No. 15-280

In The
Supreme Court of the United States

SAM FRANCIS FOUNDATION ET AL., PETITIONERS

v.

CHRISTIE'S, INC. ET AL.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether application of California's Resale Royalty Act to sales of fine art that take place wholly in other States violates the Commerce Clause.

CORPORATE DISCLOSURE STATEMENT

Respondent Christie's, Inc. is a privately held company. It has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Respondent Sotheby's, Inc. is a wholly owned subsidiary of Sotheby's, which is a publicly held corporation.

Respondent eBay Inc. is a publicly held corporation. It has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

By its express terms, California's Resale Royalty Act ("CRRA" or "Act") regulates sales of fine art that take place entirely in other States. Whenever a work of fine art is sold by a California resident in another State, the Act requires the seller or the seller's agent to locate the artist (regardless of where the artist lives) and pay the artist 5 percent of the gross sales price.

Petitioners do not dispute that California's statute expressly applies to wholly out-of-state sales. Nor do they dispute that they seek to apply it to such sales. Invoking California's statute, petitioners seek to impose onerous obligations on agents (and to collect damages, interest, punitive damages, and attorneys' fees) for art sales conducted entirely in States other than California—including in States that repeatedly have considered and declined to enact resale royalty legislation. In fact, one petitioner is a New York artist who is seeking to impose California's legislative policy on New York respondents for sales conducted entirely in New York, a State that has rejected more than ten attempts at similar legislation.

Such express extraterritorial regulation exceeds limits on state authority inherent in the Commerce Clause. California "has no power to project its legislation" into another State by regulating conduct that occurs wholly outside its borders. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *see Healy v.*

Beer Inst., 491 U.S. 324, 335-37 (1989). That longstanding principle flows from the Constitution's grant to Congress of exclusive authority over interstate commerce as well as the constitutional structure of federalism. Applying this settled law, every one of the twelve federal judges who has decided the merits has readily concluded that the CRRA is unconstitutional as applied to claims against agents based on out-of-state sales.

That straightforward conclusion warrants no further review. Petitioners point to no circuit that would have upheld California's statute as applied to out-of-state sales. Nor could they: every circuit to address the question agrees that a state law that expressly regulates wholly out-of-state commercial transactions is unconstitutional. That alone is reason to deny the petition.

In claiming a circuit conflict, petitioners focus on decisions involving a different issue: whether a state law that facially regulates only *in-state* conduct has an impermissible practical effect of controlling out-of-state conduct. But the constitutional flaw in the CRRA is that it facially regulates wholly *out-of-state* conduct, not merely that it has "out-of-state practical effects." Pet. App. 9. Regardless, the circuits are in accord in the "practical effects" decisions too.

At bottom, the instant cases present a rare situation of blatant extraterritorial state legislation. The decision below turns on the fundamental principle that the Commerce Clause precludes California

from expressly imposing its legislative policies on commercial transactions that occur wholly in other States. There is no need for this Court to grant review simply to confirm its longstanding precedent.

Review is further unwarranted because petitioners' claims fail for multiple reasons and the case is in an interlocutory posture. Resolution of the alternative grounds for dismissal could render disposition of the Commerce Clause issue unnecessary. These cases are pending on remand for the district court to consider those very grounds.

STATEMENT

A. The California Resale Royalty Act

1. The CRRA mandates that "[w]henever a work of fine art" is resold "and the seller resides in California *or* the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale." Cal. Civ. Code § 986(a) (Pet. App. 62) (emphasis added). Thus, by its express terms, the statute covers two types of sales: sales that "take[ ] place in California" ("in-state sales provision") and sales that take place outside California, so long as the seller happens to be a California resident ("out-of-state sales provision"). Given the in-state sales provision, the out-of-state sales provision has effect only where the sale takes place in another State.

The Act defines "fine art" as "an original painting, sculpture, or drawing, or an original work of art in glass." *Id.* § 986(c)(2) (Pet. App. 65). The Act exempts certain sales, including those for less than $1,000 and those "for a gross sales price less than the purchase price." *Id.* § 986(b)(2), (4) (Pet. App. 64). The artist may not waive the royalty or agree by contract to a royalty of less than 5 percent. *Id.* § 986(a) (Pet. App. 62). The right to receive the royalty survives the artist by twenty years. *Id.* § 986(a)(7) (Pet. App. 63-64).

An "artist" is "the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of [California] who has resided in the state for a minimum of two years." *Id.* § 986(c)(1) (Pet. App. 65). Accordingly, the Act regulates the resale of works by artists who are U.S. citizens regardless of where they reside or whether they have any ties to California. Petitioner Chuck Close, for example, lives in New York. ER1800.[1]

The Act also covers agents. When artwork is resold "at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist." Cal. Civ. Code § 986(a)(1) (Pet. App. 62). Under the out-of-state sales provision, these obligations apply regardless of where the agent resides or

[1] ER___ is the appellate Excerpts of Record.

the sale takes place, as long as the seller "resides in" California.

To carry out these obligations, therefore, every agent selling art anywhere in the world must determine, among other things: (1) whether the seller "resides in" California—this must be determined for *all* sellers so the agent can decide whether the CRRA applies; (2) whether the artwork resold for more than the seller paid for it—information to which the agent may not have ready access; (3) whether the artist is a U.S. citizen or resident of California who has lived in that State for at least two years; (4) whether the artist is deceased and, if so, whether he or she died within twenty years before the sale; and (5) the location of the artist or, if the artist is deceased, the location of any heirs or representatives.

If a seller or agent "is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be tran[s]ferred to the [California] Arts Council." *Id.* § 986(a)(2) (Pet. App. 62). The council will attempt to locate the artist. If it is unsuccessful and the artist does not file a written claim for the proceeds within seven years of the sale date, the "money shall be transferred to the council for use in acquiring fine art" for public buildings. *Id.* § 986(a)(5) (Pet. App. 63).

The geographic reach of the out-of-state sales provision is broad. By its terms, the Act applies equally to a sale through an art dealer in Florida or a gallery in New York, or, for that matter, a broker in

Belgium, so long as the seller is a Californian. That is true regardless of where the offer, acceptance, and actual exchange of consideration occur—and even if all occur outside California. *See* ER613 (California Lawyers for the Arts ("CLA") hailing the statute as a regulation of the "international" art market because it "extends to resales by a California resident which may in fact take place in New York or London"). Thus, as the court of appeals explained, the CRRA regulates "part-time" residents of other States who buy and sell art outside California, simply because they also happen to "reside in" California—"even if the [art], the artist and the buyer never traveled to, or had any connection with, California." Pet. App. 7-8.

To enforce its provisions, the Act gives artists and their heirs a California cause of action against "a seller or the seller's agent [that] fails to pay an artist" the required amount or "fails to transfer such amount to the [California] Arts Council." Cal. Civ. Code § 986(a)(3), (7) (Pet. App. 62-63). The artist or heirs must bring the action within three years of the sale date or one year after discovering the sale, whichever occurs later. *Ibid.*

2. California added the out-of-state sales provision despite warnings from its own Legislative Counsel that extending the statute to out-of-state sales would be unconstitutional. When the California legislature began considering the bill, the initial draft language would have applied only when "an original

work of fine art is sold at an auction or by a gallery or museum in California." ER563.

The initial proposal limiting the bill to in-state sales generated criticism that it would encourage sellers to sell through agents outside California, to the detriment of agents operating in California. ER577. At least in part to avoid that effect, the drafters amended the bill to apply "[w]henever a work of fine art is sold and the buyer or the seller resides in California or the sale takes place in California." ER581. A subsequent amendment removed the language applying to buyers residing in California. ER594.

Those amendments elicited a warning from California's Legislative Counsel. He told the bill's drafters and then-California Governor Jerry Brown that the bill "would constitute an undue burden on interstate commerce in contravention of the Federal Constitution in its application to sales which occur outside the State of California." ER585, 589-91, 603. That concern stemmed from the fact that the out-of-state sales provision addressed no "'local' problem," as well as "the possibility of conflict[ing] or duplicative regulation" as other States decided what regulations they would apply to the same sales. ER590-91. Despite these warnings, the legislature adopted the bill with the out-of-state sales provision intact, and the CRRA became effective in 1977. Cal. Civ. Code § 986(d) (Pet. App. 65).

As the district court observed, the CRRA has been sparsely enforced since its enactment. Pet. App. 48 n.3.

3. At least fifteen other States have considered and uniformly rejected similar regulations mandating a resale royalty. ER1387-90, 1410, 1516, 1600, 1604, 1637, 1640.[2] Indeed, New York (where respondents Christie's and Sotheby's reside) has rejected similar bills more than ten times, partially out of concern for the "potentially radical impact on the art market in the State of New York." ER1269, 1271-72, 1279-81, 1285-90, 1325-29, 1336-38, 1341-43, 1346-51, 1354-56, 1359-61, 1364-66, 1369-71, 1374-76, 1379-81. Besides California, only Puerto Rico has adopted a resale royalty provision. P.R. Laws Ann. tit. 31, § 1401h. Puerto Rico's law lacks any explicit limit to sales within Puerto Rico or by Puerto Ricans. *Ibid.*

B. Prior Proceedings

1. Proceedings in the district court

a. Petitioners filed three separate putative class action complaints against respondents—Christie's and Sotheby's (two New York auction houses) and eBay (the online marketplace operator). ER1800,

[2] Georgia has not adopted a similar resale royalty. *Contra* CLA Amicus Br. 16 n.16. Georgia's law simply permits an artist to contract for a resale royalty when the artist sells its work to Georgia for display in public buildings. Ga. Code Ann. § 8-5-7. South Dakota has a similar law. S.D. Codified Laws § 1-22-16(5).

1814, 1825. The complaints alleged that respondents sold works on behalf of California residents, or acted as the seller's agent for sales in California, but failed to withhold the statutorily required 5-percent royalty. ER1801-06. Petitioners also alleged that respondents violated California's Unfair Competition Law, Business and Professions Code section 17200. Petitioners requested royalties and interest, punitive damages, attorneys' fees, and injunctive relief. ER1807-09, 1819-22, 1830-33.

Respondents moved to dismiss on several alternative grounds including, *inter alia*, that the CRRA violates the Commerce Clause of the U.S. Constitution, is preempted by the federal Copyright Act, and violates the Takings Clause of the U.S. and California Constitutions. Respondent eBay also contended that it is not an "agent" of the seller and thus is not covered by the CRRA. The district court invited the California Attorney General to intervene to defend the CRRA's constitutionality (Dist. Ct. 11-cv-8604, Dkt. 22), but California did not do so.

b. The district court held that the CRRA violates the Commerce Clause because it "explicitly regulates applicable sales of fine art occurring wholly outside California." Pet. App. 54. The district court further concluded that the Act's out-of-state sales provision was not severable. Pet. App. 58-60. It thus held the entire Act unconstitutional and dismissed the complaints with prejudice. Pet. App. 60. The court accordingly declined to consider respondents' additional grounds for dismissal. Pet. App. 43-44.

2. Proceedings in the court of appeals

a. After argument before a three-judge panel, the Ninth Circuit requested supplemental briefing regarding whether en banc review should be granted in light of potentially conflicting statements in two of its own prior decisions. Pet. App. 41. Unlike here, those decisions concerned state laws that regulated indisputably in-state activities but that were alleged to have significant out-of-state practical effects. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 398 (2014). The court subsequently granted en banc review. Pet. App. 39.

Petitioners conceded before the court of appeals (and have not contested here) that they have asserted claims based on fine art sales that took place wholly out-of-state, with all elements of the sales occurring outside California. Pet'rs C.A. Br. 34.

Although the State of California had declined to weigh in before the district court or the three-judge panel, it participated as amicus curiae before the en banc court. Notably, California did not contend that the out-of-state sales provision would survive Commerce Clause scrutiny if the en banc court concluded (as it did) that the CRRA regulates sales occurring wholly outside California. Instead, the State pressed arguments that petitioners do not assert here. *See* California C.A. En Banc Amicus Br. 15-16. Despite

notice (Pet. 1), the State has not supported the petition to this Court.

b. The en banc court affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 4. All eleven members of the en banc panel agreed that the CRRA violates the Commerce Clause as applied to agents conducting sales transactions occurring wholly outside California.

i. The eight-member majority "easily conclude[d]" that the out-of-state sales provision violates the Commerce Clause. Pet. App. 8. The court explained that the provision "facially regulates a commercial transaction that 'takes place wholly outside the State's borders,'" a power reserved to the federal government. *Ibid.* (quoting *Healy*, 491 U.S. at 336). "For example, if a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the Act requires the payment of a royalty to the North Dakota artist." Pet. App. 7-8.

Despite the court's initial order requesting briefing on *Rocky Mountain* and *Harris*, the court concluded after full review that those decisions "do not apply here." Pet. App. 9. Those decisions involved the different situation where state laws "regulated *in-state conduct* with allegedly significant out-of-state practical effects." *Ibid.* By contrast, the CRRA "involves regulation of wholly out-of-state conduct," *ibid.*, and thus was unconstitutional under the "simple,

well established constitutional rule summarized in *Healy*." Pet. App. 12.

The court rejected petitioners' reliance on decisions involving state-imposed taxes. Pet. App. 9. The Act "does not impose a tax; it regulates conduct among private parties." *Ibid.*

Unlike the district court, however, the majority concluded that the out-of-state sales provision was severable, leaving the in-state sales provision in force. Pet. App. 12-14. It accordingly remanded to the three-judge panel to consider respondents' additional arguments supporting dismissal of the complaints in their entirety. Pet. App. 15.

ii. Although Judge Reinhardt questioned the wisdom of the extraterritoriality rule, he agreed with the majority that, "as applied to the actions of out-of-state agents in conducting a sale of art outside of California, the Act *directly* applies to 'commerce that takes place wholly outside of the State's borders,' and is therefore *per se* invalid under the [Supreme] Court's dormant Commerce Clause jurisprudence." Pet. App. 29-30 (concurring and dissenting in part). He would not have reached the question whether the Act is unconstitutional as applied to California sellers, because petitioners assert no claims against sellers. Pet. App. 20-24. But if he had, he would have disagreed with the majority on that limited question. Pet. App. 25-28. He also concluded that respondent eBay "is not an 'agent' within the meaning of the Act,

and is therefore not subject to the Act." Pet. App. 16 n.3.

iii. Judge Berzon, joined by Judge Pregerson, concurred in part. Like every other member of the en banc court, they agreed it "is clear" that the Act's out-of-state sales provision "directly regulates extraterritorial commercial transactions in violation of the Supreme Court's dormant Commerce Clause jurisprudence." Pet. App. 34. But they would have limited that holding to claims against agents based on out-of-state sales, leaving for another case the propriety of claims against California sellers who engaged in out-of-state sales as principals. Pet. App. 33-35.

c. On remand from the en banc panel, the three-judge panel remanded to the district court to resolve the remaining issues. Pet. App. 37.

3. Pending remand proceedings

The district court scheduled briefing on respondents' alternative grounds to dismiss, which would apply equally to claims based on in-state and out-of-state sales. That briefing is stayed pending resolution of the petition.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict Among The Circuits

1. No circuit would uphold an express regulation of wholly out-of-state sales like the one here

Petitioners do not contest that, by its very terms, the CRRA's out-of-state sales provision regulates commercial transactions occurring wholly outside California. Nor do they contest that they seek to apply the provision to such out-of-state sales. Pet. App. 8-9; *see* Pet. 2 (explaining that the Act applies to sales transacted "elsewhere," *i.e.*, outside California, and requires agents conducting those out-of-state sales "to withhold 5 percent of the sales price and pay it to the artist"). There is no conflict among the circuits on the unconstitutionality of such a law.

Petitioners cite no decision of this Court or any circuit that has sustained an express regulation by a State of commercial transactions that occur entirely outside its borders. Nor could they. The circuits that have addressed the question are in accord with the court below that such attempts at extraterritorial control violate the Commerce Clause. *E.g.*, *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001) (applying rule that "[w]hen a state statute regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state, the statute will be invalid under the dormant Commerce Clause," and upholding state law only after concluding it did

not violate either principle), *aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102-04 (2d Cir. 2003) (considering both whether Vermont law regulates commerce wholly outside its borders and whether it had that practical effect and concluding law had impermissible practical effect); *A.S. Goldmen & Co. v. N.J. Bureau of Statistics*, 163 F.3d 780, 786-87 (3d Cir. 1999) (explaining, "[i]f the transaction to be regulated occurs 'wholly outside' the boundaries of the state, the regulation is unconstitutional," and upholding the law because it applied only to in-state offers for sale); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489-90 (4th Cir. 2007) (employing rule that "the Commerce Clause 'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders'" and adopting saving construction of state law to avoid improper extraterritorial reach (quoting *Healy*, 491 U.S. at 335)); *Nat'l Solid Waste Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 660 (7th Cir. 1995) (striking down Wisconsin law for violating the "prohibition against direct regulation of interstate commerce by the states"); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (holding that "[e]xtraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way" and upholding Minnesota law after concluding it did not include such a requirement); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (holding that state law "attempt[ed] to regulate

interstate conduct occurring outside New Mexico's borders, and [was] accordingly a per se violation of the Commerce Clause"); *Bainbridge v. Turner*, 311 F.3d 1104, 1112 (11th Cir. 2002) (explaining, in the context of a discussion about the effect of the 21st Amendment on state liquor laws, that "laws that directly regulate commerce occurring in other states are invalid"); *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1358-59 (Fed. Cir. 2013) (vacating injunction under California law because it "impermissibly imposes the [California law] on entirely extraterritorial conduct" in violation of the Commerce Clause), *cert. denied*, 135 S. Ct. 2886 (2015).

In short, the CRRA's out-of-state sales provision would have been held unconstitutional in any circuit. That alone is sufficient to deny the petition.

2. The circuit decisions on which petitioners rely are inapposite "practical effects" cases

Attempting to claim a circuit conflict, petitioners point to decisions addressing an issue not presented here. Each of those decisions involves a regulation of *in-state* conduct with allegedly impermissible "practical effects" in other States. As all members of the en banc court of appeals agreed, this is not such a case. Pet. App. 9; Pet. App. 29 (Reinhardt, J., concurring and dissenting in part) ("Nor can it be said that as applied to out-of-state agents this case is a 'practical effects' case * * * ."). The petition thus presents no

opportunity to provide further clarity on that different situation.

In contending that the First, Eighth, and Tenth Circuits diverge from the decision below, petitioners point to *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), *vacated sub nom. IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091 (2011). Pet. 14-15. Unlike the CRRA's out-of-state sales provision, the Maine law upheld in *Mills* did "not regulate wholly extraterritorial commercial transactions." 616 F.3d at 29. Rather, it regulated the use of data about prescription drug prescribers licensed in Maine. *Id.* at 29-30. The law "affect[ed] only Maine prescribers and regulate[d] transactions that impact Maine, with incidental effects elsewhere." *Id.* at 29. Thus, unlike here, the question facing the court was whether the out-of-state effects of that in-state regulation rendered it invalid.

Petitioners' Eighth Circuit decision likewise is a "practical effects" case. Pet. 17 (discussing *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503 (8th Cir. 2002)). At issue in *Southern Union* was a Missouri regulation requiring utilities regulated by Missouri to obtain pre-approval to purchase securities of another utility because of the potential effect on regulated rates of return in Missouri. 289 F.3d at 507-08. Unlike here, the law was not "merely 'extraterritorial' regulation of interstate commerce." *Id.* at 508. Rather, the question was whether that "regulation of a local public utility for the protection of local Missouri

ratepayers" had impermissible extraterritorial effects. *Ibid.*

The Tenth Circuit decision cited by petitioners (Pet. 15-17) is a "practical effects" case too. *See Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015) (petition for certiorari filed October 9, 2015, in case No. 15-471). The Colorado statute at issue in *Epel* required energy producers to certify that 20 percent of the electricity they sell within Colorado to Colorado consumers comes from renewable sources. *Id.* at 1170. The question before the court was whether that regulation of "the quality of a good sold to in-state residents" had impermissible out-of-state effects. *Id.* at 1173.

Indeed, petitioners' suggestion of a conflict with the decision below is belied by *Epel*'s reliance on the Ninth Circuit's decision in *Harris*. *Id.* at 1175 (citing *Harris*, 729 F.3d at 951). *Harris* is the same decision that the en banc Ninth Circuit concluded "do[es] not apply here." Pet. App. 9. *Epel* is distinguishable for the same reason: "[u]nlike this case—which involves regulation of wholly out-of-state conduct"—both *Epel* and *Harris* "concerned state laws that regulated *in-state conduct* with allegedly significant out-of-state practical effects." *Ibid.*

The same is true of the Second and Third Circuit decisions to which petitioners point. Pet. 17-19 (discussing *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007); *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012)). In

SPGGC, the Second Circuit addressed a Connecticut gift-card law that applied "only to sales of gift cards in Connecticut." 505 F.3d at 194. And in *Sidamon-Eristoff*, the Third Circuit considered a law that applied only to travelers checks sold in New Jersey. 669 F.3d at 364, 372-74. Unlike here, the question in those cases was whether the regulation of in-state sales had impermissible out-of-state effects.

In sum, the decisions to which petitioners point are fundamentally inapposite. The outcome here follows from the straightforward principle that a state law is per se invalid if it "facially regulates a commercial transaction that 'takes place wholly outside of the State's borders.'" Pet. App. 8 (quoting *Healy*, 491 U.S. at 336). Indeed, although the Ninth Circuit apparently decided to hear these cases en banc to clarify its own "practical effects" precedent (Pet. App. 41), it ultimately concluded the "practical effects" decisions were not implicated here. Pet. App. 9.

3. *In any event, there is no conflict among the circuits in the "practical effects" decisions*

Even if the "practical effects" decisions were relevant here, that still would be no cause for review. The courts of appeals are in accord as to the legal rule to apply in that different situation.

Petitioners contend (Pet. 14) that the First, Eighth, and Tenth Circuits "flatly reject" the rule that a state law with the practical effect of regulating

beyond a State's borders can be invalidated for that reason. But in the First Circuit decision relied on by petitioners, the court acknowledged the legal rule that an in-state regulation could be per se invalid based on its "practical effects" elsewhere. *Mills*, 616 F.3d at 29 & n.27; *see Concannon*, 249 F.3d at 79 (First Circuit applying principle that a state law is unconstitutional if it "has a practical effect of controlling conduct outside of the state").

The statement in *Mills* on which petitioners seize (Pet. 15) simply observed that not "*all* extraterritorial applications" will render a state law per se invalid. *Mills*, 616 F.3d at 29. Moreover, the *Mills* court expressly rejected the notion (asserted by the petition, Pet. 20-21) that its decision was inconsistent with the Seventh Circuit: "[t]his holding does not put our circuit at odds with a recent panel opinion of the Seventh Circuit." *Id.* at 31 n.33 (discussing *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010)).

In the Eighth Circuit, too, "a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." *Cotto Waxo*, 46 F.3d at 793-94 (upholding law because it regulated only in-state sales); *see Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001) (approving decision striking down a South Dakota law "because it necessarily required out-of-state commerce to be conducted according to South Dakota terms").

The Eighth Circuit did not adopt a different rule in *Southern Union*. *Contra* Pet. 17. Although *Southern Union* did describe this Court's "recent Commerce Clause decisions" as limiting the "per se rule of invalidity 'to provisions that patently discriminate against interstate trade,'" the "recent" Supreme Court decisions that it cited all pre-dated *Cotto Waxo*, which *Southern Union* did not purport to repudiate. 289 F.3d at 508 (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)).

The Tenth Circuit likewise applies the rule that "a statute will be invalid *per se* if it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state." *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307-09 (10th Cir. 2008) (quotation marks and citation omitted) (upholding law based on Kansas's stipulation that it applied only to loan offers made in Kansas). To suggest otherwise, petitioners point to dicta in *Epel* discussing extraterritoriality jurisprudence in broad strokes. Pet. 16-17. Those statements, of course, must be understood in light of the facts of that case, which involved regulation of electricity sales within Colorado to Colorado consumers. 793 F.3d at 1170. The holding of *Epel* was simply that a per se rule of invalidity did not apply in that circumstance. *Id.* at 1173-74.

And far from being "confused" (Pet. 17-19), the Second and Third Circuits apply the same rule as every other circuit. The Second Circuit held unconstitutional as a "*per se* violation of the dormant

Commerce Clause" a Vermont law criminalizing certain Internet communications. *Booksellers*, 342 F.3d at 102-04. In doing so, it expressly "join[ed] the Tenth Circuit," which held a similar statute unconstitutional. *Ibid.* (citing *ACLU v. Johnson*, 194 F.3d 1149, 1158, 1162-63 (10th Cir. 1999)). Likewise, as the petition acknowledges (Pet. 19), the Third Circuit has applied a per se rule of invalidity for state laws where "their extraterritorial impact is so great that their 'practical effect * * * is to control conduct beyond the boundaries of the state.'" *A.S. Goldmen*, 163 F.3d at 784 (quoting *Healy*, 491 U.S. at 336; omission in original).

The Second Circuit statement to which petitioners point for that circuit's supposed "confusion" (Pet. 17-18) is nothing more than repetition of this Court's own recognition in *Brown-Forman* that "'there is no clear line'" separating laws that are per se invalid because they have the practical effect of regulating extraterritorially from laws subject to the balancing-of-interests test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *SPGGC*, 505 F.3d at 193 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). And in the single decision cited by petitioners for the Third Circuit's "silent" confusion (Pet. 18-19), the circuit balanced the interstate burden against the local benefits under *Pike* because the challenger had not argued for any other approach. *Sidamon-Eristoff*, 669 F.3d at 372 ("Because Amex has not alleged that

heightened scrutiny applies, we look to the *Pike* balancing test.").

Furthermore, and contrary to the premise of the petition (Pet. 20-22), the Sixth Circuit understands its per se rule in "practical effects" cases to be "similar" to the rules in the Second, Third, Eighth, and Tenth Circuits and consistent with the tests in "five more circuits"—the First, Fourth, Seventh, Ninth, and Eleventh. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 645-46 (6th Cir. 2010) (collecting cases). The Seventh Circuit likewise has observed that the Commerce Clause's extraterritoriality limits have "been applied consistently by the circuits." *Nat'l Solid Waste Mgm't*, 63 F.3d at 660 (citing decisions from the Ninth and Tenth Circuits).

Given these explicit statements of agreement, petitioners' claims of division ring hollow. Thus, no review would be warranted even if the "practical effects" decisions were relevant here (which they are not).

B. The Court of Appeals' Decision Is Correct

Review also is unwarranted because the court of appeals correctly applied this Court's longstanding precedent.

1. California's blatant extraterritorial regulation is unconstitutional under long-settled law

Every one of the twelve federal judges who has decided the merits has readily concluded that, under

this Court's precedent, the CRRA cannot constitutionally apply to claims against agents based on out-of-state sales. Pet. App. 15 (en banc majority), 29 (Reinhardt, J.), 34 (Berzon and Pregerson, JJ.), 54 (district court). That conclusion is correct.

The Constitution assigned to Congress the exclusive authority "[t]o regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. It did so to avert the "drift toward anarchy and commercial warfare" that had occurred under the Articles of Confederation. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949); *see Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015). As a consequence, each State's legislative authority over commerce is limited, and one State "has no power to project its legislation" into another State by adopting laws directly regulating conduct occurring entirely in the other State. *Baldwin*, 294 U.S. at 521; *see Bonaparte v. Appeal Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."). That limit ensures that state autonomy over "local needs" does not inhibit "the overriding requirement of freedom for the national commerce." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976) (quotation marks and citation omitted).

Accordingly, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336. That is because the Constitution "placed beyond the power of a state, without the

mention of an exception," the explicit imposition of duties or the like "upon interstate commerce." *Baldwin*, 294 U.S. at 522. A State's effort to regulate activity wholly beyond its borders thus "exceeds the inherent limits of the enacting State's authority." *Healy*, 491 U.S. at 336.

California exceeded those constitutional limits. On its face, the CRRA regulates art sales taking place wholly in another State any time a California resident happens to be the seller. Indeed, the only effect of the out-of-state sales provision is to extend the CRRA to sales taking place outside California.

The burdens that California has imposed on out-of-state sales are substantial. Pet. App. 10 n.1 (rejecting assertion that the Act's burdens are minor). The CRRA requires agents conducting out-of-state sales to comply with a series of regulatory requirements, "affirmatively to look for the artist and to pay the artist a royalty" of 5 percent of the gross sales price—regardless of where the artist lives and whether he or she has any ties to California. *Ibid.*; *see supra* p. 5. If neither the seller nor the agent fulfills those obligations, the CRRA gives all U.S. citizen-artists a California cause of action for damages and attorneys' fees. *See supra* pp. 4, 6.

This extraterritorial reach is particularly problematic because it creates the "impermissible risk" of "inconsistent regulation by different States." *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *id.* at 95 (Scalia, J., concurring in part). "If

one state may regulate" art sales occurring wholly outside its borders, "so may all the others," and the result could be a "serious impediment to the free flow of commerce." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945); *see Healy*, 491 U.S. at 336-37; *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality) (reasoning that if one State "may impose such regulations, so may other States" and interstate commerce "would be thoroughly stifled").

In fact, inconsistent regulation already exists. If a California resident sells art within Puerto Rico, for example, Puerto Rico's and California's laws both would require auction houses or other agents to pay the 5-percent royalty to each sovereign's respective authority when the artist cannot be located. Cal. Civ. Code § 986(a)(5) (Pet. App. 63); P.R. Laws Ann. tit. 31, § 1401h.[3] That would require an agent to pay out 10 percent of the gross proceeds. Yet neither statute entitles the artist to more than a 5-percent royalty. *Cf. Wynne*, 135 S. Ct. at 1801-02 (state laws creating threat of double taxation violate the Commerce Clause). The Commerce Clause prevents the proliferation of such incompatible state laws. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) ("[O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate

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[3] "Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine in the same fashion as the states." *Trailer Marine Transp. Co. v. Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992).

to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.").

Moreover, California has interfered with other States' legislative prerogatives *not* to have resale royalties within their borders. At least fifteen States (including New York) have explicitly considered and declined to adopt such legislation. *See supra* p. 8 & n.2. The court of appeals' decision ensures that other States remain free to pursue their own policies, without having California's forced upon them.

Contrary to the suggestion of petitioners and their amicus (Pet. 13; CLA Amicus Br. 12), the decision does not deprive California of its ability to experiment with resale royalty rights. It simply (and properly) limits California to conducting that experiment within California—the only territory within which it has the right to legislate.

The court of appeals likewise correctly concluded that the mere fact that someone resides in California is insufficient to give California control over his or her activities outside the State. Pet. App. 7-12. Just as California may not impose its health and safety regulations on a New York restaurant (even if owned by a California resident) or its traffic regulations on a driver in New York (even if the driver's permanent place of residence is California), it may not regulate art sales taking place there. That has long been settled. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (Virginia could not "prevent its residents

from traveling to New York to obtain" abortion services or "prosecute them for going there"); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (Texas was "without power to affect the terms of contracts" made by a state resident in Mexico); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (Missouri cannot regulate contracts entered into in New York based solely on the fact that one party was a Missouri resident).

Furthermore, as the concurring judges recognized, petitioners' claims fail under an even narrower principle. Pet. App. 29 (Reinhardt, J.); Pet. App. 34 (Berzon, J.). Petitioners have not sued any California sellers; instead, they have sued respondents by invoking the CRRA's "agent" provisions. Thus, even if California could constitutionally require California *sellers* to pay royalties based on their out-of-state transactions, it cannot regulate the out-of-state commercial activities of *agents*. As this Court reasoned in *Bigelow*: not only could Virginia not have prohibited its citizens from traveling to New York to obtain services, it "could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State." 421 U.S. at 822-23; *see id.* at 824 (noting that "Virginia possessed no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral

services"). Likewise, California has no authority to regulate how agents conduct their businesses outside California. *See St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 349 (1922) ("It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside.").[4]

Accordingly, as the en banc court correctly concluded, the answer on the facts here is "eas[y]" and "clear." Pet. App. 8; Pet. App. 34 (Berzon, J., concurring). There is no need for this Court to grant review simply to apply its settled law to confirm that conclusion.

2. Petitioners offer nothing that would warrant overturning this bedrock principle of federalism

Petitioners never actually contend that the CRRA is constitutional under this Court's settled law. *See* Pet. 23-28. Instead, they ask this Court to grant certiorari to "extirpate" (Pet. 23) the rule barring States from expressly regulating commercial transactions in other States. But this principle is so fundamental to our federal system that petitioners cannot muster a single precedent supporting the outcome

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[4] Petitioners rightly have abandoned their arguments that the CRRA could be upheld by analogizing it to a tax. The court of appeals correctly rejected those arguments "because the Act does not impose a tax; it "requires the seller or the seller's agent to pay a royalty *to the artist*, a private party, not to the government." Pet. App. 9.

they seek. Nor can they offer any good reason for such a radical change in the law, which would have far-reaching negative consequences.

Every *stare decisis* criterion weighs heavily against disturbing the centuries-old rule against extraterritorial legislation by States. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("antiquity of the precedent," reliance interests, and workability favor preserving precedent). Businesses rely on this Court's common sense rule that commercial transactions taking place entirely outside the boundaries of a State will not be subject to the control of that State's laws. And the rule is eminently workable; applying it requires nothing more than traditional statutory construction tools.

Although petitioners suggest it is "often" difficult to assess whether conduct occurs "wholly outside" a State (Pet. 26), no such difficulty is present here. Both lower courts concluded that petitioners seek to apply the statute to transactions occurring entirely outside California. Pet. App. 8, 54. Petitioners conceded that point below (Pet'rs C.A. Br. 34) and their question presented here is premised on it. *See* Pet. i (asking whether the Commerce Clause requires "invalidation" of a state law that "regulates commerce occurring beyond the borders of the state that enacted it"). In any event, courts routinely determine the location of relevant events. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (specific jurisdiction); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 452-54 (2007) (patent

infringement liability); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (choice of state substantive law).

Furthermore, *stare decisis* holds "special force" when "Congress remains free to alter what [the Court] ha[s] done." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quotation marks and citation omitted). Because that is true with respect to decisions rooted in the Commerce Clause's limits on state authority, this Court has been particularly reluctant to overturn its precedent. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992). Petitioners offer no good reason to take that extraordinary step here.

3. This Court has not implicitly limited its precedent, and the suggested limits would not affect the outcome in any event

Contrary to petitioners' suggestion (Pet. 12, 25), this Court has not implicitly limited invalidity under the Commerce Clause to discriminatory or protectionist state laws. A State simply has "no power to project its legislation" into another State by regulating conduct that occurs wholly outside its borders. *Baldwin*, 294 U.S. at 521; *see supra* pp. 23-25. New York's regulation of milk prices in *Baldwin* applied the same price controls to milk produced in and out of state. *Baldwin*, 294 U.S. at 519. Yet this Court held it unconstitutional. *Id.* at 521-22.

But even if the Commerce Clause were so limited, it would not change the outcome here. To the extent the statute in *Baldwin* was protectionist (*see* Pet. 25), the CRRA is protectionist in the same way. Having subjected milk produced in New York to a pricing constraint, New York sought to protect in-state producers by equally burdening milk produced out of state. *Baldwin*, 294 U.S. at 519. This Court held that New York was not free to level the playing field by enforcing the same constraint on milk produced outside its borders. *Id.* at 521-22.

So too here. When imposing a resale royalty on sales of fine art within California, California was not free to protect its own art market and in-state agents by similarly burdening out-of-state sales. But that is exactly what California tried to do: it added the out-of-state sales provision after legislators were warned that the proposed in-state-only royalty would "encourage sellers to consign works to dealers and auction houses outside California, since it can only apply to California sales." ER577; *see supra* p. 7.

Nor has this Court implicitly confined the Commerce Clause's constraint on extraterritorial state laws to price controls. *Contra* Pet. 25 (citing *Walsh*, 538 U.S. at 699). The principles underlying this Court's cases are not so limited, nor are the holdings themselves. *See, e.g.*, *MITE*, 457 U.S. at 642-43 (plurality invalidating Illinois regulation of tender offers); *Sullivan*, 325 U.S. at 781-82 (invalidating Arizona law limiting the length of trains).

No decision of this Court supports the notion that a State can reach beyond its borders and explicitly regulate—in pricing or any other terms—commerce occurring entirely in other States. The result in *Brown-Forman* would have been no different had New York attempted to impose its drinking age in other States, whether generally or with respect to traveling New York residents, rather than regulate pricing. *See Brown-Forman*, 476 U.S. at 580-84. Nor, for example, could Missouri regulate loan agreements entered into in New York. *See Head*, 234 U.S. at 161. Nothing in *Walsh* suggests the Court was *sub silentio* restricting the application of decades of Commerce Clause jurisprudence to only price-control laws.

Limiting the extraterritoriality rule to price controls would not save the CRRA in any event. It ignores basic economic principles to suggest that giving artists the right to extract 5 percent of the gross proceeds from art sales will not affect the price of those sales. Although the CRRA applies only if an art work is sold for more than the seller paid for it, Cal. Civ. Code § 986(b)(4) (Pet. App. 64), there is no requirement that the resale be profitable. The 5-percent royalty is based on the gross resale price (without any deduction for expenses such as commissions, legal fees, marketing, shipping, insurance, or the costs of complying with the CRRA). A seller therefore must demand a higher sales price to obtain the same return from an art resale despite the 5-percent royalty; moreover, if the price is not high enough to absorb the royalty, the sale may not occur

at all. Again, while so burdening the pricing of in-state sales, California was not free to similarly burden sales in other States.

4. None of petitioners' remaining arguments is reason to grant review

None of petitioners' remaining arguments justifies this Court's review.

The decision below represents no "sweeping" application of this Court's precedent. Pet. 11. California's express regulation of commercial transactions that take place completely in other States falls squarely within the core of the limitations placed on States by the Commerce Clause. *See supra* pp. 23-27.

Nor do the circumstances here present a situation where States "will have a difficult time knowing in advance whether their laws will satisfy the rule." Pet. 11. To the contrary, California's Legislative Counsel warned the legislature that the out-of-state sales provision, if enacted, would run afoul of the Commerce Clause. *See supra* p. 7. And that warning came even before this Court's decisions in *MITE*, *Brown-Forman*, and *Healy*.

Although petitioners attempt to find support for their petition from Judge Gorsuch's decision in *Epel*, he was addressing a different situation. Reviewing a facially *in-state* regulation, Judge Gorsuch was responding to invocation of the "grander proposition" that "*any* state regulation with the practical effect of control[ling] conduct beyond the boundaries of the

State" must be "automatically" invalidated. *See Epel*, 793 F.3d at 1174 (emphasis added). The Act here falters under a much narrower principle. To borrow language from Judge Gorsuch, the situation here is one "so obviously inimical to interstate commerce" that there is no need for "more searching inquiry." *Ibid.*

Similarly, petitioners' reliance on a concurring opinion by Judge Sutton falls flat. This is not a situation where "it is exceedingly difficult to understand which extraterritorial effects exceed [the extraterritoriality doctrine's] bounds and which do not." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring), *cert. denied*, 134 S. Ct. 89 (2013). To the extent Judge Sutton was suggesting that the Due Process Clause could do all the work in preventing a State from legislating completely outside its territorial bounds (*see* Pet. 27-28), he did not have the benefit of this Court's decision last Term reaffirming that the two Clauses embody distinct limits on state authority. *Wynne*, 135 S. Ct. at 1798-99. Indeed, in *Quill*, this Court already turned down an invitation (similar to petitioners') to overrule a longstanding Commerce Clause doctrine on the theory that it had been undermined by an alleged shift in the role of territorial limits under the Due Process Clause. 504 U.S. at 312. In any event, the fact that the CRRA may be invalid under multiple constitutional doctrines is simply further reason to deny review.

In the end, petitioners' critiques of Commerce Clause jurisprudence are academic here. A situation involving such blatant extraterritorial regulation of commercial transactions occurring entirely in other States is unlikely to recur. And the outcome here would be the same under any standard. *See* Resp'ts C.A. Br. 12-31 (contending the CRRA is invalid both because it facially controls wholly out-of-state transactions and because it has the practical effect of doing so); Resp'ts Joint Mot. to Dismiss 14-16 (contending the CRRA is invalid because it places an undue burden on interstate commerce).

C. The Alternative Grounds To Support The Judgment And The Interlocutory Posture Are Further Reasons To Deny Review

Because the court of appeals held the out-of-state sales provision severable from the remainder of the Act, it remanded to the district court to address respondents' additional bases for dismissal of the complaints. Substantial authority supports these alternative grounds, which are independently sufficient to sustain dismissal of petitioners' claims based on both in-state and out-of-state sales.

First, the federal Copyright Act preempts the CRRA in two separate ways. *See* Resp'ts C.A. Br. 58-72. The CRRA contravenes the federal first-sale doctrine by dictating the terms of subsequent sales and granting artists a financial interest in the copyrighted work beyond the first sale. *See* 17 U.S.C. § 109(a); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133

S. Ct. 1351, 1363 (2013). The CRRA also purports to create distribution rights equivalent to those protected by the Copyright Act, running afoul of its express-preemption provision. *See* 17 U.S.C. § 301(a). Leading treatises thus have concluded that the Copyright Act preempts the CRRA. 2 Melville & David Nimmer, *Nimmer on Copyright* § 8C.04 ([C][1] (Matthew Bender rev. ed. 2015); 2 William F. Patry, *Copyright Law and Practice* 1129 n.235 (1994).

Second, the CRRA exacts an unconstitutional taking in several ways. Under the Takings Clause, the government's duty to pay just compensation is triggered by the CRRA's forcible transfer of part of the specifically identifiable proceeds of particular transactions. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426-31 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599-600 (2013). The CRRA also effects a taking without just compensation by mandating a monetary payment as a condition of the owner's right to resell his artwork. *See Koontz*, 133 S. Ct. at 2599-600.[5]

If this Court were to grant review, respondents would be "free to defend [their] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered

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[5] As Judge Reinhardt concluded, respondent eBay is also entitled to dismissal because it "is not an 'agent' within the meaning of the Act, and is therefore not subject to the Act." Pet. App. 16 n.3.

by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Because a ruling for respondents on alternative grounds would negate the necessity of reaching the Commerce Clause issue, that is further reason to deny review.

Finally, the petition's interlocutory posture is "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Ibid.* "[B]ecause the Court of Appeals remanded the case[s], [they are] not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). The remand proceedings could render disposition of the question presented unnecessary to the ultimate resolution of these cases. No extraordinary circumstance warrants review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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