No. S270535

In the Supreme Court of the State of California

TAKING OFFENSE,
Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,
Defendant and Respondent.

Third Appellate District, Case No. C088485
Sacramento County Superior Court,
Case No. 34-2017-80002749-CU-WM-GDS
The Honorable Steven Gevercer, Judge

SUPPLEMENTAL RESPONSIVE BRIEF

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August 9, 2023

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INTRODUCTION

In enacting Code of Civil Procedure section 526a, the Legislature codified a doctrine of taxpayer standing limited to suits against "local agenc[ies]."[1] Section 526a now occupies the field of taxpayer standing in California, supplanting whatever common law-based version of the doctrine existed before the statute's enactment. (State Supplemental Opening Brief (SSOB) 18-29.) And even if that were not the case, there would be no sensible basis for the Court to create a new doctrine of state taxpayer standing on common law grounds. (SSOB 29-43.) Doing so would be fundamentally out of step with modern standing norms—inviting litigation grounded in policy disagreements and empowering courts to invalidate state laws in the absence of the real-world facts and controversies necessary for informed judicial decision-making. (SSOB 39-43.)

In its supplemental opening brief, Taking Offense argues that the Court has already recognized a "common law theory" of taxpayer standing. (Taking Offense Supplemental Opening Brief (TOSOB) 9.) This Court's precedents, however, provide no support for application of state taxpayer standing—certainly not a doctrine sweeping enough to provide Taking Offense with standing here. As to Taking Offense's policy arguments for creation of a new doctrine of state taxpayer standing (see, e.g., TOSOB 8, 12), there is no reason to think that taxpayer actions

[1] All references are to the Code of Civil Procedure unless otherwise noted.

would save the State money or make a material contribution to government accountability relative to the many existing checks on state officials' conduct. In any event, the Legislature has chosen to limit taxpayer standing to actions against local governments; there is no basis for the Court to disturb that reasonable policy choice.

ARGUMENT

I. THIS COURT'S PRECEDENTS PROVIDE NO SUPPORT FOR RECOGNIZING A STATE TAXPAYER STANDING DOCTRINE

As the State has explained, this Court has never recognized a common law theory of taxpayer standing applicable to the State or state officials. (SSOB 14-18.) To the contrary, it has emphasized the importance of adhering to "the explicit statutory limits [section 526a] imposes on taxpayer standing." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1251.) The Court has also consistently recognized that the Legislature has imposed "general standing requirements" under sections 367, 1060, and 1086—requirements that apply in all civil cases unless a specific statute provides otherwise. (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 789, internal quotation marks omitted; see SSOB 14, 22-23.) And the Court has made clear that where the Legislature "amend[s] [a statute] a number of times," regulating a subject comprehensively—as the Legislature has done with taxpayer standing under section 526a—the statute "occup[ies] the field." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 574-575; see SSOB 20-23.)

In arguing otherwise, Taking Offense principally relies on the brief discussions of taxpayer standing in *Gogerty v. Coachella Valley Junior College District* (1962) 57 Cal.2d 727, 730, and *Silver v. Los Angeles* (1961) 57 Cal.2d 39, 40-41. (See, e.g., TOSOB 9, 10-13.) As the State has explained, however, neither *Gogerty* nor *Silver* recognized any "common law" of taxpayer standing—certainly not a common law doctrine applicable to the State or state officials. (SSOB 24-25 & fn. 11.) Both cases involved local-level conduct. (SSOB 25-26 & fn. 12; see TOSOB 10 ["cases cited in *Gogerty* [and] *Silver* . . . related only to taxpayer standing to sue to challenge municipal [actions]"].) And neither provided anything beyond summary and conclusory discussions of taxpayer standing. (SSOB 26-28.)[2]

In any event, Taking Offense fails to show that "the formula" for taxpayer standing mentioned in *Gogerty* and *Silver* would be satisfied here. (TSOB 9.) Taking Offense has not alleged "fraud, collusion, ultra vires, or a failure . . . to perform a duty specifically enjoined." (57 Cal.2d at p. 730; 57 Cal.2d at pp. 40-41.) Contrary to Taking Offense's assertion (TOSOB 15), "fraud" involves deceit, a "misrepresentation or . . . concealment of a

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[2] Taking Offense also cites *Nickerson v. County of San Bernardino* (1918) 179 Cal. 518, 522-523, *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 289-290, and *Ceres v. Modesto* (1969) 274 Cal.App.2d 545, 555-557. (TOSOB 9-11, 13.) But like *Gogerty* and *Silver*, those cases involved municipal defendants and nowhere endorsed a common law doctrine of taxpayer standing, much less a doctrine authorizing taxpayer actions against the State or state officials.

material fact." (Black's Law Dict. (11th ed. 2019).) In *Gogerty*, for example, the defendant local district allegedly perpetrated a fraud on the public by falsely purporting to consider a report on potential hazards of operating a new college campus at a certain site. (57 Cal.2d at pp. 729-730, 732.) Here, by contrast, Taking Offense has not alleged any form of deceit. It instead alleges that the State has "enact[ed] an unconstitutional statute in violation of [the] First Amendment." (TOSOB 13.)

Taking Offense is also incorrect that such an assertion, standing alone, amounts to an allegation that the State has failed to perform a "duty specifically enjoined." (TOSOB 15-16.) That terminology originated in cases discussing the traditional requirements for mandamus relief—a context in which plaintiffs must generally allege a violation of a *ministerial* duty, that is, "an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists." (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340.)[3] A government actor violates a duty "specifically enjoined" only when it fails to satisfy a "provision of law *explicitly* requiring" a certain action. (*San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, 686-687, italics added.) In alleging that S.B. 219's misgendering provision violates the general terms of the First Amendment, Taking

[3] In the mandamus context, courts, commentators, and others have traditionally used the terms "specifically enjoined" and "specially enjoined" interchangeably. (See, e.g., § 1085, subd. (a); *Consolidated Printing & Publishing Co. v. Allen* (1941) 18 Cal.2d 63, 66; *Fremont v. Crippen* (1858) 10 Cal. 211, 215.)

Offense has not pointed to a violation of any such duties. (Cf. *California Attorneys for Criminal Justice v. Newsom* (Cal., May 13, 2020, No. S261829) 2020 WL 2568388, *1-2 [in mandamus context, identifying no such duty in allegations that officials violated the general terms of the due process clause]; *id.* at p. *4 (dis. opn. of Liu, J.) [similar].)[4]

Taking Offense fares no better in equating the term "ultra vires" with "unconstitutional" or "unlawful[]." (TOSOB 13, 18.) Such a capacious understanding of "ultra vires" is inconsistent with that term's narrower, traditional meaning (see SSOB 27-28, citing 7A Fletcher, Cyclopedia Corporations (rev. 2023) § 3399 ["beyond the scope of the power granted"]), as well as the Court's admonition that taxpayer standing must not become an "unfettered" doctrine (*Weatherford*, *supra*, 2 Cal.5th at p. 1250). If "ultra vires" simply meant "unconstitutional" or "unlawful"—and taxpayers had standing to challenge any state laws or policies that they view as "ultra vires"—taxpayer standing would be boundless, authorizing any taxpayer to sue the State on any legal grounds whatsoever. Such a sweeping doctrine would threaten many serious harms, including the practical abrogation of settled aspects of this Court's modern standing jurisprudence and the loss of vigorous presentation by directly interested

[4] While the opinions in *California Attorneys for Criminal Justice* are unpublished, the Court may consider them as persuasive authority. (See Cal. Rules of Court, rule 8.1115(a) [barring courts and parties from relying on an unpublished "opinion of a California Court of Appeal or superior court appellate division," but not the Supreme Court].)

parties in the context of real-world disputes. (SSOB 39-43.) This Court's body of precedent provides no support for that extraordinary result.

II. JUDICIAL CREATION OF A NEW STATE TAXPAYER STANDING DOCTRINE WOULD BE UNNECESSARY AND UNWISE

Taking Offense suggests that, even if the Court has not yet recognized state taxpayer standing on common law grounds, it should do so now. In Taking Offense's view, a broad doctrine of state taxpayer standing is necessary to save "state funds" (TOSOB 12) and "hold . . . state officials accountable" (TOSOB 8). Taking Offense is wrong on both counts.

As to the effect of taxpayer actions on the public fisc, there is no basis for assuming that opening the doors to a large new class of plaintiffs would result in aggregate monetary savings for the State. To the contrary, allowing state taxpayer standing-based suits could easily *increase* net government expenditures once the substantial time and resources necessary to litigate and adjudicate such suits are taken into account. (See, e.g., Comment, *Taxpayers' Suits: A Survey & Summary* (1960) 69 Yale L.J. 895, 909-910 [discussing the potential for taxpayer actions to "add to court congestion and unduly burden . . . officials who must defend against such suits, thereby adding to outlays for

courts and public legal staffs"]; *Commonwealth of Massachusetts v. Mellon* (1923) 262 U.S. 447, 487 [similar].)[5]

As to holding state officials accountable, there are already ample means to achieve that important objective. (SSOB 29-34.) Ordinary standing principles, for example, do not erect a "substantial or insurmountable hurdle" to suits challenging the legality of state laws and policies. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 324; see SSOB 30-31.) One of the principal decisions invoked by Taking Offense—*Serrano v. Priest* (1971) 5 Cal.3d 584 (see TOSOB 8)—is illustrative. Ordinary standing principles allowed both schoolchildren and their parents to challenge the State's property tax-based education financing scheme. (RBM 13 & fn. 2.) The plaintiff schoolchildren were "directly affected" by the challenged scheme (*Zolly*, *supra*, 13 Cal.5th at p. 789), because it resulted in "substantially inferior . . . educational opportunities" (*Serrano*, *supra*, 5 Cal.3d at p. 590). The plaintiff parents were directly affected because the scheme led them to lose "money or property" (*Zolly*, *supra*, 13

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[5] For good reason, Taking Offense does not appear to advance the "pure[ly] speculat[ive]" claim that taxpayer actions are likely to "redound to the benefit of the taxpayer because [officials] will pass along [savings] in the form of tax reductions." (*DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 344.) As the U.S. Supreme Court explained in rejecting state taxpayer standing as a matter of federal law, the government could just as easily "allocate any such savings" to other programs. (*Id.* at p. 345.) The "decision of how to allocate [revenue] is the very epitome of a policy judgment . . . which 'the courts cannot presume either to control or to predict.'" (*Ibid.*; see SSOB 36.)

Cal.5th at p. 789)—specifically, "they [were] required to pay taxes at a higher rate than taxpayers in many other districts in order to secure for their children the same or lesser educational opportunities" (*Serrano*, *supra*, 5 Cal.3d at p. 618).[6]

Taxpayers and others may also challenge state laws and policies through a number of additional means. Public interest organizations can, and frequently do, bring suit under relatively broad theories of organizational and associational standing. (See, e.g., *California Medical Assn. v. Aetna Health of California Inc.* (July 17, 2023, S269212) __ Cal.5th __ [2023 WL 4553703, *15]; SSOB 31 & fn. 16.) The public interest exception relaxes ordinary standing rules when necessary to ensure that state laws and policies are not insulated from judicial review. (SSOB 32-33 & fn. 17.) And outside of court, state residents and taxpayers may challenge the decisions of their democratically elected leaders through the broad powers of initiative, referendum, and recall—to say nothing of ordinary political organizing and advocacy, which can play a powerful role in influencing public discourse and policymaking. (See SSOB 33-34.)

Taking Offense asserts that, if the Court refuses to recognize state taxpayer standing, it "would be doing an injustice against the state constitution that gives the judiciary its authority." (TOSOB 8.) Within our constitutional system of government, however, the judiciary plays an important but circumscribed role.

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[6] *Serrano* made passing reference in a footnote to taxpayer standing (5 Cal.3d at p. 618, fn. 38), but that reference was plainly unnecessary to the decision (see OBM 45; RBM 12-14).

(See, e.g., *Weatherford*, *supra*, 2 Cal.5th at pp. 1248-1249; SSOB 38, 40-43.) That role does not include, for example, "[t]he rendering of advisory opinions." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912, citing, e.g., Cal. Const., art. VI, §§ 10-11.) The sweeping theory of taxpayer standing that Taking Offense asks the Court to embrace would differ little, if at all, from that far-reaching advisory authority. (SSOB 40-41.) The State respectfully submits that the proper role of the judiciary is to decide controversies of real-world significance—and ensure that the conduct of government officials does not become insulated from judicial review (see SSOB 32-33; OBM 39-43)—*not* to weigh in on every assertion by a taxpayer that a state law is unconstitutional.

CONCLUSION

The Court should order that the case be dismissed for lack of standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONSIVE BRIEF uses a 13 point Century Schoolbook font and contains 2,121 words.

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August 9, 2023

STATE OF CALIFORNIA
Supreme Court of California

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