No. 15-280

In The Supreme Court of the United States

SAM FRANCIS FOUNDATION, ET AL.,
Petitioners,

v.

CHRISTIES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA LAWYERS FOR THE ARTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae California Lawyers for the Arts ("CLA") is a statewide nonprofit organization founded in 1974. CLA is dedicated to educating and empowering artists and entertainers of all disciplines and to supporting nonprofit arts organizations by establishing a bridge between the legal and arts communities. Each year, CLA serves more than 11,000 individuals, arts businesses, and nonprofit organizations by providing referrals to affordable and pro bono legal services, educational programs, alternative dispute-resolution services, youth development, and information resources. CLA's membership includes artists, attorneys, accountants, educators, and other supporters of the organization's goals.

CLA, formerly known as Bay Area Lawyers for the Arts ("BALA"), helped the California legislature draft the state statute challenged in this case—the California Resale Royalty Act ("CRRA")—and was a moving force in urging legislators to enact the CRRA. BALA also acted as *amicus curiae* in support of the artist-intervenors in a prior case upholding the CRRA's constitutionality. *See Morseburg v. Bay-*

[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). The parties were given ten days' notice prior to the filing of this brief, as required by Supreme Court Rule 37.3(a). No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Supreme Court Rule 37.6.

lon, No. 77-2410, 1978 WL 980, at *2 n.* (C.D. Cal. Mar. 23, 1978), *aff'd*, 621 F.2d 972 (9th Cir. 1980).

This case affects CLA's visual-artist members directly. The CRRA grants them a fairer share in the profits from their labor, fosters the creation of new art, and communicates to both established and up-and-coming visual artists that California values their work. Also affected are art-dealer members who support the CRRA and take pride in paying resale royalties to artists.

CLA is thus uniquely suited to explain the CRRA's origins and purpose and the benefits that the CRRA provides to visual artists across California.

SUMMARY OF ARGUMENT

Joined by *amicus* CLA, the petitioners in this case have asked this Court to clarify the scope and reconsider the vitality of the "extraterritoriality" branch of dormant Commerce Clause doctrine—the rule that even a nondiscriminatory state statute may be invalidated if it regulates commerce that "takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

CLA believes that three unusual factors counsel strongly in favor of granting the Petition.

First, the Petition demonstrates that an active and ongoing three-way split exists among the Circuits on the Question Presented.[2] *See* Pet. at 13-23. Opinion on that Question is not merely divided—it is splintered, demonstrating that courts and commentators were mistaken when they pronounced the extraterritoriality doctrine "quite moribund" or opined

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[2] The Question Presented is:

> If a state statute does not in any way discriminate against, or impose an excessive burden on, interstate commerce, does the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, nevertheless require the statute's invalidation *solely* because it regulates commerce occurring beyond the borders of the state that enacted it?

Pet. at i (emphasis in original).

that this Court's 2003 decision *in Pharmaceutical Research and Manufacturers of America v. Walsh*[3] clearly restricted the doctrine to statutes that control the prices charged in out-of-state transactions.[4]

Second, the Court of Appeals took the extraordinary step of adjudicating this case en banc without a prior panel decision—demonstrating that a majority of that Court believed that the case involved significant and unsettled questions of law. The resulting published opinion did nothing to dispel that impression, as it provoked a lengthy concurrence and dissent expressing "serious doubts" that the extraterritoriality doctrine is "wise as a matter of policy" or "within the purview of the dormant Commerce Clause as properly framed." *Sam Francis Found. v. Christie's, Inc.*, 784 F.3d 1320, 1332 (9th Cir. 2015) (Reinhardt, J., concurring in part and dissenting in part).

Third, based on its long experience with and support for the challenged state statute, CLA argues below that the CRRA's characteristics make this case the ideal vehicle for clarifying the precise contours of the extraterritoriality doctrine. The same statutory characteristics also effectively tee up the issue whether the Court should abandon the extraterritoriality doctrine altogether as a relic of an out-

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[3] 538 U.S. 644 (2003).

[4] Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 979 (2013); *see also Energy & Env't Legal Inst. v. Epel*, 793 F. 3d 1169, 1175 (10th Cir. 2015).

moded model of federalism in which national and state power operated in "largely exclusive spheres."[5]

The CRRA presents the Court with this opportunity precisely because the statute *lacks* the undesirable "practical effects" sometimes associated with state regulation of out-of-state conduct. It does not regulate the price to be charged in out-of-state sales; it does not require out-of-state merchants to obtain permission from any in-state regulator before conducting an out-of-state transaction; and it does not subject out-of-state merchants to conflicting state mandates. Thus, the facts of this case enable the Court to confront the Question Presented in its purest form and to decide whether a state statute's extraterritorial effect *without more* violates the dormant Commerce Clause. *See* Argument, Part I, below.

At the same time, the CRRA furthers a legitimate state interest in encouraging artistic endeavor by ensuring fair compensation for visual artists. *See* Argument, Part II, below (discussing the CRRA's origins, purpose, and effect).

For almost forty years, CLA has explained, supported, advocated for, and when necessary defended the CRRA. To be told after all these years that the CRRA is an illegal state power-grab that undermines our federalist system rings false and suggests that dormant Commerce Clause jurisprudence re-

[5] *Am. Beverage Ass'n v. Snyder*, 735 F.3d 367, 378 (6th Cir. 2013) (Sutton, J., concurring).

mains "enveloped in a haze"[6] that only this Court can dissipate.

ARGUMENT

I. This case is the ideal vehicle for clarifying the extraterritoriality branch of dormant Commerce Clause doctrine, because the CRRA lacks the undesirable "practical effects" sometimes associated with a state's regulation of conduct outside its borders.

This Court's modern precedents[7] identify three situations in which the dormant Commerce Clause will invalidate a state statute.

1. A state statute is invalid *per se* if it discriminates against interstate commerce or has the effect of favoring in-state economic interests over out-of-state interests. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

2. A nondiscriminatory state statute that affects interstate commerce only indirectly is nevertheless invalid under the so-called *Pike* balancing test if it imposes a burden on state commerce that clearly exceeds the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

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[6] BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.01[A], at 6-5–6-6 (2d ed. 2013) [hereinafter BITTKER ON COMMERCE].

[7] For a discussion of earlier versions of the doctrine, *see* BITTKER ON COMMERCE § 6.02[B], at 6-13–6-14.

3. A state statute is invalid if it regulates commerce that "takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Healy,* 491 U.S. at 336; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982). The scope and vitality of this extraterritoriality doctrine is of course the core question posed by the Petition. As the Petition explains, there is presently a three-way Circuit split as to whether the extraterritoriality doctrine invalidates a state law that neither discriminates against out-of-state economic interests nor unduly burdens interstate commerce under the *Pike* balancing test.

CLA will not repeat that discussion here. We add only that this case is an ideal vehicle for clarifying—or abandoning—the extraterritoriality doctrine, because the CRRA presents the archetype of a state statute that "serves a vital state interest and imposes only a miniscule burden on interstate commerce," yet has been partially invalidated *solely* because it reaches out-of-state activity. *Am. Beverage Ass'n*735 F.3d at 381 (Sutton, J., concurring). This case therefore presents a perfect occasion for determining the precise contours of the extraterritoriality doctrine.

To begin with, the CRRA does not discriminate against out-of-state economic interests. If anything, it chiefly burdens *California* residents, who are required to part with 5% of the proceeds they obtain when they sell works of fine art. And no court has held that the burdens that the CRRA places on interstate commerce clearly exceed the statute's local

benefits—a finding that would invalidate the CRRA under the *Pike* balancing test.

Instead, the sole defect that the district court and the Ninth Circuit identified in the CRRA is that it regulates wholly out-of-state conduct when applied to out-of-state sales conducted by California residents or their non-California agents.[8] If that's all it takes to invalidate a state statute under the extraterritoriality doctrine, then the CRRA is unconstitutional as so applied.

But if this Court holds that any additional "practical effects" must be present to trigger the extraterritoriality doctrine,[9] then the CRRA *will* pass constitutional muster because it does not have those effects. Specifically:

- The CRRA is not a price-control or price-affirmation statute that purports to "regulate the price of any out-of-state transaction, either

[8] *See Sam Francis Found.*, 784 F.3d at 1323 (describing, as example of CRRA's improper extraterritorial effect, situation in which California resident, while outside California, sells art that has never been in California to non-California buyer); *see also id.* at 1328 (Reinhardt, J., concurring in part and dissenting in part) (criticizing majority for incorrectly holding CRRA unconstitutional "as applied to the actions of a California owner whose work of art is sold out-of-state"); *id.* at 1334 (Berzon, J., concurring in part) (criticizing majority for unnecessarily deciding that CRRA is unconstitutional "as applied to out-of-state art sales conducted by California residents").

[9] See *Healy*, 491 U.S. at 336 (cataloging the impermissible "practical effect[s]" of state laws that regulate extraterritorial conduct).

by its express terms or by its inevitable effect." *Walsh*, 538 U.S. at 669 (internal quotation marks and citation omitted); *see also Healy*, 491 U.S. at 336–37; *Brown-Forman*, 476 U.S. at 579–84. Indeed, the CRRA does not regulate the price of anything anywhere.

- The CRRA does not "force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337; *see also Brown-Forman*, 476 U.S. at 582–83; *Edgar*, 457 U.S. at 641–42. Indeed, no state agency promulgates or administers regulations under the CRRA, so there is no in-state agency for an out-of-state merchant to supplicate.

- The CRRA does not subject out-of-state sellers to conflicting state laws. *Cf. Brown-Forman*, 476 U.S. at 583. At worst, there is only a hypothetical possibility that inconsistent obligations "would arise if not one, but many or every, State adopted similar legislation"[10]—an unlikely prospect, given that only two other states have enacted anything like the CRRA in the thirty-nine years since the CRRA was enacted. *See* Argument, Part II, below.

Thus, this case likely presents the Court's best opportunity to review a state statute that could be invalidated under the dormant Commerce Clause *only* for "naked extraterritoriality"—that is, extra-

[10] *Healy*, 491 U.S. at 336.

territoriality unaccompanied by any of the undesirable "practical effects" listed above. This has two implications for the Petition.

First, because the CRRA has none of the undesirable practical effects associated with extraterritorial state regulation, this case is perfectly configured to raise and answer the question: Absent any explicit constitutional directive or due-process concerns, why should federal courts reach out to invalidate a state statute merely because in certain applications it may reach out-of-state conduct?

Second, this is a case in which the *precise* contours of the extraterritoriality doctrine truly matter to the result. The CRRA would be upheld if, for example, this Court were to rule that extraterritoriality only invalidates a state statute under the dormant Commerce Clause if the statute **(a)** regulates out-of-state prices, **(b)** requires out-of-state merchants to obtain in-state regulatory approval for out-of-state transactions, or **(c)** actually (rather than hypothetically) subjects out-of-state merchants to inconsistent legal obligations. But the CRRA would be partially invalidated if the Court were to rule that naked extraterritoriality is enough to trigger the dormant Commerce Clause.[11]

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[11] Depending on how it rules, the Court also may wish to address the question whether, as applied to in-state residents, a statute like the CRRA regulates interstate commerce at all as opposed to legitimately regulating the post-sale *income* that in-state residents receive from out-of-state sales. *See Sam Francis Found.*, 784 F.3d at 1331 (Reinhardt, J., concurring in part and dissenting in part) ("In sum, the [CRRA] is simply a regulation of the proceeds that [in-state residents] have received from the

The statute's exquisite sensitivity to the Court's precise holding makes this case the perfect one in which to clarify the contours of the extraterritoriality doctrine—or to abandon the doctrine altogether as a "relic . . . with no useful role to play" in a federal system now characterized by "largely overlapping spheres of [national and state] authority[.]" *Am. Beverage Ass'n*, 735 F.3d at 378 (Sutton, J., concurring).[12]

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sale . . . regardless of where the sale takes place."); *see also id.* at 1334 (Berzon, J., concurring in part) ("It is not so clear to me . . . that the royalty obligations the [CRRA] imposes on California sellers . . . regulate commercial *transactions*, as opposed to the post-sale income of Californian residents.") (emphasis in original).

[12] The fact that the Ninth Circuit remanded this case for consideration of Respondents' other arguments presents no "vehicle problem" here. Respondents' principal remaining argument is that the Copyright Act preempts the CRRA—and that argument is a dead letter. As the district judge who ruled in this case has pointed out, the House Judiciary Committee report accompanying the Visual Artists Rights Act of 1990 ("VARA"), which amended the Copyright Act, specifically stated that the VARA would "'*not preempt a cause of action for . . . a violation of a right to a resale royalty.*'" *Baby Moose Drawings, Inc. v. Valentine*, No. 2:11-CV-00697-JHN, 2011 WL 1258529, at *3 (C.D. Cal. Apr. 1, 2011) (Nguyen, J.) (quoting H.R. 514, 101st Cong, 1990 Cong U.S. HR 514 (Lexis)) (emphasis supplied by the court). The Committee had the CRRA specifically in mind when it made that statement, as California was then "the only jurisdiction in the United States that provided resale royalty." *Baby Moose Drawings,* 2011 WL 1258529, at *3.

II. The CRRA furthers a legitimate and important state interest in encouraging artistic endeavor by providing fair compensation to visual artists.

As previously discussed, this case is an excellent vehicle for reconsidering the extraterritoriality doctrine because the CRRA is such a clear example of a statute that "serves a vital state interest and imposes only a miniscule burden on interstate commerce," yet has been partially invalidated *solely* because it reaches out-of-state activity. *Am. Beverage Ass'n*, 735 F.3d at 381 (Sutton, J., concurring). In Part I of the Argument, we explained why the CRRA imposes only "a miniscule burden," if any, on interstate commerce. *Id.* Here we explain why the CRRA serves a "vital state interest." *Id.*

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems" and has cautioned federal courts to refrain from diminishing that experimental role "absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). The CRRA epitomizes the good work that states can do when they are allowed to experiment with innovative solutions to public needs. It is founded on the principle that society benefits when visual artists share in the increased value of their work, even after the work's initial sale.

The CRRA represents the first attempt to bring American artist-compensation laws into conformity with those of many of our closest international partners. The first legislation providing visual artists with a resale-royalty right—often referred to as the

droit de suite—originated in France in 1920,[13] with Belgium, Poland, Italy, and Germany following suit by 1965. Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 335–36 (2012) [hereinafter Turner, *Artist's Right*]. From the 1960s onward, countries of staggering diversity—both legally and culturally—codified resale royalties for visual artists. Those countries included Algeria, Australia, Chile, Czechoslovakia, Guinea, Mali, and Turkey. *Id.* at 336–38; *see also* Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.–VLA J.L. & ARTS 395, 395 (1991–1992) [hereinafter Perlmutter, *Resale Royalties*] (noting that approximately 30 countries had enacted some form of resale royalty by 1992). Moreover, in 2001, the European Union issued a directive requiring that all EU member states implement a resale royalty. Following that directive, the United Kingdom enacted resale-royalty legislation in 2006. Turner, *Artist's Right* at 337–38.

There are three main benefits to the visual artists' resale-royalty laws in force in California and around the world. *See id.* at 332–33; *see also* Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 140–45 (2005).

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[13] According to the general manager of a French *droit de suite* collection agency, over $17 million in resale royalties were distributed to more than 1,700 artists in France in 1990. Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 539 (1998–1999).

First, giving artists a share of the increased value of their work gives them a financial incentive to create new art. The resale-royalty right "is a promise, equally available to all, of reward for future success" that can encourage young artists to continue producing new works despite economic hardship. Perlmutter, *Resale Royalties* at 416. The incentive effect can be immediate, as even a modest royalty can help pay for an artist's next work, which often requires expensive upfront investment in studio space, materials, or models. *Id.*

Second, resale-royalty laws put visual artists on par with other artists, including writers and musicians, who traditionally benefit from copyright protection when reproductions of their works are sold. Visual artists produce art prized for its one-of-a-kind nature, making copies much less commercially valuable. Consequently, a work of fine art is exploited differently than a book, a play, or a musical composition. Its value lies in the "uniqueness of the original physical embodiment, the painting or sculpture itself." Perlmutter, *Resale Royalties* at 400. Each transfer of fine art is therefore a new exploitation of the work that enables a new circle of users to enjoy the original work. *See* Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 518 (1995) [hereinafter Reddy, *Droit de Suite*]. Resale-royalty laws are grounded in the sensible notion that visual artists should be given an incentive like that given to authors and musicians, by allowing visual artists to share in the popularity of their crea-

tions over time. *See* Perlmutter, *Resale Royalties* at 404.

Third, resale-royalty laws fairly compensate an artist for her creative genius and for the effort she has put into improving her reputation within the artistic community over the course of her career. Artists are ultimately responsible for their works' increased value. They should not be cut out of the enormous profits reaped by collectors and dealers. Art is more than a mere economic asset; it is also an embodiment of the artist's own vision and personality, gaining value, in part, because of its link to its creator. *See* Reddy, *Droit de Suite* at 513. Both the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is a signatory, and the Visual Artists Rights Act, passed by Congress in 1990, recognize the artist's unique right to participate in the future use of his creations.[14] *See id.* at 510–11. Resale-royalty laws likewise recognize that a visual artist has an important stake in the future sale of his work because of how closely the value of art is associated with the person who created it.

Given the many benefits and broad international consensus in favor of resale royalties for fine artists, the California legislature had good reason to think that a resale royalty would help nurture the state's artistic community.

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[14] The Berne Convention also includes an optional resale royalty for artists and other authors of original works of art and manuscripts. *See* Perlmutter, *Resale Royalties* at 395–96.

In passing the CRRA, the California legislature engaged in "the very type of innovative lawmaking that our federalist system is designed to encourage." *Morseburg*, 1978 WL 980, at *3. Enactment of the CRRA was prompted in part by a 1973 incident in which a work by celebrated artist Robert Rauschenberg, originally purchased from the artist for $900, was resold at public auction for the then-astronomical sum of $85,000.[15] *See* Turner, *Artist's Right* at 338. The seller of the painting retained all of the profits, deeply upsetting Rauschenberg, other artists, and their supporters. *Id.* The California legislature recognized that the Rauschenberg sale and others like it represented a failure to protect the rights of visual artists. In response, it passed the first American law to provide a royalty to visual artists when their works are resold.[16]

The CRRA's psychological and economic benefits to artists are clear. Studies and anecdotal evidence show that many California artists have received significant royalty payments. *See* Reddy, *Droit de Suite* at 524. Perhaps more important, the CRRA has "an expressive function, encouraging respect for artists in society." Turner, *Artist's Right* at 362. In fact,

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[15] In today's dollars, that sale was equivalent to reselling a work that was originally purchased for about $4,800 for approximately $455,000.

See Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited October 21, 2015).

[16] Georgia and Puerto Rico have since passed laws that include more limited resale-royalty provisions. *See* Turner, *Artist's Right* at 331 n.7.

many of CLA's visual-artist members report that the law gives them an important incentive to continue their work.[17]

In addition, the CRRA serves California's local interests. By expressing respect for artists and their craft, the law fosters a culturally enriched community.[18] The statute also encourages fine artists to live and work in artisan-friendly California and to do business with the state's residents, because those artists know that a royalty obligation arises when a resident decides to resell a painting or sculpture.[19]

Thus, the CRRA encourages the development of a robust local artistic community and an art-sales system that is fair for visual artists.

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[17] *See, e.g.*, Motion for Judicial Notice, No. 12-56067 (9th Cir. March 7, 2013) ECF No. 29 ("MJN"), Ex. A (letter to Governor Brown from artist Leith Johnson explaining that the CRRA would allow her to work by providing her with the functional equivalent of work insurance).

[18] *See* MJN, Ex. B (letter from California Arts Council to Governor Brown explaining that the CRRA will encourage such an environment); *see also Morseburg*, 1978 WL 980, at *3 ("An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and vital community of artists.").

[19] *See* MJN, Ex. C (telegram to Governor Brown from Robert Rauschenberg stating that, in order to support the CRRA, he will channel as much of his business as possible through California); MJN, Ex. D (letter to Governor Brown from Artists for Economic Action stating that the CRRA makes it more attractive for artists to live and work in California).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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