

NO. 22O150, ORIG

In the
Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA,

Defendant.

**BRIEF *AMICI CURIAE* RESEARCHERS, PRO-
FESSORS AND LECTURERS OF LAW IN SUP-
PORT OF MOTION FOR LEAVE TO FILE BILL
OF COMPLAINT**

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QUESTIONS PRESENTED

The State of Arizona alleges that the State of California imposes a “doing business” tax on business entities that have no connection to California except for purely passive investment in California companies. Arizona further alleges that if these taxes are not voluntarily paid, California engages in *ex-parte* extra-territorial seizures without warrant, judicial involvement, probable cause, or possibility of judicial review.

Although this Court has original jurisdiction over all controversies between two or more states (28 U.S.C. § 1251(a) and Art. III, s 2) recent jurisprudence has promulgated a rule that permits this Court to exercise discretion and decline to hear cases that fall within the terms of its original jurisdiction. However, “If this Court does not exercise jurisdiction over a controversy between two States, then the complaining state has no judicial forum in which to seek relief.” *Nebraska v. Colorado*, 136 S.Ct. 1034, 1035 (2016) (Thomas, J. dissenting).

The questions presented are:

- (1) Should this Court accept jurisdiction over Arizona’s claims under a “discretionary” analysis of a suit between two states?; and
- (2) Should this court revisit its “discretionary” approach to original jurisdiction actions?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES..... iii
IDENTITY AND INTEREST OF AMICI CURIAE ...1
SUMMARY OF ARGUMENT1
ARGUMENT2
I. **This Court Should Accept Jurisdiction
Under a “Discretionary” Analysis of this
Original Action**2
A. **Arizona’s Allegations of Extraterritorial
Due Process Violations Warrant Granting
Jurisdiction**3
B. **No Adequate Alternative Forum Exists to
Address this Controversy**4
II. **Under a Non-Discretionary Analysis,
Jurisdiction Should be Granted**5
CONCLUSION.....7
APPENDIX.....1a

TABLE OF AUTHORITIES

Cases

<i>Burton v. United States</i> , 196 U.S. 283 (1905).....	6
<i>Cohens v. Virginia</i> , 19 U.S. 264 (1821).....	2
<i>Illinois v. City of Milwaukee, Wis.</i> , 406 U.S. 91 (1972).....	2, 6, 7
<i>Miller Bros. Co. v. Maryland</i> , 347 U.S. 340 (1954)....	3
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992)	5
<i>Nebraska v. Colorado</i> , 136 S.Ct. 1034 (2016) (Thomas, J. dissenting).	i, 7
<i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976).....	6
<i>Shaffer V. Heitner</i> , 433 U.S. 186 (1977)	3, 4
<i>Swart Enterprises, Inc. v. Franchise Tax Bd.</i> 7 Cal.App.5 th 497 (Cal. Ct. of Appl, 5th Dist., 2017.)	5, 6
<i>Utah v. U.S.</i> , 394 U.S. 89 (1969).....	2
<i>Washington v. General Motors Corp.</i> , 406 U.S. 109 (1972).....	7

Federal Cases

28 U.S.C. § 1251(a).....	1, 6
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Constitutional Provisions

Art. III, s 2	i, 1, 6
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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are researchers, professors, and lecturers of law contained in the appendix attached below. We have no personal interest in the outcome of this case, but a professional interest in the development of constitutional law.¹

SUMMARY OF ARGUMENT

This Court should accept jurisdiction in the instant case, as the seriousness and dignity of claims and unavailability of another forum warrants granting Arizona leave to file a bill of complaint in this original action by the State of Arizona against the State of California.

Additionally, although this Court has adopted this “discretionary rule” for original actions between two states for policy reasons (mitigating the burden to the Court’s docket) this rule warrants reconsideration. The plain language of 28 U.S.C. § 1251(a) and Art. III, s 2 do not provide discretion to decline to decide cases within this Court’s original jurisdiction.

¹ Pursuant to this Court’s Rule 37.3(a), all parties were provided timely notice of this filing and have consented to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, although the State of Arizona paid for the cost of printing.

ARGUMENT

I. This Court Should Accept Jurisdiction Under a “Discretionary” Analysis of this Original Action

Although this Court “[has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given”² recent jurisprudence has developed a contrary rule, that “original jurisdiction should be invoked sparingly” in order “to honor [our] original jurisdiction but to make it obligatory only in appropriate cases.” *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972), citing *Utah v. U.S.*, 394 U.S. 89, 95 (1969). This Court’s original and exclusive jurisdiction over disputes between states is obligatory, however, this discretionary rule requires consideration of (1) the seriousness and dignity of the claim and (2) the 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. *Id.*

As articulated in the State of Arizona’s Motion for Leave to File a Bill of Complaint, California has developed an extra-judicial mechanism to circumvent this obvious due process issue by coercing financial institutions to comply with orders seizing funds and denying these financial institutions any opportunity to challenge the seizure order in any court under the premise that passive out-of-state investors in

² *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)

California LLCs are subject to taxation by the State of California.

Thus, even under a “discretionary” analysis of this original action, Arizona asserts serious claims for which there is no alternative jurisdiction over the named parties where the issues tendered may be litigated and where appropriate relief may be had.

A. Arizona’s Allegations of Extraterritorial Due Process Violations Warrant Granting Jurisdiction

The Due Process Clause of the Fourteenth Amendment imposes fundamental limitations on the ability of states to impose taxes where “there is jurisdiction over neither person or property.” *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954).

The instant case presents circumstances where California lacks both personal jurisdiction and *in rem* jurisdiction over out-of-state residents whose only contact with California is passive investment in California companies, specifically LLCs. See *Shaffer v. Heitner*, 433 U.S. 186 (1977). Purely passive investments in California companies by Arizona investors are an insufficient basis to impose taxes as sufficient “minimum contacts” do not exist between California and these passive investors. See *Shaffer*, 433 U.S. 186.

In *Shaffer*, this Court held the mere presence of property in a state does not support jurisdiction over out-of-state residents. Moreover, this Court stated that allowing a state to maintain jurisdiction over the out-of-state owners of property without sufficient minimum contacts would “serve only to allow state-court jurisdiction that is fundamentally unfair...” *Id.* at

212. California's current mechanism for levying taxes against out-of-state investors appears to be designed to circumvent this rule which obviously limits the jurisdiction of California State Courts over Arizona residents who are merely passive investors in California LLC's.

This Court noted in *Shaffer* that it had accepted jurisdiction over the issues presented in that case, which involved the seizure of property owned by a non-resident of Delaware. *Id.* at 195. Likewise, this Court should accept jurisdiction over a similarly serious controversy between the State of Arizona and the State of California to clarify whether California's extra-judicial mechanism for seizing out-of-state property comports with the Due Process Clause of the Fourteenth Amendment, *Shaffer*, and its progeny. The Court current is currently reviewing an important matter of state income taxation in N.C. Dep't Revenue v. Kaestner Trust No. 18-457, and this case would permit another opportunity to clarify application of the Fourteenth Amendment to state income taxation.

B. No Adequate Alternative Forum Exists to Address this Controversy

As this Court's jurisdiction over disputes between states is exclusive, no alternative forum exists to address the issues presented in this case. *Mississippi v. Louisiana*, 506 U.S. 73 (1992). Moreover, there is no alternative jurisdiction over the named parties where the issues tendered may be litigated, and where appropriate relief may be had.

The instant case is not limited to the mere recovery of property which could arguably be addressed by

individual suits filed in California State courts. Rather, this case involves 1) allegations of perpetual due process violations which cannot be adequately asserted in state court; 2) the sovereign interests of the both California and Arizona; and 3) amounts in controversy that are individually insufficient to allow for full litigation of the issues.

In fact, although at least one California State Court has held that passive investment in California LLC's does not constitute "doing business" in California, Arizona alleges that the California Franchise Tax Board has continued to seek collection of California corporation franchise taxes from passive out-of-state investors. *See Swart Enterprises, Inc. v. Franchise Tax Bd.* 7 Cal.App.5th 497, 513 (Cal. Ct. App, 5th Dist., 2017.) Of critical importance to this Court's acceptance of jurisdiction in the instant case was the refusal of the *Swart* court to rule on the constitutional challenges presented in that case given the clear violations of state law that prohibit the Franchise Tax Board from engaging in such behavior. *Id.* "It is not in the habit of the court to decide questions of a constitutional nature unless absolutely necessary..." *Id.* at 513-514, citing *Burton v. United States*, 196 U.S. 283, 595 (1905). As such, this Court should accept jurisdiction of the instant case as it represents the only forum where these critical issues may be tendered, adequately litigated, and where relief may be had.

II. Under a Non-Discretionary Analysis, Jurisdiction Should be Granted

Even in light of the of the issues presented by the parties and *Amici* under a "discretionary" analysis, Arizona's request for leave to file a bill of complaint

should be granted as the plain text of 28 U.S.C. § 1251(a) states that jurisdiction is non-discretionary.

The “discretionary rule” is a salutary one, rooted in policy considerations, and is rationalized that by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve suits to redress private grievances thus inundating the Court’s docket. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976); *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93-94 (1972), citing *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) “We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.”]

The reasoning of the “discretionary rule” bears reconsideration. *Nebraska v. Colorado*, 136 S.Ct. 1034, 1035-1036 (2016) (Thomas, J. dissenting). The rule articulated in *Pennsylvania v. New Jersey* acknowledged that a State has standing to sue when “its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer.” 426 U.S. at 665. However, this Court disapproved of states suing to redress private grievances, due to potential inundation of the Court’s docket and the “evaporation” of the critical distinction in Art. III, s 2 the Constitution of suits brought by “Citizens” and “States.” Such concerns, and others, can be easily remedied by this Court’s refusal to accept jurisdiction of matters where states do not have legitimate standing to bring suit. It is unnecessary, and contrary to the plain language of 28 U.S.C. § 1251(a) to invoke a “discretionary rule” that limits the ability of states to litigate legitimate claims before this Court, the one

and only forum in which the dispute between these states may be litigated.

CONCLUSION

Under either a discretionary or non-discretionary analysis, this Court should grant the State of Arizona's Motion for Leave to File a Bill of Complaint. The issues presented in this case represent serious claims for which there is no alternative jurisdiction over the named parties where the issues tendered may be litigated and where appropriate relief may be had.

DATED: May 3, 2019

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APPENDIX

APPENDIX

Amici, whose names and affiliations are set forth below, are law professors and lecturers in the United States and abroad who subscribe to the views stated in this amicus brief in their individual capacities and not on behalf of their institutions. They write solely based on their professional concern for the development of constitutional law and have no personal or financial interest in the outcome of this case:

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