No. 153, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
LAURA E. MYRON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

No. 153, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF CALIFORNIA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the motion to file a bill of complaint should be granted.

STATEMENT

In 2016, the California State Legislature enacted Assembly Bill 1887, 2016 Cal. Legis. Serv. ch. 687 (A.B. 1887) (West), which bars state-funded and state-sponsored travel to States that have enacted certain types of laws. See Cal. Gov't Code § 11139.8. A.B. 1887 declares that, although "[r]eligious freedom is a cornerstone of law and public policy in the United States," "[t]he exercise of religious freedom should not be a justification for discrimination." *Id.* § 11139.8(a)(3) and (4). It further declares that California, as "a leader in protecting civil rights and preventing discrimination," "must take action to avoid supporting or financing discrimination against lesbian, gay, bisexual, and transgender people." *Id.* § 11139.8(a)(1) and (5).

Having so declared, A.B. 1887 forbids, subject only to limited exceptions, state-funded or state-sponsored travel to any State that has enacted a law that (1) repeals "existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression," (2) "authorizes or requires discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression," or (3) "creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression." Cal. Gov't Code § 11139.8(b). A.B. 1887 requires the California Attorney General to maintain a list of States to which state-funded and state-sponsored travel is forbidden. *Id.* § 11139.8(e)(1).

A committee report explained that A.B. 1887 aims to deny business to "hotels, restaurants, taxicab companies, and airlines" in States with offending laws. Mot. App. A38. Although those companies may themselves be innocent of any discrimination, A.B. 1887 seeks to deny them business in order to deprive States of "tax revenues associated with" those activities, and ultimately to induce the States to change their laws. Mot. App. A38.

California has now applied its travel ban to a total of 11 States, including Texas. Compl. ¶ 21. The California Attorney General added Texas to the list of covered States in 2017, after the Texas Legislature enacted a law under which groups that provide adoption services, foster services, and other social services to or on behalf of children may decline to provide services that conflict with their sincerely held religious views. Compl. ¶ 23; see Tex. Hum. Res. Code Ann. § 45.001 *et seq.* (West 2019).

DISCUSSION

The Constitution grants this Court original jurisdiction over cases "in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that the Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80. This Court has held, though, that it retains "substantial discretion" over whether to allow a State to invoke that jurisdiction. *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citation omitted).

In exercising that discretion, this Court has traditionally considered two factors: the seriousness of the complaining State's interest and the availability of an alternative forum for resolving the issue it raises. *Mississippi*, 506 U.S. at 76. Both elements weigh in favor of granting Texas leave to file a bill of complaint here, for essentially the same reason: California has singled out Texas and other States for discriminatory treatment because of California's disagreement with those States' internal policies. Resolving such conflicts among sovereigns falls within the core of this Court's original and exclusive jurisdiction, and suits brought by private businesses would not adequately present the full range of relevant sovereign interests and claims.

On the merits, A.B. 1887 transgresses constitutional principles that are designed to bind the States together in a single Union. It discriminates against commerce in other States, in violation of the dormant Commerce Clause; it rests on a policy of hostility to the laws of other States, in likely violation of the Full Faith and Credit Clause; and it infringes Texas's sovereignty, dis-

regards Texas's stature as an equal member of the Union, and undermines interstate comity, all in violation of the structure of the Constitution. The Court should grant leave to file the bill of complaint.

A. This Controversy Warrants An Exercise Of The Court's Original Jurisdiction

"Determining whether a case is 'appropriate' for [this Court's] original jurisdiction involves an examination of two factors." *Mississippi*, 506 U.S. at 77 . First, the Court "look[s] to the 'nature of the interest of the complaining State,'" "focusing on the 'seriousness and dignity of the claim.'" *Ibid.* (citations omitted). Second, the Court "explore[s] the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Each factor weighs in favor of jurisdiction here.

1. Texas's interests are sufficiently serious to warrant the exercise of original jurisdiction

This Court has distinguished among four different types of interests that may be asserted by a State: (1) the State's interests as sovereign, (2) the State's interests as quasi-sovereign or *parens patriae* in the welfare of its people, (3) the State's interests as proprietor, and (4) interests that belong to private parties. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-603 (1982). The Court has entertained original actions asserting sovereign, quasi-sovereign, and proprietary interests, but has declined to entertain actions asserting only private interests. *Id.* at 601-608. Here, Texas asserts sovereign and quasi-sovereign interests—interests that warrant the exercise of the Court's original jurisdiction in this case.

a. This Court has explained that the principal object of its original jurisdiction is to address "controversies

between sovereigns." *North Dakota* v. *Minnesota*, 263 U.S. 365, 373 (1923). The Court accordingly has recognized that the exercise of such jurisdiction is paradigmatically appropriate in cases that concern the clash of sovereign interests. See *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945).

As relevant here, each State in the Union has a sovereign interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction" and, relatedly, in the "demand for recognition [of that power] from other sovereigns." *Alfred L. Snapp*, 458 U.S. at 601. Indeed, "'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State," and the State has a "'direct stake'" in "defending the standards embodied in that code." *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986) (citation omitted). In this case, Texas has a fundamental sovereign interest in determining what religious-liberty laws to adopt in Texas and for Texans, and in defending the standards embodied in those laws.

A.B. 1887 injures that sovereign interest in ways that justify the exercise of this Court's original jurisdiction. First, at the most basic level, California has refused to accept that Texas, rather than California, is responsible for determining the balance between the prevention of discrimination and the protection of religious liberty in Texas. One sovereign's refusal to recognize and respect another sovereign's legitimate authority is "a frequent subject of litigation, particularly in this Court." *Alfred L. Snapp*, 458 U.S. at 601. Second, California seeks to impose consequences on Texas for its legislative choices by denying business to "hotels, restaurants, taxicab companies, and airlines" in Texas and by depriving

Texas of "the tax revenues associated with those activities." Mot. App. A38. Whether or not a general loss of tax revenues from an effect on a State's economy would permit a State to invoke the Article III jurisdiction of this Court, a deliberate and targeted attempt to reduce another State's collection of taxes, "an action undertaken in [a] sovereign capacity," raises the kinds of concerns that lie within the "'reach of [the Court's] original jurisdiction.'" *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451 (1992) (citation omitted). Third, California has discriminated against Texas and certain other States on the basis of their sovereign choices, banning state-sponsored travel to those States but not to the rest of the Union. This Court has previously exercised original jurisdiction over cases in which States have claimed that they have suffered discrimination in violation of the "doctrine of the equality of States." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966).

b. This Court also has long held that it may exercise original jurisdiction over a *parens patriae* action brought by one State against another State. See *New York* v. *New Jersey*, 256 U.S. 296, 301-302 (1921). The *parens patriae* doctrine allows States to sue to protect the well-being of its "general population." *Alfred L. Snapp*, 458 U.S. at 608. Although this Court has held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government," because the United States *itself* represents a State's citizens "[i]n that field," *id.* at 610 n.16, no similar obstacle precludes a State from bringing a *parens patriae* action against another State, see *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981).

As relevant here, this Court has often allowed States to bring *parens patriae* actions to protect their citizens

at large from the discriminatory laws of other States. See *Alfred L. Snapp*, 458 U.S. at 607. The Court has explained that, as a general matter, a State has "a quasi-sovereign interest" in the "economic well-being" of its people. *Id.* at 605, 607. The Court also has recognized, more specifically, that a State has a quasi-sovereign interest in "not being discriminatorily denied its rightful status within the federal system." *Id.* at 607. As a result, a State may sue to ensure "that the benefits of the federal system are not denied to its general population"; "the State need not wait for [other plaintiffs] to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce." *Id.* at 608.

Maryland v. *Louisiana*, *supra*, an original action in this Court brought in part on a *parens patriae* basis, illustrates those principles. In that case, several States challenged Louisiana's natural-gas tax on the ground that the tax discriminated against interstate commerce, in violation of the dormant Commerce Clause. 451 U.S. at 753-760. The Court agreed to entertain the original *parens patriae* action, emphasizing the plaintiff States' "interest in protecting [their] citizens from substantial economic injury presented by imposition of the [tax]." *Id.* at 739. The Court noted that the tax did not "fall on a small group of citizens who [we]re likely to challenge the Tax directly"; rather, it fell on "a great many" consumers, who could not "be expected to litigate the validity of the [tax] given that the amounts paid by each consumer [we]re likely to be relatively small." *Ibid.*

In this case, Texas has alleged that California has harmed its "economic well-being," *Alfred L. Snapp*, 458 U.S. at 605, by deliberately denying business to "hotels, restaurants, taxicab companies, and airlines" in Texas,

Mot. App. A38. Texas also has alleged that it is "being discriminatorily denied its rightful status within the federal system," *Alfred L. Snapp*, 458 U.S. at 607, because A.B. 1887 discriminates against Texas and its people in violation of the dormant Commerce Clause and other provisions of the Constitution, Compl. ¶¶ 47-68. The injuries that Texas has alleged, moreover, fall upon the State's "general population." *Alfred L. Snapp*, 458 U.S. at 608. In particular, the harms do not fall on a discrete industry or discrete group of businesses that could be expected to challenge A.B. 1887; rather, they are dispersed across a broad range of businesses, which could not be "expected to litigate the validity" of A.B. 1887 because the harms to each business "are likely to be relatively small." *Maryland*, 451 U.S. at 739. "In such circumstances, exercise of [the Court's] original jurisdiction is proper." *Ibid.* And all the more so here, where the basis of the discrimination is nothing that the injured Texas businesses themselves have done, but rather Texas's own sovereign enactments.

c. Texas (Br. in Support 15-16) and California (Br. in Opp. 9-10) dispute whether Texas's sovereign and quasi-sovereign interests are so significant that A.B. 1887 would amount to *casus belli* if the States were fully sovereign. But the Court need not settle that debate here. The Court has explained that its original jurisdiction enables States to settle disputes without resort to the "traditional methods available to a sovereign for the settlement" of such controversies—which include not only "war," but also "diplomacy," "trade barriers," "recriminations," and "intense commercial rivalries." *Pennsylvania R.R. Co.*, 324 U.S. at 450. In accordance with that understanding, the Court repeatedly has exercised original jurisdiction over actions in which States

have alleged that other States have discriminated against interstate commerce—an action that would encourage economic retaliation, even if not war, if the States were fully sovereign. See *Wyoming*, 502 U.S. at 451; *Maryland*, 451 U.S. at 737-739; *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 582-586 (1923). In this case, California has done more than just discriminate against commerce in Texas; it has done so specifically because of Texas's own legislative choices. Regardless of whether that kind of action would amount to *casus belli*, at a minimum it has a tendency to provoke retaliation from other States; indeed, Texas alleges that it has already done so. See Compl. ¶¶ 34-35. The outbreak of such inter-sovereign hostilities, and the threat that a vicious cycle will result, is serious enough to justify the exercise of the Court's original jurisdiction.

To be sure, this Court has held that "States may not invoke original jurisdiction" when "litigating as a volunteer the personal claims of [their] citizens." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664-665 (1976) (per curiam). In accordance with that principle, the United States has recommended against the Court's exercise of original jurisdiction where States have enacted allegedly protectionist laws that harm particular industries, but do not invade any other State's sovereign or quasi-sovereign interests. See U.S. Amicus Br. at 8-17, *Arizona* v. *California*, No. 150, Original (Dec. 19, 2019); U.S. Amicus Br. at 5-13, *Indiana* v. *Massachusetts*, No. 149, Original (Nov. 29, 2018); U.S. Amicus Br. at 9-18, *Missouri* v. *California*, No. 148, Original (Nov. 29, 2018). This case, however, is different. As just noted, A.B. 1887 harms Texas's own interests as a sovereign and a quasi-sovereign; it does so because of Texas's own legislative choices; and the economic harms it imposes

are spread across a wide range of businesses in the State, not concentrated on a discrete industry or group of identifiable individuals. Texas's challenge thus falls within the Court's original jurisdiction and is of a character appropriate for its exercise.

2. There is no adequate alternative forum

In deciding whether to exercise original jurisdiction, this Court also "explore[s] the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi*, 506 U.S. at 77. For example, the Court has declined to hear suits that fall within its nonexclusive original jurisdiction—such as suits by States against citizens of other States—because such suits could be brought in district court or perhaps in state court. See *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500-501 (1971). The Court also has sometimes declined to hear suits between States, even though they fall within the Court's exclusive original jurisdiction, where the suit does not involve a sovereign interest and a private suit raising the same matter is already pending in a district court. See *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) (per curiam).

No alternative forum is available here. Congress has provided that this Court has "original and *exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a) (emphasis added). That "uncompromising" language "necessarily denies jurisdiction of such cases to any other federal court." *Mississippi*, 506 U.S. at 77-78. There is thus no other court in which Texas could sue California over the constitutionality of A.B. 1887. California proposes three alternative mechanisms through which the constitutionality of A.B. 1887 could be tested in the lower federal courts, but none of them is adequate in these circumstances.

a. California first contends (Br. in Opp. 12-13) that private persons in Texas could challenge A.B. 1887. That contention is flawed in premise and conclusion.

Most fundamentally, a private suit would not be an adequate alternative in this context. In judging the adequacy of an alternative private suit, this Court has considered two factors: (1) whether the State is asserting a sovereign rather than quasi-sovereign interest, and (2) whether a private suit is already pending. For example, in *Wyoming*, the Court agreed to hear Wyoming's dormant Commerce Clause challenge to an Oklahoma law; the Court emphasized that the law invaded Wyoming's interests "as a sovereign" by interfering with its collection of taxes, and that no private company had yet challenged the Oklahoma law. 502 U.S. at 452. In contrast, in *Arizona*, the Court declined to exercise jurisdiction over Arizona's dormant Commerce Clause challenge to a New Mexico law; the law affected no sovereign interests, and a challenge brought by private companies was already "pending" in state court. 425 U.S. at 797. Here, as discussed, A.B. 1887 injures Texas's own sovereign interests, and as far as the government is aware, no private challenge to A.B. 1887 is pending. Texas need not wait for private persons to sue at some unknown time in the future in order to protect its own sovereign prerogatives.

In any event, California has not shown that A.B. 1887 can be adequately tested by private plaintiffs from Texas. California principally proposes (Br. in Opp. 12-13) that Texas businesses or trade associations that have lost sales as a result of the statute might bring suit. But Article III standing requires (among other things) showing that the plaintiff faces an injury that is both

"certainly impending" and "fairly traceable" to the challenged law. *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 414 (2013). And an association has Article III standing only if "at least one identified member" has standing; "a statistical probability that some of [its] members are threatened with concrete injury" is not enough. *Summers* v. *Earth Island Institute*, 555 U.S. 488, 497-498 (2009). California fails to explain how 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 or sponsor travel to Texas. For example, a given restaurant, hotel, or taxicab driver has no way of knowing that, but for A.B. 1887, a state-funded visitor from California would have eaten at *that* restaurant or stayed at *that* hotel or used *that* driver's taxicab.

b. California also suggests (Br. in Opp. 13) that Californians denied funds to travel to Texas could challenge A.B. 1887. As just explained, however, Texas need not wait for private parties from Texas to sue to vindicate its sovereign interests. It would be even less appropriate to require Texas to rely on *Californians* to protect its sovereignty. In addition, under the doctrine of third-party standing, a litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). California fails to explain how a citizen of California would have third-party standing to invoke the interests of Texas and its citizens in challenging discrimination against the laws of Texas or commerce in Texas.

c. Finally, California argues in a footnote (Br. in Opp. 14 n.17) that the Court should decline to hear this case because Texas could file suit in district court, nam-

ing "California state officials" rather than California itself as defendants. That argument for denying Texas leave to file its complaint is unsound. It is true that, under *Ex parte Young*, 209 U.S. 123 (1908), a plaintiff may, in some circumstances, sue a state officer to obtain an injunction against unconstitutional state action notwithstanding that the State itself has sovereign immunity from suit. *Id.* at 145; see *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (describing *Ex parte Young* as a "formalism" and a "fiction"). The Court, however, has not previously treated the prospect of such a suit as a basis for declining to hear an original action between States. For example, the Court has heard cases in which a State has challenged another State's laws under the dormant Commerce Clause, even though, under California's theory, the plaintiff State in those cases could have brought an injunctive action in district court against state officials responsible for enforcing the challenged laws. See *Wyoming*, 502 U.S. at 451; *Maryland*, 451 U.S. at 737-739; *Pennsylvania*, 262 U.S. at 582-586.

Moreover, there is a substantial question whether the *Ex Parte Young* "fiction" extends so far as to allow Texas to sue California officials in federal district court notwithstanding 28 U.S.C. 1251(a). Indeed, courts of appeals have disagreed about whether or when—given this Court's exclusive jurisdiction over controversies between States—one State may bring an injunctive action in district court against an official of another State to challenge a state law as unconstitutional or preempted. See *Connecticut* v. *Cahill*, 217 F.3d 93, 99 (2d Cir. 2000); *id.* at 105 (Sotomayor, J., dissenting); *Safe Streets Alliance* v. *Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017). There is, however, no reason for this

Court to resolve that disagreement here. Even in *Connecticut* v. *Cahill*, *supra*—which allowed such a suit to go forward in district court after finding that it did not implicate core sovereign interests of the defendant official's State (New York)—the majority stressed that, in its view, the plaintiff State had the option either to bring an original action in this Court against New York itself or a suit in district court against the state official. See 217 F.3d at 98-99. Here, Texas decided to bring an original action against California itself. Moreover, unlike in *Cahill*, in which the plaintiff sued only as *parens patriae* on behalf of its citizens, *id.* at 97, here Texas also invokes important *sovereign* interests in securing respect for its own laws by other States. Particularly in these circumstances, Texas's choice to invoke this Court's original jurisdiction should be respected, whether or not it could have brought an injunctive action against the responsible California officials in district court.

B. A.B. 1887 Violates The Constitution

The Constitution was adopted, first and foremost, "in Order to form a more perfect Union." U.S. Const. Pmbl. To that end, the Constitution contains a number of provisions and principles designed to fuse the league of independent States that existed under the Articles of Confederation into the single Nation that exists today. Texas invokes many of those provisions in its complaint. For purposes of deciding merely whether to grant leave to file the complaint, it is sufficient that at least one of Texas's legal theories is meritorious: A.B. 1887 violates the dormant Commerce Clause. In addition, although Texas has not relied on the provision, the facts alleged in its complaint likely support a claim under the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1. Con-

firming those conclusions, A.B. 1887 violates the principles of equal state sovereignty and interstate comity underlying those constitutional provisions. And California has provided no adequate justification for A.B. 1887; the law attempts to interfere with the internal legislative choices of other States, even though those choices have no connection to California.

1. A.B. 1887 violates the dormant Commerce Clause

The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8, Cl. 3. "Although the Clause is framed as a positive grant of power to Congress," this Court has "'consistently held this language to contain a further, negative command, known as the dormant Commerce Clause,'" prohibiting certain state laws that burden interstate commerce. *Comptroller of the Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (citation omitted). As relevant here, the Court has long held that the Clause prohibits a State from discriminating against out-of-state commerce and out-of-state economic actors. See *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2461 (2019); *Welton* v. *Missouri*, 91 U.S. 275, 280-281 (1876). A law that discriminates on its face or in its purpose is "virtually *per se* invalid." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 99 (1994).

This Court has recognized a narrow exception to the virtually *per se* rule of invalidity for discriminatory laws: a State, when acting as a participant in a market rather than a regulator of the market, may favor itself over other States. See *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 440-447 (1980). For example, a State, as operator

of a cement factory, may choose to sell cement only in that State. See *ibid.*

The market-participant exception, however, does not entitle a State to leverage its participation in a market to produce regulatory effects outside that market. For example, in *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282 (1986), this Court held that a State was not acting as a market participant when it refused to do business with "repeat labor law violators." *Id.* at 289. Because the State had sought to leverage contractual relationships in order to deter legal violations that had nothing to do with those relationships, the State's scheme was "tantamount to regulation." *Ibid.* Although *Gould* primarily concerned whether the state law was preempted under federal labor law, its rejection of the State's market-participant defense expressly relied on this Court's Commerce Clause precedent. *Ibid.* (citing *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves*, *supra*; *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)).

So too, in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), a plurality held that the market-participant exception did not allow a State to require those who bought timber from state lands to have that timber processed within the State. *Id.* at 93-99. The plurality explained that, even as a market participant, a State may not impose conditions "that have a substantial regulatory effect outside of that particular market." *Id.* at 97. It concluded that, "although the State [was] a participant in the timber market," it was impermissibly "using its leverage" to "exert a regulatory effect in the processing market." *Id.* at 98.

Consistent with those cases, the United States has previously taken the position that the market-participant exception does not allow a State to discriminate against companies that do business in another State "for the purpose of affecting the internal policies of that State." U.S. Amicus Br. at 27, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474) (*Crosby* Br.). For example, "[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." *Ibid.*[*]

A.B. 1887 falls outside the market-participant exception. Even if California could choose to fund or sponsor travel for conferences, training, and similar activities only within the State, here A.B. 1887, on its face, forbids state-sponsored travel to some States but not to others. As a state committee report explains, A.B. 1887 denies business to "hotels," "restaurants," "taxicab companies," "airlines," and other companies in targeted States. Mot. App. A38. According to that report, the object of that targeting of economic actors in the disfavored States, in turn, is to penalize those States for their internal policies and potentially to induce changes in those policies. *Id.* at A38-A39. There can be little doubt that the Commerce Clause forbids such action.

---

[*] The United States has expressed the view that a State may have some room "to take action with respect to another *country* based on concerns about its record on human rights or similar matters." *Crosby* Br. 28 (emphasis added). But the United States noted that action with respect to foreign countries differs from action with respect to sister States, given the "reciprocity and mutual respect owed by the States to one another as coordinate sovereigns under the plan of the Constitutional Convention." *Id.* at 29 n.24.

2. A.B. 1887 likely violates the Full Faith and Credit Clause

The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1. As this Court recently reaffirmed, "[a] statute is a 'public act' within the meaning" of the Clause. *Franchise Tax Board* v. *Hyatt*, 136 S. Ct. 1277, 1281 (2016). Although the Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy," *Hyatt*, 136 S. Ct. at 1281 (citation omitted), the Clause does require a State to show a "healthy regard" for the "sovereign status" of other States and to refrain from enacting a "policy of hostility" to the statutes of other States, *id.* at 1282-1283 (citations omitted).

Here, A.B. 1887 evinces an obvious hostility to laws that California finds objectionable, denying equal economic treatment to Texas and other States on the basis of their having enacted such laws. Moreover, state legislative committee reports explain that A.B. 1887 "register[s] [the State's] opposition to [other States'] laws"; that A.B. 1887 "will send a message" that such laws "'are not acceptable to California'"; and that California should avoid funding travel to "objectionable state[s]." Mot. App. A21, A24, A26 (emphasis omitted). By declaring Texas to be "objectionable" and enacting a law imposing a travel ban for the purpose of giving legal force to its "opposition" to the Texas law, California appears to deny full faith and credit to Texas's law.

It is true that this Court's cases applying the Full Faith and Credit Clause have generally involved the refusal to recognize or apply a sister State's judgments or

laws in a judicial proceeding, rather than, as here, the enactment of a law that retaliates against a sister State for its laws outside a judicial proceeding. That the cases have arisen in that particular factual context does not necessarily mean that the Clause is legally limited to that context. To the contrary, the Clause requires *full* faith and credit, not just faith and credit in the context of judicial proceedings. That requirement is seemingly not met where, as here, the validity of a sister State's judgments or laws has not arisen in judicial proceedings, but a State nevertheless retaliates against the sister State or its citizens by enacting a law based on hostility to the sister State's judgments or laws. Indeed, the fact that this precise question has not previously arisen in this Court's cases may simply reflect the apparent lack of precedent for state laws that discriminate directly against the laws of another State.

To be sure, Texas's complaint does not refer to the Full Faith and Credit Clause. See Compl. 21. But under the Federal Rules of Civil Procedure—which "may be taken as guides" in original suits in this Court, Sup. Ct. R. 17.2—a complaint need only set out the "factual basis" for a claim; it need not set out the "'legal theory'" or provide "citation[s]" of constitutional provisions and statutes. *Johnson* v. *City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (citation omitted). And at a minimum, Texas should be allowed to amend its complaint, See *ibid.*; *Nebraska* v. *Wyoming*, 515 U.S. 1, 8-9 (1995). Thus far, California has not offered any reason why A.B. 1887 would comply with the Full Faith and Credit Clause, and granting leave to amend would allow the parties to address the Clause's application in this case.

3. Structure and purpose confirm that A.B. 1887 violates the Constitution

The dormant Commerce Clause and Full Faith and Credit Clause reflect the Constitution's structure of federalism. See *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943). The principles and purposes on which that structure is founded confirm that A.B. 1887 violates the Constitution.

First, the Constitution rests on the postulate that each State retains "a residuary and inviolable sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (citation omitted). At the core of that sovereignty lies the power to enact laws to govern the sovereign's territory. See *New York* v. *United States*, 505 U.S. 144, 188 (1992). Through A.B. 1887, California has reached beyond its own territory and has sought to intermeddle with Texas's decisions about how to govern Texas's territory. To be sure, that penalty is likely too small to induce Texas or any other State to change its ways. But just as a small fine for protected speech still violates the Free Speech Clause, so too a small penalty for a State's permissible legislative choices still violates the State's sovereignty. No matter the size of the penalty, the Constitution forecloses "chaotic interference by some States into the internal, legislative affairs of others." *Hyatt*, 136 S. Ct. at 1282.

"Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States." *Shelby County* v. *Holder*, 570 U.S. 529, 544 (2013) (citations omitted). In violation of that equality, A.B. 1887 treats 11 of California's 49 sister States as "objectionable states," and then subjects those States to unfavorable treatment not

imposed on any other States. Mot. App. A19. That discrimination against some States is antithetical to "the Constitution's vision of 50 individual and equally dignified States." *Hyatt*, 136 S. Ct. at 1282.

Finally, the Constitution's provisions on interstate federalism all aim to promote interstate "comity." *Hyatt*, 136 S. Ct. at 1283 (citation omitted). A.B. 1887 undermines that constitutional objective by exhibiting overt hostility to specific States, their businesses, their people, and their laws. A.B. 1887 also has the natural consequence of encouraging other States to retaliate against California with their own bans. See Compl. ¶¶ 33, 35 (alleging retaliation by Oklahoma and threatened retaliation by Tennessee). The Clauses at issue here were meant to prevent just such "rival, conflicting and angry regulations." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534 (1949) (citation omitted).

4. California has failed to advance an adequate justification for A.B. 1887

The constitutional restrictions on differential treatment of other States' commerce and laws are not absolute. The dormant Commerce Clause allows differential treatment of out-of-state commerce in service of a "legitimate local purpose." *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986). And the Full Faith and Credit Clause allows differential treatment of another State's laws if there are "sufficient policy considerations to warrant" such treatment. *Carroll* v. *Lanza*, 349 U.S. 408, 413 (1955).

California has failed to identify an adequate justification for its discriminatory actions here. California asserts (Br. in Opp. 10) that it has an interest in "declin[ing] to subsidize" "discriminatory and harmful" laws in Texas. It fails to explain, however, how state-funded

and state-sponsored travel to Texas would in any meaningful sense "subsidize" discriminatory laws in Texas. A.B. 1887 seeks to deny business to "hotels, restaurants, taxicab companies, and airlines" in Texas. Compl. App. A38. But California does not claim that those businesses have themselves engaged in any discriminatory actions. Nor does it claim that those businesses are covered by the Texas statute to which California objects—a statute that provides religious-freedom protections to child welfare service providers. California's decision to withhold business from economic actors who have not themselves engaged in any discrimination, because it disagrees with Texas's sovereign decision regarding the protection to be afforded to the religious freedom of third parties, is not justified as an effort to "decline to subsidize" discrimination.

CONCLUSION

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

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
VIVEK SURI
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
LAURA E. MYRON
Attorneys

DECEMBER 2020