No. _____, Original

In the Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff,

v.

STATE OF CALIFORNIA and FRANCHISE TAX BOARD OF CALIFORNIA,
Defendants.

MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND PROPOSED BILL OF COMPLAINT

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MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

The State of Florida moves the Court for leave to file the accompanying Bill of Complaint. In support of its motion, the State asserts that its claims arise under the United States Constitution; its claims are serious and dignified; and there is no alternative forum to provide adequate relief.

Respectfully submitted,

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STATE OF CALIFORNIA and FRANCHISE TAX BOARD OF CALIFORNIA,

Defendants.

BILL OF COMPLAINT

The State of Florida, by and through its Attorney General, James Uthmeier, brings this suit against Defendants the State of California and Franchise Tax Board of California, and for its claims for relief states:

1. Americans are voting with their feet. Since April 1, 2020, the State of Florida, with its science-based response to the COVID-19 pandemic, emphasis on parental rights and education, commitment to law and order, and hospitable tax climate, ranks first in net domestic migration.[1] The State of California, led by politicians with fundamentally different priorities, ranks dead last.[2]

2. Rather than abandoning the policies that motivated this mass exodus, California has devised an

[1] *State Population Totals and Components of Change: 2020-2024*, United States Census Bureau (Dec. 2024), https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html.

[2] *Id.*

unconstitutional business income apportionment scheme that rewards corporations that keep their operations in California and penalizes those that move out.

3. California accomplishes this by combining a "single-sales factor" with a "special rule." The single-sales factor operates as a tariff on goods manufactured in other States by excluding a corporation's payroll and property from the apportionment formula. The special rule supercharges the tariff by further excluding large sales attributable to the jurisdiction where a corporation's payroll and property are located.

4. While this Court approved the use of a single-sales factor in *Moorman Management Company v. Bair*, it did so on the condition that States may not arbitrarily exclude out-of-state sales from their apportionment formulas to reach profits earned elsewhere. *See* 437 U.S. 267, 274 (1978). But that is precisely what the Special Rule does. Such tax mechanisms violate the Commerce and Import-Export Clauses in Article I of the United States Constitution and the Due Process Clause of the Fourteenth Amendment.

5. The Special Rule deprives the State of Florida of tax and investment revenue and harms its citizens and businesses. The State therefore seeks a judgment declaring the Special Rule unconstitutional and enjoining Defendants from enforcing it.

JURISDICTIONAL STATEMENT

6. This Court has original jurisdiction over cases and controversies between States under Article III, Section 2, Clause 2 of the United States Constitution.

Title 28, Section 1251(a) of the United States Code makes that jurisdiction exclusive.

7. The Court has construed these provisions to make its original jurisdiction "obligatory only in appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).[3] "Determining whether a case is 'appropriate' . . . involves an examination of two factors": (1) the "seriousness and dignity of the claim" and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

8. Where, as here, a State alleges it is being deprived of tax revenue by another State in violation of the United States Constitution, "[i]t is beyond peradventure" that the bill of complaint "has raised a claim of sufficient 'seriousness and dignity.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (accepting jurisdiction where "Oklahoma, acting in its sovereign capacity, passed the Act, which directly affects Wyoming's ability to collect severance tax revenues, an action undertaken in its sovereign capacity"); *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981) (accepting ju-

[3] *But see Texas v. California*, 141 S. Ct. 1469, 1472 (2021) (Alito, J., dissenting) ("The practice of refusing to permit the filing of a complaint in cases that fall within our original jurisdiction is questionable, and that is especially true when, as in this case, our original jurisdictional is exclusive."); *Alabama v. California*, 145 S. Ct. 757, 758 (2025) (Thomas, J., dissenting) ("[T]he Court's assumption that it has discretion to decline review in suits between States is suspect at best" considering that "the Constitution establishes [] original jurisdiction in mandatory terms." (quotation omitted)).

risdiction because tax disputes between States "implicate[] serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction"). This is because "[t]he 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," *Mississippi*, 506 U.S. at 77, and Americans have long recognized that, if not restrained by a federal constitution, "[t]he competitions of commerce would be [a] fruitful source of contention . . . . Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent . . . . [P]articular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars." THE FEDERALIST NO. 7 (Alexander Hamilton).

9. That leaves the second factor: availability of an alternative forum. To Florida's knowledge, no court has addressed the constitutionality of the Special Rule, and there is no pending action to which this Court could defer adjudication.[4] *Wyoming*, 502 U.S. at

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[4] In *Wynnefield Bros. International, LLC v. Franchise Tax Board*, a company incorporated in Delaware and headquartered in Pennsylvania sued in California Superior Court seeking a declaratory judgment that the Special Rule violates the Due Process and Commerce Clauses of the United States Constitution. Verified Compl. for Declaratory Relief at 9, *Wynnefield Bros. Int., LLC v. Franchise Tax Board*, No. CGC-25-624073 (Cal. Sup. Ct.

451–52 & n.10; *cf. Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam). In any event, Florida's interests as a sovereign State would not be adequately represented in an action brought by an affected corporation. *See Wyoming*, 502 U.S. at 452 (recognizing that Wyoming's sovereign interests "would not be directly represented" by a lawsuit brought by the affected mining companies).

10. No alternative forum exists. Florida cannot challenge the Special Rule in any other federal court, *Mississippi*, 506 U.S. at 77–78 & n.1; in California's courts, *Alden v. Maine*, 527 U.S. 706, 730 (1999);[5] or in any other State's courts, *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 236 (2019).

San Francisco Cnty. Apr. 4, 2025). The Franchise Tax Board demurred, citing Article XIII, section 32 of the California Constitution, which provides that "[n]o legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax" but that "[a]fter payment of [the] tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest." Order at 3, *Wynnefield Bros. Int., LLC v. Franchise Tax Board*, No. CGC-25-624073 (Cal. Sup. Ct. San Francisco Cnty. July 10, 2025). The court sustained the demurrer. *Id.* at 5.

[5] Cal. Gov't Code § 860.2 ("Neither a public entity nor a public employee is liable for an injury caused by: (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax. (b) An act or omission in the interpretation or application of any law relating to a tax.").

FACTUAL ALLEGATIONS

A. Apportionment of Business Income Between the States

11. When a corporation generates business income in multiple States, each State may tax the portion "reasonably related to the activities conducted" therein. *Id.* at 273.

12. By 1978, all but one of the States imposing a corporate income tax apportioned business income based on three factors: payroll, property, and sales.[6] These multifactor formulas reflected the basic intuition that business income cannot be fairly apportioned without accounting for "the two basic factors, capital and labor, that underlie all production or business activity." Paul Studenski, *The Need for Federal Curbs on State Taxes on Interstate Commerce: An Economist's Viewpoint*, 46 Va. L. Rev. 1121, 1122–23 (1960) ("Property and payroll were incorporated in the formulas for the reason that they represented the two basic factors, capital and labor, that underlie all production or business activity. It seemed logical to assume that the extent to which a company's productive activity was carried on in the different States was indicated largely by the extent to which its productive property and its management and labor forces, measured by payroll, were located in each of them."). The three-factor formula "gained wide approval precisely because payroll, property, and sales appear in combination to reflect a

[6] *Moorman*, 437 U.S. at 283 & n.1 (Powell, J., dissenting). One of the States, West Virginia, used a two-factor formula that omitted sales. *Id.*

very large share of the activities *by which value is generated*." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 381 (1991) (quotation omitted); *see also Amerada Hess Corp. v. N.J. Dep't of Treasury*, 490 U.S. 66, 73 (1989) (describing the three-factor formula as "a benchmark against which other apportionment formulas are judged" (quotation omitted)).

13. The outlier State, Iowa, apportioned business income exclusively on sales. The constitutionality of Iowa's "single-sales factor" was the question presented in *Moorman*. This Court warned that a single-sales factor that "produced an unreasonable result" or was not "meant to reach[] only the profits earned within the State" would violate the Due Process and Commerce Clauses. 437 U.S. at 274 (quoting *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920)). But nothing about Iowa's formula was "inherently arbitrary" or "[un]related to values connected with the taxing State," and the record did "not contain any separate accounting analysis showing what portion of appellant's profits was attributable to sales, to manufacturing, or to any other phase of the company's operations." *Id.* at 272–74 (quotation omitted). The Court therefore upheld the application of Iowa's single-sales factor in that "particular case." *Id.* at 281.

14. The primary dissent deemed single-sales factors *per se* unconstitutional. It explained that the formula—"though facially neutral—operates as a tariff on goods manufactured in other States (including the District of Columbia), and as a subsidy to [in-state] manufacturers selling their goods outside [the State]." *Id.* at 283 (Powell, J., dissenting). By ignoring the

whereabouts of corporations' tangible assets and personnel, single-sales factors impose a "surcharge" that "can be avoided . . . only by locating all property and payroll" in the taxing State. *Id.* at 284. Such taxes, by "unjustifiably benefit[ting] local businesses at the expense of out-of-state businesses," violate the Commerce Clause. *Id.* at 288.

15. *Moorman* "set off a stampede among the remaining states" to adopt a single-sales factor as a "potent incentive for state economic development."[7] Now, 32 States and the District of Columbia use single-sales factors.[8]

16. California is one of those States. Cal. Rev. & Tax. Code § 25128.7. In broad terms, a corporation's liability under California's Uniform Division of Income for Tax Purposes Act (UDITPA) is calculated by multiplying three figures: the corporation's business income, the corporation's sales factor, and the applicable tax rate.[9] "Business income" is defined as "income arising from transactions and activity in the regular course of the taxpayer's trade or business," including "income from tangible and intangible property if the acquisition, management, and disposition of the

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[7] *See* Michael Mazerov, *The "Single Sales Factor" Formula for State Corporate Taxes* 45, Center on Budget and Policy Priorities (Sept. 2001).

[8] *State Apportionment of Corporate Income*, Federation of Tax Administrators (Jan. 2023), https://taxadmin.org/wp-content/uploads/resources/tax_rates/apport.pdf.

[9] California's tax rate is currently 8.84% for corporations other than banks and financial institutions. *Business tax rates*, Franchise Tax Board of California, https://www.ftb.ca.gov/file/business/tax-rates.html (last accessed Oct. 28, 2025).

property constitute integral parts of the taxpayer's regular trade or business operations." Cal. Rev. & Tax. Code § 25120(a). The sales factor is "a fraction, the numerator of which is the total sales of the taxpayer in California during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year." Cal. Rev. & Tax. Code § 25134.

17. If that were all, California's apportionment method would satisfy the Commerce Clause as interpreted by *Moorman*. But California goes further.

B. California's "Special Rule" Arbitrarily Excludes Certain Sales from its Apportionment Formula to Disadvantage Out-of-State Business.

18. A "Special Rule" promulgated by Defendant Franchise Tax Board[10] excludes certain sales from the sales factor formula:

> Where substantial amounts of gross receipts arise from an occasional sale of a fixed asset or other property held or used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale

[10] California's Controller, Director of Finance, and the State Board of Equalization Chairperson compose the Franchise Tax Board. Cal. Gov't Code § 15700. The Board administers California's tax code, Cal. Rev. & Tax. Code § 19501, and is authorized to "prescribe all rules and regulations necessary for [its] enforcement," Cal. Rev. & Tax. Code § 19503(a).

> of a factory, patent, or affiliate's stock will be excluded if substantial.

Cal. Code Regs., tit. 18, § 25137(c)(1)(A) ("Special Rule").

19. 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.[11]

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[11] The California Revenue and Taxation Code states that "[i]f the allocation and apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the Franchise Tax Board may require, in respect to all or any part of the taxpayer's business activity, if reasonable: (a) Separate accounting; (b) The exclusion of any one or more of the factors; (c) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or (d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income." Cal. Rev. & Tax. Code § 25137. However, precedent from California's Office of Tax Appeals holds that, "[i]f a relevant special formula is specifically provided for in the R&TC section 25137 regulations and the conditions and circumstances delineated in such regulations are satisfied, the method of apportionment prescribed in those regulations shall be the standard by which the parties are to compute the taxpayer's apportionment formula." *Appeal of Worthington Oil & Gas Corp.*, No. 2024-OTA-217 (quoting *Appeal of Amarr Co.*, 2022-OTA-041P; *Appeal of Fluor Corp.*, 1995-SBE-016, 1995 WL 799363). Additionally, the regulations previously provided that, "[w]here the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator

20. Defendant Franchise Tax Board has ruled that the sale of real, tangible, and intangible assets associated with "an entire line of [a corporation's] business" is "outside of the taxpayer's normal course of business" for purposes of the Special Rule, *see* Franchise Tax Board Chief Counsel Ruling 2015-01 (July 30, 2015), yet simultaneously "in the regular course of the taxpayer's trade or business" for purposes of section 25120(a), *Jim Beam Brands Co. v. Franchise Tax Bd.*, 133 Cal. App. 4th 514, 524–25 (2005). Which is to say, California taxes these sales as business income but ignores them when computing the sales factor by which income is apportioned.

21. Why doesn't California want to know where these sales occur? The answer is that, though facially neutral, the Special Rule supercharges California's single-sales factor tariff.

22. To illustrate, imagine a Florida-incorporated company with officers, employees, and assets located entirely in Florida. In the taxable year, the company generates $1 million in business income. Ninety percent of the income ($900,000) came from a one-time sale of factories located throughout Florida; the other ten percent ($100,000) was generated from widget sales. Half the widget sales ($50,000) were in Florida; the other half ($50,000) in California. The Special

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of the sales factor as well." Cal. Code Regs., tit. 18, § 25137(c)(1)(C). However, that provision does not apply to tax years beginning on or after January 1, 2013. *Worthington Oil*, No. 2024-OTA-217; *Amarr*, 2022-OTA-041P (citing Cal. Code Regs., tit. 18, § 25136-2(h)(3)(B)).

Rule would exclude the factory sale from the apportionment formula, leaving only the widget sales. Because 50% of the widget sales occurred in California, the Special Rule would apportion 50% of the company's business income ($500,000) to California, even though only 5% of sales ($50,000) had any connection to California. Meanwhile, Florida's three-factor formula[12] would apportion 97.5% of the company's business income to Florida,[13] resulting in *double taxation* of 47.5% of business income.

23. On the other hand, the Special Rule gives special treatment to corporations that stay in or relocate to California. If the company's operations and factories in the example above had been in California instead, the Special Rule would still apportion 50% of the company's business income ($500,000) to California, even though 95% of sales ($950,000) were generated there. Florida's three-factor formula would apportion just 2.5% of the company's business income to Florida,[14] resulting in *non-taxation* of 47.5% of business income.

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[12] § 220.15(1), Fla. Stat. (apportioning the business income of "taxpayers doing business within and without this state by multiplying it by an apportionment fraction composed of a sales factor representing 50 percent of the fraction, a property factor representing 25 percent of the fraction, and a payroll factor representing 25 percent of the fraction").

[13] 97.5% = (0.25 * 1 [$X FL payroll ÷ $X all payroll]) + (0.25 * 1 [$X FL property ÷ $X all property]) + (0.5 * (($900,000 factory sale + $50,000 FL widget sales) ÷ ($900,000 factory sale + $100,000 all widget sales)))

[14] 2.5% = (0.25 * 0 [$0 FL payroll ÷ $X all payroll]) + (0.25 * 0 [$0 FL property ÷ $X all property]) + (0.5 * ($50,000 FL widget sales ÷ ($900,000 factory sale + $100,000 all widget sales)))

24. The distortive, discriminatory effect of the Special Rule is not merely theoretical. For example, in 2011, a Virginia-based medical supplier sold "substantially all of its business assets" for gross receipts of approximately $249 million. *Appeal of T. Faries and Estate of D. Faries Jr.*, 2022-OTA-068 at 2. On its California tax return, the corporation included the sale in the denominator of the sales factor. *Id.* at 3. On audit, Defendant Franchise Tax Board excluded the sale from the sales factor pursuant to the Special Rule, increasing the sales factor by 5%. *Id.* The higher sales factor raised the corporation's taxable business income by over $10 million. *Id.* The corporation appealed, arguing that the sales factor did not fairly "reflect the extent of [its] business activities in California." *Id.* at 17. The Office of Tax Appeals (OTA) rejected the appeal. *Id.* at 21.

25. Similarly, in 2013, a North Carolina-based garage door manufacturer with factories in Kansas and North Carolina sold all its outstanding stock for gross receipts of approximately $101 million. *Amarr*, 2022-OTA-041P at 3. On its California tax return, the corporation included the sale in the denominator of the sales factor. *Id.* On audit, Defendant Franchise Tax Board excluded the sale from the sales factor pursuant to the Special Rule, increasing the sales factor by 8%. *Id.* at 13, n. 34. The corporation appealed, arguing that "excluding the gross receipts from the sales factor while including the corresponding net gain in their apportionable tax base is distortive and does not fairly reflect the extent of [its] California business activity." *Id.* at 14. The OTA rejected the appeal. *Id.* at 21.

26. In 2016, a corporation that operated automobile dealerships sold the assets of two subsidiaries for net proceeds of over $53 million. *Worthington Oil*, 2024-OTA-217 at 2. The assets included all the real, tangible, and intangible property associated with dealerships located exclusively in Alaska. *Id.* On its California tax return, the corporation included the sale in the denominator of the sales factor. *Id.* On audit, Defendant Franchise Tax Board excluded the sale from the sales factor pursuant to the Special Rule, increasing the sales factor by approximately 15%. *Id.* at 2, 5. The corporation appealed, arguing that "the substantial and occasional sale rule does not fairly represent the extent of [its] business activities in California." *Id.* at 5. The OTA rejected the appeal. *Id.* at 6.

27. These examples are representative of California's systematic overtaxation of corporations operating outside its borders. The message to corporations is clear: put your property and payroll in California, or else risk severe over-apportionment of business income.

C. The Special Rule Harms Florida.

28. Florida has standing in its capacity as a State based on loss of tax revenue, *Wyoming*, 502 U.S. at 447; as a shareholder based on loss of corporate revenue, *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); and as *parens patriae* seeking redress of harm to its citizens and businesses, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

29. California's single-sales factor tariff, amplified by the Special Rule, deprives Florida of tax revenue by incentivizing corporations (i) to move their payroll and property from Florida to California, (ii) to move their payroll and property from another country or State to California rather than Florida, or (iii) not to move their payroll and property from California to Florida. That is all Article III requires to show standing. *Wyoming*, 502 U.S. at 447–48 (accepting Wyoming's standing to challenge an Oklahoma statute that had the "effect" of "depriv[ing] Wyoming of . . . tax revenues").

30. Florida's Governor, Chief Financial Officer, and Attorney General constitute the State Board of Administration (SBA). Fla. Const. art. IV, § 4(e). The SBA is tasked with "invest[ing] all the funds in the System Trust Fund . . . and all other funds specifically required by law to be invested." Fla. Stat. § 215.44; *see id.* § 215.69. Investment funds managed by the SBA include Florida's Hurricane Catastrophe Fund; the Florida PRIME service, an investment vehicle for governmental organizations' surplus funds; and Florida's Retirement System Investment Plan,[15] which pro-

[15] STATE BD. OF ADMIN., ANNUAL INVESTMENT REPORT 2 (2025), https://www.sbafla.com/media/zxxprkng/2023-2024-air-draft3625-final-updated.pdf (last accessed Oct. 28, 2025).

vides benefits to more than 1.2 million vested members.[16] As of July 2025, the SBA's total assets under management totaled more than $277 billion.[17]

31. The SBA holds stock in companies that (i) are based outside California, (ii) do business in California, and (iii) make sales that are "substantial" and "occasional" as those terms are used in the Special Rule and interpreted by Defendant Franchise Tax Board. By overtaxing these corporations, the Special Rule diminishes investment revenues received by the State of Florida.

32. The State of Florida also has standing to assert injuries suffered by the many Floridians possessing ownership interests in corporations unfairly taxed by the Special Rule. While a State "is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens, . . . it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Maryland*, 451 U.S. at 737. In addition to impacting more than one million SBA fund beneficiaries, the Special Rule injures the significant segment of Florida's population

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[16] *Division of Retirement*, DEP'T OF MGMT. SERVS., https://www.dms.myflorida.com/workforce_operations/retirement (last accessed Oct. 28, 2025).

[17] *Governor Ron DeSantis Applauds Record-Breaking Year for Florida's State Board of Administration*, EXEC. OFFICE OF THE GOV. (July 23, 2025), https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-applauds-record-breaking-year-floridas-state-board (last accessed Oct. 28, 2025).

that owns—or owns stock in—any of the overtaxed corporations.

33. Absent relief from this Court, other States are likely to adopt California's unconstitutional apportionment scheme, exacerbating Florida's injuries. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many . . . State[s] adopted similar legislation.").

FLORIDA'S CLAIMS

COUNT I
COMMERCE CLAUSE

34. The Commerce Clause grants Congress power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. While the Clause is 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 taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 179 (1995).

35. A State is entitled to tax "its fair share of revenues from interstate commercial activity." *Am. Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 269 (1987). "The State's right to tax interstate commerce is limited, however, and no state tax may be

sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Maryland*, 451 U.S. at 728 (summarizing the factors from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). A tax must pass each *Complete Auto* factor to survive; the Special Rule fails each one.

A. The Special Rule taxes activity having no substantial nexus with California.

36. The first *Complete Auto* factor requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *S. Dakota v. Wayfair*, 585 U.S. 162, 177 (2018).

37. Simply put, a formula that apportions income without regard to where the income-generating activity occurred runs afoul of the nexus requirement. As this Court cautioned in *Norfolk & Western Railway Company*:

> A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to project the taxing power of the state plainly beyond its borders. Any formula used must bear a rational relationship, both on its face and in its application, to . . . the taxing State.

Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968). In that case, Missouri "impose[d] a property tax upon [8%] of [a railroad's] interstate transportation enterprise," despite evidence that just 2% of the railroad's "rolling stock" was "employed

in the State." *Id.* at 323, 327. The Court invalidated the assessment, reiterating that "[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." *Id.* at 325.

38. So too for business income. The Court has often remarked that "mathematical exactness is impossible" when it comes to apportioning business income. *Hans Rees' Sons v. State of N. Carolina ex rel. Maxwell*, 283 U.S. 123, 134 (1931). But that is no excuse for "put[ting] aside" the "evidence" altogether. *Id.* Any formula that ignores the "proportion [of] business transacted . . . in that state" is "intrinsically arbitrary" and fails the nexus requirement. *Id.* at 133.

39. Through the Special Rule, Defendant Franchise Tax Board has blinded itself to the nexus, if any, between certain "substantial" sales and California. "Put[ting] aside" the "evidence" of where the sale-generating activity occurred, *id.* at 134, the Special Rule taxes these large sales based on the nexus between California and *entirely unrelated sales*. This "intrinsically arbitrary" practice fails to "bear a rational relationship, both on its face and in its application, to [the sales'] connect[ion] with the taxing State." *Id.* at 133; *Norfolk & W. Ry. Co.*, 390 U.S. at 325.

B. The Special Rule does not fairly apportion business income.

40. The second *Complete Auto* factor consists of two components: internal consistency and external consistency. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). The test for internal

consistency is whether, "if applied by every jurisdiction, [the apportionment formula] would result in no more than all of the unitary business's income being taxed." *Id.* External consistency is a "more difficult requirement" examining whether the tax "reflect[s] a reasonable sense of how income is generated." *Id.* An apportionment method is externally inconsistent if it attributes income "out of all appropriate proportions to the business transacted . . . in that state," *Hans Rees' Sons*, 283 U.S. at 135; leads "to a grossly distorted result," *Norfolk & W. Ry. Co.*, 390 U.S. at 326; or "give[s] rise to serious concerns of double taxation," *Trinova Corp.*, 498 U.S. at 386.

41. As the examples above illustrate, *supra* ¶¶ 22-26, the Special Rule has each of these effects. It attributes income "out of all appropriate proportions to the business transacted" in California, leading to "grossly distorted results." Used alongside apportionment formulas, like Florida's, that make a good faith effort to assign payroll, property, and *all* sales to the proper States, the Special Rule inevitably results in both "nowhere income" and double taxation.

C. The Special Rule discriminates against interstate commerce.

42. "One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Maryland*, 451 U.S. at 754 (quotation omitted). "This antidiscrimination principle follows inexorably from the basic purpose of the Clause to prohibit

the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Id.* (quotation omitted).

43. Facial neutrality is irrelevant. What matters is whether the challenged tax "will in its practical operation work discrimination against interstate commerce." *Id.* at 756; *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 566–67 (2015) ("[T]he fact that the tax might have the advantage of appearing nondiscriminatory does not save it from invalidation." (quotation omitted)) (collecting cases); *Nippert v. City of Richmond*, 327 U.S. 416, 431 (1946) ("It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance . . . . Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern.").

44. The *Moorman* majority did not dispute the dissent's premise that single-sales factors operate as tariffs against out-of-state business. Curiously, while *Complete Auto* was decided the previous term, the majority opinion did not apply its factors.[18] Instead, it emphasized that, while sales alone yield only a "rough approximation" of the amount of income-generating activity occurring in a given state, Iowa's formula "reached, and was meant to reach, only the profits

[18] It is difficult to square *Moorman*'s quiet acquiescence in discriminatory taxation with this Court's more recent decision in *Wynne*, which referred to taxes with the "economic effect as a state tariff" as "fatal" and "the quintessential evil targeted by the dormant Commerce Clause." *Wynne*, 575 U.S. at 545, 565.

earned within the State." *Moorman*, 437 U.S. at 273–74. In other words, *Moorman* stands for the proposition that a State may apportion business income solely on sales, *so long as it evaluates sales fairly*.

45. That saving grace is not present here. The Special Rule carves out large, infrequent sales of tangible and intangible property—the exact types of sales most likely to occur where a corporation's payroll and property are located. Indeed, lest there be any confusion, the Special Rule specifically identifies "the sale of a factory, patent, or affiliate's stock" as excluded sales. Cal. Code Regs., tit. 18, § 25137(c)(1)(A). The sale of a factory is attributable to the State where the factory is located. Multistate Tax Compact art. IV, § 6(a); Fla. Stat. § 220.16(4); Cal. Rev. & Tax. Code § 25125(a). The sale of a patent would ordinarily be attributed to the State(s) where the patent was "employed in production, fabrication, [and] manufacturing." Multistate Tax Compact art. IV, § 8(b); Fla. Stat. § 220.16(2)(c); Cal. Rev. & Tax. Code § 25127. Sales of other intangible property are ordinarily attributed to the corporation's commercial domicile. Multistate Tax Compact art. IV, § 8; Fla. Stat. § 220.16(8); Cal. Rev. & Tax. Code § 25127. Excluding these sales stamps out any trace of property and payroll from the apportionment formula, supercharging the single-sales factor tariff and coercing businesses to remain in, or relocate to, California.

46. This apportionment scheme, though clever, is plainly unconstitutional. It has "a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure

rather than among the several States." *Am. Trucking*, 483 U.S. at 286–87 (quotation omitted); *see also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (tax that imposed "disparate treatment" as "an incentive to locate within Louisiana" violated the dormant Commerce Clause); *Amerada Hess Corp.*, 490 U.S. at 77–78 (tax that "exert[ed] pressure on an interstate business to conduct more of its activities in New Jersey" violated the dormant Commerce Clause); *Wynne*, 575 U.S. at 561 (collecting cases invalidating taxes that "had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity").

D. The Special Rule is not fairly related to the services provided by California.

47. "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629 (1981).

48. A State may adopt a single-sales factor consistent with this Court's precedents by including all sales in the pre-apportionment tax base in the sales factor formula, or by excluding certain sales from both the tax base and the sales factor formula. But it may not include one and exclude the other, as California has. Doing so "impos[es] an undue burden on inter-

state commerce" by taxing business income irrespective of its relationship to the corporation's presence or activities in the taxing State. *Id.*

49. In sum, apportionment methods that fail any of the *Complete Auto* factors are invalid under the dormant Commerce Clause. The Special Rule fails each of them.

COUNT II
IMPORT-EXPORT CLAUSE

50. While this Court has policed discriminatory taxes under "the judicially created negative Commerce Clause," the Constitution also provides "an *express* check" in the Import-Export Clause. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); *see also Wynne*, 575 U.S. at 573 (Scalia, J., dissenting) ("The Constitution addresses the evils of local impediments to commerce by prohibiting States from imposing certain especially burdensome taxes—'Imposts or Duties on Imports or Exports' . . . without congressional consent."). The Clause prohibits States from "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws" without Congressional consent. U.S. Const. art. I, § 10, cl. 2.

51. As originally understood, "the terms 'imports' and 'exports' encompassed not just trade with foreign nations, but trade with *other States* as well." *Camps Newfound*, 520 U.S. at 621 (Thomas, J., dissenting). There is therefore a "close relationship" between the Import-Export and dormant Commerce Clauses,

which in most cases will "lead to the same result." *Wynne*, 575 U.S. at 570; *see also Camps Newfound*, 520 U.S. at 610 (Thomas, J., dissenting) ("[M]uch of what the Import–Export Clause appears to have been designed to protect against has since been addressed under the negative Commerce Clause.").

52. A key difference is that the Import-Export Clause "only prohibits States from levying 'duties' and 'imposts,'" whereas the dormant Commerce Clause is not so limited. *Camps Newfound*, 520 U.S. at 637 (Thomas, J., dissenting). An "impost" is "a tax levied on *goods* at the time of *importation*." *Id.* "Duty" is a broader term "applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects." *Id.* (quoting James Madison, Debates in the Convention of 1787 (Draft), circa 1836, in 2 Farrand 305 (remarks of James Wilson)).

53. Both terms encompass a tariff on sales from out-of-state corporations. Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 Wash. U. L.Q. 1127, 1191 (1996) ("Under the Import-Export Clause as applied to interstate trade, tariffs plainly would be unlawful. The plain meaning of the prohibition on 'imposts and duties on imports' outlaws tariffs. Thus, under the Import-Export Clause, tariffs would . . . be treated exactly the same as they are under the dormant Commerce Clause."). Indeed, the Constitution's failure to address "state tariffs" would have been a glaring omission, considering that "exercises of sovereign powers in adversely affecting trade from sister States was one of the factors leading to the Annapolis conference." T.

Powell, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 182 (1956); *see also* Drahozal at 1187 ("In his notes for debate on the proposal, and in a subsequent letter to Thomas Jefferson, Madison explained that the prohibition on state tariffs was intended to address precisely the sort of problems caused by actions such as the 1784 Connecticut tariff."); *Wynne*, 575 U.S. at 570 ("State tariffs were among the principal problems that led to the adoption of the Constitution.").

54. California's single-sales factor operates as a tariff—i.e., impost or duty—against sales made into California by corporations based outside of California. The Special Rule increases this tariff, often exponentially, when out-of-state corporations make "substantial" sales that have little or no connection to California. This tariff is neither absolutely necessary for executing California's inspection laws nor approved by Congress. The Special Rule is therefore invalid under the Import-Export Clause.

COUNT III
DUE PROCESS CLAUSE

55. "For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a minimal connection between the interstate activities and the taxing State, and 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*, 445 U.S. 425, 436–37 (1980) (quotation omitted).

56. These requirements are "encompassed by" the *Complete Auto* factors. *Trinova Corp.*, 498 U.S. at 373 ("The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the due process requirement that there be a minimal connection between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." (quotation omitted)); *Container Corp.*, 463 U.S. at 164 ("Under both the Due Process and the Commerce Clauses of the Constitution, a state may not, when imposing an income-based tax, tax value earned outside its borders."); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 350 n.14 (1982) (O'Connor, J., dissenting) ("Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause.").

57. The Special Rule is a clear-cut due process violation. Its express purpose is to *ignore* the connection between certain "substantial" sales and California, irrationally apportioning California's share of those sales based on California's share of unrelated sales. *Mobil Oil Corp.*, 445 U.S. at 436–37. Just as a State may not constitutionally tax out-of-state property based on the presence of other property in that State, *Norfolk & W. Ry. Co.*, 390 U.S. at 325, California may not constitutionally tax out-of-state sales based on the occurrence of other sales in California.

PRAYER FOR RELIEF

WHEREFORE, the State of Florida respectfully requests that this Court issue the following relief:

A. Declare that Title 18, Section 25137(c)(1)(A) of the California Code of Regulations violates the United States Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

B. Declare that Title 18, Section 25137(c)(1)(A) of the California Code of Regulations violates the United States Constitution's Import-Export Clause, U.S. Const. art. I, § 10, cl. 2.

C. Declare that Title 18, Section 25137(c)(1)(A) of the California Code of Regulations violates the United States Constitution's Due Process Clause, U.S. Const. amend. XIV, § 1.

D. Issue a permanent injunction ordering Defendants and their agents not to apply or enforce Title 18, Section 25137(c)(1)(A) of the California Code of Regulations.

E. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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