NO. _____

In the Supreme Court of the United States

SABAN RENT-A-CAR, LLC, ET AL.,

Petitioners,

v.

ARIZONA DEPARTMENT OF REVENUE, ET AL.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The dormant Commerce Clause prohibits states from enacting laws regulating local resources or services that "fall by design" on nonresidents in a "predictably disproportionate way." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 579 (1997). Ariz. Rev. Stat. § 5-839 authorizes imposition of a tax on car rentals in Maricopa County that was deliberately designed to impose such a disproportionate burden, forcing nonresidents to bear a share of the taxation burden out of proportion to their use of rental cars through exemptions covering the types of rental vehicles residents typically use, and the reasons residents typically rent. Yet the Arizona Supreme Court disregarded the unambiguous and unrebutted evidence of the tax's protectionist purpose because it found that the tax did not have a disproportionate effect on nonresidents. And it found the tax to lack this disproportionate effect solely because the tax was assessed on, and paid by, rental car companies, rather than the nonresidents themselves.

The Questions Presented are these:

1. Whether a car-rental tax designed to foist a disproportionate share of the tax's burden onto nonresidents is nonetheless immune from dormant Commerce Clause scrutiny simply because the tax is assessed on the companies that rent the cars rather than the nonresidents who are the ultimate target for the tax.

2. Whether evidence that a tax was intended to impose a disproportionate burden on nonresidents is relevant in determining whether a statute imposes an impermissibly discriminatory design.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Saban Rent-A-Car LLC, DS Rento, Inc., and PTNK. Petitioners represent a class of similarly situated individuals or entities that paid the automobile rental surcharge tax imposed under Ariz. Rev. Stat. § 5-839 from September 2004 through March 2008.

Petitioners are each nongovernmental corporate parties. None has any parent corporation, and no publicly held company holds 10% or more of any Petitioners' stock.

Respondents include the Tourism and Sports Authority, Defendant-Intervenor, Appellant, and Cross-Appellee in the courts below.

STATEMENT OF RELATED PROCEEDINGS

Saban Rent-a-Car LLC, et al. v. *Arizona Department of Revenue et al.*, No. CV-18-0080-PR (Ariz. S. Ct.) (opinion issued and judgment entered February 25, 2019).

Saban Rent-a-Car LLC, et al. v. *Arizona Department of Revenue et al.*, No. 1 CA-TX 16-0007 (Ariz. Ct. App.) (opinion issued and judgment entered March 13, 2018).

Saban Rent-a-Car LLC, et al. v. *Arizona Department of Revenue et al.*, No. TX 2010-001089 (Ariz. Superior Ct.) (opinion issued June 17, 2014) and final judgment entered June 9, 2016).

There are no additional proceedings in any court that are directly related to this case.

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Petitioners Saban Rent-A-Car, LLC, DS Rentco, Inc. and PTNK respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The Arizona court's opinion (Pet. App. 1) is published at 434 P.3d 1168. The opinion of the Court of Appeals of Arizona, Division 1 (*id.* 35) is published at 418 P.3d 1066. The opinion of the Arizona Tax Court (*id.* 68) is unpublished but is available at 2014 WL 12738281.

JURISDICTION

The Arizona Supreme Court issued its opinion on February 29, 2019. Justice Kagan, Circuit Justice for the United States Court of Appeals for the Ninth Circuit, extended the time to file a petition for writ of certiorari to and including July 25, 2019. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 8 of Article I of the United States Constitution 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[.]

The provisions of the Arizona Revised Statutes at issue in this case are reproduced in the appendix. Pet. App. 77–83.

STATEMENT

This case raises issues of great importance about the extent of states' and localities' authority to tax interstate commerce, arising in the context of a seemingly pedestrian taxation mechanism: taxes on rental cars.

The only time most people rent cars is when they go to visit someplace else. That means any tax on rental cars will burden nonresidents more than residents. But this naturally occurring disparity is not necessarily a discriminatory effect that violates the dormant Commerce Clause. Rather, when it comes to laws that regulate in-state resources and services in ways that impact nonresidents, this Court has developed a framework to discern

the line between permissible disparity and unconstitutional discrimination. That framework derives from *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), which upheld a Montana tax on coal, and *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564 (1997), which struck down a Maine law denying a tax exemption to charitable organizations operating "principally for the benefit of nonresidents."

Under this framework, a law regarding local resources that burdens nonresidents more than residents remains constitutional if, like Montana's coal tax, the law treats residents and nonresidents equally, and the disparate burden results solely because nonresidents consume more of the resource being regulated—be it rental cars, hotel rooms, airports, or, in the case of *Commonwealth Edison*, coal. The disparity is not the result of "'real discrimination'" at all, *Camps*, 520 U.S. at 579 n.13 (quoting *Commonwealth Edison*, 452 U.S. at 619). The burdens might be unequal, but they are *proportionate*, following the "likely demand for a particular good by nonresidents," *ibid.*—a symptom of the proper functioning free-flowing interstate market the Commerce Clause meant to foster. But when the burdens of a state or local law like the tax exemption at issue in *Camps* "fall by design in a predictably disproportionate way," then the tax constitutes discrimination against interstate commerce. *Id.* at 579.

The car-rental tax authorized by Ariz. Rev. Stat. § 5-839 falls into the latter category under any sound application of this well-established framework. The tax deliberately foists a *disproportionate* burden on nonresidents, beyond what market demand for rental cars itself would dictate, through a series of exceptions that exempt from the surcharge the types of rentals that residents

traditionally use. These exemptions operate in a "predictably disproportionate way," ensuring that nonresidents bear *virtually all* of the tax's burden. And if there were any doubt whether that disproportionate burden was intended, it is resolved by the legislative record, which brims with unrebutted evidence that the car-rental tax's exemptions "target[]" nonresidents to raise tax revenue "without increasing taxes paid by local residents." [IR.20 at F-4.]

Yet the Arizona Supreme Court held that this deliberately discriminatory law was not discriminatory at all, relying on a series of rulings that upset this Court's careful *Camps/Commonwealth Edison* framework, and plainly disregard this Court's dormant Commerce Clause teachings.

"'Exhibit[ing] a naiveté from which ordinary citizens are free,'" *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)), the Arizona court held that the tax's deliberate and facially apparent design to provide unequal treatment for residents and nonresidents did not "treat in-state and out-of-state interests differently" because it was excused by the thinnest of legal pretexts—the fact that the tax does not exempt residents *themselves* from paying the tax, it simply exempts the cars they rent. Pet. App. 8.

The Arizona court did so because it dismissed the unambiguous evidence of the statute's underlying protectionist purpose by misreading this Court's rules for determining discriminatory intent. Instead of properly examining that evidence to *help discern* whether the law was discriminatory, the court improperly restricted its use to *confirming* facial or effects-based discrimination that already existed, on the theory that if the law's design was not

impermissibly disproportionate on its own, it could not become impermissible through the motives of those enacting it.

Most consequentially of all, the Arizona court held that no matter how protectionist the voters' intent in enacting a car-rental tax might be, or how disproportionate the law's design, Arizona's car-rental tax (and any like it) remained entirely immune from dormant Commerce Clause scrutiny because—like virtually all such laws—it is assessed on, and sometimes absorbed by, car-rental companies, rather than car-rental customers. That is so, the court concluded, even if nonresidents are the real target of the tax, and even if interstate commerce still "'feels the pinch'" from the tax's imposition. *Camps*, 520 U.S. at 573 (quoting *Heart of Atlanta Motel* v. *United* States, 379 U.S. 241, 258 (1964) (internal quotation omitted)).

At each turn, these deviations from precedent deepen or create divisions among the lower courts on vital dormant Commerce Clause principles and erode the constraints on states' and localities' capacity to discriminate against interstate commerce. The resulting confusion makes it harder to determine the constitutionality of any tax on local resources having disparate impacts on nonresidents—whether it concerns coal, camps, cars, or calculators. The Arizona court's decision also contributes to the already intolerable confusion about the constitutionality of car-rental taxes generally—as evinced by the fact that the four courts asked to determine the constitutionality of these kinds of laws have come up with four mutually inconsistent answers. As a result, even as these tax-exporting laws number in the hundreds and are becoming ever more popular, the rules about their constitutionality are

becoming completely incoherent, making the time ripe for this Court to establish order in this area of the law.

A. Background

1. Car-rental taxes generally

a. Governments in 44 states and the District of Columbia have imposed more than 118 different excise taxes on car rentals—at the state, county, and municipal level.[1] The structure of these taxes varies considerably, but at their core, they all represent an attempt at "tax exporting": shifting tax burdens away from residents and onto nonresident visitors. Watson, *supra* note 1 at 7. Legislatures and voters see the visitors who pay the lion's share of these taxes as easy targets, because they have no representation in the legislature and cannot therefore voice displeasure at being forced to pay them. And visitors cannot necessarily vote with their feet, since travelers' need for a rental car is fairly inelastic: without the car, they often have no practical way of getting around, leaving them little choice but to pay the increased rental costs associated with these taxes. *Id.* 8. These taxes are therefore derided by economists and tax experts as "discriminatory, economically harmful, and constitutionally troublesome" efforts that "unfairly single out consumers who travel"—a modern-

[1] Garrett Watson, Tax Foundation Fiscal Fact, *Reforming Rental Car Excise Taxes* 2 (Mar. 2019), <https://bit.ly/2Mb0x1W>; Kevin Neels, The Brattle Group, *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 1 (June 2010).

day attempt at "taxation without representation."[2] And they are often hidden in a byzantine structure of taxes and fees assessed on the state, county, and city level that the traveler is unlikely even to understand. *Ibid.* They also represent unsound tax policy, as they remove the accountability that taxpayers would normally demand of their representatives, which tends to curb profligate government spending.[3] Perhaps as a result, the funding from car-rental taxes is often funneled to expensive vanity projects having little to do with transportation, and providing little benefit to those paying the taxes. CART Coalition, *supra* note 2. Indeed, over 35 sports stadiums have been funded from car-rental tax revenue. Watson, *supra* note 1.

b. Yet that has not stopped car-rental taxes from becoming enormously popular, especially since the economic downturn of 2008–2009, which left states and localities looking to find ways to balance budgets without further burdening their economically struggling constituents.[4] Over the past fifteen years or so, the number of car-rental

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[2] The CART Coalition, *EDSTAR Introduced in U.S. Senate; Bill Would Protect Consumers from Discriminatory Rental Car Taxes* (May 1, 2015) <https://prn.to/2OrmAnw> (statement of CART spokesman Kevin Lawlor).

[3] Watson, *supra* note 1 at 8-9; CART Coalition, *supra* note 2; William G. Gale and Kim Rueben, *Taken for a Ride: Economic Effects of Car Rental Excise Taxes, Heartland Institute* (July 17, 2006) <https://bit.ly/2JOgCJ3>.

[4] Dennis Cauchon, USA Today, *Tourists pay price as states jack up taxes to balance budgets* (July 9, 2009), https://usatoday30.usatoday.com/travel/2009-07-05-traveltax_N.htm.

taxes has more than tripled, costing car-rental customers more than $7.5 billion.[5]

c. Even the most facially neutral of these taxes raises constitutional concerns, given their obvious tax-exporting purpose. And that purpose is as often explicit as implicit. Car-rental taxes are frequently advertised to voters in explicitly protectionist terms, implying that government officials are not "raising any tax" at all, since "most rentals are to visitors anyway," Neels, *supra* note 1 at 8 (quoting the Mayor of Sandy Springs, an Atlanta suburb). And many of these laws are *not* facially neutral. In many states and localities, lawmakers have found ways of making the nonresident share of the tax even more disparate. 22 states impose taxes on the short-term rentals that tourists most often use.[6] At least 32 localities impose special taxes

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[5] Pamela M. Prah, Governing, *Where are State Travel Taxes the Highest* (Mar. 28, 2013).

[6] Alaska Stat. Ann. § 43.52.010 (90 days); Ark. Admin. Code § 006.05.212-GR-20(B)(3), (6), & (7) (30 days); Cal. Gov. Code § 50474.3(b)(3)(d) (5 days); Colo. Rev. Stat. § 43-4-804(1)(b)(I)(A) & (B) (30 days); Conn. Gen. Stat. Ann. § 12-666(a) (30 days); Fla. Stat. Ann. § 212.0606(1) (30 days); Haw. Code R. 18-251-2-03(a) (six months); Ind. Code Ann. § 6-6-9.7-7, Sec. 7 (30 days); Kan. Stat. Ann. § 79-5117(a) (28 days); Md. Code, Tax-General Ann. § 11-104(c) (180 days); Me. Rev. Stat. tit. 36, § 2015(1) (one year); Minn. Stat. Ann. § 297A.64, subdiv. 1 (28 days); Miss. Code Ann. § 27-65-231(1) (30 days); 35 Miss. Admin. Code Pt. IV, R. 5.03, § 401(b) (30 days); Mont. Admin. R. 42.14.1202(2) (30 days); Nev. Rev. Stat. Ann. §§ 244A.810(1), 482.053 (31 days); N.J. Stat. App. A:9-78(b) (28 days); Oregon Rev. Stat. § 803.219(1)(a) (90 days); 72 Pa. Cons. Stat. § 8602-A(a) (29 days); Tenn. Code Ann. §§ 67-4-1901 (30 days); 67-4-1907 (31 days); 67-4-1908 (5

at airports, where travelers congregate and residents rarely go even in the unlikely event they need a car.[7] At least eight states exempt replacement vehicles—rentals that residents use when their own car is in the shop.[8] And states employ a dizzying array of other methods, including farm-equipment exemptions, exemptions for off-road vehicles, restrictions on weight, size, and passengers, and more recently, exemptions for ride-sharing services, to prevent the taxes from being assessed on the vehicles that residents use and the purposes for which they typically use them, thereby ensuring that visitors bear virtually all of the tax burden.[9]

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days); 32 Vermont Stat. Ann. §§ 8902(9), 8903(d) (1 year); Wis. Stat. § 77.99 (30 days); Wyo. Stat. § 31-19-105(a) (31 days).

[7] Sabre, Press Release, *Travelocity's Third National Rental Study Reveals Continued Hike in Taxes at Airport Locations* (Dec.12, 2006), <https://bit.ly/2GsITTz>(documenting car-rental taxes impacting 32 airports).

[8] Fla. Stat. § 212.0601(4); Haw. Code R. 18-251-2-01; Ky. Rev. Stat. Ann. § 138.4605(a); Nev. Rev. Stat. Ann. § 244A.810(2); R.I. Gen. Laws § 31-34-8; Tenn. Code Ann. §§ 67-4-1907(a); 67-4-1908; Wash. Rev. Code §§ 46.04.465(2)(a), 82.08.020; Wis. Stat. § 77.99.

[9] E.g., Fla. Stat. Ann. § 212.0606(1) (vehicles carrying fewer than nine passengers); Fla. Stat. Ann. § 212.0606(1) & (2) (car-sharing services); Ind. Code Ann. § 6-6-9.7-8 (weight limit); Ky. Rev. Stat. § 138.460 (exempting vehicles not intended for highway use); Mont. Admin. R. 42.14.1202 (farm vehicles, machinery).

2. The car-rental surcharge authorized by Ariz. Rev. Stat. § 5-839.

The Arizona car-rental tax authorized by Ariz. Rev. Stat. § 5-839 is among the most odious and draconian of these. It contains at four separate features designed to foist a disproportionate portion of the tax's burden onto nonresidents. And it couples discriminatory text with discriminatory intent, with a legislative record containing nothing but unambiguously protectionist rhetoric suggesting that the statute meant to provide "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994).

a. The idea for § 5-839's car-rental tax originated from an effort to build updated sports facilities that would help Arizona retain its professional football team, the Arizona Cardinals, along with the Fiesta Bowl college football playoff and Major-League spring training facilities. Raising the hundreds of millions of dollars for this project hit a snag when resident voters rejected a local sales tax to fund construction. [IR.1 at H-20.] Polling showed that the public instead preferred "using tourism taxes, of which most are paid by out-of-state visitors, to pay for the public portion of any new stadium project." [*Id.* B-6.]

The Governor responded by forming the Stadium Plan "B" Advisory Task Force to explore ways of raising the necessary funding, and in keeping with the voters' anti-tax sentiment, she instructed the Task Force to think of ways to "minimize the impact on the average Arizona resident." [IR.20 at A-3.]

After months of study, the Task Force recommended raising the funds through a hotel tax (not at issue here), and a car-rental "surcharge" tax—an extra tax to be assessed atop an already-existing flat $2.50 tax that had been collected on all car-rental transactions in the state since 1991. Pet. App. 63; Act of June 25, 1991, ch. 285, § 10, 1991 Ariz. Sess. Laws 1444, 1451–1453 (1st Reg. Sess.) (codified at Ariz. Rev. Stat. § 48-4234). The money would be funneled to the Arizona Tourism and Sports Authority (AzSTA), the entity charged with building the new stadium facilities. The Task Force promised this "car rental tax increase" would be "paid primarily by out-of-state visitors," and it estimated that under its proposal, 85–90% of the assessments would be paid by visitors to Arizona. [IR.20 at A-2.]

b. The original proposal for the law authorizing the surcharge tax would have discriminated expressly against nonresidents, by exempting all "vehicle rentals to Arizonians"—the result of one lawmaker's desire to minimize the bill's "impact to residents." See S.B. 1220, 44th Leg., 2d Reg. Sess., Committee on Program Authorization Review, Minutes of Meeting E–11 (March 9, 2000) (considering S.B. 1220). Other members of the committee developing that legislation opposed the exemption out of concern for its constitutionality; one warned that "certain nonresidents cannot be targeted." *Id.* at E–12. Ultimately, the resident exemption was stricken, and legislators opted instead to target nonresidents in a more indirect way.

Under the version of the authorizing legislation that became law, the surcharge tax would be assessed on all motor-vehicle rentals in Maricopa County, and would amount to the greater of $2.50 per rental or 3.25% of the rental business's "gross proceeds or gross income" on

each rental. Ariz. Rev. Stat. § 5-839(B)(1). But the law would include exemptions that prevent the tax from being imposed on the types of rentals residents typically use. The surcharge tax is only imposed on companies that provide "short-term" rentals of less than one year. *Id.* § 5-839(C). Businesses that provide longer-term rentals—like residents or local businesses would use—are entirely exempt. And there are two exemptions pertaining to "temporary replacement motor vehicle[s]"—for residents to use when their own car "is not in use because of breakdown, repair, service, damage or loss." *Id.* § 5-839(B)(2) & (D)(1). These reduce the tax to $2.50 in some cases and eliminate it entirely in others. *Ibid.* And there are a bevy of other exemptions for specific types of rentals used by residents, such as rentals of off-road vehicles (those not "designed to operate on the streets and highways"), *id.* § 5-839(C); buses (those "vehicles primarily intended to carry *** more than fourteen passengers") that residents might rent for a special occasion, *ibid.*; or vehicles used in an "employee vanpool arrangement" that groups of coworkers might use for commuting to work, *id.* § 5-839(D)(2). All these exemptions combine to ensure that residents would be shielded from the burden of the tax as much as possible—short of exempting residents by name.

The law only authorized the tax to be collected in counties with more than two-million residents, *id.* §§ 5-802A, 5-839(A), which, as a practical matter, meant it could only apply in Maricopa County.[10] And it required the approval

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[10] See U.S. Census Bureau, American FactFinder, *Population, Housing Units, Area, and Density: 2000 – Arizona*, <https://bit.ly/2LBicAc>.

of a majority of those residing in the county for the surcharge to go into effect. *Id.* § 5-839(A).

c. When voters considered the referendum on the surcharge tax, they were given publicity materials informing them that the "best part" of the scheme was that "it will cost Arizona residents next to nothing. As much as 95% of the new *** taxes will be borne by visitors to our state." [IR-20 at F-12.] The pamphlet also emphasized how "the exemption for replacement vehicles" "target[s] visitors to the State." [*Id.* F-4.] "This scheme," the pamphlet explained, enabled the state to obtain the funds needed for the new facilities "without increasing taxes paid by local residents." [*Ibid.*] The pamphlet also included statements endorsing the surcharge tax from prominent supporters of the tax, all of whom echoed these protectionist sentiments. Typical statements emphasized how the tax "is accomplished without ANY new taxes on residents," because "our visitors will be paying more than the lion's share of the cost." [*Id.* F-13, F-14, see also *id.* F-12, F-17–18.]

In November 2000, the voters approved the surcharge tax, and to date, it has raised over $150 million in revenue, overwhelmingly from out-of-state visitors, who account for 72.3% of rental car transactions at Hertz [IR.142], 87% at Avis, and 80% at Budget [IR.143].

B. Proceedings below

1. On August 19, 2009, Petitioners, which are local rental-car companies that rented cars in Maricopa County and have paid the surcharge tax, sued for a refund in Arizona Tax Court. Pet. App. 4. Petitioners argued that the surcharge was invalid under both the dormant Commerce Clause and the "anti-diversion" provision of the Arizona

Constitution, which requires fees derived from the use of vehicles to be used solely for operating highways and streets. Ariz. Const. art. IV, sec. 14; Pet. App. 4. The tax court certified a class of all individuals and entities that paid the surcharge from September 2005 through March 2008, and allowed AzSTA to intervene as a defendant. *Ibid.* The tax court held that the surcharge did not violate the dormant Commerce Clause, but did violate the anti-diversion provision. Pet. App. 72–75. On appeal, the Arizona Court of Appeals, Division One, affirmed the tax court's dormant Commerce Clause ruling, while reversing the tax court's state law ruling. *Id.* 52–67.

2. The Arizona Supreme Court affirmed in a divided opinion. Pet. App. 12. In upholding the tax under the dormant Commerce Clause, the majority, in an opinion authored by Justice Timmer, expressed no doubt that the tax affected interstate commerce. It focused instead solely on whether the surcharge tax was "motivated by discriminatory intent," claiming that Petitioners had "abandon[ed] prior assertions that the surcharge is facially discriminatory." *Id.* 7.[11] The majority acknowledged the statements in "the initiative's publicity pamphlet suggesting voters targeted nonresident visitors, but it nonetheless decided that "[t]he car rental surcharge was not enacted with a

[11] Petitioners made no such concession. They argued instead exactly what they argue now, that what was "true" in *Camps* is also true in this case: the tax falls "by design in a predictably disproportionate way." Saban Az. S. Ct. Supp. Br. 12. Yet given the Arizona court's eventual disposition, which rejected the evidence of the tax's discriminatory purpose because it found the tax to lack disproportionate *effect*, this error is ultimately unimportant.

discriminatory intent, as that term is used in Commerce Clause jurisprudence." *Id.* 8.

This conclusion resulted less because of what the statements in the tax's legislative history actually *said* about the tax's purpose—which could hardly be more unambiguously protectionist—and more because of what the court thought to be needed to make out a case of discrimination under the dormant Commerce Clause using discriminatory intent. Following *Commonwealth Edison*, the court concluded that "[j]ust as a tax that does not differentiate between interstate and intrastate commerce does not have a 'discriminatory effect' when the tax burden is borne primarily by out-of-state consumers, those who enacted the tax intending that consequence did not do so with a 'discriminatory intent.'" *Id.* 9. The court therefore refused to consider the possibility that the evidence of the tax's impermissible purpose might tip the scales in determining whether the tax's exemptions were "design[ed] to burden non-residents in a "predictably disproportionate way." *Camps*, 520 U.S. at 579.

The majority determined that the tax was more like the coal tax at issue in *Commonwealth Edison*, and less like the discriminatory tax exemption from *Camps*, because it concluded that "the car rental surcharge is imposed uniformly on all call rental agencies, and ultimately on their customers"—despite the tax's many exemptions for residents. Pet. App. 11. This was because the tax was not imposed on nonresidents directly, but was imposed on, and largely paid by, the car-rental agencies—although the court did acknowledge that some car-rental companies pass these costs on to their customers. *Ibid.* To the court, this meant the tax did not give "more favorable treatment" to residents, or single out nonresidents for differential

treatment—even though it singled out the car rental agencies based on their connections to those nonresidents. *Ibid.*

The court also believed the tax was redeemed because it discriminated only by proxy, making it potentially underinclusive. The court reasoned that some nonresidents might get the lower surcharge rate reserved for residents, in the unlikely event that a nonresident needed a "temporary replacement vehicle[]." *Id.* 12. To the court, these facts saved the tax even though the court acknowledged that the voters' discriminatory suppositions were largely correct: "[V]isitors as a group pay most of the surcharges collected by car rental agencies"—to the tune of hundreds of millions of dollars. Pet. App. 8.

3. Justice Bolick concurred in part and dissented in part, joining "the Court's Commerce Clause analysis with some reservations." Pet. App. 23. He found "in the record more evidence than [his] colleagues of an intent to place the predominant economic burden of this tax on out-of-state consumers," given that they were "more likely to rent cars in Arizona for non-replacement purposes (for which more-favorable terms apply on the statute's face) than Arizona residents." *Id.* 33. He also raised concern that "out-of-state visitors are unable to vote to protect their economic interests," all of which led him to conclude that "this question is very close." *Ibid.* But he decided on restraint, because of the fact that this Court "has not invalidated state policies solely on the basis of discriminatory intent," and given this "Court's conflicting precedents and that it has not yet provided significant guidance on how to treat a Commerce Clause Claim based on discriminatory intent." Accordingly, he "join[ed] the majority in denying relief." *Id.* 33–34.

REASONS FOR GRANTING THE WRIT

The traditional criteria of certworthiness are all present here. There are multiple, acknowledged, fully developed splits embodied in the Questions Presented—and the Arizona court's position within each of those splits is irreconcilable with this Court's precedent. This question is right now leading to different outcomes in similar cases involving car-rental taxes across the country, and is contributing to an erosion of dormant Commerce Clause jurisprudence threatening to have an even wider impact. This case is a compelling one for resolving these conflicts, as the factual record is well-developed, the evidence of discriminatory intent unambiguous, and the issues of law cleanly presented. The question is also of obvious national importance. It concerns tax laws that have raised billions of dollars nationwide, and hundreds of millions of dollars in Maricopa County alone. The resolution of this case will directly affect the constitutionality of some 54 laws in 28 states with discriminatory features similar to Arizona's tax (possibly more), and laws targeting companies for their connections to commerce in many others. And the erroneous rule applied below is important to correct, as it will have serious adverse effects on the individuals who will be unfairly burdened with taxation without representation, and the businesses and individuals whose conduct is likely to be hindered by the protectionist impulses that have fueled the proliferation of these laws.

A. The decision below conflicts with this Court's decisions and cements conflicts among the courts of appeals.

This petition presents an opportunity to resolve several sets of conflicts on essential dormant Commerce

Cause principles all at once. The first concerns an intractable division over the basic rules for determining the constitutionality of car-rental taxes. And the particular logic of the Arizona court's decision has sown deeper divisions in dormant Commerce Clause jurisprudence, deepening one circuit conflict—on whether taxing companies based on their connections to interstate commerce constitutes impermissible discrimination, even as it creates another—on whether evidence that a tax was intended to impose a disproportionate burden on nonresidents is relevant in determining whether a statute imposes an impermissibly discriminatory design.

1. The intractable division on the basic rules for determining the constitutionality of car-rental taxes.

The first of these conflicts concerns the Arizona court's departure from this Court's well-settled framework for analyzing taxes on use of state and local resources that impact residents of other states, and the decision's contribution to the intractable division that has resulted as other courts have attempted to apply this same framework to other car-rental taxes.

a. The dormant Commerce Clause principles underlying this framework are familiar. As this Court has long recognized, the Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys.*, 511 U.S. at 98. The test for discrimination is clear: "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. "[L]aws that discriminate against interstate commerce face a virtually per se rule of invalidity," *Granholm* v. *Heald*, 544 U.S. 460, 476

(2005) (quotation marks omitted). That is so whether the law is facially discriminatory, discriminatory in effect, or discriminatory in purpose. See *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 344 n.6 (1992) (noting three types of discrimination).

b. Applying these principles and the Court's *Camps/Commonwealth Edison* framework to car-rental taxes like Arizona's should be straightforward and should result in invalidation of the Arizona tax. That tax's numerous exemptions for long-term rentals, replacement vehicles, off-road vehicles, busses, van pools, and the like function to impose burdens on non-residents that "fall by design in a predictably disproportionate way," virtually eliminating the share of the tax to be paid by residents, and constituting a virtually per se dormant Commerce Clause violation—even before the protectionist rhetoric surrounding its enactment is even considered. But if there any doubt about whether those exemptions were intended to disproportionately burden nonresidents, or simply to exempt certain vehicles without concern for the larger interstate commercial implications of doing so, that protectionist rhetoric would certainly push the tax into constitutionally impermissible territory.

That same framework can just as easily be applied to virtually any car-rental tax. If a tax charges all customers equally, and any disparity in assessment of car-rental taxes follows the natural disparity in consumption of car rentals, it would not raise constitutional suspicion. But when a car-rental tax contains features like Arizona's, that are "design[ed]" to foist a "disproportionate" burden onto nonresidents, *Camps*, 520 U.S. at 579, it becomes discriminatory.

In this inquiry, the scales should be weighted heavily toward invalidating car-rental taxes, which are all designed, to various degrees, to ensure that they are virtually never paid by residents, and are therefore intended to impose taxation without representation. Concerns of discrimination against interstate commerce are at their absolute height when those burdened by the laws have no say in enacting them, making the discrimination unlikely "to be alleviated by those political restraints which arc normally exerted on legislation where it affects adversely interests within the state." See *McGoldnck* v. *Berwind-White Coal Mining Co*., 309 U.S. 33, 45–46 n.2 (1940).

c. Yet the lower courts have not properly heeded these principles. The Arizona court has joined others around the country in finding dubious ways of distancing particularly disproportionate car-rental fees from the *Camps/Commonwealth Edison* framework, and excusing away the disproportionate burdens imposed by those laws, even as these courts conflict among themselves on the proper way to get there.

For the Arizona court, it was the fact that the tax was assessed on rental-car companies, and not directly on the nonresident consumers—which to the court meant it did not single out nonresidents for differential treatment, Pet. App. 11–12, regardless of whether the car companies passed on the tax to those customers or not. By that logic, even the most disproportionate and protectionist car-rental tax is immune from dormant Commerce Clause scrutiny, because virtually all car-rental taxes are assessed on car rental-car companies, not their customers.

But Arizona stands alone in providing this blanket immunity for car-rental taxes. Every other court to have analyzed car-rental taxes has recognized them to impose

discrimination cognizable under the dormant Commerce Clause—even as some have found questionable ways of concluding that the discrimination was somehow permissible.

The Ninth Circuit, for example, recognized the discrimination in a California law that imposed disproportionate burdens on nonresidents by imposing the tax at airports. See *In re Tourism Assessment Fee Litig.*, 391 Fed. App'x 643, 644 (2010). Yet the Ninth Circuit declined to invalidate the tax, determining that its disproportionate burdens did not go toward any impermissibly "protectionist" end. *Id.* at 645. The Ninth Circuit contrasted the tax from that at issue in *Camps*, which had the "purpose of discouraging Maine charities from serving out-of-state residents," and thus "attempted to hoard Maine's natural resources and beauty for its own residents," while the California car-rental tax did nothing to discourage "affected rental car companies from serving out-of-state customers." *Ibid.* It simply meant to raise tax revenues on the backs of tourists, which the court deemed to be a permissible purpose.

Even before *Camps and Commonwealth Edison* were ever decided, the Oregon Supreme Court presaged their framework and found a Multnomah County car-rental tax to be a discriminatory "tailored tax," *Budget Rent-A-Car of Washington-Oregon, Inc.* v. *Multnomah Cty.*, 597 P.2d 1232, 1241 (1979) (en banc)—one obviously "designed to single out interstate businesses and subject them to effects forbidden by the Commerce Clause," *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 n.15 (1977)—even though it contained no special exemptions. Yet the Oregon court held that this targeting was permissible because "the residents of Multnomah County" felt enough of the

burden of that tax to "assure a local political constituency against its abuse," meeting the concerns of "the Supreme Court's commerce clause doctrine." 597 P.2d at 1241.

Only the Massachusetts Supreme Court, in *Opinion of Justices to the House of Representatives*, 702 N.E.2d 8 (1998), has been properly faithful to the *Camps/Commonwealth Edison* framework and identified a disproportionately-designed tax for what it was—a virtually per se unconstitutional discrimination against interstate commerce. The Massachusetts court invalidated a legislative proposal to impose a tax on all car rentals in Boston, while providing an exemption for all Boston residents. *id.* at 10, 16, saying that it directly "resemble[d]" the statute at issue in *Camps*, *id.* at 14–15.

The Massachusetts court's decision reveals the extent of the direct conflicts among lower courts considering the constitutionality of car-rental taxes. A conclusion that these taxes do not implicate interstate commerce because they are assessed upon car-rental companies cannot be squared with the majority of courts finding that they *do* have interstate impacts. And similarly, a conclusion that these car-rental taxes can never be discriminatory cannot be squared with conclusions of three courts that these laws are virtually *always* discriminatory because of their basic tax-exporting purpose—even when, like in the Oregon case, they appear facially neutral. Nor can the Massachusetts court's conclusion that car-rental taxes are virtually irredeemable—so that they must be invalidated even before they are written—be squared with the numerous court decisions providing various creative ways they can virtually always be redeemed.

d. The breadth of the Massachusetts court's decision also reveals the weaknesses in the off-ramps from *Camps*

concocted by other courts. Massachusetts recognizes that it does not matter, as the Ninth Circuit seems to believe, whether the government *expects* car-rental companies to pay the tax or cease renting to nonresidents. Under *Camps*, what matters is whether the law *actually* provides an incentive to curb service to nonresidents: encouraging "affecting entities to limit their out-of-state clientele, and penalizing the principally nonresident customers of businesses catering to a primarily interstate market." 520 U.S. at 576. Nor does discrimination against nonresidents become permissible whenever there is "enough"—by some illusory standard—of a local constituency to assume no abuse would occur, as the Oregon court assumed. While there is good reason to believe that an absence of representation can exacerbate the discriminatory impact of a law discriminating against interstate commerce, this Court has rejected as "fanciful" the idea that "victims of *** discrimination" under the dormant Commerce Clause have a complete remedy at the polls" simply because they have *some* presence in the state. *Comptroller Maryland* v. *Wynne*, 135 S. Ct. 1787, 1798 (2015).

Nor, for that matter, does it matter that the Massachusetts proposal involved explicit discrimination against nonresidents, while other laws, including Arizona's, discriminate by proxy. The Massachusetts proposal's blatant discrimination may have made it easy to identify the dormant Commerce Clause violation. But it does not make the Massachusetts proposal any different in kind from any of the others. "Dormant Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994). And a statute can foist disproportionate burdens on nonresidents "by

design" even when it does not explicitly target them by name. Designs are more flexible than that. Accordingly, neither Arizona nor California nor Oregon can escape reach of the dormant Commerce Clause simply because their statutes do not explicitly discriminate against nonresidents based on their residence, when they are simply discriminating against them based on the rental cars they drive instead.

2. The acknowledged, entrenched split on whether states and localities may discriminate against companies because of their connections to interstate commerce.

As for the Arizona court's particular rationale—that § 5-839's car-rental tax does not discriminate against interstate commerce because it is assessed on the rental car companies rather than the nonresidents themselves—this presents a more complex set of conflicts: with this Court's precedent, with other courts, and indeed, with basic logic.

a. For one thing, the notion that the tax law is permissible because it is usually paid by the car companies is at war with itself. The Arizona court admits that sometimes the tax is passed on to customers. The direct burden those nonresidents experience from the tax is plainly impermissible and cannot be explained away simply because it is funneled to them by the car-rental companies.

b. But even if the full weight of the tax were borne by the car-rental companies alone, that still would not make the tax's disproportionate burden on nonresidents and interstate commerce go away. This is because the law does not treat all "car rental agencies" equally, as the Arizona court assumes. Pet. App. 11. Rather, the law singles out car-rental companies solely based on their connection to

the nonresidents that are the ultimate object of the tax. That too is discrimination in violation of the dormant Commerce Clause, because when companies are singled out for their connections to interstate commerce, it is interstate commerce that "feels the pinch"—from the incentives directed to the car-rental agencies that encourage them "to limit their out-of-state clientele," to the penalties experienced by the "principally nonresident customers of businesses catering to a primarily interstate market" that results. *Camps*, 520 U.S. at 573, 576.

That is why "[f]or over 150 years," this Court's "cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage" to the out-of-state economic interests. *W. Lynn*, 512 U.S. at 202–203 (citing *Brown* v. *Maryland*, 25 U.S. 419, 444 (1827)). That was true in *Camps* itself, where the Court made clear that what made the law impermissible discrimination against interstate commerce was that it "targets out-of-state consumers by taxing the businesses that principally serve them." 520 U.S. at 580-581.

d. For the most part, the lower courts have followed suit. Following *Camps*, the Fifth and Eleventh Circuits, along with the supreme courts of Minnesota and Vermont have all invalidated laws targeting businesses because of their connections to interstate commerce. See *Inst. of Prof'l Practice, Inc.* v. *Town of Berlin*, 811 A.2d 1238 (Vt. 2002) (holding that a tax exemption requiring benefits of exempted property to flow to Vermonters would impermissibly discriminate against out-of-state recipients of services); *Chapman* v. *Comm'r of Revenue*, 651 N.W.2d 825 (Minn. 2002) (sustaining challenge to a regulatory

decision disallowing deductions for contributions to non-Minnesota charities in computing Minnesota alternative minimum tax liability); *Pelican Chapter, Associated Builders & Contractors, Inc.* v. *Edwards*, 128 F.3d 910 (5th Cir. 1997) (invalidating ad valorem tax exemptions for contractors requiring preferential use of Louisiana construction products and labor); *Island Silver & Spice, Inc.* v. *Islamorada*, 542 F.3d 844 (11th Cir. 2008) (invalidating local efforts to discriminate against "formula" retailers and restaurants, because that prohibition "disproportionately targets restaurants operating in interstate commerce); *Cachia* v. *Islamorada*, 542 F.3d 839 (11th Cir. 2008) (same).

Yet even before the Arizona court's decision in this case, courts began departing from this long-settled rule. In *International Franchise Association, Inc.* v. *City of Seattle*, 803 F.3d 389, 403, 404 n.7 (2015), the Ninth Circuit sustained the constitutionality of Seattle's law targeting national-chain franchises for an accelerated schedule for phasing in its $15 minimum wage law, which targeted small businesses based solely on their "out-of-state relationships," concluding that this had no impact on the "wheels of interstate commerce." *Id.* at 406.

Yet in doing so, the Ninth Circuit acknowledged its decisions conflicted with others on whether measures to regulate companies based on their "affect" on "national chains" violate "the dormant Commerce Clause." *Id.* (citing *Cachia*, 542 F.3d at 843 and *Island Silver*, 542 F.3d at 846). The Ninth Circuit likewise acknowledged that its holding was "somewhat difficult to reconcile" with this Court's Commerce Clause holdings. *Int'l Franchise*, 803 F.3d at 404. But "lacking Supreme Court authority assessing whether a regulation affecting franchises ipso facto has the effect of discriminating against interstate

commerce," the court decided to uphold the law. *Ibid.* Thus, the Ninth Circuit both acknowledged the existing conflict—which the decision under review has only deepened—and added a request for clarification, underscoring the urgent need for this Court's review.

3. The conflict with holdings of this Court and the lower courts on the relevance of evidence of discriminatory purpose.

a. The Arizona court's decision also departs from this Court's precedent, and creates conflicts among the lower courts, over the basic rules for discerning discriminatory intent in dormant Commerce Clause cases. The Arizona court determined that evidence of discriminatory intent was irrelevant in determining the constitutionality of § 5-839's tax, because it decided the tax was not disproportionate in effect. It therefore relegated evidence of discriminatory purpose, no matter how strong, to a confirmatory role—irrelevant unless the court had already found the tax to impose a disproportionate burden on its own.

b. But that is not how this Court considers evidence of discriminatory intent. Rather, this Court's cases demonstrate that evidence of discriminatory intent is used whenever a statute is not facially discriminatory, to *suss out* the true reason for a statute's enactment—determining, for example, whether legislators have hidden a discriminatory purpose in neutral-sounding language—knowing that, in practice, the law will have discriminatory effect. See, e.g., *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352–353 (1977) (finding evidence of discriminatory purpose "[d]espite the statute's facial neutrality"). Evidence of discriminatory intent therefore does not merely confirm whether a statute is discriminatory, it helps *discern* whether it is. That is what it means to treat

to treat "discriminatory purpose" as a separate category for invalidating a law under the dormant Commerce Clause, beyond an examination of the statute's "facial[]" discrimination or "discriminatory effect." *Chem. Waste Mgmt.*, 504 U.S. at 342, 344 n.6.

c. Yet this Court has never addressed the question on which Justice Bolick sought this Court's advice: Whether evidence of discriminatory intent is relevant in determining whether a law has a "disproportionate" "design" under the *Camps/Commonwealth Edison* framework. 520 U.S. at 579. That inquiry was unnecessary in *Camps* and *Commonwealth Edison* because the law in *Camps* was facially discriminatory, and the law at issue in *Commonwealth Edison* contained no hint of discriminatory motive or even indication "the tax is administered in a manner that departs from [its] even-handed formula." 453 U.S. at 613. Yet there is no reason why the inquiry into a law's "disproportionate" "*design*" must be confined to its effects or language alone. Evidence of discriminatory motive would certainly be relevant in that inquiry—for instance in determining whether Arizona included exemptions for replacement vehicles in the car-rental tax with the purpose of burdening interstate commerce or was simply blind to their interstate commercial effects. That evidence would likewise be relevant in determining whether Arizona intended the tax to disadvantage nonresidents or car companies.

Until now, that is exactly how the lower courts have used such evidence. Lower courts have treated examinations of intent and effects as having a mutually reinforcing quality in determining whether a statute has a "disproportionate" "design," with evidence that a law discriminates "in its effects strengthen[ing] the inference that the

statute was discriminatory by design"—and vice versa. *Family Winemakers of California* v. *Jenkins*, 592 F.3d 1, 10, 13–14 (1st Cir. 2010). Lower courts have likewise recognized evidence of discriminatory purpose to be useful generally in revealing discrimination hidden in neutral-sounding language. See, e.g., *S.D. Farm Bureau, Inc.* v. *Hazeltine*, 340 F.3d 583, 594, 597 (8th Cir. 2003) (striking down a facially neutral measure prohibiting "corporations and syndicates from owning farms" for its "discriminatory purpose" based on a record "brimming with protectionist rhetoric"); *Waste Mgmt. Holdings, Inc.* v. *Gilmore*, 252 F.3d 316, 337, 338, 340 (4th Cir. 2001) (holding that statute had discriminatory purpose when bill's sponsor stated it addressed the "large volume of out of state waste" coming into Virginia, and governor declared the state "has no intention of becoming the nation's dumping grounds"); *Alliance for Clean Coal* v. *Miller*, 44 F.3d 591, 593–594, 595 (7th Cir. 1995) (using statute's stated purpose about "the need to maintain and preserve as a valuable State resource the mining of coal in Illinois" to discover the law's "none-too-subtle-attempt" to purposefully discriminate against out-of-state coal).

That is the only way to treat such evidence—as a factor that can push a law's constitutionality over the line on its own. To reduce such evidence a mere confirmatory role, as the lower court did, would virtually erase the category of intentional discrimination from this Court's dormant Commerce Clause jurisprudence. But cases of discriminatory intent the heartland of what is prohibited under the clause, and the main focus of the Court's modern jurisprudence. See Daniel Francis, *the Decline of the Dormant Commerce Clause*, 94 Denver L. Rev. 256, 257 (2017) (suggesting the Court has "narrowed the prohibition on

discriminatory state action to focus on 'intentional' protectionism."). Accordingly, when the Court below refused to assign any weight to the evidence in the legislative record, it created conflicts not only with this Court's doctrine, but with the lower courts' expansions upon it.

d. This problem in the lower court's analysis was determinative. Had the Arizona court given the consideration this Court and others require to the evidence in the legislative record, it would have had no choice but to invalidate the tax as intentionally discriminatory. No reasonable observer could conclude that the Governor sought to explore only those funding mechanisms that would a impose only a burden that followed "likely demand for a particular good by nonresidents," *Camps*, 520 U.S. at 580, when he directed the Task Force to "minimize the impact" of the stadium financing project on "the average Arizona resident." [IR.20 at A-3.] Nor could such benign intent be inferred upon viewing the § 5-839's legislative history, under which the Legislature shifted from a version of the statute that discriminated explicitly against nonresidents to an only slightly more subtle proxy for the sole purpose of avoiding charges of intentional discrimination. And there is no way to read the pamphlet's statements about the way the scheme would raise funds "without increasing taxes paid by local residents," and how the tax "targets" non-residents through design features like "the exemption for rental vehicles," and conclude that the exemptions had benign intent. [IR.20 at F-4.] What the voters wanted, and what they got, was a tax that put a *disproportionate* burden on non-residents. And that is prohibited under the dormant Commerce Clause.

* * *

The Arizona Supreme Court's opinion thus cements and widens long-brewing, acknowledged, and entrenched conflicts among the lower courts. And even before this case, judges had expressed confusion about the fundamental dormant Commerce Clause principles at play in this case, and explicitly asked for this Court's guidance in resolving them. This case adds another voice to that chorus calling for this Court to step in, with Justice Bolick's concurrence.

There is also no question that these issues are dispositive. Legislatures in Arizona, California, and Oregon are free to discriminate against non-residents through car-rental taxes that are plainly prohibited in Massachusetts, and they do so because they divide hopelessly on the rules for assessing the constitutionality of these taxes.

That is only the beginning of the divides in basic dormant Commerce Clause jurisprudence implicated by this case, which ensure some laws will fail, and other statutes succeed, not because of the features of those laws or legislators' intent in enacting them, but because of the legal rules applied to analyze them. And as a result, even as car rental taxes become more popular, the rules used to analyze their constitutionality have become muddled. The time is right to grant certiorari and resolve these conflicts.

B. The Questions Presented are important.

Certiorari is also warranted because the Questions Presented in this case are recurring ones of national significance.

The controversy on the propriety of car-rental fees encompasses a wide geographic scope. Governments in 44 states have enacted over 115 car-rental tax laws—many based on a legislative record containing blatantly discriminatory intent. There is thus room to question whether *any* of these laws are permissible, given their obvious tax-exporting purpose. And the design features of at least 54 of those laws make them particularly disproportionate, and particularly problematic. These laws will be in the crosshairs of any decision issued by the Court in this case.

The erroneous legal rule applied below is also important to correct because of its potential ill incentives. Left unchecked, the Arizona court's erroneous ruling will encourage legislatures to try ever more ingenious ways of shifting tax burdens onto nonresidents, who provide easy targets as they lack a voice in the legislature. Indeed, the nonsensical idea now adopted in both the Ninth Circuit and Arizona—that states are free to discriminate against interstate commerce by discriminating against the businesses that serve interstate commerce, will provide particularly fertile ground for future crops of discriminatory laws.

The new era of taxation without representation fostered by the Arizona court's decision will also sow deeper financial instability into government budgets, as states and localities are improperly incentivized to spend ever more on entitlements and vanity projects, knowing they can devise schemes to insulate their own citizens from the financial consequences of that profligate spending.

Nor are these harms confined to the Ninth Circuit and Arizona courts that currently permit discrimination against companies based on their connections to interstate commerce. Other jurisdictions are looking to laws like

Arizona's and Seattle's as models, and if these models for discriminating against interstate commerce are approved, they will follow suit. And even in the interim, because of the interconnected nature of interstate commerce, the Arizona court's decision will harm residents of all 50 states, who are now subject to one of the most draconian car-rental fees anywhere in the country whenever they travel to Arizona. This Court should therefore intervene to avert further economic protectionism that will threaten our entire nationwide market.

C. This case provides a compelling vehicle to decide these issues.

This case presents an ideal vehicle to consider the Questions Presented. This case lies at the intersection of several different strands in dormant Commerce Clause jurisprudence and exacerbates splits in each. Accordingly, this petition offers an opportunity to resolve several conflicts at once.

Furthermore, this case provides an attractive set of facts through which to resolve these strands and fashion a rule for the constitutionality of all car-rental fees, because it concerns the law with the worst set of discriminatory characteristics of any car-rental tax in the country—combining obvious discriminatory intent with obvious multifaceted discriminatory design. A law so clearly over the line throws into high relief the impermissible discrimination often present in these laws, and allows the Court to choose which features are determinative, allowing the Court to fashion rules that will provide guidance to future courts on how to resolve these cases, and provide lessons to legislatures on how they can craft permissible legislation.

This case also provides an attractive vehicle through which to consider these issues as it involves none of the difficult questions that often arise in dormant Commerce Clause cases. There is no need here to determine whether different types of businesses are similarly situated, or to determine whether the discrimination at issue is direct or indirect. And this case likewise does not require the conceptually difficult balancing of interests involved in many dormant Commerce Clause cases that sometimes divides members of the Court—no need to discern "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). The tax law at issue in this case treats two rental car companies differently based one criteria only—whether, and how often, they rent the types of vehicles used by tourists. And that characteristic alone provides a means to declare this law unconstitutional, without even getting into the evidence of the law's discriminatory intent.

Yet the Court would certainly want to consider the evidence of the law's intent, and that task is aided considerably by the fact that the Arizona court's novel and erroneous approach does not depend upon resolving any record disputes. The record is fully developed, uncontested, and unambiguous. There is no inference to be drawn from the evidence other than an intent to discriminate against nonresidents. The only question is whether it is an intent to perform discrimination prohibited by the dormant Commerce Clause. It is purely an issue of law.

While the Court has declined in the past to take up issues encapsulated in the first Question Presented, most notably with *International Franchise Association* v. *City of Seattle*, No. 15-958, this petition presents a superior

vehicle to that one. For one thing, *International Franchise* came to Conference while the Court was shorthanded after Justice Scalia's passing. For another, *International Franchise* had vehicle problems not present in this case, because the Ninth Circuit's ruling on the first Question Presented was only one of the reasons it decided to uphold the law. The Ninth Circuit also held that discriminating against franchises was discrimination against a particular "'business model,'" which is not prohibited under the dormant Commerce Clause. See *Int'l Franchise*, 803 F.3d at 402 (quoting *Exxon Corp.* v. *Governor of Md.*, 437 U.S. 117, 127 (1978)). Accordingly, in *International Franchise*, there were alternate grounds to affirm the lower court's ruling aside from that issue.

This case presents no similar complexities. And the petition perfectly highlights multiple splits that can be resolved all at once. This case is thus a strong vehicle through which to resolve these splits and correct the errors below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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