presumptively valid," *id.* at 273, such formulas may violate the Due Process Clause if the state is claiming income "out of all reasonable proportion to the business transacted in that state or has led to a grossly distorted result," *id.* at 274 (internal citations omitted).[2]

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[2] Three justices dissented, believing the Court's evaluation of Iowa's policy was too deferential. *See id.* at 281 (Brennan, J., dissenting) ("I do not agree, however, that Iowa's single-factor sales apportionment formula meets the Commerce Clause requirement that a State's taxation of interstate business must be fairly apportioned to the commerce carried on within the taxing state."); *id.* at 282-83 (Blackmun, J., dissenting) (predicting that the Iowa policy's "adverse and parochial impact on commerce" will cause "other States, perceiving or imagining a similar advantage to local interests" to do "what the Commerce Clause, absent governing congressional action, was devised to

This is such a case: California has sharply departed from a neutral and presumptively valid tax apportionment formula, to one that agglomerates income properly assigned to other states to instead be "in" California. Under California's Special Rule challenged here, when tax authorities identify what they consider to be "substantial" and "occasional" large sales, they can carve them out of the formula. *See* Cal. Code Regs., tit. 18, § 25137(c)(1)(A).[3] When this occurs, California will disregard such sales of property, stock, intellectual property, or otherwise. If the sales occurred in other states, the unsurprising result of this policy is to artificially increase California's share of the overall taxable income pie. Worse, California does not disregard the *income* related to those sales from the tax base. Combining the formula's artificially higher California share with the retention in the tax base of sales happening in other states, the distorted formula increases California's share of taxable income at the expense of other states.

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avoid."); *id.* at 283 (Powell, J., dissenting) ("Iowa's [policy]—though facially neutral—operates as a tariff on goods manufactured in other States (including the District of Columbia), and as a subsidy to Iowa manufacturers selling their goods outside of Iowa.").

[3] California's provision, which dates to before 2001, is separate from a much more common "equitable apportionment" provision from the uniform law (also in California regulations) that allows either the state or the taxpayer to seek adjusted apportionment formula for a particular taxpayer to "fairly represent the extent of the taxpayer's business in the state." *See* Uniform Law Commission, Uniform Division of Income for Tax Purposes Act (UDITPA) § 18 (1957), *codified by* Cal. Code Regs., tit. 18, § 25137(a) (Cal. A.B. 11, Stats. 1966).

California's policy sets it apart from most other states. Aside from California, 37 states and the District of Columbia use single sales factor apportionment, dividing the total sales in a year by the taxpayer in the state by the total sales in a year by the taxpayer everywhere, to produce a fraction that is multiplied by the state's tax rate to calculate tax liability.[4] This is the policy Iowa had adopted that was upheld in *Moorman*. 8 states retain the pre-*Moorman* Uniform Division of Income for Tax Purposes Act (UDITPA) three-factor formula, averaging the sales ratio with a payroll ratio and a property ratio, with 2 of those states double-weighting the sales factor.[5] NTUF was able to identify 2 states with a regulation like California's, one in a state half the tax rate of California and the other in a state with the three-factor formula. *See* Ark. Admin. Code 006.05.308-26-51-715 (Exceptions); Haw. Admin. Rules § 18-23-38-03(a). California's state economy is also more than 21 times larger than Arkansas's and 34 times larger than Hawaii's, making California's regulation uniquely destructive. *See* Bureau of Economic Analysis, "State

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[4] Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and District of Columbia. *See* Tax Foundation TaxEDU, "Apportionment," https://tinyurl.com/43ukwupf.

[5] Alaska, Florida (double-weighted sales), Hawaii, Kansas, New Mexico, North Dakota, Oklahoma, Virginia (double-weighted sales). *See id.* Five states are not listed in any category because they do not have a state corporate income tax: Nevada, Ohio, South Dakota, Washington, and Wyoming.

annual gross domestic product summary," 2024, https://tinyurl.com/mrxm6764.

A different and recent California action with similar purpose also faces legal challenge and should reach this Court eventually. California tax officials have demanded that taxpayers disregard out-of-state deductions when computing their apportionment factors (thereby artificially boosting California's share of the tax pie), a demand that the California Office of Tax Appeals found to be improper. *See Appeal of Southern Minnesota Beet Sugar Cooperative and Subsidiary*, No. 2023-OTA-342P (Cal. Off. Of Tax App. Mar. 17, 2023); *Appeal of Microsoft Corp. & Subsidiaries*, No. 2024-OTA-130 (Cal. Off. Of Tax App. Jul. 27, 2023). A 2024 statute "declares" that the tax officials' position was correct and that taxpayers shall exclude such deductions from the apportionment formula in "taxable years beginning before, on, or after the effective date of the act adding this section." Cal. Rev. & Tax Code § 25128.9. National Taxpayers Union, NTUF's sister organization, is challenging this enactment on Due Process vagueness, Due Process retroactivity, and California constitutional grounds. *See National Taxpayers Union v. California Franchise Tax Board*, No. 24-CV-016118 (Cal. Sacramento Cty.) (filed Aug. 14, 2024).

California, New Jersey, and New York have proceeded with other actions with similar goals, but by redefining the scope of what it means to do business within the state. *See* Cal. Franchise Tax Board, TAM 2022-01 (Feb. 2022); N.J. Division of Taxation, TB-108 (Sep. 2023); 20 N.Y.C.R.R. 1.2-10 (Dec. 2023). The Interstate Income Act of 1959 prohibits states from assessing income tax obligations on out-of-state

businesses whose only activity within the state is solicitation of orders. *See* P.L. 86-272, *codified at* 15 U.S.C. § 381-384. However, some state tax administrators have prepared "a blueprint for the majority of online businesses to lose the protections of P.L. 86-272." Andrew Wilford, "States Preparing Workaround of P.L. 86-272, A Key Taxpayer Protection for Interstate Businesses," NTUF, May 25, 2022, https://tinyurl.com/yb89ujc9. Instead of protecting businesses from excessive state tax burdens, "state tax administrators have reinterpreted the phrase 'solicitation of orders' to be so narrow and limited as to make the underlying law almost meaningless." *Id.* This creative narrowing of the federal law restricting state taxes also faces legal challenge and future appeals. *See, e.g.*, *American Catalog Mailers Ass'n v. California Franchise Tax Board*, No. CGC-22-601363 (Cal. Sup. Ct. Dec. 13, 2023) (invalidating regulation on procedural grounds); *American Catalog Mailers Ass'n v. Dep't of Taxation & Finance*, Slip. Op. 31588 (N.Y. Sup. Ct. Albany Cty. Apr. 25, 2025) (invalidating the New York regulation on retroactivity grounds); Andrew Wilford, "California Faces Lawsuits Over Tax Apportionment Rules," TAX NOTES STATE, Dec. 22, 2025, https://tinyurl.com/ysjnsh84 ("The potential internal consistency issue with what California is doing is that two states using the same single-sales factor apportionment system could impose double taxation with these rules in place.").

National Taxpayers Union Foundation has catalogued these state actions, which raise Due Process Clause, Commerce Clause, Import-Export Clause, and federalism concerns, concerns that

Florida should be permitted to have California answer for in a neutral judicial forum. *See, e.g.*, *National Pork Producers Council v. Ross*, 598 U.S. 356, 375 (2023) ("Doubtless, too, courts must sometimes referee disputes about where one State's authority ends and another's begins—both inside and outside the commercial context."); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777-78 (1992) ("In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 (1977) (holding that a valid state tax on interstate commerce is one that "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954) ("It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) ("That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."); *McCullough v. Maryland*, 4 Wheat. (17 U.S.) 316, 429 (1819) ("All subjects over which the sovereign

power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.").

B. Florida Faces Needless Economic Damage If California Prevails in Its Power Grab and Other States Follow Its Lead.

Florida is uniquely impacted by the action challenged here. "Florida is much better governed, safer, better budget, lower taxes, … people have fled California and come to the state of Florida." Florida Governor Ron DeSantis, "DeSantis and Newsom Debate Transcript," Fox News, Nov. 30, 2023, https://tinyurl.com/3sr4xffu. Numerous studies have found that the two states have taken different, almost directly opposite, approaches to economic, tax, and regulatory policies. *See, e.g.*, Andrew Wilford, "Florida Continues to Attract New Residents; New York, California, and Illinois Lose the Most Population, NTUF, May 29, 2025, https://tinyurl.com/35v9kjxm; Andrew Rice, "California loses one taxpayer per minute, Florida gains," The Center Square, Nov. 22, 2025, https://tinyurl.com/33zajtkv; Tax Foundation, "2026 State Tax Competitiveness Index," Oct. 30, 2025, https://tinyurl.com/3thkmvtv (ranking Florida #5 and California #48); U.S. News & World Report, "Best States," May 6, 2025, https://tinyurl.com/3ab9yuws (ranking Florida #6 and California #37); CNBC, "Top States for Business 2025," Jul. 10, 2025, https://tinyurl.com/2ut3kc76 (ranking Florida #3 and California #22). While Florida has no income tax and encourages business investment, "California's tax agency is known for its

aggressive pursuit of revenue….” Ryan Mac, Theodore Schleifer, & Heather Knight, “A Wealth Tax Floated In California Has Billionaires Thinking of Leaving,” THE NEW YORK TIMES, Dec. 26, 2025, https://tinyurl.com/4e675cwn.

California, unwilling to revisit its policies that cause this economic underperformance, instead seek to manipulate tax formulas to tax more than their fair share of interstate commerce, subjecting California tax on activities happening in other states. Florida could hardly be expected to retaliate against California’s action by doing the same, since it would undermine Florida’s reputation for being low-tax and pro-business. Florida finds itself in a no-win situation due to California’s provocative acts, where the only lawful way to change California’s law is to seek relief here in this Court. *Cf. Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983) (“The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.”).

While Florida has a cognizable direct “interest in protecting its citizens from substantial economic injury presented by imposition” of the tax, *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981), a decisive factor for exercise of this Court’s jurisdiction is the lack of “availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

This case is not the equivalent of Florida standing in the shoes of its residents facing a California tax bill;

it is Florida resisting California's aggressive invasion of the sovereignty of sister states. The appropriate remedy is not just a refund of amounts assessed but limiting the scope of what California is now claiming as *its* sovereign tax powers. Some officials in other states will conclude that the Court declining to hear this case will be the equivalent of blessing a system and letting California face no risk of sanction for its conduct for many years, if ever. Florida can voice opposition to this power grab and violation of its state sovereignty in a way that its residents seeking refund suits cannot. It is "a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected," thus warranting this Court's exercise of original jurisdiction. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

Letting California's action stand will encourage other states to follow its lead. The result would be a tax version of a trade war between the states—precisely what the U.S. Constitution was set up to avoid. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 224 (1824) (opinion of Johnson, J.) ("[States,] guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures . . ., destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause that led to the forming of a convention."); THE FEDERALIST NO. 42 (James Madison, 1787) ("To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is

unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain."); 1 Story Const. § 497 ("[T]here is wisdom and policy in restraining the states themselves from the exercise of [taxation] injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments, and create dissensions, to the ruin of the harmony and amity of the states."); Statement of Gouverneur Morris, SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 360 ("These local concerns ought not to impede the general interest. There is great weight in the argument, that the exporting States will tax the produce of their uncommercial neighbors."); Daniel Shaviro, "An Economic and Political Look at Federalism in Taxation," 90 MICH. L. REV. 895, 957 (1992) ("Perceived tax exportation is a valuable political tool for state legislators, permitting them to claim that they provide government services for free.").

The policy by California is a power grab that harms taxpayers and intrudes on the sovereign powers of Florida. California will not give a fair or timely hearing for these claims, which are pure questions of law justiciable by this Court. This Court should allow Florida the opportunity to make its case.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the motion for leave to file the bill of complaint be granted.

Respectfully submitted,

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