No. 19-1081

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2015, the City of Santa Monica passed an ordinance (since amended) that maintained its longstanding prohibition of short-term vacation rentals, but created an exception permitting hosted short-term home shares during which a primary resident host continued to live in the rented unit with the renting guest. Petitioner brought suit, alleging that the ordinance violated the dormant Commerce Clause. The district court dismissed for failure to state a claim. The court of appeals affirmed.

The questions presented are:

1. Whether the court of appeals correctly applied this Court's well-established dormant Commerce Clause standards in determining that Santa Monica's home-share ordinance does not discriminate against interstate commerce because it does not result in differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

2. Whether the court of appeals correctly accepted a narrowing construction to which the Santa Monica ordinance's advertising restrictions were readily susceptible where that narrowing construction was supported by California law and avoided any unconstitutional extraterritorial application.

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BRIEF IN OPPOSITION

Petitioner Arlene Rosenblatt's complaint asserted that the unremarkable exercise by the City of Santa of Monica ("City") of a city's traditional authority to regulate competing land uses violates the dormant Commerce Clause. The district court rejected this argument, and the court of appeals affirmed, applying the two-tiered approach required by this Court's long standing precedent. Pet. App. at 9a (citing *Brown Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). Specifically, the court of appeals held that the home-share ordinance does not discriminate against interstate commerce because it makes no distinction between in-state and out-of-state renters or hosts (Pet. App. at 17a-25a) and does not directly regulate interstate commerce as it merely regulates persons, regardless of their home state, who choose to engage in commerce within the City by operating short-term rental businesses using local real estate (Pet. App. at 10a-17a).

With respect to Rosenblatt's challenge to the ordinance's advertising restrictions, the court of appeals held that Rosenblatt, a Santa Monica resident, would lack standing to challenge the ordinance's purported direct regulation of a non-resident's vacation rental advertising occurring wholly outside of the City. *Id.* at 17a n.4. It also held, however, that, consistent with California Supreme Court authority, the ordinance as subject to a narrowing construction preventing its application to advertising occurring entirely outside the City that would avoid any direct regulation of interstate commerce. *Id*. at 15a-17a.

Turning to the ordinance's incidental effects on interstate commerce, the court of appeals held that because Rosenblatt failed to allege any significant burden on interstate commerce, and "at most, suggests some negligible burden on the local economy of Santa Monica," there could be no dormant Commerce Clause violation under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. at 26a-30a.

Rosenblatt presents two question on which she seeks review by this Court. But her formulation of these questions is based on her characterization of the court of appeals' holdings, not its actual holdings. The court of appeals' actual holdings represent application of well-established standards for assessing dormant Commerce Clause standards and interpreting statutes. They are consistent with this Court's precedent, are not the subject of a circuit split, and do not present any reason—let alone a compelling one—warranting this Court's review.

This Court has already answered in the negative the first question Rosenblatt contends is presented for review—that is, whether discrimination against interstate commerce requires that the discrimination be exclusively against out-of-state interests. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 361-63 (1992). The court of appeals here acknowledged *Fort Gratiot*. Pet. App. at 19a. Its holding that the ordinance does not discriminate against interstate commerce reflects a straightforward application of this Court's dormant Commerce Clause standards, including *Fort Gratiot*,

and is not subject to the purported circuit splits on which Rosenblatt relies. There is no basis for review.

The second question Rosenblatt contends is presented for review challenges the court of appeals' acceptance of a narrowing construction of the ordinance's advertising restrictions to avoid their extraterritorial application. Rosenblatt does not challenge the court of appeals' finding that she lacks standing to challenge the advertising restrictions' purported extraterritorial reach, and the ordinance has since been amended to implement the narrowing construction rendering her challenge to the prior version of the ordinance moot. Moreover, the ordinance was readily susceptible to the court of appeals' narrowing construction, which was consistent with the ordinance's purposes and supported by California Supreme Court authority. The court of appeals' acceptance of the narrowing construction does not conflict with this Court's precedent and is not subject to the purported circuit split on which Rosenblatt relies. There is no basis for review.

This Court should deny the petition.

STATEMENT OF THE CASE

1. Since at least 1988, Santa Monica implicitly prohibited short-term (less than 31 consecutive days) vacation rentals in residential zones. Pet. App. at 5a & n.1. In 2015, the City passed an ordinance that explicitly codified this zoning prohibition on vacation rentals. *Id.* at 5a-6a. The ordinance created an

exception for home sharing, which allowed residents to "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." *Id.* at 35a. Amended two times since 2015 (in 2017 and 2019), the ordinance retains this basic structure—prohibiting un-hosted short-term vacation rentals but permitting hosted short-term home shares.

In enacting this ordinance, the Santa Monica City Council sought to preserve the city's "available housing stock and the character and charm which result, in part, from cultural, ethnic, and economic diversity of its resident population," and "its unique sense of community which derives, in large part, from residents' active participation in civic affairs, including local government, cultural events, and educational endeavors." Pet. App. at 32a. The city council noted that Santa Monica afforded "a diverse array of visitor-serving short term rentals, including, hotels, motels, bed and breakfasts, vacation rentals and home sharing, not all of which are currently authorized by local law." *Id*.

The city council stressed that "vacation rentals, where residents rent-out entire units to visitors and are not present during the visitors' stays are detrimental to the community's welfare and are prohibited by local law, because occupants of such vacation rentals, when not hosted, do not have any connections to the Santa Monica community and to the residential neighborhoods in which they are visiting" and "the presence of such visitors within the City's residential

neighborhoods can sometimes disrupt the quietude and residential character of the neighborhoods." *Id*. at 32a-33a. On the other hand, the city council noted, "home-sharing does not create the same adverse impacts as unsupervised vacation rentals because, among other things, the resident hosts are present to introduce their guests to the City's neighborhoods and regulate their guests' behavior." *Id*. at 33a.

2. Rosenblatt is a Santa Monica resident and homeowner who, prior to the ordinance, rented out her house on Airbnb for $350 per night when she and her husband traveled. Pet. App. at 7a. After Santa Monica enacted the ordinance, Rosenblatt sued the city and its city council to enjoin the ordinance and recover damages on behalf of herself and a class of similarly situated individuals, claiming that the ordinance violates the dormant Commerce Clause. *Id.*

3. The district court dismissed Rosenblatt's initial and first amended complaints for failure to state a claim. *Id.* at 7a-8a. Rosenblatt appealed, and the court of appeals affirmed. Rosenblatt petitioned for rehearing and rehearing *en banc*, which the court of appeals denied. Rosenblatt's petition for certiorari followed.

REASONS FOR DENYING THE PETITION

The court of appeals' decision was a straightforward application of this Court's dormant Commerce Clause precedent. Its holdings on both questions presented does not give rise to a conflict among the

circuits, nor did the court of appeals deviate from this Court's precedent. There is no basis —let alone a compelling reason—for this Court's review, and the petition should be denied.

A. There Is No Basis for Review of the Court of Appeals' Holding that the Ordinance Does Not Discriminate Against Interstate Commerce

1. The court of appeals' decision does not warrant review because it does not conflict with relevant decisions of this Court. Sup. Ct. R. 10(c). To the contrary, the court of appeals applied this Court's well-established two-prong standard for addressing dormant Commerce Clause claims as set out in *Brown Forman Distillers*:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

476 U.S. at 578-79 (citations omitted). In applying both prongs of this test, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id*. at 579.

Under the first prong of this test, the court of appeals carefully parsed the different portions of the ordinance challenged by Rosenblatt and for each applied this Court's precedent to determine whether it improperly "directly regulated" or "discriminated" against interstate activity or improperly favored in-state interests over out-of-state interests. Pet. App. at 10a-25a. In particular, in assessing whether each portion of the ordinance challenged by Rosenblatt discriminated against interstate commerce, it applied this Court's definition of discrimination, looking to see whether the ordinance, either facially or in effect, resulted in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Pet. App. at 18a (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994)). Its holding that there was no such discrimination represents its application of a well-established and properly stated rule of law that provides no basis for review.

2. Review is also not warranted because the first question Rosenblatt contends is presented has already been settled by this Court. Sup. Ct. R. 10(c). Indeed, the first question Rosenblatt presents for review—"whether a local ordinance that discriminates against interstate commerce, and was enacted for a discriminatory purpose, must additionally discriminate exclusively against non-residents to be subject to heightened scrutiny under the dormant commerce clause" (Pet. at 2)—was directly answered by this Court in *Fort Gratiot*. There, relying on earlier

decisions to the same effect, this Court held that Michigan's Waste Import Restrictions, which discriminated against out-of-state waste, could not be saved by the fact that they "treated waste from other Michigan counties no differently than waste from other States." 504 U.S. at 361-63; *see also Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951) ("immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce"); *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891) (Virginia statute imposing special inspection fees on meat from animals slaughtered more than 100 miles from place of sale—"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").

The court of appeals' ruling, which recognized and discussed *Fort Gratiot* (Pet. App. at 19a), is entirely consistent with that case's holding. Rosenblatt argues that the court of appeals "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." Pet. at 6. But the court of appeals did nothing of the sort. It did not find that the ordinance's language, effect, and purpose demonstrated discrimination against interstate commerce, and then negate that finding because the ordinance applies to both local and out-of-state residents. To the contrary, it expressly

recognized this Court's holdings precluding such an approach. Pet. App. at 18a-19a (discussing *Fort Gratiot* and *Dean Milk*).

Rather, the court of appeals looked to whether the ordinance applied differently to intrastate, as opposed to interstate, transactions as part of its overall analysis of whether the ordinance's language, effects, and purpose rendered it discriminatory. Pet. App. at 20a-25a. This is not only entirely consistent with, but commanded by, this Court's precedent. *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 342 (2008) ("fundamental element of dormant Commerce Clause jurisprudence" is "the principle that 'any notion of discrimination assumes a comparison of substantially similar entities'") (citation omitted); *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 576 (1997) (Maine law discriminatory on its face because it "expressly distinguishes between entities that serve a principally interstate clientele an those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business"); *Oregon Waste Systems*, 511 U.S. at 99 ("discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.").

As support for her claim that the court of appeals did what she claims and so acted contrary to *Fort Gratiot*, Rosenblatt argues that the ordinance's language and purposes are clearly discriminatory, and that the court of appeals agreed. Pet. at 15-18. Neither the

ordinance nor the court of appeals' ruling supports these arguments.

Rosenblatt misreads the ordinance as prohibiting property owners from renting their properties to "transients," instead requiring them to rent to "permanent residents," and argues that this necessarily constitutes discrimination against interstate commerce. Pet. at 5, 10, 15-16. But this is not what the ordinance does. Rather, the ordinance allows a property owner to rent to "transients," defined as individuals who rent for less than 31 days, but requires that during such a rental a "primary resident" of the property live on site, thus converting the rental from a prohibited un-hosted vacation rental into a permitted hosted home share. Pet. App. at 35a-37a (ordinance §§ 6.20.010(a), (c), 6.20.020, 6.20.030).

But even if the ordinance precluded all short-term rentals of less than 31 days, it would not discriminate against interstate commerce. From the point of view of owners, the ordinance would not discriminate, precluding any owner, whether local (Santa Monica resident), in-state (California resident), or out-of-state from renting their Santa Monica property for a period of less than 31 days. From the point of view of prospective renters, the ordinance would also not discriminate, precluding any renter, whether local, in-state, or out-of-state, from renting a Santa Monica property for a period of less than 31 days. This would not be discrimination because there would be no differential treatment of in-state and out-of-state economic interests. *See*, *e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S.

617, 625-27 (1978) (New Jersey may pursue its protective goals "by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected" but cannot accomplish those goals by "discriminating against articles of commerce coming from outside the State").

As noted, the ordinance does not implement a complete ban on rentals for less than 31 days, but instead places a condition on those rentals, requiring that a primary resident live on site during the rental. This condition too is non-discriminatory because it applies equally to all owners and all renters, with no differential treatment of in-state and out-of-state economic interests. In sharp contrast, all of the cases on which Rosenblatt relies involved such differential treatment. *See* Pet. at 21-23; *Camps Newfound/Owatonna*, 520 U.S. at 575-78 (Maine imposes "higher tax on a camp that serves principally nonresidents than on one that limits its services primarily to residents"); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 341 (1989) (Connecticut beer pricing statute "exempting brewers and shippers engaging in solely domestic sales from the price regulation imposed on brewers and shippers who engage in sales throughout the region"); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 282-86 (1987) (Pennsylvania's "method of assessing the marker and axle taxes in this case on Pennsylvania-based vehicles and on other vehicles establishes that the State is not treating the two types of vehicles with an even hand"); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 319, 330-32 (1977) (New

York transfer tax on securities transactions under which "transactions involving an out-of-state sale are now taxed more heavily than most transactions involving a sale within the state").

Rosenblatt argues that the stated purposes of the ordinance also clearly evidence discrimination, and that the court of appeals agreed. Pet. at 17-18, 24. Neither is correct.

The court of appeals did not, as Rosenblatt contends, agree that "the avowed purposes of the Ordinance are discriminatory." Pet. at 18. In the portion of its opinion cited by Rosenblatt to support this claim, the court of appeals—addressing and rejecting Rosenblatt's argument that the ordinance improperly sought to preclude out-of-state travelers from accessing residential neighborhoods—stated:

> Given the availability of reasonable alternatives to vacation rentals, the ordinance does not preclude anyone from accessing city neighborhoods. And, insofar as the ordinance might favor owners by allowing them to live in residential neighborhoods, it does not discriminate against persons outside of Santa Monica, who stand on equal footing with Santa Monica residents in their ability to purchase Santa Monica property and reside there.

Pet. App. at 20a. This hardly constitutes agreement, or even non-dispute, with Rosenblatt's claim that the purposes of the ordinance are clearly discriminatory. Nor could it, since those purposes do not demonstrate any intent to discriminate against interstate commerce.

The stated purposes of the ordinance are preserving available housing stock, protecting the residential character of the City's neighborhoods, and maintaining the cultural, ethnic, and economic diversity of the City's resident population. Pet. App. at 31a-32a. These are all traditional protective purposes of local zoning and land use regulations. And the ordinance does not further these purposes in any way that constitutes discrimination against interstate commerce. As the court of appeals noted (Pet. App. at 20a-21a), in *Philadelphia v. New Jersey*, 437 U.S. at 625-27, despite recognizing that waste was an article of commerce, the Court stated that even a purpose of protecting "its residents' pocketbooks" would not preclude New Jersey from "slowing the flow of *all* waste into the State's remaining landfills," and struck the statute at issue only because it "discriminat[ed] against articles of commerce coming from outside the State." As applied here, precluding or limiting the flow of short-term renters into Santa Monica's residential neighborhoods to protect the character of those neighborhoods does not discriminate against interstate commerce so long as the limitation applies, as it does here, regardless of whether those renters come from within Santa Monica, within the State, or outside the State.

3. The court of appeals' ruling does not implicate the purported circuit splits on which Rosenblatt relies (Pet. at 26-32)—another reason why the petition should be denied. Sup. Ct. R. 10(a).

As discussed above, the court of appeals did not disregard *Fort Gratiot* and hold that despite

discrimination against interstate commerce, a statute remains valid unless "accompanied by discrimination exclusively against out-of-staters." Pet. at 19. To the contrary, the court of appeals recognized *Fort Gratiot*'s holding that discrimination against some in-staters cannot save a statute that discriminates against out-of-staters, but concluded, correctly, that the ordinance does not discriminate against out-of-staters because it treats all in-staters and out-of-staters alike. This holding is consistent with the circuit authority cited by Rosenblatt. *See infra* at 17-20.

Moreover, none of the authorities Rosenblatt cites as doing so (Pet. at 26-27) confirms a circuit split relevant to the court of appeals' holding that the ordinance does not discriminate against interstate commerce.

In *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994), the Ninth Circuit disagreed with the Tenth Circuit's decision in *Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992), as to whether state regulations banning the importation of certain wildlife species were per se discriminatory regardless of the overall scheme. The Ninth Circuit held that an "import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items." 20 F.3d at 1012. Here, this disagreement is not implicated because the ordinance does not implement a complete ban on out-of-state short-term renters. Rather, it applies to out-of-state short-term renters the same standards it applies to in-state short-term renters, limiting

both to short-term rentals in which a primary resident continues to live. Moreover, the differences between the Ninth and Tenth Circuits in these cases had nothing to do with application of *Fort Gratiot*. And, in any event, the Ninth and Tenth Circuit's disagreement appears to have been resolved, in the Ninth Circuit's favor, by two cases decided after *Dorrance*: *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 346-47 (1992) (recognizing validity of laws that "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin") (internal quotations and citation omitted) and *Oregon Waste Systems*, 511 U.S. at 99 (defining "discrimination" as "differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter.").

Rosenblatt relies (Pet. at 26) on a portion of a dissent from the denial of rehearing *en banc* in *Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 517-18 (9th Cir. 2014) (Smith, J., dissenting), that accused the majority of disregarding "controlling precedent" and departing "from the holdings of the Supreme Court and our sister circuits." But the differences between the dissent and majority in that case concerned an issue different than discrimination against interstate commerce—namely, whether the regulations at issue sought "to control conduct in other states." *Id*. The court of appeals here addressed this issue separately from its discussion of discrimination, holding that the ordinance does not directly regulate interstate commerce because it does not "directly regulate

extraterritorial activity," that is, activities "that are separate and entirely out-of-state." Pet. App. at 12a, 13a. Any circuit split identified by the dissent in *Rocky Mountain Farmers* has no application to Rosenblatt's challenge to the court of appeals' distinct holding that the ordinance does not discriminate against interstate commerce.

Nor does the portion of *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 210-11 (2d Cir. 2003), on which Rosenblatt relies (Pet. at 26-27, 30) establish the existence of any applicable circuit split. The Second Circuit there rejected the district court's finding that a New York statute facially discriminated against interstate commerce on two grounds: "First, the district court erred in finding 'facial' discrimination based upon its interpretation of the Statute's effects. Second, the district court concluded that the Statute is invalid in large part based upon its analogy to a significantly different statute in an inapposite case." In this context, the Second Circuit faulted the district court for citing *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390-91 (1994) for the proposition that "a law may be discriminatory even though it limits activities of in-state as well as out-of-state business," not because it disagreed with this proposition, but because the district court "failed to recognize that this statement was made within the context of the Court's analysis of the ordinance's discriminatory effects." 320 F.3d at 211. The validity of this distinction between facial discrimination and discriminatory effects is not presented here.

The law review article cited by Rosenblatt (Pet. at 27) discusses a circuit split "over the purported discriminatory effect of laws regulating national chains." 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, 1897 (2016). This case does not involve the regulation of any national chain. Moreover, the article acknowledges this Court's clear definition of discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 1900. As discussed above, this is precisely the definition the court of appeals applied in concluding that the ordinance does not discriminate against interstate commerce, either facially or in effect.

Finally, the other cases Rosenblatt cites as evidencing an applicable circuit split with the court of appeals decision in this case do not actually do so. Pet. at 27-28. Some of these cases do not even address discrimination against interstate commerce. *See Association for Accessible Medicines v. Frosh*, 887 F.3d 664, 674 (4th Cir. 2018) (not addressing discrimination against interstate commerce, and finding Maryland statute prohibiting price gouging in the sale of prescription drugs "unconstitutional under the dormant commerce clause because it directly regulates transactions that take place *outside Maryland*") (emphasis in original); *Florida Transportation Services, Inc. v. Miami Dade County*, 703 F.3d 1230, 1257 (11th Cir. 2012) (declining to address whether application of stevedore permit

ordinance directly discriminated against interstate commerce because district court "did not commit reversible error in finding that the Port Director's permitting practices unduly burdened interstate commerce under the *Pike* undue burden test").

The cases that do address discrimination comport with the court of appeals' approach in this case—requiring a showing of differential treatment of in-state and out-of-state economic interests as a basis for finding discrimination, even where they recognize *Fort Gratiot*'s holding that if such differential treatment is present, the fact that the statute also discriminates against some in-state interests will not save it. *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (local ordinance limiting frontage and total square footage of chain retail stores discriminates against interstate commerce because it works an "effective elimination of all new interstate chain retailers"); *Jones v. Gale*, 470 F.3d 1261, 1267-69 (8th Cir. 2006) (state initiative limiting farming by corporations and syndicates is "discriminatory on its face because it affords differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter") (internal quotation marks and citation omitted); *McNeilus Truck and Manufacturing, Inc. v. Ohio*, 226 F.3d 429, 442-43 (6th Cir. 2000) (Ohio statute discriminates in effect because "in-state dealers and remanufacturers benefit under the statute to the exclusion of out-of-state remanufacturers"); *Milton S. Kronheim & Company, Inc. v. District of Columbia*, 91 F.3d 193, 201-02 (D.C. Cir. 1996)

(D.C. warehouse storage act discriminates against interstate commerce because "it allows only wholesalers who store their beverages within the District to sell their product"); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1277-79 (7th Cir. 1992) (facially neutral statutes that "treat similarly situated waste haulers alike, regardless of their residence of the origin of the waste" discriminate in effect because "those engaged in intrastate waste disposal have not been forced to alter their business practices in order to comply with the statute, while those engaged in hauling out-of-state waste will have to change drastically their method of operation or give up hauling waste into Indiana altogether"); *In re Southeast Arkansas Landfill, Inc.*, 981 F.2d 372, 375-78 (8th Cir. 1992) (applying *Fort Gratiot* to find that statute restricting a landfill's use for out-of-district waste discriminates against interstate commerce because in-district waste is treated differently from in-state, out-of-district waste or out-of-state waste); *Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781, 790-91 (4th Cir. 1991) (statutes and executive orders "appear facially to discriminate against out-of-state hazardous waste" because they "compel in-state facilities to give preference to in-state waste, to reserve a specific amount of in-state capacity for in-state waste, to limit the acceptance of out-of-state waste to certain amounts, and to bar waste from specific states"); *National Revenue Corp. v. Violet*, 807 F.2d 285, 289-90 (1st Cir. 1986) (Rhode Island statute limiting debt collection to members of Rhode Island bar discriminates against interstate commerce because it

"effectively bars out-of-staters from offering a commercial service within its borders and confers the right to provide that service—and to reap the associated economic benefit —upon a class largely composed of Rhode Island citizens").

Rosenblatt failed to allege any significant burden on interstate commerce, and "at most, suggests some negligible burden on the local economy of Santa Monica." Pet. App. at 30a. The question she contends is presented for review has already been answered by this Court. The court of appeals' holding that the ordinance does not discriminate against interstate commerce is consistent with that answer, consistent with this Court's other precedent setting out well-established dormant Commerce Clause standards, and not subject to the purported circuit splits cited by Rosenblatt. There is simply no basis for review.

B. There Is No Basis for Review of the Court of Appeals' Interpretation of a Portion of the Ordinance That Has Since Been Amended

1. Rosenblatt's challenge to the court of appeals' ruling regarding the ordinance's restrictions on advertising does not warrant review because she lacks standing and, in any event, the ordinance has since been amended, rendering her challenge moot.

As the court of appeals noted, even if "the ordinance could be construed broadly to apply to a nonresident's vacation rental advertising occurring wholly outside of the city, Rosenblatt, as a Santa Monica

resident, lacks standing to challenge Santa Monica's direct regulation of such a transaction." Pet. App. at 17a n.4. Rosenblatt provides no response to the court of appeals' concern about her lack of standing—reason alone for this Court not to grant review.

There is also no compelling reason for the Court to grant review because the ordinance has since been amended. As the court of appeals recognized, the ordinance's advertising restrictions were amended in 2017 to render it applicable only to "hosts." Pet. App. at 16a n.3. The definition of "host" in the 2017 amendment effectively limits the reach of the ordinance's advertising restrictions, precluding the exterritorial application about which Rosenblatt complained—that is, their application to advertisements placed outside Santa Monica with no intent to actually rent a property in Santa Monica. *Id.* Rosenblatt's challenge is only to the 2015 version of the ordinance—a point she confirmed in the court of appeals. *Id*. But a case is moot if the dispute between the parties "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights," even if the parties continue to dispute the lawfulness" of the conduct that gave rise to the litigation." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). This "abstract dispute about the law" (*id*.) as it once existed does not warrant this Court's review.

2. Even if Rosenblatt could overcome these fatal justiciability defects, the petition should be denied because the court of appeals' acceptance of a narrowing

construction was consistent with well-established principles of statutory interpretation. Sup. Ct. R. 10(c).

According to Rosenblatt, the court of appeals only upheld the ordinance's advertising restrictions because it "'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. at 36 (citing Pet. App. at 17a), original emphasis. But this is a gross mischaracterization of the court of appeals' ruling in an attempt to create an issue worthy of review where none exists.

Contrary to Rosenblatt's framing of the issue, the court of appeals applied proper principles of statutory interpretation when addressing Rosenblatt's contention that the ordinance "purports to ban wholly extraterritorial communications and advertisements made over the Internet and in other jurisdictions." Pet. App. at 15a. Rosenblatt premised this claim on a particular section of the ordinance (Pet. App. at 36a-37a (Ordinance § 6.20.030)), which she contended applied to deprive "any person —within or outside of Santa Monica and regardless of whether she actually intends to rent out her property—of her right to advertise a Santa Monica vacation rental." *Id*. at 15a-16a.

The court of appeals rejected Rosenblatt's broad construction of the ordinance's advertising restrictions. Instead, it accepted a narrowing construction, agreed to by the City, under which the ordinance would not have extraterritorial application. As the court of appeals

explained, "Federal courts 'must accept a narrowing construction to uphold the constitutionality of an ordinance if its language is "readily susceptible" to it.' " *Id.* at 16a (citing *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 942 (9th Cir. 1997)). This is because a "California municipality 'may not exercise its governmental functions beyond its . . . boundaries,' *S.D. Myers, Inc.* [*v. City and County of San Francisco*], 253 F.3d [461,] 473 [(9th Cir. 2001)] (quoting *City of Oakland v. Brock*, 8 Cal.2d 639, 67 P.2d 344, 345 (1937)) (emphasis omitted)," and courts " 'presum[e] that the legislative body intended not to violate the constitution' when enacting ordinances, *City of Los Angeles v. Belridge Oil Co.*, 42 Cal.2d 823, 271 P.2d 5, 11 (1954)." Pet. App. at 16a-17a. The court of appeals further explained that, when interpreting a municipal ordinance, courts "therefore 'presum[e] that the governing body of the city was legislating with reference to the conduct of business within the territorial limits of the city.' " *Id.* (citing *Belridge Oil*). After finding that "nothing in the ordinance here suggests that it was intended to have extraterritorial application," the court of appeals "reject[ed] Rosenblatt's broader construction of the ordinance's advertising ban." Pet. App. at 17a.

Accordingly, the court of appeals did not, as Rosenblatt contends, apply an irrebuttable presumption despite indications that the City supposedly intended exterritorial effect. Rather, it applied the narrowing construction only after concluding that "nothing in the ordinance" suggested an intent that it have extraterritorial application and hence that it was "reasonably

susceptible" to the narrowing construction. Pet. App. at 16a-17a. This was entirely consistent with the stated purposes of the ordinance, preserving housing stock and the nature of the City's residential neighborhoods. Pet. App. at 31a-32a. These purposes would not be served by extending the pre-2017 ordinance to a person outside Santa Monica engaging in advertisement with no intention to actually rent a property within Santa Monica subject to the ordinance.

The court of appeals' acceptance of the narrowing construction was thus entirely consistent with this Court's precedent recognizing that a narrowing construction of a statute to avoid constitutional issues may be accepted so long as the statute is readily susceptible to it. *See*, *e.g.*, *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 397 (1988). It is also consistent with the California Supreme Court cases cited by the court of appeals, which establish the general presumption that California cities legislate with reference to conduct of business within a city's territorial limits. This too is not an irrebuttable presumption, but it applies where there is "nothing in the provisions of the ordinances indicating that it was the intention to give them extraterritorial effect." *Belridge Oil*, 42 Cal. 2d at 832, 271 P.2d at 11. The court of appeals, finding nothing in the ordinance to suggest an intention to have extraterritorial application, was justified in applying these presumptions to accept the offered narrowing construction.

In sum, the court of appeals' application of well-established principles of statutory construction to a municipal ordinance provides no basis for review.

3. The petition should be denied because the court of appeals' acceptance of the narrowing construction of the ordinance does not contradict this Court's precedent or implicate the purported circuit split cited by Rosenblatt. Sup. Ct. R. 10(a), (c).

Rosenblatt relies on *Healy*, which recognizes simply that legislative intent will not save a statute whose exterritorial effects cannot be avoided with a narrowing construction. *See* 491 U.S. 324, 336 ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature"). But that case has no application here where extraterritorial effect *can* be avoided through a narrowing construction. Nor is *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), apposite. That case did not address either legislative intent or narrowing constructions, holding only that an Illinois statute with "sweeping extraterritorial effect" violated the dormant Commerce Clause because it "purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the state." 457 U.S. at 642.

The ordinance, as narrowed, also does not implicate any circuit split. The majority of the cases Rosenblatt cites as contrary to the court of appeals' approach

do not address the validity or consequences on their dormant commerce clause analysis of an offered narrowing construction to which the statute at issue is readily susceptible. *See Frosh*, 887 F.3d at 672-73; *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 836 (7th Cir. 2017); *American Beverage Association v. Snyder*, 735 F.3d 362, 376 (6th Cir. 2013); *Bainbridge v. Turner*, 311 F.3d 1104, 1111 (11th Cir. 2002); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 615-20 (7th Cir. 1999).

The two cases cited by Rosenblatt that address an offered narrowing construction are consistent with the court of appeals' approach. The Fourth Circuit did not preclude the possibility that such a narrowing construction could, in an appropriate case, avoid extraterritorial application, but rather held that given the Commonwealth's "blanket regulation of internet material" an effective narrowing construction to accomplish only local effects was "nearly impossible." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-40 (4th Cir. 2004). The Second Circuit similarly did not foreclose the possibility that an appropriate narrowing construction could avoid extraterritorial reach but rejected the offered narrowing construction because the language of the statute was not readily susceptible to the offered narrowing and because it had been pointed to no state supreme court authority suggesting "that court would construe the statute differently." *American Booksellers Foundation v. Dean*, 342 F.3d 96, 100-01, 103 (2d Cir. 2003). Here, the court of appeals relied on California Supreme Court authority supporting its narrowing construction, to which the ordinance was readily

susceptible, and which avoids extraterritorial application. There is thus no circuit split providing a basis for review of this ruling.

CONCLUSION

For all the reasons set forth above, this Court should deny the petition for writ of certiorari.

Respectfully submitted April 2, 2020,

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