No. _____

In The
Supreme Court of the United States

ARLENE ROSENBLATT,

Petitioner,

v.

THE CITY OF SANTA MONICA ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the dormant Commerce Clause framework set forth by this Court, a state law is subject to heightened scrutiny if it either "discriminates against interstate commerce" or has an "extra-territorial reach." This appeal raises two important constitutional questions, both of which are subject to an entrenched circuit split:

1. Whether a local ordinance that discriminates against interstate commerce, and was enacted for a discriminatory purpose, must additionally discriminate exclusively against nonresidents to be subject to heightened scrutiny under the dormant Commerce Clause.

2. Whether a local ordinance that purports to ban advertisements for interstate services made over the Internet, and is enforced in that extraterritorial manner, can be saved from dormant Commerce Clause scrutiny based on an irrebuttable "presumption" that the legislature did not "intend" for the ordinance to apply in the extraterritorial manner in which the ordinance is being enforced.

PARTIES TO THE PROCEEDING

The sole Petitioner here (Plaintiff below) is Arlene Rosenblatt, an individual. Ms. Rosenblatt brought the underlying action on behalf of herself and all others similarly situated.

In addition to the defendant-respondent identified on the cover, the City Council of the City of Santa Monica is also a named defendant below.

Accordingly, no entity warrants inclusion under Rule 29.6.

LIST OF PROCEEDINGS

Rosenblatt v. City of Santa Monica, United States Court of Appeals for the Ninth Circuit, Case No. 17-55879

Opinion (October 3, 2019);

Order Denying Petition for Rehearing (December 2, 2019);

Mandate Issued (December 10, 2019).

Rosenblatt v. City of Santa Monica, United States District Court for the Central District of California, Case No. 2:16-cv-04881

Order Granting Motion to Dismiss (December 1, 2016);

Order Granting in Part and Denying in Part Motion to Dismiss (March 30, 2017);

Order Granting Motion to Dismiss First Amended Complaint (May 24, 2017).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arlene Rosenblatt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet.App. 1a) is published at *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019). The relevant orders of the district court (Pet.App. 41a-74a) are unpublished.

JURISDICTION

The Ninth Circuit issued its initial opinion on October 3, 2019. The Ninth Circuit denied Rosenblatt's petition for rehearing on December 2, 2019. (Pet.App. 75a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8, cl. 3 of the Constitution of the United States provides, in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Federal Rule of Civil Procedure 12(b)(6) provides: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . failure to state a claim upon which relief can be granted."

The full text of the ordinance, including its preamble, being challenged is attached as an appendix to the Ninth Circuit opinion and can be located at Pet.App. 31a-40a. The relevant provisions provide as follows:

> **S.M. Mun. Code § 6.20.010 Definitions**
>
> For purposes of this Chapter, the following words or phrases shall have the following meanings:
>
> (a) Home-Sharing. An activity whereby the residents host visitors in their homes, for compensation, for periods of 30 consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay.
>
> (b) Hosting Platform. A marketplace in whatever form or format which facilitates the Home-Sharing or Vacation Rental, through advertising, match-making or any other means, using any medium of facilitation, and from which the operator of the hosting platform derives revenues, including booking fees or advertising revenues, from providing or maintaining the marketplace.
>
> (c) Vacation Rental. Rental of any dwelling unit, in whole or in part, within the City of

Santa Monica, to any person(s) for exclusive transient use of 30 consecutive days or less, whereby the unit is only approved for permanent residential occupancy and not approved for transient occupancy or Home-Sharing as authorized by this Chapter. Rental of units within City approved hotels, motels and bed and breakfasts shall not be considered Vacation Rental.

S.M. Mun. Code § 6.20.030 Prohibitions

(a) No person, including any Hosting Platform operator, shall undertake, maintain, authorize, aid, facilitate or advertise any Home-Sharing activity that does not comply with Section 6.20.020 of this Code or any Vacation Rental activity.

S.M. Mun. Code § 6.20.100 Enforcement

(a) Any person violating any provision of this Chapter shall be guilty of an infraction, which shall be punishable by a fine not exceeding two hundred fifty dollars, or a misdemeanor, which shall be punishable by a fine not exceeding five hundred dollars, or by imprisonment in the County Jail for a period not exceeding six months or by both such fine and imprisonment.

(b) Any person convicted of violating any provision of this Chapter in a criminal case or found to be in violation of this Chapter in a civil case brought by a law enforcement agency shall be ordered to reimburse the City and other participating law enforcement

agencies their full investigative costs, pay all back TOTs, and remit all illegally obtained rental revenue to the City so that it may be returned to the Home-Sharing visitors or used to compensate victims of illegal short term rental activities.

(c) Any person who violates any provision of this Chapter shall be subject to administrative fines and administrative penalties pursuant to Chapter 1.09 and Chapter 1.10 of this Code.

(d) Any interested person may seek an injunction or other relief to prevent or remedy violations of this Chapter. The prevailing party in such an action shall be entitled to recover reasonable costs and attorney's fees.

(e) The remedies provided in this Section are not exclusive, and nothing in this Section shall preclude the use or application of any other remedies, penalties or procedures established by law.

INTRODUCTION

Today, travelers are increasingly steering away from hotels and towards rentals of residential property for a duration of 30 days or less, more commonly known as "vacation rentals." As vacation rentals continue to gain popularity, cities have increasingly banned vacation rentals. Some of the most populous cities in the Country, including New York City, have enacted

complete bans on vacation rentals and impose severe criminal penalties upon violators. These ordinances prohibit property owners from making commercial use of their privately-owned properties in *interstate commerce* and require that any commercial usage of residential property occur in local commerce. The ordinance enacted by Respondents the City of Santa Monica and its City Council (collectively, "the City" or "Santa Monica") is a prime example.

Under Ordinance 2484CCS ("the Ordinance"), property owners choosing to make commercial use of their properties are prohibited from renting their properties to "transients" and are required to rent their properties to "permanent residents." State laws that "discriminate against interstate commerce" in this manner—"discourag[ing] domestic corporations from plying their trades in interstate commerce," "assur[ing] that residents trade only in intrastate commerce," and "discriminat[ing] between transactions on the basis of some interstate element"—are *per se* invalid under the dormant Commerce Clause. *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 578 (1997); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12, 334-335 (1977); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 341 (1989). The express purpose of the Ordinance is to restrict residential neighborhood access for those without "connections to the Santa Monica community." Santa Monica is not permitted to limit a means by which the interstate marketplace allows nonresidents to access residential neighborhoods, *City of Philadelphia v. New Jersey*, 437 U.S. 617,

627 (1978), nor permitted to discriminate among persons "according to the extent of their contacts with the local economy," *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980).

The Ninth Circuit, however, affirmed dismissal under Federal Rule of Civil Procedure 12(b)(6). It held that the Ordinance's discriminatory language, effect, and purpose were negated by its application to "persons nationwide," including the few, if any, Santa Monica residents seeking to vacation in the small eight square mile city in which they live. This does *not* save the Ordinance. A state law that places its burden "upon interstate commerce" itself "cannot be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992).

Nevertheless, this issue is the subject of a firmly entrenched split of authority amongst the federal circuits. All circuits have weighed in. The majority of circuits—the First, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits—faithfully follow *Fort Gratiot* to hold that when a law directly discriminates against interstate commerce, the law need *not* additionally discriminate against out-of-staters. A minority of circuits—the Second, Third, Fifth, and Ninth Circuits—extend the "disproportionate impact" discussion in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), and *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), to hold

that discrimination against interstate commerce must be accompanied by discrimination exclusively against out-of-state actors.

The entrenched circuit split has left an imbalance in this Country, as states in the circuit minority are left with substantially greater authority to enact laws that discriminate against interstate commerce than the states in the circuit majority. While the circuit majority precludes states from depriving their own citizens of benefits derived from interstate commerce, the circuit minority allows states to deprive their citizens of those *same* benefits so long as those "benefits . . . are denied to others." The circuit split has such strong footing that it has resulted in these circuits issuing conflicting interpretations of the *same* Supreme Court decisions and conflicting rulings on the constitutionality of *identical* laws, with the only explanation being that the circuit court fundamentally "disagree[s]" with the approach of the circuit court which had earlier addressed the identical law and issue.

In addition to the vacation rental ban, the Ordinance contains an advertising ban prohibiting property owners from placing an advertisement for a vacation rental on the Internet. Even though the City has enforced the advertising ban in this extraterritorial manner, the Ninth Circuit upheld the advertising ban based on a "presumption" that the legislature did not "intend" for the advertising ban to apply to Internet advertisements. In *Healy*, the Court held that laws that purport to have an "extraterritorial reach" are *per se* invalid under the dormant Commerce

Clause "regardless of whether the statute's extra-territorial reach was intended by the legislature." 491 U.S. at 336.

The circuits are split as to the propriety of a "presumption of no extraterritorial intent." Five circuits follow *Healy* and refuse to consider legislative intent or apply the presumption. Five other circuits apply a "presumption of no extraterritorial intent." Meanwhile, the Third Circuit believes that extraterritorial reach is *not* an independent basis for a Commerce Clause violation. Left undisturbed, the "presumption of no extraterritorial intent" allows states to enforce a law extraterritorially and then rely upon its silence as to its scope to immunize its extraterritorial enforcement from constitutional scrutiny, just as Santa Monica has successfully accomplished with the Ordinance.

Petitioner Arlene Rosenblatt ("Rosenblatt") re-raised these issues in a petition for rehearing and explained the conflict and tension between the Ninth Circuit's holdings and the decisions of this Court. The Ninth Circuit declined the opportunity to address these issues, seemingly content to liberally allow states to artfully construct laws that interfere with interstate commerce but magically escape the strictures of the Commerce Clause.

In order to resolve and bring unity to the important constitutional questions raised herein, the Court should grant certiorari.

STATEMENT OF THE CASE

I. Vacation Rentals

In recent years, the Internet—most notably, websites such as Airbnb and HomeAway—has furnished property owners with an online marketplace to list privately-owned properties for rent as vacation rentals. (D.C. Dkt. 52 (FAC) ¶ 8.) The online marketplace for vacation rentals brings together property owners with millions of travelers seeking travel lodging from all over the Country. (*Id.* ¶¶ 14-16.) Travelers can search, compare, and/or book fully furnished, privately-owned residential properties. (*Id.*) Approximately 95% of vacation rental transactions involve a prospective tourist residing in another state. (*Id.* ¶ 23.) In addition to increasing the supply of travel lodging, vacation rentals are significantly cheaper than hotels. (*Id.* ¶¶ 27, 33-34.)

II. The Ordinance

On May 12, 2015, Santa Monica passed one of the strictest regulations against vacation rentals in the Country. The Ordinance provides in relevant part: "No person . . . shall undertake, maintain, authorize, aid, facilitate or advertise . . . any Vacation Rental activity." S.M. Mun. Code § 6.20.030 (full text available at Pet.App. 36a). A "Vacation Rental" is defined as a "[r]ental of any dwelling unit, in whole or in part, within the City of Santa Monica, to any person(s) for exclusive transient use of 30 consecutive days or less." *Id.* § 6.20.010(c).

The Ordinance contains a complete ban on all vacation rentals. *Id.* § 6.20.030. By prohibiting vacation rentals and requiring that the residential rental be over 30 days, the Ordinance requires that the residential rental be offered to a "permanent resident" of Santa Monica, as defined by Article 6 of the Santa Monica Municipal Code, which is where the Ordinance is located. *Id.* §§ 6.20.010(c), 6.68.010(f). A "permanent resident" is defined as a person who has possessed the "right" to reside in Santa Monica for more than "thirty consecutive days." *Id.* § 6.68.010(f). A "transient" is defined as a person who resides in Santa Monica for "not more than one month." *Id.* § 6.68.010(a).

The Ordinance also expressly prohibits any person from "advertis[ing] . . . any Vacation Rental." *Id.* § 6.20.030. The only requirement for the application of the advertising ban is that the subject of the advertisement be a Santa Monica vacation rental, regardless of the forum on which the advertisement is placed, where the advertiser was at the time of placing the advertisement, or whether the advertisement actually culminates in a vacation rental transaction. *Id.* Vacation rental advertisements are, by their nature, directed towards prospective tourists in other states and cities typically via websites, such as Airbnb and HomeAway. (FAC ¶¶ 14-16, 23, 44-45.) To aid in the City's enforcement efforts, the Ordinance requires these websites to disclose to the City all advertisements placed on their websites. (Pet.App. 37a); S.M. Mun. Code § 6.20.050(b).

Violations of the Ordinance are subject to criminal punishment, including imprisonment and/or criminal fines up to $500. S.M. Mun. Code § 6.20.100.

The City's avowed purposes for enacting the Ordinance are twofold: "preserving housing stock and preserving the quality and character of its existing single and multi-family residential neighborhoods." (Pet.App. 31a-32a.) The preamble claims that this will allow "Santa Monica's prosperity . . . to continue to flourish." (*Id.* 32a.) According to the preamble, vacation rentals threaten these local interests because foreign residents "can sometimes disrupt the quietude and residential character of the neighborhoods and adversely impact the community" and be "detrimental to the community's welfare." (*Id.* 32a-33a.) The City believes that this is because "vacation rental occupants . . . do not have any connections to the Santa Monica community and to the residential neighborhoods in which they are visiting." (*Id.* 32a.)

III. Proceedings Below

Prior to the enactment of the Ordinance, Rosenblatt used Airbnb to rent out her two-bedroom house in Santa Monica while out-of-town. (FAC ¶¶ 54-55.) As a retired school teacher, Rosenblatt relied upon the supplemental vacation rental income she earned from her otherwise unoccupied house to fund vacations for her and her family. (*Id.*) After Rosenblatt advertised her property as a vacation rental on Airbnb's website, the City threatened her

with criminal punishment under the Ordinance for any future vacation rental advertisement or activity. (D.C. Dkt. 25-1 at 238-254.) On June 21, 2016, Rosenblatt filed the underlying action in the United States District Court for the Central District of California. (D.C. Dkt. 1.) Rosenblatt's Complaint seeks declaratory relief that the Ordinance is invalid under the Commerce Clause as well as injunctive relief prohibiting the City from any further enforcement efforts that violate the Commerce Clause. (FAC ¶¶ 66-82.)

On December 1, 2016, the district court granted the City's Rule 12(b)(6) motion and found that the Complaint failed to state a claim under the dormant Commerce Clause. (Pet.App. 68a-70a.) On March 30, 2017, the district court dismissed Rosenblatt's dormant Commerce Clause claims in the First Amended Complaint ("FAC") with prejudice under Rule 12(b)(6). (Pet.App. 54a-58a.) On May 24, 2017, the district court granted the City's successive Rule 12(b)(6) motion to the FAC and dismissed Rosenblatt's remaining state claims. (Pet.App. 41a-46a.)

Rosenblatt appealed to the Ninth Circuit. (9th Cir. Dkt. 1.) Rosenblatt argued that the vacation rental ban discriminates against interstate commerce because, among other things, it "penalize[s] in-state persons for engaging in interstate commerce" and burdens nonresidents with increased lodging costs and restricted access to Santa Monica's residential neighborhoods. (9th Cir. Dkt. 11 at 37-42, Dkt. 30 at 14-20.) The City's primary defense to discrimination was that the dormant Commerce Clause requires that

a state law "specifically target[] out-of-state actors for different and less-favorable treatment than in-state actors." (9th Cir. Dkt. 22 at 16.)

On October 3, 2019, the Ninth Circuit affirmed the district court's Rule 12(b)(6) dismissal of the Commerce Clause claims. (Pet.App. 1a.) The Ninth Circuit agreed with the City's "target out-of-state actors" argument and held that the Ordinance was nondiscriminatory because "Santa Monica's ban on vacation rentals applies in the same manner to persons nationwide, including Santa Monica residents who may be interested in renting a vacation home from another resident." (*Id.* 21a.) It also upheld the advertising ban as not having an "extraterritorial reach." Citing a 60-year-old California Supreme Court case, the Ninth Circuit "presume[d] that the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city" and held that "nothing in the ordinance here suggests that it was intended to have extraterritorial application." (*Id.* 16a-17a (quoting *City of Los Angeles v. Belridge Oil Co.*, 271 P.2d 5, 11 (Cal. 1954)).)

Rosenblatt sought rehearing *en banc*. (9th Cir. Dkt. 47.) She argued that the Ninth Circuit's "discrimination" analysis conflicts with this Court's precedent because the "applies nationwide" reasoning does not negate the discrimination against interstate commerce or the discriminatory purpose. (*Id.* 5-11.) Rosenblatt further argued that the Ninth Circuit's creation of a "presumption of no extraterritorial intent" conflicts with *Healy* and that a Rule 12(b)(6) dismissal

was inappropriate in light of the City's extraterritorial enforcement of the advertising ban. (*Id.* 11-15.) On December 2, 2019, the Ninth Circuit denied Rosenblatt's petition for rehearing. (Pet.App. 75a.)

This Petition follows.

REASONS FOR GRANTING THE WRIT

The Court has adopted a two-tiered approach to analyze a violation of the dormant Commerce Clause. A state law that either "directly regulates or discriminates against interstate commerce" is "virtually *per se* invalid" and "generally struck down . . . without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly," the Court applies the balancing test espoused in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and "examine[s] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579.

I. The Ninth Circuit's "Discrimination" Analysis Conflicts With This Court's Precedent And Is The Subject Of A Firmly Entrenched Circuit Split

"The Commerce Clause presumes a national market free from local legislation that discriminates in

favor of local interests." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994). State laws that "promote local interest at the expense of interstate commerce" will be invalidated. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 536 (1949). This mandate is necessary "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). "Economic protectionism is not limited to attempts to convey advantages on local merchants." *Brown-Forman*, 476 U.S. at 580. Discrimination against interstate commerce may exist on the face of the statute, in effect, or in purpose. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

The Ordinance contains multiple forms of discrimination against interstate commerce on its face, in effect, and in purpose.

1. **Discouraging Interstate Commerce:** The Ordinance prohibits property owners from offering their services in interstate commerce. Pursuant to the Ordinance, a property owner is prohibited from renting his or her privately-owned property for "transient use" to a "transient" staying for 30 days or less. S.M. Mun. Code §§ 6.20.010(c), 6.20.030, 6.68.010(a). If the property owner wishes to make commercial use of his residential property, he or she must limit clientele to a "permanent resident," as that term is defined by the Santa Monica Municipal Code. *Id.* § 6.68.010(f). This pits intrastate commerce against interstate commerce. Whereas a transaction between a Santa Monica

property owner and a Santa Monica "permanent resident" naturally occurs in *local* commerce, a transaction for a vacation rental occurs in *interstate* commerce. Like hotels and summer camps, property owners who offer their residential properties as vacation rentals are "unquestionably" engaged in interstate commerce because they "market those services . . . to [tourists] who are attracted to its facility from all parts of the Nation" and "solicit[] patronage from outside" of Santa Monica through Internet advertising. *Camps*, 520 U.S. at 573; *Fort Gratiot*, 504 U.S. at 359; *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

These property owners and transactions are afforded protection under the Commerce Clause. *Dennis v. Higgins*, 498 U.S. 439, 449 (1991). Santa Monica may not regulate residential rentals in a manner that encourages property owners to rent to a "permanent resident" of Santa Monica in local commerce. "[W]hen a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it." *Hood*, 336 U.S. at 535. State laws that "discourage domestic corporations from plying their trades in interstate commerce" or "encourage entities to limit their out-of-state clientele" discriminate against interstate commerce and are *per se* invalid. *Camps*, 520 U.S. at 578; *Healy*, 491 U.S. at 341; *Am. Trucking Assocs., Inc. v. Scheiner*, 483 U.S. 266 (1987). As are state laws that

"discriminate between transactions on the basis of some interstate element" or that "assure that residents trade only in intrastate commerce." *Bos. Stock Exch.*, 429 U.S. at 332 n.12, 334-335. Since the Ordinance has these discriminatory elements, it discriminates against interstate commerce.

2. **Discriminatory Purpose:** The preamble is brimming with protectionist rhetoric. Each of the avowed purposes for enacting the Ordinance is an impermissible protectionist purpose. Santa Monica cannot prevent property owners from offering their properties as vacation rentals as a means of "preserving" "housing stock" or the "character and charm" of residential neighborhoods. (Pet.App. 31a-32a.) "A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." *Hood*, 336 U.S. at 536. The "character and charm" of Santa Monica's residential neighborhood and the attendant vacation rental services are local "resources" and "products" derived therefrom. *See Camps*, 520 U.S. at 576-577. Santa Monica may not block a means by which the interstate marketplace allows nonresidents to access those resources and products. *Id.* The Commerce Clause prohibits states from interfering with "the natural functioning of the interstate market." *Reeves, Inc. v. Stake*, 447 U.S. 429, 450 (1980).

Not only are the intended legislative ends protectionist, so are the intended legislative means.

The FAC alleges that the City enacted the Ordinance "to prevent foreign travelers from accessing residential neighborhoods." (FAC ¶ 51.) The preamble too discloses the City's belief that it could further its local interests by limiting residential neighborhood access for those without "connections to the Santa Monica community and to the residential neighborhoods in which they are visiting." (Pet.App. 32a.) Because the Ordinance is grounded in a desire to discriminate against those without "connections to the Santa Monica community," it illegitimately discriminates among persons "according to the extent of their contacts with the local economy." *Lewis*, 447 U.S. at 42.

3. **Ninth Circuit Opinion:** The Ninth Circuit did not dispute that the Ordinance had this language, effect, and/or purpose. It "agree[d]" with Rosenblatt that vacation rentals constitute interstate commercial activity (Pet.App. 11a), and are therefore afforded Commerce Clause protection, *Fort Gratiot*, 504 U.S. at 359, *Camps*, 520 U.S. at 573, *Dennis*, 498 U.S. at 449. The Ninth Circuit did not dispute that the Ordinance creates a "substantial disincentive" for property owners to offer their properties in interstate commerce, *Healy*, 491 U.S. at 341, *Camps*, 520 U.S. at 578. (Pet.App. 20a-22a.) Nor did it dispute that the avowed purposes of the Ordinance are discriminatory. (*Id.*)

Rather, the Ninth Circuit believed that these forms of facial, effective, and purposeful discrimination were negated by its conclusion that the Ordinance "applies in the same manner to persons nationwide, including Santa Monica residents who may be

interested in renting a vacation home from another resident," however remote that possibility may be. (*Id.* 21a.) According to the Ninth Circuit, a local law that by design and in effect prohibits residents from offering their services in interstate commerce does not discriminate against interstate commerce if, contrary to the intended design of the legislature, the prohibition's impact extends to a small percentage of residents. (*Id.*)

A. The Ninth Circuit's View Directly Conflicts With Precedent From This Court

The Ninth Circuit's reasoning for upholding the Ordinance as nondiscriminatory directly conflicts with this Court's holdings that: (a) a state law that discriminates against interstate commerce itself cannot be saved from invalidation on the ground that it purports to apply equally to the citizens of all states; and (b) the absence of a discriminatory effect cannot mask a discriminatory purpose.

1. **Definition of "Discrimination":** The Ninth Circuit's belief that discrimination against interstate commerce must be accompanied by discrimination exclusively against nonresidents is based on a fundamental misapprehension of the Commerce Clause. The Commerce Clause "protects interstate commerce," *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985), "the interstate market," *Exxon*, 437 U.S. at 127, and "those who are . . . engaged in interstate commerce," *Dennis*, 498 U.S. at 449. "[P]rotect[ing] persons from

unconstitutional discrimination by the States" is the function of the Equal Protection Clause. *Metro. Life*, 470 U.S. at 881.

When a law discriminates directly against interstate commerce, the fact that it "applies in the same manner to persons nationwide" is no defense to its constitutionality. *Fort Gratiot*, 504 U.S. at 361; *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891); *State of Minnesota v. Barber*, 136 U.S. 313, 326 (1890).

> [A] statute cannot be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States . . . ; for, "**a burden imposed by a State *upon interstate commerce* is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute**."

Fort Gratiot, 504 U.S. at 361 (emphasis added). The "applies nationwide" defense obscures the "fundamental purpose" of the Commerce Clause, which equally protects an in-state sellers' right to engage in interstate commerce as it does an out-of-state company's right to compete in an interstate market: "The people of [the state enacting the law] have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of other states." *Barber*, 136 U.S. at 326; *Bos. Stock Exch.*, 429 U.S. at 335; *see Hughes v. Oklahoma*, 441 U.S. 322, 336-337 (1979).

The Court, applying these principles, has routinely struck down laws that discourage residents from engaging in interstate commerce as *per se* unconstitutional, even where the law applies equally to residents and nonresidents. *See*, *e.g.*, *Bos. Stock Exch.*, 429 U.S. at 331-332; *Scheiner*, 483 U.S. at 284-286; *Camps*, 520 U.S. at 578; *Healy*, 491 U.S. at 341.

In *Boston Stock Exchange*, the Court invalidated a New York law that imposed a transfer tax on securities transactions involving an out-of-state sale "more heavily than most transactions involving a sale within the State." 429 U.S. at 319. The Court explained that the "common theme" of its dormant Commerce Clause cases is the requirement of "[e]qual treatment of *interstate commerce*." *Id.* at 331 (emphasis added). Contrary to the view of the Ninth Circuit in its opinion below, discrimination in favor of intrastate commercial *transactions* is no less constitutionally offensive than discrimination in favor of local *businesses*. *Id.* at 332 n.12. "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce." *Id.* at 334-335. Since the transfer tax discouraged interstate transactions and encouraged local transactions, it fell "short of the substantially evenhanded treatment demanded by the Commerce Clause." *Id.* at 319, 332.

In *Scheiner*, the Court invalidated a Pennsylvania law imposing an "axle tax" for use of the State's highways. 483 U.S. at 274. Although the axle tax applied evenhandedly and charged all carriers the

same flat $36/axle fee, it subjected carriers who engage in interstate commerce more frequently to higher cost-per-mile charges, thereby impermissibly "exert[ing] . . . pressure on interstate businesses to ply their trade within [Pennsylvania] rather than 'among the several States.'" *Id.* at 286-287. Since the axle tax discriminated against interstate commerce in this manner, it made "no difference" "[w]hether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers," that "some out-of-state carriers . . . pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers," or that "the axle tax, on its face, does not exact a lower per-mile charge from Pennsylvania-based carriers than from out-of-state carriers." *Id.* at 284, 286.

In *Camps*, the Court invalidated a Maine statute that disallowed certain tax benefits to a summer camp because the summer camp was principally attended by nonresidents of Maine. 520 U.S. at 568. The Maine statute discriminated against "entities that serve a principally interstate clientele" because it "tended 'to discourage domestic corporations from plying their trades in interstate commerce.'" *Id.* at 576, 578. It did not matter that the summer camp was also attended by Maine residents. *Id.* *See also Healy*, 491 U.S. at 341.

Likewise, here, "[w]hether the full brunt, or only a major portion [of the Ordinance's burden] is imposed on nonresidents," *Scheiner*, 483 U.S. at 284, the inevitable effect is to "discriminate between transactions on the basis of some interstate element,"

Bos. Stock Exch., 429 U.S. at 332 n.12, "assure that [property owners] trade only in intrastate commerce" to someone who qualifies as a "permanent resident" of Santa Monica, *id.* at 334-335, and "discourage [property owners] from plying their trades in interstate commerce," *Camps*, 520 U.S. at 578, *Healy*, 491 U.S. at 341, *Scheiner*, 483 U.S. at 286-287. Consequently, the Ordinance "cannot be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States." *Fort Gratiot*, 504 U.S. at 361. Santa Monica property owners wishing to offer their residential properties as vacation rentals to out-of-staters are entitled to the same Commerce Clause protections as out-of-state companies wishing to sell products to Santa Monica residents, *Barber*, 136 U.S. at 326, Maine summer camps wishing to offer their services to out-of-staters, *Camps*, 520 U.S. at 578, Pennsylvania-based carriers wishing to transport goods outside of Pennsylvania, *Scheiner*, 483 U.S. at 286-287, New York residents wishing to sell securities on stock exchanges outside of the State, *Bos. Stock Exch.*, 429 U.S. at 335, and Connecticut brewers and shippers wishing to sell to wholesalers in other states, *Healy*, 491 U.S. at 341.

2. **Discriminatory Purpose:** Obviously, Santa Monica is unable to enact an ordinance providing that "no person may rent residential property for exclusive use to any person who is a 'transient.'" Nor can Santa Monica accomplish this goal by prohibiting the very form of rental that is marketed almost, if not, exclusively towards "transients," and then rely upon

the prohibition's slight, if any, overinclusiveness to defend its constitutionality. "The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940) (North Carolina could not require out-of-state retailers to pay tax for conducting business; nor could it tax retailers who rent a hotel room knowing in-state retailers "normally" will have no need to rent a hotel room).

Yet, this is the approach adopted by the Ninth Circuit. Although the preamble and the FAC expressly set forth the *specific type of discrimination* the Ninth Circuit was searching for—discrimination against nonresidents—the Ninth Circuit relied upon the Ordinance's possible application to "persons nationwide, including Santa Monica residents" to conclude that it is nondiscriminatory. (Pet.App. 21a.) This is not the first time the Ninth Circuit has used the purported absence of an exclusive discriminatory effect to justify an established discriminatory purpose. In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (*Rocky Mountain I*), the district court found that the legislature was motivated by a discriminatory desire to favor California crude oil. *Id.* at 1098. The Ninth Circuit reversed, reasoning that since statistics showed that the statute "burdened and benefited in-state industries . . . there is no reason to believe that [California] preferred California [oil]." *Id.* at 1100.

The Ninth Circuit's reasoning directly conflicts with this Court's holdings that state laws motivated by a discriminatory purpose are invalid notwithstanding

the argument that the law "will not operate in the way [the state] found that it would." *Hood*, 336 U.S. at 540; *Bacchus*, 468 U.S. at 269. "Examination of [Santa Monica's] purpose in this case is sufficient to demonstrate [its] lack of entitlement" to the *Pike* balancing test. *Bacchus*, 468 U.S. at 270.

3. ***Exxon/CTS*:** The Ninth Circuit felt that its holding that all local laws are nondiscriminatory so long as they could, in theory, apply to "persons nationwide" is supported by *Exxon* and *CTS*. (Pet.App. 21a.) While *Exxon* and *CTS* stand for the proposition that a local law that applies more often to out-of-state companies, "by itself" and without impacting interstate commerce, is insufficient to establish discrimination against interstate commerce, *Exxon*, 437 U.S. at 127, *CTS*, 481 U.S. at 88, no case from this Court stands for the proposition that discrimination against interstate commerce must be accompanied by discrimination exclusively against out-of-staters. The Court has rejected the notion that *Exxon* and *CTS* extend that far. In *Lewis*, the Court held that the *Exxon*/*CTS* line of cases do not govern when the disproportionate impact is accompanied by an "additional form of discrimination." 447 U.S. at 42. In *Camps*, Maine cited *Exxon* and *CTS* to demonstrate that the alternative basis for discrimination—increased camp costs that disproportionately impacted the 95% of campers who were nonresidents—was not a basis for a Commerce Clause violation. 520 U.S. at 580 n.13. The Court held that *Exxon* and *CTS* were "inapposite" because, unlike those cases, the increased summer camp costs fell "by design in a predictably

disproportionate way on out-of-staters," and thus "the pernicious effect on interstate commerce [was] the same as in our cases involving taxes targeting out-of-staters alone." *Id.* Thus, even if viewed in this narrow light, ignoring that the Ordinance prevents *property owners* from offering their services in interstate commerce and focusing solely on the disproportionate impact on *consumers*, *Exxon* and *CTS* are still inapposite.

B. Federal Circuits Are Split

Confusion among federal courts of appeals as to the import and interplay of the *Fort Gratiot* line of cases and the *Exxon/CTS* line of cases has created an entrenched circuit split concerning whether a state law that discriminates against interstate commerce must be accompanied by discrimination exclusively against out-of-staters to constitute a *per se* violation of the dormant Commerce Clause.

1. Courts and legal scholars agree that this issue is the subject of a circuit split. *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994) ("disagree[ing]" with the Tenth Circuit and refusing to invalidate law identical to that struck down by Tenth Circuit); *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 517 (9th Cir. 2014) (*Rocky Mountain II*) (denial of rehearing *en banc*) (Smith, J., dissenting) (the "majority disregards controlling precedent and departs from the holdings of the Supreme Court and our sister circuits"); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 210 (2d Cir. 2003) (finding

circuit majority's approach to be "flawed"); Valerie Walker, *The Dormant Commerce Clause "Effect": How the Difficulty in Reconciling* Exxon *and* Hunt *Has Led to A Circuit Split for Challenges to Laws Affecting National Chains*, 91 Wash. L. Rev. 1895 (2016).

2. **Circuit Majority:** The majority of circuits, including the First, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, faithfully follow this Court's guidance and hold that discrimination against interstate commerce need *not* be accompanied by discrimination exclusively against nonresidents. According to these circuits, the Commerce Clause invalidates state laws that "impermissibly discriminate against interstate commerce even if that law applies to all." *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1244 (11th Cir. 2012); *see McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 443 (6th Cir. 2000); *Hazardous Waste Treatment Council v. State of S.C.*, 945 F.2d 781, 791-792 (4th Cir. 1991); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1277-1279 (7th Cir. 1992); *Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992); *In re Se. Arkansas Landfill, Inc.*, 981 F.2d 372, 375-377 (8th Cir. 1992); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 201 (D.C. Cir. 1996). These circuits:

(a) rely upon *Fort Gratiot* to hold that if a state law discriminates directly against interstate commerce, the fact that it "purports to apply equally to citizens of all states does not save it" from

invalidation and is of "little relevance," *Gov't Suppliers*, 975 F.2d at 1278, *Hazardous Waste*, 945 F.2d at 791, *Nat'l Revenue*, 807 F.2d at 290, *Arkansas Landfill*, 981 F.2d at 375-377, *Fla. Transp.*, 703 F.3d at 1244; *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006) (citing *Carbone*, 511 U.S. at 391-392); *Kronheim*, 91 F.3d at 201 (citing *Carbone*, 511 U.S. at 391-392);

(b) cite *Dennis* and *Barber* to hold that a state may not "penalize its own citizens by prohibiting them from participating in interstate commerce with other states' citizens" or "deprive[ ] the citizens of [the enacting state] of any benefits arising from competition," *Hazardous Waste*, 945 F.2d at 791-792, *Nat'l Revenue*, 807 F.2d at 290; and

(c) hold that *Exxon* and *CTS* are inapposite where the state law at issue discriminates against interstate commerce, *McNeilus*, 226 F.3d at 443, *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 673 (4th Cir. 2018), *Gov't Suppliers*, 975 F.2d at 1277-1278, *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-847 (11th Cir. 2008).

3. **Circuit Minority:** In direct contrast, a minority of circuits, including the Second, Third, Fifth, and Ninth Circuits, hold that a local law that discriminates against interstate commerce in favor of local commerce is "nondiscriminatory" unless

accompanied by discrimination exclusively in favor of in-staters and exclusively against out-of-staters. Relying upon the *Exxon/CTS* line of cases, these circuits allow states to discriminate against interstate commerce so long as the ban on interstate commercial activity applies to both in-staters and out-of-staters. *Pac. Nw. Venison*, 20 F.3d at 1012; *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013); *Rocky Mountain I*, 730 F.3d at 1087; *Rosenblatt*, 940 F.3d at 449-450; *Brown & Williamson*, 320 F.3d at 210; *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402, 406 (3d Cir. 1987); *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 502 (5th Cir. 2001) (holding that the discrimination against interstate commerce must also be "*among* in-state and out-of-state [competitors]" (emphasis in original)).

The Ninth Circuit allows states to deprive their own citizens of the ability to engage in interstate commerce and the benefits derived therefrom so long as there is no discrimination between in-state and out-of-state actors. (Pet.App. 21a); *Rocky Mountain I*, 730 F.3d at 1094. Importation and exportation bans are upheld "as long as the ban on commerce does not make distinctions based on the origin of the items." *Pac. Nw. Venison*, 20 F.3d at 1012. In *Pacific Northwest Venison*, the Ninth Circuit upheld a Washington State law that banned the importation of certain wildlife species. *Id.* Acknowledging the circuit split, the court cited the Tenth Circuit's decision in *Dorrance*, which invalidated an *identical* importation ban on wildlife species. *Id.* The Ninth Circuit "disagree[d]" because

the importation ban "simply" effectuates a ban on interstate commercial activity but did not "result in the citizens of Washington receiving benefits that are denied to others." *Id.*

The Second Circuit also holds that a state law that discriminates between interstate and local commercial transactions is nondiscriminatory without discrimination between in-state and out-of-state competitors. *Brown & Williamson*, 320 F.3d at 210. At issue in *Brown & Williamson* was a New York statute that made it unlawful to ship or transport cigarettes directly to New York consumers. *Id.* at 204. The district court applied the approach of the circuit *majority* and concluded that although the law's "prohibitions apply to all direct sellers, the law, on its face, discriminates against interstate commerce by requiring that retail sales take place only in-state." *Id.* at 210. The Second Circuit found the analysis to be "flawed." *Id.* Despite this Court's discussion in *Boston Stock Exchange* condemning laws that "assure that residents trade only in intrastate commerce," 429 U.S. at 334-335, the Second Circuit explained that the law "merely" "forces all retail sales of cigarettes to occur in the state" but did not "prefer either a particular in-state direct shipper of cigarettes or in-state direct shippers generally." 320 F.3d at 210.

The Third Circuit likewise holds that a state law choosing in-state interests over out-of-state interests "does not implicate the Commerce Clause . . . so long as the state's choice does not discriminate between in-state and out-of-state competitors." *Norfolk*, 822 F.2d at 402. In *Norfolk*, the court upheld a Delaware law

that "prohibit[ed] the export, import, or transshipment of coal." *Id.* at 401. Although the law "block[ed] the flow of interstate commerce at a State's borders," the court found *Philadelphia* to be inapposite since the statute did not discriminate between "in-state and out-of-state competitors," exclusively favoring the former and exclusively burdening the latter. *Id.* at 401, 406. The Third Circuit believed that it was not "legally relevant" that the law hoarded a natural resource for the exclusive use of State citizens since the burden extends to all coal exporters. *Id.* at 407. *See also Heffner v. Murphy*, 745 F.3d 56, 72-73 (3d Cir. 2014) (reaffirming these holdings).

4. The circuit split is fully entrenched. All circuits[1] have spoken and explained their reasoning for defining "discrimination" in their chosen manner. The Second, Third, Fifth, and Ninth Circuits have addressed and consistently rejected the majority's view, seemingly content that their view finds some support in certain (out-of-context) statements from *Exxon* and *CTS*. The Ninth Circuit, in particular, has steadfastly applied its narrow definition of "discrimination," even in the face of argument-after-argument from counsel, district judges, and dissenting Circuit judges that this Court's precedent requires inclusion of states' attempts to discriminate against interstate commercial activity. *Harris*, 729 F.3d at 948; *Pac. Nw. Venison*, 20 F.3d at 1012; *Rocky*

[1] The Federal Circuit has not addressed this issue; however, given the contours of its subject matter-specific jurisdiction, it is highly unlikely that the Federal Circuit will ever address this issue.

Mountain I, 730 F.3d at 1087; *Rocky Mountain II*, 740 F.3d at 517 (denial of rehearing *en banc*) (Smith, J., dissenting); *Rosenblatt*, 940 F.3d at 449-450. Rosenblatt presented the Ninth Circuit with another opportunity to reassess its narrow definition of "discrimination" through an *en banc* hearing in light of the decisions cited herein (9th Cir. Dkt. 47 at 5-11), but the Ninth Circuit declined the invitation (Pet.App. 75a). Meanwhile, it is highly unlikely that *all eight* circuits representing the circuit majority will succumb to the minority's narrow definition of "discrimination," especially given that they have interpreted the *Exxon/CTS* line of cases differently and espoused a view that is well-supported by a host of this Court's decisions. This split can only be resolved by this Court.

C. The Disagreement Over This Constitutional Issue Has Created A Dramatic Imbalance In The Country And Threatens To Turn The Commerce Clause Into A Nullity

The Court should resolve the circuit split in order to bring uniformity before the split further widens, to prevent the Commerce Clause from being turned on its head, and to prevent cities, such as Santa Monica and New York City, from continuing to deprive millions of property owners of their constitutional rights.

1. Regardless of how the Court resolves the circuit split, the Court should grant certiorari to bring uniformity and balance to the issue. While the 20 states and territories in the Second, Third, Fifth, and

Ninth Circuits have the ability to craft statutes in a manner that would allow those states to ban interstate commercial activity and hoard natural resources, the remaining states and cities do not have this luxury. The Court need not look beyond the various circuit decisions cited above to see the imbalance that currently exists in the Country.

Whereas the circuit majority precludes states from enacting complete importation or exportation bans that "block the flow of interstate commerce at a State's borders," *Hazardous Waste*, 945 F.2d at 791-792, *Gov't Suppliers*, 975 F.2d at 1279, *Arkansas Landfill*, 981 F.2d at 375-377, *Dorrance*, 957 F.2d at 765, the circuit minority allows states to enact such bans that "block the flow of interstate commerce at a State's borders," believing that the disruption of interstate commerce is justified by the law's universal application, *Norfolk*, 822 F.2d at 401, 406, *Brown & Williamson*, 320 F.3d at 210, *Pac. Nw. Venison*, 20 F.3d at 1012. The circuit imbalance is so wide and firm that it has resulted in the Ninth Circuit upholding a Washington State importation ban on wildlife species *identical* to a Wyoming importation ban on wildlife species previously struck down by the Tenth Circuit for no reason other than the Ninth Circuit stating that it "respectfully disagree[d]" with the approach of the Tenth Circuit. *Pac. Nw. Venison*, 20 F.3d at 1012.

Whereas the circuit majority precludes states from enacting complete bans on interstate commercial activity and from "penaliz[ing] its own citizens by prohibiting them from participating in interstate

commerce," *Nat'l Revenue*, 807 F.2d at 290, *Hazardous Waste*, 945 F.2d at 791-792, *McNeilus*, 226 F.3d at 434, *Gov't Suppliers*, 975 F.2d at 1278, the circuit minority permits states to enact bans on interstate commercial activity, to direct all commercial activity to local commerce, and to deprive their citizens of their right to receive benefits derived from interstate commerce so long as those "benefits . . . are denied to others," *Brown & Williamson*, 320 F.3d at 210, *Norfolk*, 822 F.2d at 401, *Ford*, 264 F.3d at 502, *Pac. Nw. Venison*, 20 F.3d at 1012, *Rosenblatt*, 940 F.3d at 449-450.

2. The Court's intervention is also necessary to prevent the Second, Third, Fifth, and Ninth Circuits from turning a sturdy constitutional provision into a flimsy rule by allowing states to artfully construct local laws in a manner that stifles interstate commerce yet survives dormant Commerce Clause scrutiny. Under the minority's approach, states can eliminate interstate commercial services either by forcing all sales to occur in intrastate commerce or by extending a ban on those interstate commerce services to the small percentage of in-state persons who use the service.

If New York can ban the importation of cigarettes and "force[] all retail sales of cigarettes to occur in the state" with in-state businesses, *Brown & Williamson*, 320 F.3d at 210, then the State can use tax benefits to encourage persons to trade on the New York Stock Exchange or force all retail sales of wine to occur in the State with in-state wineries. *But see Bos. Stock Exch.*, 429 U.S. at 335-336; *Granholm*, 544 U.S. at 473-474. If

Santa Monica can ban all vacation rentals, then Florida can ban all hotels. Texas can ban in-state commercial airlines, such as American Airlines, from selling airline tickets for any flight into Texas. Pennsylvania can ban taxis, rental cars, and all other commonly-used forms of tourist transportation. Under the Ninth Circuit's novel rule allowing a discriminatory purpose to be masked by the absence of a discriminatory effect, Florida, Texas, and Pennsylvania can even enact these laws for the express purpose of limiting the presence of tourists. Despite the effective and purposeful discrimination against interstate commerce, Florida's hotel ban would withstand constitutional scrutiny under the minority's approach simply because the law "applies in the same manner to persons nationwide, including [Florida] residents who may be interested in renting a [hotel room in the State]." (Pet.App. 21a.) The same would be true for Texas's and Pennsylvania's bans. What if all 50 States decided to ban hotels or airline purchases? *See Healy*, 491 U.S. at 336 (courts must consider the effects "if not one, but many or every, State adopted similar legislation").

The minority's approach also allows states to block the importation or exportation of any good, so long as the ban applies to all competitors. If Delaware can ban all coal exporters from exporting coal, *Norfolk*, 822 F.2d at 402, then any state may hoard any resource that is unique to that state for the exclusive use of its citizens. California, which produces 92% of the Nation's avocados, can ban the import and export of all

avocados and rely upon its purported evenhandedness between in-state and out-of-state avocado producers to justify hoarding California avocados. *But see New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-339 (1982); *Hughes*, 441 U.S. at 324.

Accordingly, the Court should grant certiorari.

II. The Circuits Are Split As To Whether A "Presumption Of No Extraterritorial Intent" Can Save A State Law From Invalidation Under The Dormant Commerce Clause

The Commerce Clause prevents states from enacting legislation with an extraterritorial reach or effect. *Healy*, 491 U.S. at 336. The Ordinance's advertising ban has such an extraterritorial reach because it purports to regulate advertisements on the Internet, such as Airbnb's website, even if those persons were not located in the City at the time of placing the listing. (Pet.App. 36a.) The City has applied the advertising ban in this extraterritorial manner and has subjected persons to criminal punishment for placing a vacation rental advertisement on the Internet. (D.C. Dkt. 25-1 at 238-254.) Yet, the Ninth Circuit upheld the advertising ban, reasoning that it is "presumed" that the City did not *intend* for the advertising ban to apply to Internet advertisements and that "nothing in the ordinance here suggests that it was intended to have extraterritorial application." (Pet.App. 17a.)

1. The Ninth Circuit's focus on whether the legislature "intended to have extraterritorial

application" is inconsistent with this Court's precedent. Local laws that purport to apply extraterritorially are invalid "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the plurality used a hypothetical to strike down an Illinois statute prohibiting persons from communicating certain tender offers regarding any Illinois company to its shareholders. *Id.* at 635-636, 642. Although the challenger of the law was an Illinois company whose shareholder population consisted of 27% Illinois residents, the plurality held that the law purported to have an impermissible extraterritorial reach because "the Illinois law on its face would apply even if not a single one of [the company's] shareholders were a resident of Illinois, since the Act applies to every tender offer for a[n Illinois] corporation." *Id.* Despite *Healy* and *MITE*, the federal circuits[2] are in disagreement as to the application of legislative intent in the "extraterritoriality" analysis.

2. The Second, Fourth, Sixth, Seventh, and Eleventh Circuits follow *Healy's* directives and refuse to consider the legislature's intent or assume that the legislature did not intend an extraterritorial application; instead, these circuits focus on the practical and purported effect of the statute. *See*, *e.g.*, *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 836 (7th Cir.

[2] Other than the Federal Circuit, which will likely never address this issue, the D.C. Circuit is the only other circuit not to have addressed this issue.

2017) (although state statute did not "explicitly regulate[]" extraterritorial transactions, the state "*could* enforce the provisions" in an extraterritorial manner (emphasis added)); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615 (7th Cir. 1999) (interpreting Supreme Court decisions to invalidate laws that "*could* be applied" extraterritorially (emphasis added)); *Frosh*, 887 F.3d at 672-673 (although legislature's "aim" was purely in-state effects, "practical effect" of statute was that it purported to control out-of-state conduct); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013) (since statute could apply extraterritorially, there was no reason to determine the intent of the legislature); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *Bainbridge v. Turner*, 311 F.3d 1104, 1111 (11th Cir. 2002) (focusing upon effects of statute rather than intent of the legislature).

The Second and Fourth Circuits have held that where, as here, a local law purports to regulate Internet communications, the state law must limit its application to "purely intrastate communications," both in wording and effect. *See*, *e.g.*, *Dean*, 342 F.3d at 103; *PSINet*, 362 F.3d at 240. "Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'projecting its legislation into other States.'" *Dean*, 342 F.3d at 103 (quoting *Healy*, 491 U.S. at 334); *PSINet*, 362 F.3d at 240.

3. The First, Fifth, Eighth, Ninth, and Tenth Circuits hold that a state law that could apply extraterritorially will be upheld based on a "presumption" that the legislature did not intend for the statute to apply extraterritorially. *See*, *e.g.*, *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 471 (1st Cir. 2009); *North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016); *Rosenblatt*, 940 F.3d at 447; *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736, 746 (10th Cir. 2016); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 178 (5th Cir. 2010). According to these circuits, there must be language *in the local law* demonstrating "that it was *intended* to have extraterritorial application." *Rosenblatt*, 940 F.3d at 447 (emphasis added); *W.R. Grace & Co. v. Cont'l Cas. Co.*, 896 F.2d 865, 883 (5th Cir. 1990).

The Eighth and Tenth Circuits, however, hold that the presumption does *not* apply when the local law regulates "post[ing] information on an out-of-state internet website." *Heydinger*, 825 F.3d at 921; *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999). These two circuits are in agreement with the Second, Fourth, Sixth, Seventh, and Eleventh Circuits that a statute that regulates Internet communications must contain a "guarantee" and "express limitation confining it to communications which occur wholly within its borders" to pass constitutional muster. *Johnson*, 194 F.3d at 1161; *see Heydinger*, 825 F.3d at 921.

4. In contrast to all other circuits, the Third Circuit, relying upon a law review article, believes that extraterritorial reach is *not* an independent basis for a dormant Commerce Clause violation; instead, it requires an extraterritorial reach to be accompanied by discrimination between in-state and out-of-state *consumers*, much like it requires discrimination against interstate commerce to be accompanied by discrimination between in-state and out-of-state *competitors*. *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 298 F.3d 201, 212 n.14 (3d Cir. 2002) (*Cloverland-Green I*); *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 462 F.3d 249, 261, 262 n.15 (3d Cir. 2006) (*Cloverland-Green II*).

5. The Ninth Circuit's opinion below goes further than that of any other Circuit applying the presumption. Not only does the Ninth Circuit apply a "presumption of no extraterritorial intent" to local laws that regulate Internet communications, it additionally makes the presumption *irrebuttable*. To be sure, in her petition for rehearing, Rosenblatt re-cited Ninth Circuit precedent that a rebuttable presumption is an inappropriate basis for affirmation of dismissal under Rule 12(b)(6) and pointed to FAC allegations and available evidence demonstrating that the City has been enforcing the advertising ban in an extraterritorial manner. (9th Cir. Dkt. 47 at 13-14 (citing *Grisham v. Philip Morris U.S.A.*, 403 F.3d 631, 639 (9th Cir. 2005)).) The Ninth Circuit denied the petition. (Pet.App. 75a.) It follows that, according to the Ninth Circuit, if the statute does not contain

language expressly stating that it is "*intended* to have extraterritorial application," the "presumption of no extraterritorial intent" will preclude a Commerce Clause challenge, even if the challenger alleges and is able to produce evidence that the statute is being enforced extraterritorially. (Pet.App. 17a (emphasis added).)

This approach, as well as that taken by the First and Fifth Circuits, dangerously invites states to circumvent the Commerce Clause through artful legislative language. A state could enact a law that purports to apply extraterritorially and that is enforced extraterritorially, and yet obtain dismissal pursuant to Rule 12(b)(6) simply by pointing to the absence of any legislative discussion regarding extraterritorial application, just as Santa Monica has accomplished with respect to the Ordinance. "To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its [statute in a certain manner] would destroy the barrier against protectionism that the Constitution provides" and lead to "radical and unacceptable results." *Camps*, 520 U.S. at 575.

In denying Rosenblatt's petition for rehearing, the Ninth Circuit also refused to reconsider the legitimacy of its presumption in light of *Healy* and the other circuit decisions addressing regulation of Internet communications (9th Cir. Dkt. 47 at 12-13), perhaps taking solace in the fact that its view is seemingly supported by a 60-year-old *California* Supreme Court case. (Pet.App. 17a.) On the other hand, none of the

circuits faithfully applying *Healy* and *MITE* have any reason to revisit their views. Nor is there any reasonable likelihood that *all* will abandon *Healy* in favor of a California Supreme Court case, the Ninth Circuit opinion below, or the law review article relied upon by the Third Circuit. Only this Court can bring uniformity to this issue.

CONCLUSION

For the foregoing reasons, Rosenblatt's Petition for Writ of Certiorari should be granted.

Respectfully submitted March 2, 2020,

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