No. 25-173

IN THE

Supreme Court of the United States

ELIZABETH FLYNT,

Petitioner,

v.

ROB BONTA, ATTORNEY GENERAL
OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Through the Statutes,[1] California has exported its policy preference to the rest of the Nation by leveraging its attractiveness as a market to preclude the very people who desire to engage in cross-border investment within a particular industry from engaging in that activity simply because California does not like it. California accomplishes this result by forcing members of an industry to choose between being part of California's intrastate market or the interstate markets of other states, but, as the record below demonstrates, no one can do both.

California's Brief in Opposition ("BIO") does not address the Statutes' most fundamental problem—the complete barrier to cross-border investment within an industry. Instead, California claims that: (i) the Statutes do not violate any dormant Commerce Clause rights because members of the regulated industry retain the right to participate in other industries; (ii) but if the Statutes do violate rights, they only violate the constitutional rights of some merchants, rather than all, which California says is permissible; (iii) but even if violating the constitutional rights of some is a problem, California should get a free pass because the federal government should defer to states on policy choices concerning gaming; and (iv) even if California is not entitled to a free pass, this Court is unable to review the Statutes without reversing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), or applying the framework articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which Petitioner has not raised.

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1. All terms defined in the Petition will be used herein.

None of these claims holds up under scrutiny. California knows it cannot regulate or prevent the operation of casinos in other states. So, it has done the next best thing—it has disabled the members of its in-state market from having any involvement in the markets of other states, and vice versa—and it hopes this Court will not notice or care.

In upholding the Statutes, the Ninth Circuit relied upon *Pork Producers*, even though that opinion did not analyze a law like the Statutes. Clarification is needed on whether discrimination against firms engaged in interstate commerce remains actionable after *Pork Producers*. Merchants need to know whether they have the right to enter the market of each state, as envisioned by the Founders, *see Hughes v. Oklahoma*, 441 U.S. 332, 326 (1979), or whether a state can force them to forfeit that right as a condition of licensure, as California has done here. Additionally, review is necessary because the decision below conflicts with opinions from other Circuits. Critically, other Circuits have recognized that laws that discriminate against interstate commerce or favor intrastate commerce over interstate commerce are invalid, even if the laws apply to residents and non-residents alike, and even if the laws apply to some rather than all. Pet. 25-31. This Court should grant the Petition.

I. THE DECISION BELOW IS WRONG.

The decision below is wrong. The Ninth Circuit made it clear that the only form of discrimination that it views as ***actionable*** after *Pork Producers* is discrimination based on residency, which it defined as a state's targeting of "out-of-state goods or nonresident actors." Pet.App.7a-

8a. While the Ninth Circuit theorized that discrimination against firms engaged in interstate commerce may be actionable, when presented with a law that did just that, it upheld it, finding no discrimination whatsoever. Pet. App.13a-19a. In doing so, the Ninth Circuit unleashed a new state power, discarded over a century of precedent from this Court concerning the rights of merchants, and blessed a state's balkanization of an industry. Pet. 13-25.

Rather than address these significant constitutional problems, California offers distraction.

A. California claims, and the Ninth Circuit ruled, that the Statutes do not discriminate against firms engaged in interstate commerce because licensees, like Petitioner, are free to engage in interstate commerce in ***other*** industries, and members of ***other*** interstate industries are able to obtain California cardroom licenses. BIO 11-12; Pet.App.16a. Petitioner's ability to engage in interstate commerce in ***other*** industries does not mean, as California suggests, that the Statutes do not target firms engaged in (or who desire to engage in) interstate commerce. Defining commerce this way means claims for discrimination against firms engaged in interstate commerce are no longer actionable because States could always point to the ability to participate in other interstate industries as a defense to a clear constitutional violation. Instead, the only commerce that is ***relevant*** to the Court's review is investment in the regulated industry—gaming.

At its core, it appears that California's defense of its discriminatory law is that it only deprives ***some*** rather than ***all*** merchants of the ability to participate in the interstate gaming industry. That, however, is no defense

at all. The test is whether a law discriminates, not whether the rights of what California views to be a critical mass of merchants have been violated.

But even if discrimination-against-some-rather-than-all was a defense, the record is to the contrary. The Statutes impact ***all*** members of the gaming industry because members of this industry must choose between being part of California's in-state market or the markets of other states, but not both. Once that decision is made, market participants are in one camp or the other. *See infra* II.A.

Moreover, California has provided this Court with no answer for the concern that the decision below—which was not cabined to gaming—will enable other states to meddle with other industries (and possibly other constitutional rights). As discussed in the Petition, Connecticut will be able to prevent gun retailers from selling rifles in Connecticut if the retailers sell disfavored rifles in states where such sales are lawful (or have more than a one percent interest in any company that does). Pet. 32. Likewise, West Virginia will be able to ban pharmacy chains from its in-state market if the pharmacies sell mifepristone in states where the sale of that drug is lawful. *Id*. Under California's theory, both laws are permissible because those states are only restricting the rights of some members of the interstate gun and firearm industries, rather than all. California has not cited a single opinion that endorses such a principle, and it has no answer for why other states cannot enact equally commercially divisive laws like these in other industries.

B. California says—with no hint of irony—that the decision below was correct because the Ninth Circuit applied the "federal policy" of respecting "the policy choices of the people of each State on the controversial issue of gambling" to uphold the Statutes. BIO 8, 12-13 (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 594 U.S. 453 (2018)). But far from respecting the policy choices of the other gaming states, California has nullified them. Merchants are not free to enter the market of each gaming state to follow the local policy choices of each such state. Doing so means a merchant cannot enter California's market.

One of the telltale signs of a dormant Commerce Clause problem is a state law that interacts or conflicts with the laws of other states in a way that balkanizes an industry. *See, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989.) California has not explained how its policy choice respects rather than tramples the policy choices of the other gaming states. It is hard to imagine that this Court would have viewed the law analyzed in *Pork Producers* as a mere local policy choice if, in addition to banning the sale of crated pork in California, the law prohibited a producer from participating in California's market if the producer had more than a 1 percent interest in a separate company that sold crated pork in other states where such sales were lawful.

Notably, California's words and actions bely its stated need for deference to its policy choice. Although California's lawyers rationalize the Statutes as necessary to prevent infiltration of organized crime, BIO 7-8, the actual record is otherwise. In 2002, California conducted a thorough study of the Statutes, concluding that "there [was] no

evidence that" corporations operating casinos outside of California "pose[d] a risk to public safety" if they invested in California's gaming market. E.D.C.A. Dkt. No. 81 at 13, 15, 17. California's top gaming regulator, the Chairman of the California Gambling Control Commission, "testified that the primary reason for the ownership limitations—to prevent criminals from operating casinos—[was] no longer valid." *Id.* at 13.[2]

California's actions are just as revealing. California does not rely on the Statutes to prevent organized crime in its gaming market. Instead, California has enacted a robust regulatory scheme—the GCA—governing the operation of cardrooms, and the vetting of cardroom owners, operators, and employees, including extensive biennial background checks. These laws—which provide full transparency into the actions, relationships, and finances of members of California's gaming market—are what protect the integrity of California's gaming market.

II. THERE ARE NO VEHICLE PROBLEMS.

California has attempted to manufacture vehicle problems that simply do not exist.

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2. Moreover, by that time, dozens of casinos operated on tribal land in California and those casinos were "manage[d] or finance[d]" by the owners of out-of-state casinos. *Id.* Thus, the very people thought to be so dangerous that a ban on cross-border investment was necessary, were active members of California's tribal casino market, and were not associated with any uptick in crime.

A. The issue presented is squarely before this Court.

California wrongly claims that the issue presented is not reviewable. First, Petitioner has asked this Court to review the most problematic feature of the law, rather than every claim previously litigated. The feature of the law to be reviewed—discrimination against firms engaged in (or who desire to engage in) interstate commerce, as compared to those that are content to remain wholly inside or wholly outside California—was squarely before the Ninth Circuit. Pet.App.16a-19a.

Second, this Court can address the validity of the Statutes without consideration of the *Pike* framework pushed by California because this Court's review of the issue presented would be limited to whether the Statutes discriminate against firms engaged in interstate commerce and whether such discrimination remains actionable after *Pork Producers*. Section 19858 prohibits licensees from obtaining more than a one-percent interest in a casino-style gaming operation, "whether within or without" California. CGA § 19858(a). In practice, the only commercial activity this provision references is out-of-state activity because casino-style gaming operations are expressly prohibited within California. Cal. Pen. Code § 330. No licensee or applicant could ever come before the Gaming Commission with an in-state casino among his or her investments because they do not exist. If there were any doubt, the GCA further clarifies that California is targeting merchants with "financial interest[s] in another business that conducts lawful gambling outside the state." CGA § 19858.5.

Although Petitioner has provided background on how the Statutes operate, there is no need to engage in burden-benefit balancing to resolve the issue presented.[3]

Third, the problems the Statutes inflict on the gaming industry are real. Petitioner, her fellow plaintiffs, and amicus curiae explained in detail how licensees have been precluded from investing in out-of-state gaming markets and, conversely, have been barred from receiving investment in their cardrooms from parties who participate in the gaming markets of other states, including publicly traded casino companies licensed in dozens of states, lest they forfeit the ability to participate in California's market. *See* E.D.C.A. Dkt. Nos. 89-91; Ninth Cir. Dkt. No. 21 ("Am.Br.") at 20-27; No. 46 at 8-9.

Far from being theoretical, in 2014, California brought an enforcement action against one licensee/plaintiff when he sought to participate in Washington's lawful and regulated gaming market, forcing him to choose between divesting himself of his investment in Washington's gaming market or forfeiting his participation altogether in California's gaming market. E.D.C.A. Dkt. No. 91 at 5-6. The result would be the same if a licensee attempted to enter any other state's gaming market, which is why no licensees do. As amicus curiae explained to the Ninth Circuit, even efforts to explore opportunities in other

3. California's position in this Court that *Pike* is the necessary framework to review the Statutes is an all-to-convenient turnabout. In the lower courts, California consistently said that it was "unnecessary . . . to engage in any judicial balancing" under *Pike*. *See* Ninth Cir. Dkt. 34 at 43; *accord* E.D.C.A. Dkt. Nos. 50-1 at 16 ("*Pike* balancing is not required."); No. 59-1 at 9 ("[T]he Court need not reach the balancing test (*Pike* balancing).").

markets come to a stop when potential investors and regulators raise concerns about the reach of the Statutes. Am.Br. 20-21.

California has never offered anything to counter Petitioner's record on the impossibility of participating in the markets of other states. All it has done is convince the lower courts that its unconstitutional fracturing of the gaming market should not matter. This Court should grant review to clarify whether economic balkanization like this is unconstitutional, as Petitioner asserts under opinions this Court issued prior to *Pork Producers*, *see, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 171 (2018); or not a problem at all, as California continues to claim.

B. Overruling *Exxon* is not necessary to review the issue presented.

It is unnecessary for this Court to address, let alone reverse *Exxon*, to review the Statutes. *Exxon* resolved a challenge to a very different type of law. First, the Statutes expressly discriminate against firms engaged in (or who desire to engage in) interstate commerce because they only apply when a merchant is engaged in (or desires to engage in) the interstate gaming industry. *See* Pet. 5-10. In *Exxon,* on the other hand, the challenged law did not ban members of the interstate industry from entering the state. *See Exxon*, 437 U.S. at 126. There, the challenged law prohibited petroleum producers from operating retail gas stations to sell their finished product—gasoline—directly to consumers in Maryland. *Id*. at 119-20. Other members of the interstate gasoline market, such as interstate gas marketers, were permitted to sell to their retailers. *Id*. at 125-26. In contrast, there

are no members of the interstate gaming industry who are part of California's in-state gaming market. Thus, what was possible in *Exxon* is not possible here.

Second, the regulated parties and commerce at issue in *Exxon*—gasoline refined by petroleum producers—still entered Maryland's market—through sales of gasoline to independent retailers who then sold to consumers. Here, the regulated parties and commerce at issue—the investment capital and expertise of highly regarded members of the interstate gaming industry (or those who desire to be members of the interstate gaming industry, such as Petitioner)—are stopped at California's border.

Finally, although petroleum producers were prohibited from vertical integration within Maryland, they retained the freedom and economic liberty to engage in vertical integration in states where such structures were lawful. Conversely, licensees are prohibited from going to other gaming states to follow their rules concerning their gaming markets. To be part of California's gaming market, you must follow California's rules everywhere.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Statutes constitute such an extraordinary exercise of state licensing authority that there is no opinion addressing a law from another state that offends the Constitution in a way that is a perfect fit with the Statutes. Nonetheless, laws with sufficiently similar features have been invalidated by other Circuits and those rulings conflict with the decision below.

For example, the Second and Eleventh Circuits recognized that laws that target firms engaged in interstate commerce, regardless of residency, violate the dormant Commerce Clause. Pet. 25-27. California hopes this Court will ignore the Second Circuit's ruling that a law that "discriminates against interstate commerce in favor of intrastate commerce" is unconstitutional, *Nat'l Shooting Sports Found., Inc. v. James*, 114 F.4th 98, 114 (2d Cir. 2025), because there is no way to square the Second Circuit's articulation and application of that antidiscrimination principle with the decision below. California claims, unconvincingly, that there is no conflict because New York's law regulated only interstate activity, whereas the Statutes regulate activity occurring "within or without" California, meaning both intrastate and interstate activity. However, that distinction does not exist because the underlying premise is false. The Statutes do not regulate intrastate activity at all. Casino-style gaming is illegal in California and does not occur there. Although New York and California employed different means, their laws share one critical feature—they only restrict commerce when a merchant is engaged in (or desires to engage in) interstate commerce. While the Ninth Circuit said that is okay, the Second Circuit says it is not.

In *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), the Eleventh Circuit held that a law that "target[ed] restaurants operating in interstate commerce" was discriminatory, even though it applied to residents and non-residents alike. *Id.* at 842-44. Here again, to bypass the clear conflict between the principle of law articulated and applied in *Cachia* to the decision below, California offers an irrelevant distinction about the Statutes. California claims that the Statutes do not erect a barrier

around California's market or target firms engaged in interstate commerce because Petitioner is free to engage in interstate commerce in other states in ***other*** industries. BIO 15. Just like the only commerce relevant to the *Cachia* opinion was the regulated commerce—restaurant operations—the only commerce relevant here is investment/participation in lawful gaming businesses.

California continues to rely on that red herring—Petitioner's ability to participate in other interstate industries—to claim that there is no conflict between the decision below and the opinions from other Circuits that have recognized that state barriers to trade are unconstitutional. California's approach is equally unavailing here. The Statutes are a complete barrier to cross-border investment in the gaming industry. Either that is a problem, as some Circuits have recognized, Pet. 27-30, or it is not, as the decision below found. Clarity from this Court is needed on whether a state can balkanize an industry as California has done here.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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