Estate Planning State Tax Nexus Considerations: *Nexus Issues in State Tax Planning*

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NEXUS ISSUES IN STATE TAX PLANNING

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There are two main state tax issues for trusts and estate to consider – domicile and the existence of any state income and/or estate or inheritance tax. With a highly mobile population with a desire to retire in warmer climates, these issues will confront a practitioner from time to time. And with many states facing budgetary crunches combined with declining populations, state governments are facing pressure to recoup taxes from those individuals and companies who are leaving the states.

Migration from state to state

When analyzing nexus issues, one can never get away from the demographics that are driving much of the states' activities in this area. It has been obvious to everyone that there has been a shift in population away from the North and Northeast, the proverbial "Rust Belt" states, to the South and Southwest, the proverbial "Sun Belt" states. But this shift has apparently accelerated in recent years, heightening the dire financial situation that many states are facing.

This shift is not a one-time event. For instance, the states of Illinois and Connecticut, both with troubled state government finances, have now lost population for six years in a row. The state of New York has lost population in each of the past four years. Over the last decade New York has lost more of its population (7.2%) than any other save Alaska (8%), followed by Illinois (6.8%), Connecticut (5.6%) and New Jersey (5.5%).

There have been some prominent billionaires, most notably President Trump and investor Carl Icahn, who have declared that they moving their residence/domicile from New York to Florida.

One state's loss in another state's gain. Depending on what criteria are used, the states that are generally considered to have gained the most are Arizona, Nevada, Utah and Idaho with states such as Texas and Florida not far behind.

The Congressional allocations of the 435 seats in the House of Representatives reflect this. When I first moved to Arizona in 1989, there were five Congressional Districts in Arizona. There are currently nine Congressional districts in Arizona and, after the 2020 census, it is largely expected that Arizona will pick up a tenth district.

After the 2010 census, New York and Ohio both lost two Congressional districts. Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey and Pennsylvania each lost one district. Conversely, Texas gained four Congressional districts and Florida gained two. Arizona, Georgia, Nevada, South Carolina, Utah and Washington each gained one district.

For a more historical perspective, New York has gone from a high of 47 Congressional districts in 1933 to currently having 27. Pennsylvania's Congressional districts have gone from 36 to 18 in that period. In the same time period, California has gone from 20 Congressional districts to currently having 53 districts. (Surprisingly, it is expected that California will lose one district with the 2020 census.) Texas has gone from 18 districts to 36 in that period.

As stated earlier, the shift in population is not news. But the loss in sone states' population, not in relative terms but in absolute terms, has set off alarm bells is some state capitols. This is reflected in the more aggressive tax activities in certain states.

This is costing the states who are losing population. According to a recent article in the Wall Street Journal analyzing data from the Census Bureau and IRS, New York has lost a net $18 billion in adjusted gross income in 2018 and 2019. Where are these people going? According to the WSJ, "Zero income tax Florida drew $16.5 billion in adjusted gross income last year. Many have also fled to Arizona ($3.5 billion), Texas ($3.5 billion), North Carolina ($3 billion), Nevada ($2.3 billion), Colorado ($2.1 billion), Washington ($1.7 billion) and Idaho ($1.1 billion)."

Constitutional requirement of nexus

The basic concept with nexus is that the Due Process Clause of the Fourteenth Amendment requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Bros. Co. v. Maryland, 347 U.S. 340, 342 (1954).

This brings up the jurisdictional issues from many of those cases from civil procedure calls in first-year law school that most of us had happily forgotten about. The Miller Brothers court ruled that "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a … judgment against a nonresident defendant." WorldWide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). The Clause requires that the out-of-state defendant "be subject to the personal jurisdiction of the court." Id. (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)). It "has long been settled" that "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." Id. (quoting Int'l Shoe, 326 U.S. at 316). Minimum contacts exist only where the defendant has "purposefully avail[ed] itself of the privilege[s] of conducting activities within the forum," see Hanson v. Denkla, 357 U.S. 235, 253 (1958), and thus "should reasonably anticipate being haled into court there," see World-Wide Volkswagen, 444 U.S. at 297.

But jurisdiction and nexus are similar conceptually but still different because, as a life-long resident of a state, there is no question a state would have jurisdiction over the person. Nexus, rather, is more of point in time question – was there a connection at the point in time over which a tax issue has come about?

Put another way, if there is no jurisdiction, there is no nexus. Yet there can be jurisdiction with no nexus.

This comes into play when the issue is one of domicile and residency. Much legal ink has been spilt trying to distinguish "residency" from "domicile" and the two terms are often used interchangeably. **The long and short of it is: where does the person consider his or her home to be?** But this is ultimately a question of intent that, as a practical matter, will be proved by circumstantial evidence. For practitioners, the challenge is with establishing this to the satisfaction of taxing authorities in the client's former state of residency/domicile.

The basic rule is that a person may have several residences but only one domicile.

The Kaestner case

There has been a noticeable uptick in the number of court cases, most notably in the recent US Supreme Court case of North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992

Family Trust, 588 US _____ (2019) decided in a unanimous opinion on June 21, 2019, involving a state's attempt to reach the interest of an in-state beneficiary of an out-of-state trust. From the Court's syllabus:

> Joseph Lee Rice III formed a trust for the benefit of his children in his home State of New York and appointed a fellow New York resident as the trustee. The trust agreement granted the trustee "absolute discretion" to distribute the trust's assets to the beneficiaries. In 1997, Rice's daughter, Kimberley Rice Kaestner, moved to North Carolina. The trustee later divided Rice's initial trust into three separate subtrusts, and North Carolina sought to tax the Kimberley Rice Kaestner 1992 Family Trust (Trust)—formed for the benefit of Kaestner and her three children—under a law authorizing the State to tax any trust income that "is for the benefit of" a state resident, N. C. Gen. Stat. Ann. §105–160.2. The State assessed a tax of more than $1.3 million for tax years 2005 through 2008. During that period, Kaestner had no right to, and did not receive, any distributions. Nor did the Trust have a physical presence, make any direct investments, or hold any real property in the State. The trustee paid the tax under protest and then sued the taxing authority in state court, arguing that the tax as applied to the Trust violates the Fourteenth Amendment's Due Process Clause. The state courts agreed, holding that the Kaestners' in-state residence was too tenuous a link between the State and the Trust to support the tax.
>
> Held: The presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain to receive it.

The opinion does not give us any specifics on the income or assets of the trust other than to state that the amount of North Carolina income tax for the three years at issue was $1.3 million. If that is the amount of state tax owed by one of three beneficiaries, then then size of the trust must have been enormous.

In upholding the North Carolina courts, all of whom ruled against the state, the Court stated that it

> "applies a two-step analysis to decide if a state tax abides by the Due Process Clause. First, and most relevant here, there must be "'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" Quill Corp. v. North Dakota, 504 U. S. 298, 312 (1992). Second, "the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State." Ibid. To determine whether a State has the requisite "minimum connection" with the object of its tax, this Court borrows from the familiar test of International Shoe Co. v. Washington, 326 U. S. 310 (1945)."

Multi-state income taxation

There have also been happenings in New York that have generated considerable attention in the media. On almost the same day that the Kaestner opinion was released, a writ of certiorari was filed with the Court in Samuel Edelman v. New York State Department of Taxation and Finance, that has drawn a great deal of attention with a number of amicus briefs filed.

Mr Edelman owned a shoe manufacturing company that he later sold. He lived in Connecticut but had a condo in Manhattan. He was frequently in NYC during business hours but at home in Connecticut at night. He paid taxes as a Connecticut residence but the State of New York also sought to tax him a second time on that same income. The case focuses on New York's broad statutory definition of residence for tax purposes.

New York requires its residents to pay tax on all their worldwide income. N.Y. Tax Law §§ 611, 612. And New York provides multiple ways individuals can be considered residents. The first is if New York is their domicile; the second is if New York considers them "resident individuals." A taxpayer's "domicile" is the place where he lives — his "permanent home." N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(1). By contrast, a "resident individual" is anyone who is not domiciled in the State yet maintains a permanent

abode in New York and spends more than 183 days there. N.Y. Tax. Law § 605(b)(1)(B). This broad definition of New York residence makes it likely that many New Yorkers will also be considered residents of other States and thereby become subject to residence-based taxation on the same income in multiple States.

The difficulty in these cases is that states such as Connecticut and New Jersey do not allow a taxpayer to deduct taxes paid to another state, such as New York.

The question that was put to the Court is whether this double-taxation is constitutional. However, on October 7, 2019, the United States Supreme Court denied certiorari even though there was a slew of amicus curiae briefs filed with the Court urging reversal of the lower courts.

These briefs emphasized, among other case, the case of Comptroller of Maryland v. Wynne, 135 S.Ct. 1787 (2015) that dealt with the tax statues of the state of Maryland that did not offer its residents a full credit against the income taxes that they pay to other States. This resulted in double-taxation.

Mr Wynne owned a Subchapter S corporation that paid state income taxes in 39 states. Wynne sought to require the state to allow him a deduction for the states taxes paid elsewhere, outside of Maryland.

A very divided court ruled that the double taxation effect created by Maryland's statutes were unconstitutional:

> "Under our precedents, the dormant Commerce Clause precludes States from "discriminat[ing] between transactions on the basis of some interstate element." Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 332, n. 12, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). This means, among other things, that a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." Armco Inc. v. Hardesty, 467 U.S. 638, 642, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of `multiple taxation.'" Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959)"

A similar case has also generated interest in the media concerning Nelson Obus, a hedge-fund manager who works in NYC but lives in New Jersey with a vacation home in northern New York. As with the Edelman case, Obus was audited with a deficiency of $527,000 assessed against him for the 2012 and 2013 tax years. Much has been made that the deficiency is more than twice the $290,000 he paid for the house in 2011.

On August 22, 2019, an administrative law judge upheld the deficiency, leading to prominently published article in the Wall Street Journal and New York Times, among others.

Mr Obus has made it clear he also intends to fight this.

There has also been a ruling in December 2019 in which an administrative law judge ruled that David Russekoff, the chief investment officer at Perry Capital located in Manhattan who moved to Greenwich, Connecticut, was liable for $10 million in taxes and interest for the six years that he lived in Connecticut but worked in Manhattan. See https://www.dta.ny.gov/pdf/determinations/827740.det.pdf.

These are not isolated cases. According to CNBC, the State of New York conducted about 3,000 "nonresidency" audits a year between 2010 and 2017, collecting around $1 billion in taxes.

In other cases that I have been involved with, the opening salvo in any fight over this will be over the location of homes owned by the client. Ideally, there is only one home that is located in the new, gaining state. But many of our clients will hold onto the "old", "former" home, perhaps for sentimental reasons but often for a place to return to when the weather warms up north. The "old" state will maintain that the "old" home is really where the client resides.

The challenge will be to create as much of a paper trail indicating that many or all of the client's ties have been cut with the "old" state. It doesn't take much imagination to guess what this entails:

Make sure the addresses on all bank statements, bills, tax bills and assessments, etc reflect the new address

Register to vote in the new state

Register automobiles in the new state

File tax returns in the new state with the new address used

Updating estate planning documents to reflect issues created in the new state

Become a formal, recognized member of local organizations or churches

Keep track of the location which doctors and veterinarians you are visiting

Keep a calendar as to the client's whereabouts each day

According to the California's Franchise Tax Board Publication 1031, the factors to consider are as follows:

- Amount of time you spend in California versus amount of time you spend outside California .
- Location of your spouse/RDP and children .
- Location of your principal residence .
- State that issued your driver's license.
- State where your vehicles are registered .
- State where you maintain your professional licenses .
- State where you are registered to vote .
- Location of the banks where you maintain accounts .
- The origination point of your financial transactions .
- Location of your medical professionals and other healthcare providers (doctors, dentists etc .), accountants, and attorneys .
- Location of your social ties, such as your place of worship, professional associations, or social and country clubs of which you are a member .
- Location of your real property and investments .
- Permanence of your work assignments in California .

The State of Illinois looks to the above factors and a few more:

"location of spouse and dependents"

"telephone and/or other utility usage over a duration of time"

See 86 Ill. Admin. Code 100.3020(g)

The Illinois regs also create a presumption as to residency:

"An individual who is an Illinois resident in one year is presumed to be a resident in the following year if he or she is present in Illinois more days than he or she is present in any other state."

In the Kaestner case, the Supreme Court emphasized that "The Trust was subject to New York law, the grantor was a New York resident and no trustee lived in North Carolina. The trustee kept the Trust documents and records in New York, and the Trust asset custodians were located in Massachusetts. The Trust also maintained no physical presence in North Carolina, made no direct investments in the State, and held no real property there." (citations to the record omitted)

As for trusts, the Kaestner Court noted that "In the context of beneficiary contacts specifically, the Court has focused on the extent of the instate beneficiary's right to control, possess, enjoy, or receive trust assets.".

State estate taxes

With the sky-high $11.4M federal estate exemption, many practitioners view their clients' estate tax exposure as unrealistic and a thing of the past. While this may be true at the federal level, states are all over the map on whether there is a state-level estate tax and the amount of the exemption. For a chart of all 50 states, see https://www.actec.org/resources/state-death-tax-chart/.

State sales taxes & the Wayfair case

A very controversial and high profile case was decided by the United States Supreme Court in June 2018 in South Dakota v. Wayfair, Inc., 585 US ___, 138 S.Ct. 2080, 201 L.Ed.2d 403 (2018) that dealt with the extent that a state can tax a business that has no physical presence in the taxing state.

It was the first state sales tax case that the Court had heard in over 25 years – since the 1992 Quill decision that pre-dated the Internet and that required physical presence in the taxing state. It was a divided 5-4 decision with two concurring opinions that upheld the South Dakota tax. Here is the syllabus provided by the Court:

> South Dakota, like many States, taxes the retail sales of goods and services in the State. Sellers are required to collect and remit the tax to the State, but if they do not then in-state consumers are responsible for paying a use tax at the same rate. Under *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, and *Quill Corp.* v. *North Dakota*, 504 U. S. 298, South Dakota may not require a business that has no physical presence in the State to collect its sales tax. Consumer compliance rates are notoriously low, however, and it is estimated that *Bellas Hess* and *Quill* cause South Dakota to lose between $48 and $58 million annually. Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. Respondents, top online retailers with no employees or real estate in South Dakota, each meet the Act's minimum sales or transactions requirement, but do not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit the sales tax. Respondents sought summary judgment, arguing that the Act is unconstitutional. The trial court granted their motion. The State Supreme Court affirmed on the ground that *Quill* is controlling precedent.
>
> *Held*: Because the physical presence rule of *Quill* is unsound and incorrect, *Quill Corp.* v. *North Dakota*, 504 U. S. 298, and *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, are overruled. Pp. 5–24.

(a) An understanding of this Court's Commerce Clause principles and their application to state taxes is instructive here. Pp. 5–9.

(1) Two primary principles mark the boundaries of a State's authority to regulate interstate commerce: State regulations may not discriminate against interstate commerce; and States may not impose undue burdens on interstate commerce. These principles guide the courts in adjudicating challenges to state laws under the Commerce Clause. Pp. 5–7.

(2) They also animate Commerce Clause precedents addressing the validity of state taxes, which will be sustained so long as they (1) apply to an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279. Before *Complete Auto*, the Court held in *Bellas Hess* that a "seller whose only connection with customers in the State is by common carrier or . . . mail" lacked the requisite minimum contacts with the State required by the Due Process Clause and the Commerce Clause, and that unless the retailer maintained a physical presence in the State, the State lacked the power to require that retailer to collect a local tax. 386 U. S., at 758. In *Quill*, the Court overruled the due process holding, but not the Commerce Clause holding, grounding the physical presence rule in *Complete Auto*'s requirement that a tax have a "substantial nexus" with the activity being taxed. Pp. 7–9.

(b) The physical presence rule has long been criticized as giving out-of-state sellers an advantage. Each year, it becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause. Pp. 9–17.

(1) *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of *Complete Auto's* nexus requirement. That requirement is "closely related," *Bellas Hess*, 386 U. S. at 756, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345. And, as *Quill* itself recognized, a business need not have a physical presence in a State to satisfy the demands of due process. When considering whether a State may levy a tax, Due Process and Commerce Clause standards, though not identical or coterminous, have significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Other aspects of the Court's doctrine can better and more accurately address potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied.

Second, *Quill* creates rather than resolves market distortions. In effect, it is a judicially created tax shelter for businesses that limit their physical presence in a State but sell their goods and services to the State's consumers, something that has become easier and more prevalent as technology has advanced. The rule also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.

Third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of "a sensitive, case-by-case analysis of purposes and effects," *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 201. It treats economically identical actors differently for arbitrary reasons. For example, a business that maintains a few items of inventory in a small warehouse in a State is required to collect and remit a tax on all of its sales in the State, while a seller with a pervasive Internet presence cannot be subject to the same tax for the sales of the same items. Pp. 10–14.

(2) When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that *Quill's* physical presence rule is artificial, not just "at its edges," 504 U. S. at 315, but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State. Pp. 14–15.

(3) The physical presence rule of *Bellas Hess* and *Quill* is also an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia have asked the Court to reject *Quill*'s test.

Helping respondents' customers evade a lawful tax unfairly shifts an increased share of the taxes to those consumers who buy from competitors with a physical presence in the State. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. And it is also essential to the confidence placed in the Court's Commerce Clause decisions. By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill*'s physical presence rule has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field. Pp. 16–17.

(c) *Stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. The Internet revolution has made *Quill*'s original error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy. The expansion of e-commerce has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes, leading the South Dakota Legislature to declare an emergency. The argument, moreover, that the physical presence rule is clear and easy to apply is unsound, as attempts to apply the physical presence rule to online retail sales have proved unworkable.

Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced. *Stare decisis* may accommodate "legitimate reliance interest[s]," *United States* v. *Ross*, 456 U. S. 798, 824, but a business "is in no position to found a constitutional right . . . on the practical opportunities for tax avoidance," *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 366. Startups and small businesses may benefit from the physical presence rule, but here South Dakota affords small merchants a reasonable degree of protection. Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. The potential for such issues to arise in some later case cannot justify retaining an artificial, anachronistic rule that deprives States of vast revenues from major businesses. Pp. 17–22.

(d) In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State, 430 U. S., at 279. Here, the nexus is clearly sufficient. The Act applies only to sellers who engage in a significant quantity of business in the State, and respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Any remaining claims regarding the Commerce Clause's application in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.

The unanswered question is what will constitute a significant nexus with the taxing state? The $100,000/200 transaction trigger used by South Dakota was not a minimum. Likewise, South Dakota's statute specifically stated there would be no retroactive application. The Wayfair court noted this but did not state or hold that retroactivity was prohibited.

Much of the Wayfair commentary suggests that these factors will effectively create a safe-harbor for states when amended their sales tax laws on remote sellers.

Arizona v. California

Another case that was before the United States Supreme Court was the case of Arizona v. California, in which the State of Arizona sought the Court to invoke original jurisdiction to address the issue of whether the State of California could impose a tax on Arizona citizens and companies who had ownership interest in California entities.

The California Franchise Tax Board assesses an annual "doing business" tax of $800 on all business entities "for the privilege of doing business" in the state. Cal. Rev. & Tax. Code §17941(a). A

business entity is deemed to be "doing business" in California if it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." §23101(a). And a taxpayer is deemed to be "doing business in California if certain criteria are met. One is being domiciled in California. Other criteria are if the entity "owns real property and tangible personal property in California exceeding the lesser of fifty thousand dollars ($50,000) or twenty-five percent of the taxpayer's total real property and tangible personal property; or ….. pays compensation in California of the lesser of fifty thousand dollars ($50,000) or twenty-five percent of the total compensation paid by the taxpayer". Cal. Rev. & Tax. Code §§ 17941, 23101.

At issue is the Tax Board's interpretation of Section 23101(a)'s "active engagement" that includes passive investments in California companies by out-of-state entities. In other words, a company's mere ownership interest in an LLC that does business in California—and nothing more— amounts to the company doing business in California itself and subjects the company to the $800 annual tax.

Arizona contended that these tax assessments violated the Due Process Clause, the Commerce Clause, and the Fourth Amendment, asserting many of the arguments already discussed, such as the lack of jurisdiction.

On February 24, 2020, the Supreme Court denied Arizona's motion for leave to file a bill of complaint, with Justices Thomas and Alito dissenting.