No. 15-280

In The Supreme Court of the United States

SAM FRANCIS FOUNDATION, ESTATE OF ROBERT GRAHAM, CHUCK CLOSE, and LADDIE JOHN DILL,

Petitioners,

v.

CHRISTIE'S, INC., SOTHEBY'S, INC., and EBAY, INC.,

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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PETITIONERS' REPLY BRIEF

Respondents do not – because they cannot – contest the fundamental principle underlying the petition: The dormant Commerce Clause's purpose – rooting out economic protectionism – isn't advanced by a rule that invalidates statutes based solely on their territorial scope, without any inquiry whatsoever into whether those statutes are protectionist or otherwise discriminatory. As the petition argued, since the territorial reach of a statute alone says nothing about whether it has deleterious effects on interstate commerce, extraterritoriality cannot be the sole factor dictating a state law's constitutionality under the Commerce Clause. *See* Pet. 7-11, 23-24.

It should be no surprise, then, that some courts of appeals require a party to demonstrate more than merely that a statute applies to commerce "wholly outside" a state before undertaking the serious business of holding it unconstitutional. But not all courts do, and the Ninth Circuit, relying on language from *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), held "easily" that because a statute reached a Californian's out-of-state art sale, that statute was per se unconstitutional. Pet. App. 8. The en banc court did so without any assessment of whether the law at issue, California's Resale Royalty Act, actually impeded interstate commerce. Such rote application of a dormant Commerce Clause prohibition on extraterritoriality has been criticized since its inception by scholars and jurists; Judges Reinhardt and Sutton have both explicitly called for this Court to review whether such

a rule makes any sense at all. The Court should do so in this case. Respondents' arguments do not undermine that conclusion:

First, the circuits are presently applying two fundamentally different tests in an effort to make sense of *Healy*: Some ask only about a law's territorial scope before holding it unconstitutional; others ask about the law's actual impact on interstate commerce, *e.g.*, whether it imposes price controls on out-of-state goods. Left with no straightforward response to the fact that different circuits are applying *Healy* in incompatible ways, respondents misdirect. They argue that the first test applies when a statute "facially" reaches out-of-state commerce, and the second applies when a statute has the "practical effect" of reaching extraterritorially. *See* Opp. 16-19. But there's no coherent rationale for treating those functionally identical situations differently. And sure enough, the language in *Healy* – the language every court on all sides of the split purports to interpret – admits no such distinction. Indeed, *Healy* disavows that its rule considers anything *except* practical effects.

Second, it isn't true that "[n]o circuit would uphold" the Resale Royalty Act. Opp. 14. The Act would pass muster in any court that looks beyond the bare territorial scope of a statute and inquires into

whether it offends the actual purposes of the dormant Commerce Clause.[1]

Third, were the Act upheld – and even replicated by every state – respondents wouldn't find themselves subject to inconsistent regulations, as they suggest. They always would pay one amount, 5 percent of the sales price, to one person, the artist. Respondents contend that even this is unduly burdensome, but that's beside the point: The per se rule that respondents are defending cares nothing about *how* the law at issue affects commerce; it looks only at *where* the law's effects are felt. That's precisely the problem that occasioned this petition, *see* Pet. 8, Judge Reinhardt's opinion below, *see* Pet. App. 30, and Judge Sutton's opinion in *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring).

Finally, respondents' argument that the case might be resolved on alternate grounds elides the fact that they are unlikely to prevail on those alternate grounds. Meanwhile, the per se rule at issue here will not benefit from any factual development in the

[1] Petitioners certainly do *not* concede, however, that the invalidated portion of the Act regulates commerce "wholly outside" California. *Contra* Opp. 10. Indeed, far from conceding the point, the petition argued that the entire inquiry into whether a law applies "wholly outside" a state smacks of the hoary territorialism this Court has otherwise discarded, and should discard here. *See* Pet. 12, 26-28.

district court, and while this case proceeds, a significant portion of a state law will remain improperly in the dustbin.

The time is right for the Court to take up this important – and recurring – dormant Commerce Clause issue, which has been the subject of scholarly and judicial debate for years. As respondents concede, *see* Opp. 2, this case presents a particularly clean application of an exceedingly dubious extraterritoriality rule. The petition should be granted.

I. THE CIRCUITS' DISAGREEMENT AND CONFUSION ABOUT HOW TO TREAT EXTRATERRITORIALITY CANNOT BE PAPERED OVER BY RESPONDENTS' CONFECTED "CATEGORIES" OF EXTRATERRITORIALITY CASES.

The en banc Ninth Circuit held that a statute's extraterritorial reach alone is sufficient to compel its invalidation under *Healy*. *See* Pet. App. 8. But in the Tenth Circuit (for example) that's not so: Only a statute that is "(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses" is invalid per se. *Energy and Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015). Those approaches are in direct conflict.

That conflict is not resolved by respondents' manufactured distinction between a statute that

directly regulates commerce outside a state and one whose "practical effect" is to do so. *See* Opp. 18. Whether the regulation is explicit and direct, or implicit with "practical" consequences, the constitutional inquiry should be the same.

And *Healy* itself confirms there's no relevant basis for respondents' proposed distinction, calling for an inquiry directed *only* at a regulation's effects: "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State . . . is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The 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; *cf. Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1796 (2015) (for dormant Commerce Clause purposes, the distinction between taxes that directly burden interstate commerce and those that burden it only indirectly is an "arid" – and long since discarded – one).

Review is necessary because different courts approach that inquiry differently: Some read *Healy* to require the invalidation of a statute solely because it regulates commerce "wholly outside" a state, *see* Pet. 20-22; other courts require more than merely extraterritorial scope, *see id.* 14-17; and still other courts have vacillated, expressing confusion as to the proper approach, *see id.* 17-19. A law's validity shouldn't depend on the circuit in which its enacting state happens to lie. Clarity is needed, and only this Court can provide it.

II. THE RESALE ROYALTY ACT WOULD BE UPHELD UNDER ANY TEST THAT CONSIDERS MORE THAN JUST A LAW'S TERRITORIAL SCOPE.

Respondents are simply wrong that no court would uphold the Resale Royalty Act. *See* Opp. 14-16. Any court that asks whether a statute is protectionist or discriminatory – rather than simply whether the statute reaches extraterritorially – would uphold the Act.

For example, after observing that "'economic protectionism'" was the force motivating the decisions in *Healy* and *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Eighth Circuit upheld a Missouri statute that, by respondents' own definition, regulated conduct that occurred "wholly outside" Missouri. *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002). Missouri required a Delaware corporation with headquarters in Texas and a division in Missouri to obtain Missouri's regulatory approval before acquiring stocks or bonds issued by another utility – even if the other utility did not operate in Missouri at all. *Id.* at 505-06; *see* Opp. 5-6 (characterizing respondents' activities as extraterritorial because the offer, acceptance, and transfer of consideration for art they auction all occur outside California). Although the Missouri statute had a "wholly extraterritorial" sweep, the Eighth Circuit upheld it because it wasn't protectionist. And neither is the Resale Royalty Act.

The Tenth Circuit, too, would uphold the Act, relying on its holding in *Energy and Environment Legal Institute*. That's because the Act (1) is neither a price control nor a price affirmation regulation; (2) does not link prices in California to prices charged elsewhere; and (3) doesn't raise costs for a Californian's out-of-state rivals. *See* 793 F.3d at 1173 (listing the elements of the Tenth Circuit's test).

Respondents argue that the Act *does* control prices, because "basic economic principles . . . suggest that giving artists the right to extract 5 percent of the gross proceeds from art sales will . . . affect the price of those sales." Opp. 33. But that's a facile argument, for two reasons. First, just because a regulation incidentally affects price doesn't make it a price control. *See Energy & Env't Legal Inst.*, 793 F.3d at 1173-74 (requiring "more blatant[ ]" regulation of prices before invalidating a law); *compare id.* at 1173 (upholding a regulation that would likely have an effect on price) *with Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935) (holding unconstitutional New York's attempt to extend "a system of minimum prices to be paid" to Vermont producers). Second, to the extent the Act does impact price, it is to the *detriment* of the California seller.

The Act is therefore nothing like, for example, the price control regulation at issue in *Baldwin*. *Contra* Opp. 32. Unlike New York's attempt to raise Vermont's milk prices in that case, California's attempt to extract a royalty from its own residents doesn't impose a burden on out-of-staters in order to

keep Californians' art sales competitive: It imposes a burden only on Californians, wherever they make profitable art sales, and on art sales made in California. Far from protecting Californians, the Act burdens them uniquely.

III. UPHOLDING THE ACT WOULD NOT FORCE ANYONE TO SHOULDER A SIGNIFICANT REGULATORY BURDEN OR TRAMPLE ON BASIC PRINCIPLES OF FEDERALISM.

Respondents contend that if every state were to enact the Resale Royalty Act, the result would be hopelessly inconsistent regulation among different states. *See* Opp. 25-26. That's not true. No matter how many states were to enact it, the Act gives one 5 percent royalty right to only one person: the artist. Pet. App. 62-63.

Nor is there a basis for complaint even when the artist can't be located, and the seller or agent must turn over the royalty payment to a state's arts council. Contrary to respondents' argument, *see* Opp. 26, this would not require multiple 5 percent payments. Since the Act doesn't give the states a right of action to collect the royalty – only the artist has that – a seller or agent could easily choose between either the seller's state of residence or the state in which the sale took place, send the 5 percent royalty there, and exonerate itself from any liability to the artist. *See* Pet. App. 62-63. And under the assumption that

each state enacts California's law, the Act's freestanding statute of limitations ensures that the artist has the same amount of time to collect the money from whichever arts council holds it.

Respondents assert that the burden of attempting to locate an artist is nonetheless too heavy. *See* Opp. 25. But by the terms of respondents' own arguments, any burden imposed by the Act is entirely irrelevant to the dormant Commerce Clause extraterritoriality analysis on which they rely. *See* Pet. 7.

Moreover, the burdens of which respondents complain are easily alleviated: Don't know if a seller is a California resident? Ask the seller before accepting the consignment of art. Don't know who the artist is, or where to find him or her? Ask the seller. Or Google the artist: In this case, that would have located a contact for each named petitioner within seconds. Unsure if the sale will be profitable? Require the seller to disclose his or her purchase price. Still concerned about liability under the Act? Demand indemnification from the seller as a condition of auctioning the art.

Further, the Act's administrative burdens are little different than those this Court has held a state may impose in the realm of taxation: If respondents were selling something *to* Californians, their undisputed physical presence in the State would be a

sufficient basis for California to require them to withhold and remit Californian buyers' use tax. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 315-17 (1992).

And California's imposition of a royalty on its residents' out-of-state art sales does not undermine other states' decisions *not* to impose such a royalty. Other than trivial administrative costs (*e.g.*, postage), the burden of the Act falls solely on California residents (or others who choose to sell art in California), and then only after a sale of art is completed. It has no impact whatsoever on states that decline to impose a similar burden on their residents. Thus, while it may be true, as respondents suggest, that California can't force one of its residents to operate a restaurant in New York pursuant to California's health regulations, Opp. 27, California certainly is entitled to tax its resident on income earned from operating that restaurant. *See Wynne*, 135 S. Ct. at 1792 (noting that it's routine for states to tax their residents on income earned out-of-state). That would remain true even if New York chose ten times over not to levy its own tax on such income, and it's equally true of California's decision to require its residents to pay a 5 percent royalty on art sales, whether or not New York does the same.

Likewise, while California's traffic laws don't travel along with its residents driving in New York, Opp. 27, subject to ordinary choice of law principles, California law governing its residents' tort liability for an accident *can* travel with them to New York. *See*

Allstate Ins. Co. v. Hague, 449 U.S. 302, 313-14 (1981) (due process permits Minnesota, with "three contacts with the parties and the occurrence giving rise to the litigation," to apply its law to a Wisconsin accident). And New York would be in no position to complain about that. *See Babcock v. Jackson*, 191 N.E.2d 279, 284-85 (N.Y. 1963) (applying New York tort law to an Ontario, Canada accident involving New Yorkers).

What respondents' hypotheticals actually demonstrate, then, is that under modern principles of constitutional law, a state's regulatory reach is *not* circumscribed solely by its territorial boundaries. Nothing in respondents' opposition suggests any reason why such strict territoriality, otherwise a dead letter, should remain viable under the aegis of the dormant Commerce Clause – as it is in the Ninth Circuit and the other courts of appeals that subscribe to the same reading of *Healy*.

IV. NOTHING PENDING IN THE DISTRICT COURT PROVIDES A REASON FOR DENYING CERTIORARI.

The issue presented in the petition is one of national importance, regarding an "unsettled and poorly understood" rule of constitutional scope that conflicted and confused courts are applying to invalidate state laws and the fundamental state policies they serve. *See* Lea Brilmayer, Jack Goldsmith & Erin O'Hara O'Connor, *Conflict of Laws* 377 (7th ed.

2015) (describing dormant Commerce Clause extraterritoriality jurisprudence). Nevertheless, respondents insist that the Court should deny the petition because the case might later be disposed of on other grounds. That argument is meritless.

As for respondents' Copyright Act preemption defense, the same district court that decided this case held previously that Congress explicitly intended that the Copyright Act *not* preempt the Resale Royalty Act. *See* Pet. 4 n.1; *see also* H.R. Rep. No. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6931 ("For example, the law will not preempt a cause of action . . . for a violation of a right to a resale royalty"). Even more significantly, the Ninth Circuit already upheld the Resale Royalty Act against a preemption challenge under the 1909 Copyright Act, the relevant terms of which remain in effect in the current version of the Copyright Act. *See Morseburg v. Balyon*, 621 F.2d 972, 975-78 (9th Cir. 1980).

Respondents' Takings Clause argument should similarly fail. As the Ninth Circuit rejected a preemption argument in *Morseburg*, it also rejected a due process "assert[ion] that [Morseburg] has lost a fundamental property right" in being required to pay a 5 percent royalty on his sale of art. *Id.* at 979-80. Given the failure of Morseburg's due process challenge to the Act, "'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508

U.S. 602, 641 (1993) (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

The Court should not hesitate to grant certiorari here, in light of the nationwide importance of the issue presented, the fact that the Ninth Circuit has held a significant portion of a California law unconstitutional, and the fact that the validity of that holding will significantly impact further proceedings in this case. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (reviewing, before trial, a legal ruling "fundamental to the further conduct of the case"); *see also Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting) ("Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review.").

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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