No. _____

IN THE
Supreme Court of the United States

AT&T INC. (F/K/A SBC COMMUNICATIONS INC.),
Petitioner,
v.

RLH INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street
4th Floor
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
PRIYA R. AIYAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioner

May 23, 2006

QUESTION PRESENTED

Whether a State's direct regulation of commercial conduct that occurs wholly outside that State and that has no effect on consumers or markets within that State is a *per se* violation of the Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioner AT&T Inc. (f/k/a SBC Communications Inc.) ("AT&T") was a defendant/respondent in the proceedings in the California state courts. Respondent RLH Industries, Inc. ("RLH") was the plaintiff/appellant in the proceedings in the California state courts.

Pacific Bell Telephone Company ("Pacific Bell"), a wholly owned subsidiary of AT&T, also was a defendant/respondent in the proceedings in the California state courts. The California Superior Court granted summary judgment to Pacific Bell, the Court of Appeal affirmed that decision, and RLH did not petition for review of that holding in the California Supreme Court. Accordingly, Pacific Bell no longer has any continuing interest in this case and will not participate as either a petitioner or a respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner AT&T Inc. (f/k/a SBC Communications Inc.) states the following:

On November 18, 2005, SBC Communications Inc. merged with AT&T Corp. That same day, SBC Communications Inc. changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND RULES

OTHER MATERIALS

Petitioner AT&T Inc. (f/k/a SBC Communications Inc.) respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California in this case.

INTRODUCTION

This case presents a frequently litigated issue of constitutional law that divides the federal courts of appeals and is of great significance to businesses across the nation: Does the Commerce Clause permit a State directly to regulate commerce occurring wholly outside that State's borders?

The California Court of Appeal sided with the First and Eighth Circuits in permitting such extraterritorial regulation, subject to an amorphous balancing of local benefits and potential burdens on interstate commerce. By contrast, the Second, Seventh, Ninth, and Tenth Circuits have held that such extraterritorial regulation constitutes a *per se* violation of the Commerce Clause.

This case presents the question in a stark and straightforward fashion. The plaintiff, RLH Industries, Inc. ("RLH"), does not dispute that the actions for which it seeks relief from AT&T Inc. ("AT&T") occurred exclusively outside of California. Moreover, RLH has alleged no effect of those actions on California consumers or markets; the only effect to which RLH points is the injury to itself, a California resident, sustained *outside* of California, in the course of efforts to compete *outside* of California. Yet the California Court of Appeal found no *per se* bar to applying California's antitrust and unfair competition laws to markets throughout the country in which RLH has sought to compete, even when the alleged anticompetitive activity has no impact on California markets or consumers. In other words, California claims that, at the behest of any business with operations in California, it can trump the laws of other States in order to regulate transactions that take place and have market effects only in those other States.

The adverse consequences for interstate commerce from the California court's decision are potentially enormous. California is the nation's most populous State. Under the decision below, California may apply its laws to extraterritorial conduct that in any way affects a California business choosing to do business outside the State, even where, as here, the conduct at issue has no effect on consumers or markets in California. Businesses sued by California plaintiffs are now potentially subject to inconsistent demands from, on the one hand, California and, on the other hand, different States properly attempting to regulate conduct *within* their borders. Moreover, because two federal courts of appeals share the approach of the California court, businesses also risk being sued for wholly extraterritorial activity by residents of States in the First and Eighth Circuits under the laws of those plaintiffs' home States.

In place of the *per se* rule that should bar such extraterritorial application of California law under this Court's precedents, the California Court of Appeal required the defendant to prove that the burden of extraterritorial regulation "'is clearly excessive in relation to the putative local benefits.'" Pet. App. 15a (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Forcing businesses to rely for their defense on such fact-intensive balancing, weighted in favor of constitutionality, creates an unacceptable level of uncertainty regarding whether they must conform their conduct to California law in addition to the laws of the jurisdictions in which they operate. The *Pike* test was designed for state laws that target in-state activity and only incidentally affect interstate commerce. It was not intended to justify wholly extraterritorial application of a State's laws. The rule that States may not govern extraterritorially is a basic principle of federalism whose applicability does not turn on a balancing test. This Court has not hesitated to review decisions from intermediate California appellate courts that involve important constitutional issues, and it should grant review here.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 2a-21a) is reported at 133 Cal. App. 4th 1277, 35 Cal. Rptr. 3d 469. The order of the California Superior Court (Pet. App. 22a-24a) is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on November 3, 2005. The California Supreme Court denied a petition for review on February 22, 2006. *See* Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3, provides in relevant part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]

Relevant statutes are set forth at Pet. App. 43a-59a.

STATEMENT OF THE CASE

RLH is a California corporation that manufactures high voltage protection ("HVP") equipment. *See* Pet. App. 26a (Second Am. Compl. ¶ 4). HVP equipment protects telephone lines against hazardous voltages generated by lightning or voltage surges. RLH attempted to sell its equipment to customers of various local telephone companies (subsidiaries of AT&T) in Nevada, Texas, Oklahoma, Missouri, Kansas, Arkansas, Indiana, Ohio, Wisconsin, Illinois, Michigan, and Connecticut. *See id.* at 31a-32a (¶¶ 21-22, 24). RLH alleges that it was excluded from the HVP equipment market in each of these States by a purported arrangement that "tied" HVP service to telephone service, requiring customers to purchase their HVP equipment from the local telephone company or a source "approved" by that company. *See id.* at 33a, 35a (¶¶ 28, 37).

RLH filed suit against petitioner AT&T[1] in California superior court under California's Cartwright Act and Unfair Competition Act (reproduced at Pet. App. 43a-59a). RLH's Second Amended Complaint – now the operative pleading – sought, *inter alia*, a judgment that the alleged anticompetitive conduct of the local telephone companies wholly outside California violated the Cartwright Act; treble damages for alleged violations of California law based on conduct outside of California; restitution and/or disgorgement of allegedly unlawful profits obtained from conduct outside California; an order requiring the local telephone companies operating in States other than California to cease their allegedly anticompetitive conduct outside of California; and an order requiring these local telephone companies to approve RLH's equipment for use in their States other than California. *See id.* at 38a, 40a-41a (¶ 49, Prayer for Relief). The Second Amended Complaint did not allege any claims against AT&T's out-of-state subsidiaries based on RLH's efforts to sell its product in California.[2] Nor did the complaint allege that the supposed tying arrangements implemented outside of California impacted the California market for HVP equipment or California consumers of HVP equipment. Rather, the complaint alleged that the conduct of AT&T's

---

[1] AT&T is a holding company that is incorporated in Delaware and has its principal place of business in Texas. AT&T provides no telecommunications services; rather, its subsidiaries provide such services to consumers. AT&T is not registered to do business in California and has no contacts with the State of California. The California superior court nonetheless ruled that it had personal jurisdiction over AT&T. That erroneous ruling is not at issue in this petition.

[2] The Second Amended Complaint did allege such claims, based on alleged anticompetitive activity in California, against Pacific Bell, an AT&T subsidiary and the local telephone company in California. The trial court granted summary judgment to Pacific Bell. The California Court of Appeal affirmed, finding that RLH failed to raise a triable issue as to whether Pacific Bell illegally tied its HVP service to its local telephone service. *See* Pet. App. 2a-3a. That holding is not at issue in this petition.

out-of-state subsidiaries injured RLH as a potential competitor, and that RLH was a California resident. *See also supra* note 2 (explaining that RLH's claims against the AT&T subsidiary that serves California were dismissed and are no longer at issue in this case).

AT&T moved to strike the portions of the Second Amended Complaint seeking damages from and an injunction against AT&T and its non-California subsidiaries.[3] AT&T argued that "plaintiff's prayer for injunctive relief and damages is based on conduct occurring in states other than California" and "would give improper extraterritorial effect to California law." Defendant's Notice of Motion and Motion To Strike at 3 (filed July 23, 2003). RLH opposed the motion on the ground that it was immaterial where in the United States the alleged anticompetitive conduct occurred, because "[AT&T] engaged in intentional conduct designed to injure RLH, a California resident." Plaintiff's Opp. to Motion To Strike at 2-3 (filed Aug. 14, 2003).

The Superior Court denied the motion to strike, reasoning that, because it had personal jurisdiction over AT&T, "it can order [AT&T] to act or refrain from action outside of California." Aug. 26, 2003 Minute Order. AT&T sought a writ of mandate, which the California Court of Appeal denied, and the California Supreme Court denied review.

AT&T then sought summary judgment on, *inter alia*, the ground that the Commerce Clause bars RLH's claims. AT&T argued that, under *Healy v. The Beer Institute*, 491 U.S. 324 (1989), a State cannot regulate commerce that takes place wholly outside its borders. AT&T further observed that every State where an AT&T subsidiary provides local telephone service has its own regulatory body

---

[3] Under California law, a motion to strike may be brought to "[s]trike out any irrelevant . . . matter inserted in any pleading," Cal. Code Civ. Proc. § 436(a), and a request for relief is "immaterial" if it is "not supported by the allegations of the complaint," *id.* § 431.10(b)(3).

and tariffs. For example, the regulatory tariffs in the States where Ameritech, one of AT&T's subsidiaries, operates specify that only the local telephone company may install HVP equipment. *See* Defendants' Separate Statement of Undisputed Facts at 6 (Fact No. 22) (filed Apr. 9, 2004); Request for Judicial Notice, Exhs. 7-14 (filed Apr. 9, 2004) (tariffs filed with the Federal Communications Commission, Illinois Commerce Commission, Indiana Utility Regulatory Commission, Michigan Public Service Commission, Public Utilities Commission of Ohio, and Public Service Commission of Wisconsin).

The Superior Court granted summary judgment to AT&T on different grounds, finding that RLH failed to establish the elements of an illegal tying arrangement. *See* Pet. App. 22a-24a. On appeal, AT&T noted that the Court of Appeal was obligated to uphold the trial court's decision if that decision was correct on any legal theory raised below, and renewed its contention that the Commerce Clause bars application of California law to commerce occurring wholly outside of California. AT&T again cited *Healy* for the proposition that "the 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders.'" Brief for Respondents at 31 (quoting 491 U.S. at 336) (ellipsis in original). In response, RLH argued that the Cartwright and Unfair Competition Acts properly regulate conduct occurring anywhere in the United States that significantly affects a California resident, and that RLH properly invoked California law against AT&T because the extraterritorial activities of AT&T's subsidiaries impacted RLH, a California corporation. *See* Appellant's Reply Br. at 17-24; *see also id.* at 7 ("Pacific Bell was named as a defendant to face responsibility for the conduct which injured RLH in California. SBC was named as a defendant to face responsibility for *conduct in other states* which resulted in injury to RLH.") (emphasis added).

The Court of Appeal reversed the grant of summary judgment to AT&T. With respect to AT&T's Commerce Clause argument, the court concluded that "the commerce clause does *not* bar application of California antitrust law to out-of-state anticompetitive conduct that causes injury in California." Pet. App. 3a. The court acknowledged *Healy*'s statement that the Commerce Clause "precludes the application of a state statute" to wholly out-of-state commerce "whether or not the commerce has effects within the State." *Id.* at 12a. But the court believed that it could not "blindly wield" that principle "without taking a closer look at the issue actually decided in *Healy*." *Id.* at 13a. The court proceeded to find the rule of *Healy* inapplicable to the facts of this case, reasoning that *Healy* involved a statute regulating prices; that "*Healy* was *not* specifically concerned with the extraterritorial application of state antitrust laws"; and that *Healy* relied on a non-antitrust case, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). Pet. App. 13a.

The Court of Appeal thus confined *Healy* to its precise facts, concluding that the language cited by AT&T "restates the 'specific concerns' that *price-affirmation statutes* have raised under the commerce clause." *Id.* at 14a. Having thus dismissed this Court's decision in *Healy*, the court squarely rejected AT&T's argument that a State's regulation of wholly extraterritorial conduct was a *per se* violation of the Commerce Clause. According to the court, "the commerce clause's primary concern is not geographic, but practical," and the clause "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." *Id.* at 15a. The court held that, even when a state statute directly regulates interstate commerce, its constitutionality turns on a "fact-intensive balancing analysis": the "basic consideration of commerce clause jurisprudence" was, "[t]aking everything into account, does the state law unreasonably burden interstate commerce?" *Id.* After declining to conduct such a

balancing analysis – stating that "[AT&T] has not attempted to carefully balance the benefits of applying California law to their alleged out-of-state tying arrangements against the burden that condemning the tying arrangements under California law . . . would impose on interstate commerce," and "[w]e decline to do so for it" – the Court of Appeal remanded the case to the superior court. *Id.* at 15a-16a.

AT&T sought review of the Commerce Clause issue in the California Supreme Court, presenting the question: "Does the Commerce Clause of the United States Constitution bar California from applying its antitrust laws to allegedly anti-competitive conduct that takes place entirely out of state and has no effect upon California markets or California consumers?" Petition for Review at 5 (filed Dec. 13, 2005). On February 22, 2006, the California Supreme Court denied review. *See* Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three reasons. First, under a proper reading of this Court's precedents, a State is and should be flatly forbidden from attempting to govern commerce occurring wholly outside that State. Second, the lower courts are nevertheless confused and divided on the question whether such direct regulation is a *per se* violation of the Commerce Clause, or whether its constitutionality depends on the outcome of a balancing analysis. Third, the question presented is of enormous practical importance. If the California Court of Appeal's decision is allowed to stand, California will be able to project its legislation into other States merely because activities conducted exclusively within those other States and having effects only on markets and consumers in those other States may affect or injure one California resident seeking to do business in those States. Under the decision below, California's antitrust and unfair competition laws would control markets throughout the country so long as a California corporation is a potential plaintiff. The decision correspondingly invites other States to apply their

own laws extraterritorially whenever one of their residents believes that it has been injured by out-of-state conduct. Such interstate economic battles and the conflicting demands imposed on businesses is precisely what the Commerce Clause was designed to avoid.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Since the Nineteenth Century, this Court has recognized that the Commerce Clause both empowers the federal government to regulate interstate commerce and restricts the authority of the States to do the same. *See*, *e.g.*, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). The California Court of Appeal's decision runs afoul of the correct reading of controlling Supreme Court law under which a State's direct regulation of commerce occurring wholly outside that State is unconstitutional *per se*.

A. The Decision Below Conflicts With This Court's Two-Tiered Approach To The Dormant Commerce Clause

The Court has established a two-tiered approach to determining when a state law violates what has been referred to as the "dormant" or "negative" Commerce Clause:

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

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (emphases added, citations omitted); *see Healy*, 491 U.S. at 337 n.14 ("As a

general matter, the Court has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause.").

Brown-Forman also explains that "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach," and that "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity." 476 U.S. at 579. The Court thus recognized that whether a statute falls into the first or second *Brown-Forman* category often turns on the statute's practical impact. As the Court later explained in *Healy*, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." 491 U.S. at 336.

Healy summarized the Court's "cases concerning the extraterritorial effects of state economic regulation" as "stand[ing] at a minimum" for several propositions. *Id.* One is that "the 'Commerce Clause . . . *precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State*.'" *Id.* (quoting *Edgar*, 457 U.S. at 642-43 (plurality)) (emphasis added). Another is that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* The Court explained that, "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37.

The Court additionally reaffirmed its statement in *Brown-Forman* that "the critical consideration in determining whether the extraterritorial reach of a statute violates the Commerce Clause is the overall effect of the statute on both local and interstate commerce." *Id.* at 337

n.14. While the California court cited this language as evidence that the constitutionality of extraterritorial regulation depends on a balancing test, *see* Pet. App. 14a, the footnote simply confirms that whether a statute regulates extraterritorially involves consideration of practical consequences, not just the face of the statute. In this case, there is no dispute over whether RLH's lawsuit directly regulates extraterritorial conduct: RLH concededly seeks to enjoin and deter conduct occurring wholly outside of California. *See supra* pp. 4-5 (discussing and citing RLH's Second Amended Complaint).

Under *Healy* and *Brown-Forman*, RLH's effort to apply California law directly to activity outside of California is unconstitutional *per se*, regardless of whether the extraterritorial activity also has effects upon a competitor resident in California. *Healy* invalidated a Connecticut statute that effectively governed beer prices in other States. *See* 491 U.S. at 337-39. Similarly, *Brown-Forman* invalidated a statute that, in practice, required distillers to obtain approval from New York before changing prices in other States. *See* 476 U.S. at 583. In neither case did the Court employ the balancing analysis of *Pike*. Rather, after determining that the law at issue "directly regulated commerce" in other States, the Court struck it down "without further inquiry." *Brown-Forman*, 476 U.S. at 579, 584; *see Healy*, 491 U.S. at 339. The *Pike* test, which weighs the local benefits of the statute against the burden on interstate commerce, governs when "a statute has only indirect effects on interstate commerce." *Brown-Forman*, 476 U.S. at 579. Here, California's regulation of the conduct of AT&T's subsidiaries outside of California is not an "indirect" consequence of the regulation of in-state activity. On the contrary, RLH's lawsuit against AT&T does not arise from any in-state activity at all: it targets out-of-state conduct purely and directly, seeking damages for, and an injunction against, allegedly anticompetitive acts that are exclusively extraterritorial.

The California Court of Appeal dismissed the holdings of *Healy* and *Brown-Forman* with the statement that "the commerce clause's primary concern is not geographic, but practical." Pet. App. 15a. The court cited *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), and *Pike* in support of its view that Commerce Clause jurisprudence "focuses on the balance between the state law's benefits to local commerce and its burdens upon interstate commerce, not simply on the location of the challenged conduct." Pet. App. 15a.

The California court's assertions are quite wrong; they ignore the first "tier" of the Court's approach to the dormant Commerce Clause. Nothing in *Raymond Motor* or *Pike* casts doubt on the proposition that a law directly controlling extraterritorial commerce is unconstitutional *per se* "without further inquiry." *Brown-Forman*, 476 U.S. at 579. Both of those cases involved statutes falling into the second *Brown-Forman* category of laws targeting in-state activity that had "only indirect effects on interstate commerce." In *Raymond Motor*, the Court considered the constitutionality of Wisconsin regulations "governing the length and configuration of trucks that may be operated within the State." 434 U.S. at 430. In *Pike*, the Court considered an Arizona statute requiring that fruit grown within the State be packed and labeled in a certain manner. In both cases, because the effects on interstate commerce were "only incidental," *Pike*, 397 U.S. at 142, the Court employed a balancing test to determine that the state laws at issue unconstitutionally burdened interstate commerce. Because the extraterritorial regulation at issue here is in no way "incidental," the lower court erred in holding that the constitutionality of applying California law to the alleged conduct of AT&T's subsidiaries turned on the outcome of a balancing test.

While direct regulation of extraterritorial conduct is impermissible even when that conduct has in-state effects, *see Healy*, 491 U.S. at 336, the lower court also erred in concluding that any injury to RLH amounted to a

substantial effect on commerce within California. It is undisputed that the only effect "within" California alleged by RLH is the injury purportedly suffered by RLH itself in its efforts to do business outside the State. This Court has recognized in a related context that financial injury to a U.S. corporation from anticompetitive conduct abroad is not an effect on U.S. commerce warranting application of U.S. antitrust law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 & n.6 (1986) (explaining that "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce," and that U.S. manufacturers "cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies"). Similarly, injury to a resident of California from anticompetitive conduct elsewhere that has no impact on California markets or consumers does not warrant application of California antitrust law. *See also Power East Ltd. v. Transamerica Delaval, Inc.*, 558 F. Supp. 47, 49 (S.D.N.Y.) (where activities complained of occurred outside the U.S., and the market from which plaintiff was supposedly excluded was outside the U.S., the fact that both the defendant and the plaintiff's principal shareholder were U.S. citizens did not "provide[] the requisite nexus with American trade that would bring the alleged illegal activity within the purview of the Sherman Act"), *aff'd*, 742 F.2d 1439 (2d Cir. 1983) (table); *Emergency One, Inc. v. Waterous Co.*, 23 F. Supp. 2d 959, 971 (E.D. Wis. 1998) (holding that the plaintiff could not bring a claim under Wisconsin antitrust law because mere injury to the plaintiff, which allegedly operated three Wisconsin dealerships, did not constitute significant injury to trade and commerce in Wisconsin).

Finally, the lower court was also wrong to claim that the Commerce Clause is not concerned with "geograph[y]." Pet. App. 15a. On the contrary, the Court's Commerce Clause jurisprudence is grounded on fundamental princi-

ples of federalism that recognize the geographic limitations of each State's jurisdiction and sovereignty. As *Healy* explained, that jurisprudence "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36 (footnote omitted).[4]

B. This Court's Two-Tiered Approach To The Dormant Commerce Clause Is Not Restricted To The Context Of Price Regulation

The lower court additionally misread this Court's decisions in attempting to confine *Healy* to its facts, suggesting that *Healy* merely "restates the 'specific concerns' that *price-affirmation statutes* have raised under the commerce clause." Pet. App. 14a. *Healy* struck down a law

---

[4] The Court has recognized the prohibition on extraterritorial regulation not only under the Commerce Clause, but also under other constitutional provisions, such as the Due Process Clause and the Full Faith and Credit Clause. *See*, *e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and into the state of New York . . . . The principle . . . lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996) (concluding from "principles of state sovereignty and comity" that "a State may not impose economic sanctions on violators of its law with the intent of changing the tortfeasors' lawful conduct in other States") (citing *Healy*, 491 U.S. at 335-36, and *Edgar*, 457 U.S. at 643 (plurality)); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders[.]") (citing *Gore*, 517 U.S. at 569, 572; *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *Head*, 234 U.S. at 161; and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states.")). *See also Bonaparte v. Appeal Tax Court*, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction.").

requiring out-of-state beer shippers to affirm that their posted prices for sales within Connecticut were, at the time of posting, no greater than their prices for sales outside the State. The Court, however, made clear that its holding flowed from fundamental Commerce Clause principles, not from any principles unique to the context of price-affirmation statutes. It applied the general rule of *Brown-Forman* – that the Commerce Clause bars a State's regulation of "commerce that takes place wholly outside of the State's borders" (*Healy*, 491 U.S. at 336) – to the specific context of price affirmation, striking down the Connecticut statute because it "has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337. According to the Court, the statute had the practical impact of governing prices in Massachusetts (because of its interaction with the Massachusetts beer-pricing statute); deterring promotional discounts in New York; and deterring volume discounts in Massachusetts, New York, and Rhode Island. *See id.* at 337-39. Similarly, in this case, RLH seeks to use California law to make AT&T's subsidiaries change their filed tariffs in Illinois, Indiana, Michigan, Ohio, and Wisconsin. *Cf.* Appellant's Reply Br. at 24-25 (conceding that tariffs in other States specify that local telephone companies will provide HVP service, but arguing that a California court may compel AT&T's subsidiaries to rewrite their tariffs in those States).

Healy's reliance on *Edgar v. MITE Corp.* further confirms that its reasoning is not restricted to the context of price regulation. In *Edgar*, the Court invalidated an Illinois takeover statute that governed interstate tender offers where the target company had certain Illinois connections (e.g., it had its principal executive office in Illinois, or was at least 10% owned by Illinois shareholders). *See* 457 U.S. at 626-67. The plurality stated that the Commerce Clause prohibits "direct regulation" of interstate commerce by a State. *Id.* at 640; *see also id.* at 643 ("[A]ny attempt 'directly' to assert extraterritorial

jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's powers.") (internal quotation marks omitted). According to the plurality, the Illinois statute was unconstitutional because it "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. This Court has not confined the *per se* prohibition on direct extraterritorial regulation to the specific context of price regulation, and the California court erred in refusing to recognize that prohibition.

II. THE LOWER COURTS ARE DIVIDED ON WHETHER DIRECT REGULATION OF OUT-OF-STATE COMMERCE IS A *PER SE* VIOLATION OF THE COMMERCE CLAUSE

This Court should grant certiorari because the lower courts are divided on the question whether direct regulation of extraterritorial commerce is unconstitutional "without further inquiry." *Brown-Forman*, 476 U.S. at 579. The Second, Seventh, Ninth, and Tenth Circuits have correctly interpreted this Court's precedents to invalidate statutes that directly control out-of-state commerce, regardless of whether those statutes involve setting prices. The First and Eighth Circuits, however, have followed the approach of the California court in holding that statutes directly regulating interstate commerce are properly analyzed under the *Pike* balancing test. This Court's intervention is necessary to clarify the core principles of its dormant Commerce Clause jurisprudence.

A. The Decision Below Conflicts With Decisions Of The Second, Seventh, Ninth, And Tenth Circuits

Four federal courts of appeals have, in square conflict with the decision below, recognized this Court's *per se* rule against direct extraterritorial regulation.

In *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), the Second Circuit considered a Vermont law prohibiting distribution of sexually explicit

material to minors over the Internet. The court concluded that, "[a]lthough [the statute] does not discriminate against interstate commerce on its face, . . . it presents a *per se* violation of the dormant Commerce Clause." *Id.* at 104. The Court reasoned that, "[i]n practical effect, Vermont 'has projected its legislation[] into other States, and *directly regulated* commerce therein,'" *id.* (quoting *Brown-Forman*, 476 U.S. at 584) (emphasis added by Second Circuit); that the rule of *Healy* and *Brown-Forman* was not restricted to statutes dealing with prices, *see id.* at 103-04; and that it had "no need to apply the *Pike* balancing test," *id*. at 104.

Similarly, in *National Solid Wastes Management Association v. Meyer*, 63 F.3d 652, 653-55 (7th Cir. 1995), the Seventh Circuit invalidated a Wisconsin statute that prevented both in-state and out-of-state generators of solid waste from using Wisconsin landfills unless their home communities had a recycling program that met Wisconsin's standards. The court found the Wisconsin law unconstitutional *per se* because the law "essentially controls the conduct of those engaged in commerce occurring wholly outside the State of Wisconsin and therefore directly regulates interstate commerce." *Id.* at 658. The Seventh Circuit specifically noted that the principles articulated in *Healy* and *Brown-Forman* were not limited to the context of price-affirmation statutes. *Id.* at 658-59.

In *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), the Ninth Circuit considered the constitutionality of a Nevada statute requiring national collegiate athletic associations to provide Nevada institutions, employees, and athletes accused of rules infractions with various procedural protections. *See id.* at 637. The Ninth Circuit observed that, applying the Supreme Court's "two-tiered approach to analyzing state economic regulations under the Commerce Clause,"

> we must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state

> economic interests over out-of-state interests. If the Statute does any of these things, it violates the Commerce Clause per se, and we must strike it down without further inquiry.

Id. at 638. The Ninth Circuit found the statute invalid *per se* because it regulates "only interstate organizations which are engaged in interstate commerce, and it does so directly." *Id.*

Finally, the Tenth Circuit, in *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), affirmed an injunction against enforcement of a New Mexico statute that criminalized the dissemination by computer of material harmful to minors. The court concluded that the statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause." *Id.* at 1161.

B. The Split Of Authority Is Well Developed

Though the weight of authority is to the contrary, two federal courts of appeals have, like the court below, rejected the view that direct regulation of interstate commerce is *per se* invalid under the Commerce Clause. The circuit split on the question presented is thus wide as well as deep.

In *Grant's Dairy-Maine, LLC v. Commissioner of Maine Department of Agriculture*, 232 F.3d 8 (1st Cir. 2000), the First Circuit upheld a Maine statute setting prices for milk sold within Maine. A milk dealer had argued that Maine's minimum pricing scheme violated the dormant Commerce Clause because it directly regulated interstate commerce, citing the Court's statement in *Brown-Forman* that "'[w]hen a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry.'" *Id.* at 19 (quoting *Brown-Forman*, 476 U.S. at 579) (alterations in original). The First Circuit rejected that argument, asserting that "this reference to direct regulation as a basis for invalidation has not been repeated in

subsequent Supreme Court opinions and it does not fit into the *West Lynn* framework. *See West Lynn* [*Creamery, Inc. v. Healy*], 512 U.S. [186,] 201 [(1994)] (directing inquiring courts to look for discriminatory 'purposes and effects')." *Id.* (citations omitted). The court concluded: "Given that the *Brown-Forman* Court itself conceded that 'the critical consideration [in a dormant Commerce Clause analysis] is the overall effect of the statute on both local and interstate activity,' we rebuff Grant's attempt to forge a new mode of analysis." *Id.* (citation omitted, alteration in original).

Similarly, in *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), a public utility company contended that a Missouri statute regulating interstate stock transactions occurring entirely outside Missouri was "per se invalid because it [was] both 'extraterritorial' and 'direct' regulation of interstate commerce." *Id.* at 507. The Eighth Circuit dismissed that contention, reasoning that the utility "cites no authority supporting this contention in the context of public utility regulation," *id.*, and that, "[i]n its recent Commerce Clause decisions, the Supreme Court has limited its per se rule of invalidity to provisions that patently discriminate against interstate trade," *id.* at 508 (internal quotation marks omitted). Like the First Circuit, and in square conflict with the Second, Seventh, Ninth, and Tenth Circuits, the Eighth Circuit held that Commerce Clause jurisprudence contains no *per se* prohibition on direct state regulation of interstate commerce.

There is no indication that this split among the circuits will resolve with further percolation. At least six federal courts of appeals have already weighed in on the question whether direct regulation of extraterritorial commerce is unconstitutional *per se*, with confusion rather than clarity as the result. In addition, the Third Circuit has indicated its agreement with the Second, Seventh, Ninth, and Tenth Circuits. *See A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 785 (3d Cir. 1999) ("[A] state

may not attempt to regulate commerce that takes place 'wholly outside' of its borders: such 'projection of one state regulatory regime into the jurisdiction of another State' is impermissible.") (quoting *Healy*, 491 U.S. at 336-37). On the other side of the split, the Supreme Court of Washington has indicated that it follows the approach of the First and Eighth Circuits. *See State v. Heckel*, 24 P.3d 404, 409 (Wash. 2001) (finding the *Pike* balancing test to govern when a statute "is facially neutral, applying impartially to in-state and out-of-state businesses"). The conflicting decisions are recent, and commentators have remarked on the unsettled state of the law. *See* Jack Goldsmith & Alan Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001) (while "[t]he dormant Commerce Clause . . . is . . . said to prohibit certain state laws that regulate extraterritorially and others that lead to inconsistent regulatory burdens," "[t]hese aspects of the dormant Commerce Clause are unsettled and poorly understood"); Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 Me. L. Rev. 467, 491-92 (2003) (explaining that lower courts have had difficulty determining where the prohibition on extraterritorial regulation fits into the Court's dormant Commerce Clause jurisprudence). The Court should take this opportunity to bring coherence to Commerce Clause jurisprudence in the lower courts and to clarify the scope and import of its prior decisions.

This case, moreover, poses the question of the constitutionality of extraterritorial regulation in a uniquely sharp fashion. It is undisputed that RLH seeks to apply California law to conduct that is wholly extraterritorial and that has no effect on California markets or consumers, and whose only connection to California is the bare fact of RLH's California residency. Unlike many of the cases from this Court and the federal courts of appeals applying the prohibition on direct extraterritorial regulation, this case involves no preliminary question as to whether,

while a challenged law appears to govern in-state conduct, its practical impact is to control conduct entirely outside the State. In this instance, it is clear on the face of RLH's suit that RLH seeks to invoke California law against, and to enjoin, activity that occurs exclusively outside of California and that has no impact on markets or consumers in California. AT&T has consistently pressed and preserved the question whether such direct extraterritorial regulation is unconstitutional *per se*. The California court squarely ruled on the issue, explaining its reasoning and its position at some length, and AT&T squarely presented the issue for consideration by the California Supreme Court.[5]

III. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL SIGNIFICANCE

The issue in this case is of great significance both to businesses throughout the country and to the States whose policy choices may be undermined by the extraterritorial regulation of other States. If the decision below is allowed to stand, California's antitrust and unfair competition laws can control conduct in markets throughout the United States, even when that conduct has no effect on California markets or consumers. Companies that conduct no business in California or with California consumers will nonetheless have to conform their actions to California law, given the possibility that a California corporation may believe itself injured in the course of its efforts to compete with out-of-state companies, and may invoke California law against out-of-state conduct. Moreover, if other state courts follow the lead of the California Court of Appeal, companies resident in those States will similarly be able to apply their home-state law to markets

---

[5] This Court has not hesitated to review decisions of California intermediate appellate courts when the California Supreme Court has denied review and the case involves an important constitutional question. *See, e.g., Tory v. Cochran*, 544 U.S. 734 (2005); *Stogner v. California*, 539 U.S. 607 (2003); *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458 (2000).

across the country. The First and Eighth Circuits already allow States to project their laws into other jurisdictions so long as the burden on interstate commerce is not "clearly excessive" in relation to the local benefits. *Pike*, 397 U.S. at 142. Commentators have highlighted the difficulties inherent in *Pike* balancing, which often requires courts to weigh incommensurables and to make complex empirical judgments. *See*, *e.g.*, Donald H. Regan, *Siamese Essays*, 85 Mich. L. Rev. 1865, 1866-68 (1987); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment) (inquiry mandated by *Pike* "is ill suited to the judicial function and should be undertaken rarely if at all"). The decision below renders balancing the touchstone of every dormant Commerce Clause case.

The current patchwork of law on extraterritorial regulation forces businesses to operate in an environment of intolerable uncertainty. It also threatens to produce exactly the type of disharmony and interstate economic battles that the Constitution's drafters had experienced under the Articles of Confederation, and that they sought to forestall with the Commerce Clause. *See*, *e.g.*, *Healy*, 491 U.S. at 335-36; *see also Head*, 234 U.S. at 161 (permitting the statutes of one State to operate beyond its jurisdiction and into another State would "throw[] down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends").

The risk of inconsistent regulation is especially significant in the antitrust context, because of the potential for one State to enjoin conduct that may be authorized and even required under other States' laws and to assess treble damages for conduct another State has chosen not to regulate. *See* Pet. App. 40a (Second Am. Compl., Prayer for Relief (2) (seeking treble damages)). Moreover, the adverse effects of lower courts' confusion regarding the Commerce Clause will only become more severe as

States increasingly attempt to regulate extraterritorial commerce that takes place, for example, over the Internet. *See*, *e.g.*, *American Booksellers Found.*, 342 F.3d at 102-04 (analyzing a state statute regulating Internet communications under the Commerce Clause); *ACLU*, 194 F.3d at 1160-62 (same).

There is no reason to delay consideration of the Commerce Clause issue in this case. The issue is a pure question of law that will be unaffected by any proceedings on remand. Because RLH has never identified any conduct in California from which its claims against AT&T might arise, or any effect within California of the conduct of AT&T's non-California subsidiaries other than the injury to RLH, there are no facts relevant to the Commerce Clause question that might be further developed. Nor will the harms to AT&T, other companies, and consumers from California's extraterritorial regulation dissipate if AT&T ultimately prevails under a balancing analysis. Under settled Supreme Court law, no benefits on the side of regulation can justify California in controlling conduct that occurs wholly outside the State and that does not impact California markets or consumers. The lower court's approach forces antitrust defendants to undergo protracted discovery, and to face the highly uncertain outcome of an open-ended balancing test, in suits that ought to be dismissed on the pleadings. *Cf.* 6 *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2006) ("antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit'"). The Court should grant review to reaffirm the core principle of federalism that States may not regulate extraterritorially, and to spare businesses throughout the country from the unconstitutional burden of subjection to an array of conflicting state mandates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street
4th Floor
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
PRIYA R. AIYAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioner

May 23, 2006