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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Faced with important constitutional questions in the context of a Rule 12(b)(6) dismissal, positions on the merits that are directly at odds with this Court's precedent, and an unfavorable split in the circuits, the City resorts mostly to vehicle arguments. Most prominently, the City relies on abstract citations to *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93 (1994), to conclusorily assert that the Ordinance does not discriminate "between in-state and out-of-state economic interests." Interpreting this language in the City's desired manner requires overturning the Court's past precedent which has consistently defined "economic protectionism" to include discrimination between in-state entities, services, and/or transactions that serve a principally interstate market and those that serve an intrastate market. The circuit majority agrees and strikes down 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).

The circuit minority, however, requires that discrimination against interstate commerce be "*among* in-state and out-of-state [competitors]" and upholds laws that apply nationwide, despite discrimination between interstate and intrastate commerce. *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 502 (5th Cir. 2001) (emphasis in original). This is not only the standard that the Ninth Circuit applied, and has consistently applied, it is the standard that the City advocated for in its Ninth

Circuit briefing and again in its Opposition. This case, therefore, presents the very question that Petitioner Arlene Rosenblatt claims it does: The propriety of the Ninth Circuit's dispositive treatment of its "applies nationwide" reasoning. (Pet. i, 19-25.)

The City's attempt to carve out a "statutory construction" exception to this Court's precedent that legislative intent is irrelevant to the extraterritorial reach analysis is similarly better suited for merits briefing. The Court's ability to address this issue is *not* impeded by the City's "mootness" arguments, which rely upon two issues that were raised and rejected in the district court, but that the Ninth Circuit unnecessarily and unilaterally decided (incorrectly) in footnotes without any prompting and without any briefing.

Accordingly, in order to bring uniformity to the important constitutional issues raised in Rosenblatt's Petition and to bring all circuits in compliance with this Court's precedent, the Court should grant certiorari.

ARGUMENT

I. The Rule 12(b)(6) Dismissal Below Presents The Perfect Vehicle To Resolve The Entrenched Circuit Split

A. This Case Presents The Question Presented

1. The City's suggestion that this case does not present the question presented—whether

"discrimination against interstate commerce" requires "discriminat[ion] exclusively against nonresidents" (Pet. i)—is disingenuous given that the City advocated for this precise requirement below. In the Ninth Circuit, Rosenblatt strenuously argued that the Ordinance impermissibly "prohibits property owners from offering their privately-owned properties as vacation rentals in interstate commerce" and limits residential neighborhood access for nonresidents. (9th Cir. Dkt. 11 at 36-38.) The City limited its response to arguing that Third and Ninth Circuit precedent requires that "the state or local regulation at issue specifically target[] out-of-state actors for different and less-favorable treatment than in-state actors." (9th Cir. Dkt. 22 at 15-17.) Rosenblatt, in her reply brief and petition for rehearing, explained that discrimination can also occur between interstate and intrastate commerce. (9th Cir. Dkt. 30 at 14-20, Dkt. 47 at 5-11.)

Contrary to the City's attempt to discredit Rosenblatt, Rosenblatt's Petition does *not* state that the Ninth Circuit "agreed" that the Ordinance discourages interstate commercial activity or that the City was motivated by a desire to limit residential neighborhood access for nonresidents. (*Compare* Opp. 9, 12 *with* Pet. 18.) Such factual findings would have been well-beyond the purview of Rule 12(b)(6). *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("If appellant has correctly characterized the effect of the New York lowest-price affirmation law, that law violates the Commerce Clause.").

The Ninth Circuit did, however, acknowledge that "Rosenblatt relie[d] heavily" on *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997), and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which discussed these forms of discrimination. (Pet.App. 11a, 21a.) Nevertheless, the Ninth Circuit agreed with the City that the Ordinance's purported application to all persons "nationwide" was dispositive. (*Id.* 21a.) After stating that the "purpose" of the Commerce Clause is to prohibit states from "burdening out-of-state competitors"[1] (*id.* 8a), the Ninth Circuit interpreted *Philadelphia* to require discrimination aimed solely "outside the State," (*id.* 21a). The question presented, therefore, is appropriate for this Court's review. *See Jefferson v. Upton*, 560 U.S. 284, 293 (2010) (granting certiorari and reversing because court of appeals' treatment of statute as "*exclusive* statutory exception" and failure to address other argument meant that "the Court of Appeals applied the statute and our precedents incorrectly" (emphasis in original)).

2. The City's merits-based defenses do not preclude review; they highlight the need for review. Throughout its Opposition, the City heavily relies on *Oregon Waste* to argue that there must be discrimination "between in-state and out-of-state economic interests." The Ordinance does *not* prohibit

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[1] Both cases cited for this proposition likewise treated the "applied nationwide" reasoning as dispositive. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013).

all residential rentals; it prohibits *all vacation rentals* without imposing any restrictions on long-term rentals. (Pet. 16.) By expressly disting-uishing between vacation rentals and long-term rentals, the Ordinance "distinguishes between entities [and services] that serve a principally interstate clientele and those that primarily serve an intrastate market." *Camps*, 520 U.S. at 564; (Pet. 15-16). The Court's precedent forecloses any argument that this is beyond the scope of the definition of "discrimination against interstate commerce" or that discrimination must occur between in-state and out-of-state actors. (Pet. 19-26.) Discrimination may occur between in-state entities principally engaged in interstate commerce and ***other in-state* entities** primarily engaged in intrastate commerce, *Camps*, 520 U.S. at 564, between interstate and intrastate commercial ***transactions***, *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331, 332, n.12 (1977), or, more generally, between interstate and intrastate commerce, *Am. Trucking Assocs., Inc. v. Scheiner*, 483 U.S. 266, 286-287 (1987), *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 340-341 (1989).

Oregon Waste did not suddenly make these forms of discrimination no longer viable, especially given that the Court's holding *expanded* the definition of "discrimination." 511 U.S. at 95, 100. The Court's subsequent precedent confirms that the means by which the Ordinance discriminates against interstate commerce continue to be viable. In *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), the Court, immediately after citing *Oregon Waste*, cited *Boston Stock Exchange* for the proposition that "a State 'may not discriminate between transactions on the basis of

some interstate element.'" *Id.* at 331. Similarly, in *Camps*, the Court cited *Oregon Waste* to hold that the Maine tax statute—which "encourages [in-state] entities to limit their out-of-state clientele" or, alternatively, increases tuition costs for campers, 95% of whom were nonresidents—"discriminates against interstate commerce, and is all but *per se* invalid." 520 U.S. at 576, 581.

Oregon Waste reaffirmed the principle from *Philadelphia* that "economic protectionism" includes "resource protectionism." 511 U.S. at 107. There is therefore no merit to the City's unvarnished assertions, which include the first sentence of its Opposition, that the City's labeling of the Ordinance and its avowed preservationist purposes as a "land use" ordinance with "land use" purposes exempt the Ordinance from Commerce Clause scrutiny. (Opp. 1, 13); *see Camps*, 520 U.S. at 576-578 (state cannot reserve state's natural beauty and land for intrastate use by limiting interstate use of nonresidents).

The City's final contention in defense of the "applies nationwide" reasoning is its suggestion that even though the Ninth Circuit "agree[d] that vacation rentals generally implicate interstate commerce" (Pet.App. 11a), the remote possibility that a Santa Monica resident may seek to vacation in Santa Monica destroys any discrimination against interstate commerce. (Opp. 8-9.) Not even the City's cited cases require the burden to fall *exclusively* on interstate commerce. *See, e.g.*, *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 346 (1992) (striking down statute where "most of the burden" fell on those outside the State). The Court has consistently

invalidated states' attempts to discriminate against interstate commerce, even if that results in over-inclusiveness. *See, e.g.*, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42, n.9 (1980) (Florida statute that discriminated against out-of-state bank holding companies could not be saved on grounds that it could, in theory, "also apply to locally organized bank holding companies"); *Bos. Stock Exch.*, 429 U.S. at 319 (New York taxed out-of-state transactions "more heavily than *most* transactions involving a sale within the State" (emphasis added)); *Camps*, 520 U.S. at 576-581; *Scheiner*, 483 U.S. at 286.

Given the Court's existing precedent, the City's defenses to the Ordinance are more appropriately reserved for merits briefing.

3. The Ordinance's provision allowing "home sharing" as an alternative to allowing *both* home sharing *and* vacation rentals is not relevant to the discrimination analysis. The notion that home sharing would be as enticing to either a property owner or a vacationing family as the rental of an entire house defies common sense. The public's insipid taste for home sharing is reflected in the City's admissions that "home-sharing activities are relatively very small in number, when compared to the number of persons utilizing vacation rentals" (Pet.App. 33a-34a), and that the Ordinance "would slash Santa Monica Airbnb listings from 1,700 listings to 300 listings" (D.C. Dkt. 52 (FAC), ¶ 46). Consequently, the availability of home sharing, at best, slightly *lessens* the "'*extent* of the discrimination' and 'is of no relevance to the determination whether a State has discriminated against interstate

commerce.'" *Oregon Waste*, 511 U.S. at 100, n.4 (emphasis in original); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 363, n.4 (1992).

Nor does allowing home sharing cleanse the discriminatory purposes underlying the Ordinance. (Pet. 17-18.) Just the opposite. The City's allowance of home sharing is expressly premised on the discriminatory reason that unlike home sharing occupants, "occupants of such vacation rentals…do not have any connections to the Santa Monica community and to the residential neighborhoods in which they are visiting." (Pet.App. 32a); *see Lewis*, 447 U.S. at 42.

B. The City Fails To Reconcile The Circuit Split

As explained in Rosenblatt's Petition, a fully entrenched circuit split exists. (Pet. 26-36.) Each court in the circuit majority was confronted with a dormant Commerce Clause challenge to a state or local law that, as with the Ordinance: (1) directly burdens interstate commerce in a manner that the Court deems to be impermissible discrimination against interstate commerce; and (2) applies to both in-staters and out-of-staters. Yet, the circuits reach conflicting conclusions as to the constitutionality of such laws. (Pet. 27-31.) Tellingly, the City fails to cite a single case from the circuit majority that had these two elements and did *not* find a *per se* Commerce Clause violation.

1. The disagreement between the circuit majority and circuit minority cannot be explained by the "between in-state and out-of-state economic interests" language from *Oregon Waste*. (Opp. 13-15, 18-19.) The City's attempt to rely upon distinctions in the type of discrimination at issue unravels at the start, as the City grapples with a disagreement between the Ninth and Tenth Circuits as to the constitutionality of *identical* statutes. *Pac. Nw. Venison Prods. v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994); *Dorrance v. McCarthy*, 957 F.2d 761, 765 (10th Cir. 1992). The City attempts to attribute these conflicting rulings to some sort of change in law effectuated by the "between in-state and out-of-state economic interests" language from *Oregon Waste*; however, that language originates from *Brown-Forman*, 476 U.S. at 579, which was decided in 1986, well before any of the conflicting circuit decisions were issued.

A comparison of the decisions of the D.C. and the Second Circuits similarly illustrates the fatal flaw in attributing the circuit split to the type of discrimination alleged. In *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996), the D.C. law was struck down as "patently discriminatory" even though it "subject[ed] [all manufacturers] to the same requirement." *Id.* at 201. The City claims that a finding of discrimination was warranted because the D.C. law "'allow[ed] only wholesalers who store their beverages within the District to sell their product.'" (Opp. 18-19 (quoting *Kronheim*, 91 F.3d at 201-202).) In *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003), however, New York's importation ban on

cigarettes also had the effect of "forc[ing] all retail sales of cigarettes to occur in the state." *Id.* at 210. The Second Circuit even acknowledged that the "[t]he only way an out-of-state seller could legally sell retail cigarettes to New York consumers is to establish a brick-and-mortar outlet in New York." *Id.* at 212. Despite having the ***same exact type of discrimination***, the Second Circuit reached a different conclusion than the D.C. Circuit and upheld the importation ban because the requirement "applie[d] evenhandedly to both out-of-state and in-state direct cigarette shippers." *Id.*

2. The reason for the circuits' different conclusions is the circuits' fundamental disagreement as to the impact of a law that "applies nationwide." The Ninth Circuit acknowledged this in *Pacific Northwest Venison*. 20 F.3d at 1012; *see Dorrance*, 957 F.2d at 765. In direct contrast to the Ninth Circuit's dispositive treatment of its "applies nationwide" reasoning and its interpretation of *Fort Gratiot*, the circuit majority cites *Brimmer v. Rebman*, 138 U.S. 78 (1891), on which *Fort Gratiot* is based, to hold that a determination that a law "'purports to regulate evenhandedly' does not end the question of which scrutiny should apply," and that laws that "directly burden[] the interstate market" violate the Commerce Clause even if they "purport[] to apply equally to citizens of all states." *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992); *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 434-436, 443 (6th Cir. 2000).

Accordingly, the Court should grant certiorari.

II. The City's "Mootness" Arguments Do Not Warrant Avoiding The Constitutional Issue Attendant To The Advertising Ban

The City attempts to carve out an exception to *Healy* that allows legislative intent to be considered under the guise of "statutory construction." (Opp. 21-27.) The City's proposed "statutory construction" exception does not explain its extraterritorial enforcement of the Ordinance. This highlights the danger of the City's proposed exception. To allow a state, municipality, and/or court to circumvent the Commerce Clause by a simple labeling device would effectively swallow the rule. *See Camps*, 520 U.S. at 575. It would also be inconsistent with *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), as well as the numerous circuit decisions that have invalidated laws that could be enforced extraterritorially. (Pet. 36-38.) To the extent that the City's proposed exception has any merit, the resulting tension between the City's proposed rule and *Healy* is an issue that should be resolved on the merits.

The Court's ability to consider this issue is *not* impeded by the City's "mootness" arguments, which are based on two issues the Ninth Circuit raised in footnotes—the 2017 amendments and standing. (Opp. 20-21); *see Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) ("the fact that the relevant claim here became moot before certiorari does not limit this Court's discretion"). The Ninth Circuit unnecessarily and unilaterally raised these issues without any prompting or briefing.

When this action was pending in the district court, the City represented to the district court and to Rosenblatt that "the [2017] amendments will be to parts of the Ordinance not at issue in this litigation" and "will [not] have an effect on the legal issues in this case." (D.C. Dkt. 48 at 2:16-18, 3:28-4:1.) The City did *not* raise the amendments in its brief filed in the Ninth Circuit. (9th Cir. Dkt. 22.) Although the City raised standing in the district court, the district court rejected the City's standing challenge (Pet.App. 66a) and the City did *not* re-raise standing in the Ninth Circuit (9th Cir. Dkt. 22).

In her petition for rehearing, Rosenblatt notified the Ninth Circuit of these facts and that she has defenses to each of the newly-raised issues. (9th Cir. Dkt. 47 at 14-15.) The Ninth Circuit denied rehearing and supplemental briefing to address the unaddressed issues. (Pet.App. 75a-76a.) The Ninth Circuit's brief discussion of unbriefed, unraised, and unnecessary issues should not preclude review of a question properly presented. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 299-300 (1974) (refusing to construe district court's finding as part of its "final ruling" since it was "unnecessary to the District Court's disposition of the case").

There is a reason why the City abandoned these issues in its Ninth Circuit briefing: They are entirely meritless. The focus on Rosenblatt's standing "as a Santa Monica resident" to challenge the advertising ban is misplaced. (Pet.App. 17a, n.4.) Whether she is located in Santa Monica or on vacation in New York at the time of placing the advertisement, Rosenblatt

is prohibited from advertising her Santa Monica house as a vacation rental on the Internet. The City cited Rosenblatt for that very conduct and threatened her with imminent criminal punishment, including imprisonment, for any future advertisement. (D.C. Dkt. 25-1 at 238-254.) As the City acknowledged in the district court, the amendments do not change this. The Ordinance continues to prohibit Rosenblatt from "advertis[ing]…any Vacation Rental." S.M. Mun. Code § 6.20.030. Accordingly, Rosenblatt has standing to challenge the advertising ban and seek declaratory and injunctive relief to allow her to engage in the conduct without the threat of criminal punishment. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 668 (2003) (standing exists where there is "a genuine threat of enforcement").

CONCLUSION

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

Respectfully submitted this April 16, 2020,

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