No. 16-_____

IN THE

Supreme Court of the United States

KEVIN MARILLEY; SALVATORE PAPETTI; SAVIOR PAPETTI, on behalf of themselves and similarly situated

Petitioners,

v.

CHARLTON H. BONHAM, in his capacity as director of the California Department of Fish and Wildlife,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California charges substantially higher fees for commercial fishing licenses to fishermen from other states than it does to its own residents. It successfully defended those fees in the *en banc* Ninth Circuit (which voted 6-5 in favor of the State) on the theory that it was permissible to use these higher fees to recoup a "subsidy" nonresident fishermen were receiving from California, regardless of whether or how much of the same subsidy competing, California-resident fishermen were asked to pay back. The question presented is:

Whether the Privileges and Immunities Clause of Article IV prohibits a State from preferentially subsidizing its own residents in the pursuit of a common calling governed by the Clause, to the detriment of their nonresident competitors.

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INTRODUCTION

This case involves an unusually precise and untenable disagreement among the lower courts on an important issue of federal law that divided the *en banc* Ninth Circuit below as closely as possible. In fact, of the fifteen federal judges who have voted in this case, more have sided with petitioners than respondent. That includes the district court, the initial panel majority, and the five dissenters on the eleven-judge *en banc* court. *See* Pet.App.28a (M. Smith, J. dissenting); Pet.App.48a (Reinhardt, J. dissenting).

As both the *en banc* proceedings and close vote suggest, this petition presents a compelling question of federal law—one at the heart of the Founders' constitutional design. That question is whether a State may choose to preferentially subsidize its own residents' commercial use of the State's natural resources, to the detriment of nonresident competitors who need access to the same resources to make their living. The *en banc* majority said "yes." It held that California could charge facially discriminatory fees for commercial fishing licenses to out-of-state residents up to the point of recouping from them any "subsidy" that the State provided by spending tax dollars to maintain the fishery—even though that left nonresident fishermen paying far more than their subsidized, in-state competitors for the same resources. The correct answer is "no." Such preferential subsidies violate the essential character of our federal union; even the far-weaker bonds of the Articles of Confederation unequivocally prohibited such discrimination.

This issue has divided not only the Ninth Circuit, but the lower courts as well. Two courts (the Ninth Circuit and the New Jersey Supreme Court) have approved these kinds of preferential subsidies, while two courts (the Fourth Circuit and the Alaska Supreme Court) have rejected them. This disagreement calls with particular force for this Court's resolution because it presents a uniquely untenable intra-jurisdictional conflict: Alaska's differential fees have been struck down by its state courts, even though its federal courts would now be compelled to uphold them. *Compare* Pet.App.28a *with Carlson v. Alaska*, 798 P.2d 1269 (Alaska 1990). Moreover, it creates a uniquely unfair regime covering some of the Nation's most valuable fisheries: Fishermen from Washington to Hawaii now avoid higher fees in Alaska's rich coastal waters, while Alaska fishermen receive no comparable hospitality away from home.

Resolving this disagreement is also important for this area of the law. Discriminatory fees like these have become widespread, even though this Court's precedents almost certainly condemn them. *See, e.g.*, *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). That is not surprising: States have every incentive to favor their own residents in these circumstances because nonresidents necessarily lack political power—except, of course, in their home states, which can be expected to retaliate against protectionism in kind. *See, e.g.*, *Austin v. New Hampshire*, 420 U.S. 656, 662-63 (1975). This Court's intervention is thus necessary not only to reinforce precedents the states are ignoring, but also to break the retaliatory cycle that

was the animating concern behind the very clause at issue. Indeed, this Court has long shown a "heightened concern for the integrity of the Privileges and Immunities Clause" precisely because "prevent[ing] retaliation was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Id.*

As the dissenters explained below, Pet.App.47a-48a, the Ninth Circuit's high-profile, *en banc* decision will create an even stronger temptation for California (and other states) to hoard state resources for state residents, and thus weaken the economic ties that have bound the Nation from its inception. And yet this Court cannot await another case to check that dangerous impulse, because that case may never come. Fishermen and other migratory workers typically lack the resources to bring cases like this, particularly because sovereign immunity prevents them from seeking anything other than prospective relief. As Judge Graber indicated below, *see* Pet.App.65a, this is a split the Court has perhaps already waited too long to resolve.

In short, the question presented divides lower courts—including state and federal courts within the same jurisdiction—and is presented here in unusually clear terms by the closely divided *en banc* decision below. This Court must eventually resolve the uncertainty created by the lower courts' irreconcilable decisions in this area, and it is hard to imagine a better vehicle than this one. Certiorari should be granted.

PETITION

Petitioners respectfully seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's *en banc* opinion (Pet.App.1a-49a) is published at 844 F.3d 841. The panel opinion (Pet.App.50a-78a) is published at 802 F.3d 958. The district court's decision (Pet.App.79a-127a) is unpublished but available at 2013 WL 5745342.

JURISDICTION

The Ninth Circuit's judgment issued December 21, 2016. Pet.App. 28a. Justice Kennedy extended this petition's due date to May 20, 2017. *See* No. 16A881. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Privileges and Immunities Clause of Article IV provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATEMENT

I. Legal Background

The Privileges and Immunities Clause requires each State to provide the same "privileges and immunities" to residents of other states as it provides to its own. The Clause was "designed 'to place the citizens of each State upon the same footing with

citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1869)). The goal was "to create a national economic union," *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985), and it is "therefore not surprising that this Court repeatedly has found that 'one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.'" *Id.* (quoting *Toomer*, 334 U.S. at 396).

The Clause's "norm of comity" predates even the Constitution itself. As this Court has explained, the Articles of Confederation "reveal … the concerns of central import to the Framers," who adopted the Privileges and Immunities Clause to address the widespread, pre-constitutional "practice of some sates denying to outlanders the treatment that its citizens demanded for themselves." *See Austin*, 420 U.S. at 660. The fourth Article provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States … shall be entitled to all privileges and immunities of free citizens in the several States; and … shall enjoy therein all the privileges of trade and commerce, *subject to the same duties, impositions and restrictions as the inhabitants thereof respectively*.

Id. (emphasis added). Article IV's drafter, Charles Pinckney, "assured the Convention" that it was

"formed exactly upon the principles of the 4th article of the present Confederation," *Id.* at 661 n.6. Those principles were thus "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation." *Id.* at 661.

Because the Clause imposes a strict "rule of substantial equality of treatment" for residents and nonresidents, *id.* at 665,[1] this Court has recognized that not *all* residency benefits can possibly fall within its scope. For example, this Court has distinguished between laws governing *recreational* use of natural resources for activities like hunting, and laws governing *commercial* use of those same resources in practicing a trade. *Compare Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978) *with Toomer*, 334 U.S. at 396. This limitation excludes from the Clause's purview a vast set of advantages that states may legitimately direct to their residents; it is "only with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity that a State must accord residents and non-residents equal treatment." *Friedman*, 487 U.S. at 64-65 (quoting *Piper*, 470 U.S. at 279). But this limitation is not at issue here: This Court has twice held that laws charging nonresidents higher fees for *commercial* fishing are governed by the Clause, and

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[1] The Clause refers to "citizens," but "citizenship and residency are essentially interchangeable" in this context. *Friedman*, 487 U.S. at 64.

so even the majority below "easily conclude[d]" that the Clause was implicated in this case. *See* Pet.App.9a (citing *Toomer*, 334 U.S. at 403 and *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952)).

This case instead concerns the second step of this Court's "two-step inquiry" for Privileges and Immunities Clause challenges. Once a plaintiff shows that a law "falls within the purview" of the Clause, "the burden shifts to the state to show that the challenged law is 'closely related to the advancement of a substantial state interest.'" Pet.App.8a (quoting *Friedman*, 487 U.S. at 65). For generations, facially discriminatory fee regimes have routinely failed this step-two requirement. *See, e.g.*, *Toomer,* 334 U.S. at 403 (striking down South Carolina's higher commercial fishing fees on nonresidents); *Mullaney*, 342 U.S. at 419 (same for Alaska fees); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998) (striking down New York law denying full tax write-off on alimony payments to nonresidents); *Austin*, 420 U.S. at 665 (striking down higher tax on those who commute into New Hampshire for work); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80-81 (1920) (striking down higher tax on those that commute to New York for work); *Ward v. Maryland*, 79 U.S. 418 (1870) (striking down higher fees on nonresidents who import goods for sale into Maryland). This case involves just such a fee regime.

The sole but substantial wrinkle is that, here, California endeavored to justify its discriminatory commercial fees on nonresidents as fitting within a potential exception that this Court recognized in the

course of striking down a very similar fee in a previous case. In 1948, this Court held that South Carolina's regime of imposing higher fees on nonresident shrimpers violated the Privileges and Immunities Clause. *See Toomer*, 334 U.S. at 403. In so doing, it suggested that states might nonetheless be free "to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Id.* at 399. As further explained below, the core question in this case is whether the final clause of this possible exception—regarding recoupment of expenditures based on "taxes which only residents pay"—simply permits efforts to place similarly situated residents and nonresidents on equal footing, or whether it instead allows states to target their subsidies so as to give their own residents a leg up.

II. Factual Background

1. By statute, "California charges nonresident commercial fishers higher fees for vessel registrations, licenses, and permits than it charges resident commercial fishers." Pet.App.4a-5a (citing Cal. Fish & Game Code §§713, 7852, 7881, 8280.6, 8550.5). These facially discriminatory fees apply to herring gill-net permits, Dungeness crab vessel permits, and commercial boat registrations and licenses. The nonresident premium on these permits ranges from $240–$930 each, with nonresidents paying two-to-four times what Californians pay for the same access. Pet.App.5a-6a.

These fee differentials mean that, each year, nonresident fishermen working in California's coastal waters start far behind their local competitors. Because multiple permits may be necessary, the sums can quickly exceed a small fisherman's profit margin. For example, in 2010, petitioners paid from about $2000 to $4000 more each year to launch their seasonal fishing businesses because of California's regime. *See* Pet.App.30a (M. Smith, J. dissenting). Inflation indexing is also constantly increasing these gaps: Between 2004 and 2013, the nonresident fee for herring gill-net permits increased by $369, while the resident fee increased only $103. C.A.App. ER-2:51, 56.

Importantly, the relative fees imposed on both residents and nonresidents are tied *exclusively* to residency and inflation. No adjustments are made for how much a fisherman takes from the fishery, how profitable they are, how much California actually expends each year on fishery maintenance, or anything else. *See* Pet.App.89a.

These fees are not the only contributions California requires from its nonresident fishermen. Because California's income tax is imposed on all income derived from the State—without regard to residence, *see* Cal. Rev. & Tax Code §17041(i)(1)(B)—nonresident fishermen pay the same income taxes on their California fishing income that residents do. They also pay other fees and duties, including sales and excise taxes on their in-state purchases. *See, e.g.*, Pet.App.38a-40a (M. Smith, J. dissenting).

2. California conceded below that the higher fees charged to nonresident fishermen are not assessed

because nonresidents impose any greater costs on the State than their in-state competitors. Pet.App. 122a-123a. That concession was unavoidable; there is no logical reason why nonresident fishermen would create "*added* enforcement burden[s]" relative to their in-state competitors that would justify requiring them to pay higher fees—rather than the same fees that resident fishermen pay. *See Toomer*, 334 U.S. at 399 (emphasis added).

Accordingly, the sole argument the courts seriously entertained below was that California's higher fees on nonresidents were a permissible effort to recoup "conservation expenditures" California made to maintain these fisheries "from taxes which only residents pay." *Id.* Notably, however, California did not suggest that the fee differentials were calibrated to create "substantial equality" between residents and nonresidents after accounting for the portion of each resident fisherman's taxes that were devoted to fishery maintenance. That is because—as the record evidence makes very clear—California's avowed purpose was the opposite: It *wanted* to preferentially subsidize its own fishermen by spending generally on fishery maintenance and then recouping a much larger share of those expenditures from each nonresident fisherman than from his in-state counterpart. Put otherwise, California's regime is undisputedly designed to give a greater net benefit from fishery maintenance to its own residents, not to equalize residents' and nonresidents' effective contributions to the shared resource.

Accordingly, the record demonstrates that, each time the California Legislature enacted or increased

a nonresident fee, the goal was simply to lessen the financial burden that would otherwise have been borne by *all* fishermen in common—including its own resident fishing interests. William "Zeke" Grader, a representative of the California fishermen's lobby who was intimately involved in crafting the bills in question, candidly described the process in his testimony below:

> The only analysis I know is what they probably had targeted for the amount of money they were seeking to raise.
>
> Then oftentimes, they said to industry, okay, you figure out how you want to raise it, and then that became a sort of intra-industry squabble about who's going to pay for what. And those who weren't at the table obviously—well, it's the same as writing the tax code nowadays: If you're not at the table, look out, you know, next April 15th.

C.A.App. SER-1:156.

The history of California's fee regime bears out Grader's testimony. The catalyst for the first differential fee, imposed on nonresident herring fishermen in 1986, was indeed a budget shortfall at the California Department of Fish and Wildlife that had nothing particularly to do with nonresidents—or even herring fishermen generally. Pet.App.83a. Yet nonresident herring fishermen bore the burden of alleviating that shortfall, and then were targeted again in 1990 and 1992 with increased fee gaps. Their fees thus rose over that period to $300 and then to $1,000, while the corresponding resident fee

increased only $65—from $200 to $265. *See* Pet.App.82a-85a.

In 1992, California also imposed its first differential fees on nonresidents for general commercial fishing licenses and boat registrations. *See* Pet.App. 85a. Again, the issue was a generic budget shortfall, not any policy problem specific to nonresidents. *Id.* Policymakers thus first considered several proposals that would have spread the burden of the Department's budget shortages more evenly and rationally among all those benefitting from the fishery. *See, e.g.*, C.A.App. SER-2:270, 2:406. Yet those proposals were jettisoned in favor of increasing fees on nonresident fishermen, for reasons the head of the Department's legislative office described as simply "politics." C.A.App. SER-2:270.

In 2003, when the Department faced another shortfall, the California Legislature again turned to higher nonresident fees to cover the gap. *See* Pet.App.88a. And, again, it did so after rejecting a broader and more rational cost-sharing proposal. C.A.App. SER-4:928. This time, the winning proposal was simply to make nonresident fees three times the resident fees, although California officials involved in these increases could not recall any reason for them other than that "they wanted it to be three times as much." C.A.App. SER-2:293-294. The fees were also subjected at this point to inflation indexing, with no consideration for how that would steadily increase the gap between residents and nonresidents over time. *See* Pet.App.88a-89a.

The same story played out with respect to the Dungeness crab fishery. Grader—who effectively

designed this regime himself—again explained in extraordinarily candid terms that the purpose of the law was to "include the fishermen represented by our port associations in the crab fishery while excluding new and large amounts of effort from Oregon and Washington." C.A.App. SER-4:858. Legislative analyses thus repeatedly observed that the proposal would provide an "unfair advantage to the sponsors of the bill—the [California fishermen's lobby]—by making it very difficult for any new crab fishers to obtain permits and enter the market." Pet.App.86a. The bill's sponsor even urged the governor to sign it in order to "*[g]ive a preference to … California citizenry* to commercially harvest the resource." C.A.App. ER-855 (emphasis added). The bill has since been repeatedly renewed, with the effect of raising nonresident fees to at least double those of California residents—a result Grader sought in order to "keep the resident vessel fee lower." C.A.App. ER-4:802; Pet.App.85a, 87a.

3. At the time of this suit, and despite its high differential fee on nonresident permits, California still spent more on fishery-related programs than it recouped in direct fees and duties on the industry. Back-of-the-envelope computations by the *en banc* majority placed this "shortfall" at around $14,435,000, excluding the nonresident premiums. Pet.App.13a. The majority assumed that this entire shortfall was covered by California's general tax revenues, and then used a series of rough calculations to determine that nonresident fishermen received an overall implicit subsidy from California of approximately $641,000, including implicit subsidies

of $106,000 and $60,000 respectively for nonresident Dungeness crab and herring fishermen in particular. Pet.App.20a-21a. This petition assumes that these calculations are precisely correct.[2]

III. Procedural History

Having long suffered under this discriminatory regime, a group of nonresident fishermen eventually sued the State in the Northern District of California. The district court certified a class "of commercial fishermen who ply their trade in California's waters, but who are not California residents." Pet.App.79a. The class sought only prospective relief. *See* Pet.App.126a.

On summary judgment, the district court held California's regime unconstitutional. It catalogued the evidence that California enacted its differential fees for protectionist purposes, and without regard to any particular costs created by nonresident fishermen. *See* Pet.App.80a-89a. It then turned to this Court's doctrinal two-step for the Privileges and

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[2] Petitioners accept this assumption to make clear that the operative facts are undisputed, and that the vagaries of these calculations do not affect the question presented. That said, the majority's math is just not right. For example, California uses general revenues to cover less than a third of the Department's "shortfall," an amount that had to be specifically appropriated for this purpose. *See* C.A.App. ER-4:652(¶¶49-50), ER-3:513, ER-4:575(¶15), Cal. Fish & Game Code §711(a)(2). And many of the majority's other working assumptions are unrealistic, especially the belief that California's general revenue is wholly derived from "taxes only residents pay." *See infra* p.9; Pet.App.38a-40a, 44a-46a.

Immunities Clause, concluding at the first step that, under this Court's holdings in *Toomer* and *Mullaney*, commercial fishing fees were clearly covered by the Clause. Pet.App.113a-114a.

Next, at the second step, the court confronted what it viewed as the State's core argument—namely, that "differential fees are constitutional" as long as they are less than "the state's subsidy of nonresidents" and do not result in "exclusion of nonresidents" from the State's natural resources. Pet.App.119a. The court explained that "Defendant created these two limits himself; no case law supports this articulation of [the] constitutional boundaries." Pet.App.119a n.20. Instead, as the district court carefully explained, the constitutional question is whether the subsidy provided to State residents is greater than the one provided to nonresidents after accounting for all the ways both groups contribute financially to the fisheries; the Clause has no safe-harbor for preferentially recouping subsidies from nonresidents, because its fundamental requirement is "substantial equality" in treatment for in-state and out-of-state competitors. Pet.App.119a-126a. Using the State's own figures, the court found that "from a comparative perspective, non-resident commercial fishermen pay more than double of what their resident competitors pay towards covering their share of the shortfall in the state's investment." Pet.App.121a.

In reaching this conclusion, the district court carefully isolated the question presented here. It highlighted the State's argument that, "where a state's investment in natural resources is at issue, a

comparison of the amounts paid by residents and nonresidents is irrelevant and unnecessary," because "it is constitutionally permissible for a state to subsidize its residents at a greater level than nonresidents, regardless of whether this results in substantial inequality of treatment with respect to a common calling." Pet.App.123a. It then rejected this precise proposition, emphasizing this Court's recent holding that the Privileges and Immunities Clause "forbids a State from intentionally giving its own citizens a competitive advantage in business or employment." *Id.* (quoting *McBurney v. Young*, 133 S. Ct. 1709, 1716 (2013)). Adopting the reasoning of the Fourth Circuit in *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264 (4th Cir. 1993), and the Alaska Supreme Court in *Carlson*, 798 P.2d at 1273, the district court held that California's regime necessarily failed because the State's own theory was that it had created a preferential subsidy for its own citizens. *See* Pet.App.115a-116a, 123a-126a.

On appeal, a panel of the Ninth Circuit affirmed. After agreeing (as did all the judges below) that California's fee regime fell within the purview of the Clause, the majority noted that the critical question was California's interpretation of *Toomer*'s dictum that the State could use differential fees to recoup "'conservation expenditures from taxes which only residents pay.'" Pet.App.62a (quoting *Toomer*). Siding with the Fourth Circuit, the majority rejected California's view that this putative exception is satisfied whenever the aggregate fees collected from nonresident licensees is less than their share of the effective subsidy the State provides to their industry.

Pet.App.62a-63a. Instead, differential fees are only permitted insofar as they attempt to "'evenly or approximately evenly distribute[] the costs imposed on residents and nonresidents to support those programs benefiting both groups.'" Pet.App.63a (quoting *Tangier Sound*, 4 F.3d at 267). Put otherwise, California *could* "forc[e] an individual non-resident who benefits from the State's expenditures to contribute an amount substantially equal to that which an individual resident contributes across all fees and related taxes," but it could not preferentially subsidize only its own residents by intentionally charging them less (*including* their applicable share of general taxes) for the same economic privileges. *Id.* Because California had not even tried to show that "the fee differential approximates the amount in taxes a resident contributes to the State's expenditures related to commercial fishing," its effort to justify its regime necessarily failed. *Id.*

Judge Graber dissented. She emphasized that there was "little guidance" from this Court about the meaning of *Toomer*'s putative exception—noting that this Court had failed to resolve a clear disagreement on the question between the New Jersey and Alaska Supreme Courts. *See* Pet.App. 65a-68a (outlining the disagreement). Siding with New Jersey's rule from *Salorio v. Glaser*, 414 A.2d 943 (N.J. 1980), and expressly rejecting the Alaska Supreme Court's reasoning in *Carlson*, *see* Pet.App.69a, Judge Graber endorsed a rule that would allow the State to charge differential fees up to the point where they eliminate any subsidy to nonresidents, without regard to any comparative analysis between those nonresidents

and their resident competitors. *See* Pet.App.66a, 70a-71a. Her express view was that the Privileges and Immunities Clause should treat "not subsidizing nonresident participation in an activity funded with residents' tax dollars [a]s a substantial reason for discrimination," even if the State chooses to use its general revenues to provide a competitively advantageous subsidy to state residents using the same natural resources to ply the same trade as the nonresidents who must pay the subsidy back in higher fees. Pet.App.71a.

The Ninth Circuit granted rehearing *en banc*. No member of the original panel sat on the *en banc* court.

In an opinion by Judge Fletcher, a 6-to-5 majority of the Ninth Circuit reversed, adopting the essential aspects of Judge Graber's panel dissent. The court first used data from the State and certain rough assumptions to estimate the "subsidy" that California delivered to nonresident fishermen through its general revenue expenditures on fish and wildlife. *See supra* pp.13-14, Pet.App.19a-21a. It then concluded that, because the premiums charged to nonresidents were below these implied subsidies, they necessarily satisfied the Privileges and Immunities Clause. Pet.App.22a. The majority allowed that, if nonresident fishermen actually paid into California's general revenues—which, in turn, support its fisheries—the analysis might be different. But it found no record evidence that the named plaintiffs had made meaningful income tax payments, and so reversed. Pet.App.23a-26a.

Notably, the majority's reasoning eschewed any *comparison* between the treatment of resident and nonresident fishermen. Accordingly, the majority viewed it as irrelevant that (1) California was substantially and intentionally creating a preference for its own residents in the pursuit of a calling governed by the Clause, *see supra* p.10; and that (2) California law already imposes the *identical* income-tax liability on resident and nonresident fishermen for income derived from the State's fisheries, *see supra* p.9.

Five judges joined two separate *en banc* dissents. Echoing the district court and original panel, Judge M. Smith's dissent criticized the majority for omitting any comparative analysis. He highlighted both that the fee differentials "bear[] the hallmarks of economic protectionism," Pet.App.34a-35a n.1, and underlined his disagreement with the majority over whether "a state's expenditures may justify discrimination against nonresidents." Pet.App.36a n.2 (quoting majority). As he explained, the latter may be true in areas governed by the dormant Commerce Clause, but not the Privileges and Immunities Clause. *Id.*

Similarly, he severely criticized the majority for assuming nonresident fishermen do not contribute to the general revenue of California when (1) California law says they must do so on equal terms with California residents, and (2) the State bore the burden to justify facially discriminatory fees under the Clause. Pet.App.38a-47a. He then explained that, if the required *comparative* analysis were undertaken, the Court would have to find that California accorded far more favorable treatment to

its resident fishermen. Pet.App.46a. For example, emphasizing the direct disagreement between the majority and the Alaska Supreme Court in *Carlson*, he explained that it was inappropriate to allow California's "775 nonresident fishermen [to] be charged for a $641,000 'subsidy,'" when "[i]n-state fishermen, by contrast, receive a $4,700,080 subsidy," for which "California's 15,000,000 taxpayers collectively foot the bill." Pet.App.46a & n.9. The comparative result is that "California's residents, fishermen or not, pay about thirty cents on average towards the subsidy to in-state fishermen, whereas nonresident fishermen are charged over $800 each on average for the 'subsidy' they receive." *Id.*

In closing, Judge M. Smith noted that such a lax approach to economic protectionism under the Privileges and Immunities Clause would allow discrimination to "proliferate."

> California could, for example, charge nonresident truckers and commercial airline pilots fees for earning a living off state-subsidized highways and airports. And why wouldn't states seek to recoup from those professions conservation expenditures aimed at maintaining air quality? As in this case, they need only intend to close a budget gap and need not identify any relationship between the shortfall and nonresident truckers or pilots. … The Privileges and Immunities Clause should preclude such barriers because they disrupt interstate economic harmony unjustifiably. The majority unfortunately holds otherwise, and

> thereby subverts one of the most important economic compacts that initially bound us together.

Pet. App. 47a-48a.

Having joined the principal dissent in part, Judge Reinhardt emphasized that the majority's analysis had not actually required the State "to justify *any* differential" in fees. Thus, while refusing to endorse any of the mathematical exercises other opinions had undertaken, he would have rejected California's subsidy-recoupment defense as a matter of law. Pet.App.48a-49a (emphasis added).

REASONS FOR GRANTING THE WRIT

As the foregoing demonstrates, there are several, straightforward reasons to grant certiorari in this case, most of which have already been ventilated by the numerous, well-developed opinions below. Most importantly, there is a very precise conflict among the lower courts on the question presented—one that is particularly untenable both legally (because it is intra-jurisdictional) and practically (because it leads to disparate results among neighboring fishermen). But it is also clear that this issue is important, that this is an unusually strong vehicle for its resolution, that the decision below is incorrect, and that this Court's intervention is necessary to prevent the Ninth Circuit's permissive approach from leading to, or further entrenching, an unending cycle of retaliation—the very reason the Founders enacted the Privileges and Immunities Clause. Future vehicles are unlikely to arise, and will certainly lack the benefit of the strong presentation this case has

received through the *en banc* process. And particularly because many of this Court's members have criticized the expansion of dormant Commerce Clause doctrine, this case represents an important opportunity for this Court to underline the narrower but firmer protections provided by the textually grounded guarantees of the Privileges and Immunities Clause.

I. This Case Involves An Unusually Precise And Untenable Disagreement Among The Lower Courts.

1. As Judge Graber noted below, Pet.App.65a, this case presents a question on which this Court has provided "little guidance," and on which there is an entrenched disagreement among the lower courts. Two courts now read this Court's decision in *Toomer* to permit the State to preferentially subsidize its own citizens in the pursuit of a calling governed by the Privileges and Immunities Clause. States may do so by expending state resources to benefit the relevant industry, and then charging unique or higher fees to nonresidents to recoup some or all of the subsidy from them—without similarly charging its own residents. Judge Graber, who expressly endorsed that result, derived it from the reasoning of the New Jersey Supreme Court in *Salorio*, *see* Pet.App.66a-67a (discussing 414 A.2d at 953-54), and the *en banc* majority adopted her approach. But as Judge Graber herself recognized, the Alaska Supreme Court in *Carlson* took the precise opposite view and explicitly rejected *Salorio*'s result, holding that it violates the Clause for a State to so favor its own residents. *See* Pet.App.67a-68a (discussing *Carlson*, 798 P.2d at

1278). Meanwhile, unlike the Ninth Circuit, the Fourth Circuit has substantially followed *Carlson*, rejecting facially discriminatory fees on nonresident fishermen that do not "evenly or approximately evenly distribute[] the costs imposed on residents and nonresidents to support those programs benefiting both groups." *Tangier Sound*, 4 F.3d at 267; *see also* Pet.App.125a (district court endorsing *Tangier Sound*).

Indeed, the split between the Ninth and Fourth Circuits is perfectly square. In *Tangier Sound*, Virginia tried the same justification for differential fees on out-of-state fishermen as California asserted here—namely, the desire to recoup subsidies allegedly conveyed to them by Virginia's taxpayers. But the Fourth Circuit rejected that argument because, *just as here*, the "fee imposed on the nonresidents as computed does not reach to the goal of equality of treatment between resident and nonresident." *Tangier Sound*, 4 F.3d at 267. As the Fourth Circuit explained, it *would* be permissible to make up for resident fishermen's contributions to fishery maintenance as taxpayers—to "'place the burden so that it will bear as nearly as possible equally upon all.'" *Id.* (quoting *Travelers Ins. Co. v. Conn.*, 185 U.S. 364, 372 (1905)). But an effort to create a one-sided subsidy would necessarily fall outside *Toomer* because it does not "evenly or approximately evenly distribute[] the costs imposed on residents and nonresidents to support those programs benefiting both groups." *Id.* This, of course, is the precise requirement the Ninth Circuit's subsidy-recoupment theory rejects: It requires *no*

comparative analysis and instead focuses *exclusively* on whether any premiums paid by nonresidents are less than their implicit subsidy from the State.

While there is thus now a clear 2-2 split on the question presented—with federal Courts of Appeals on both sides—the heart of the disagreement lies in the head-on collision between the Ninth Circuit and the Alaska Supreme Court. Not only are the facts of these courts' two cases remarkably similar, but the reasoning of the two opinions is also diametrically opposed—as Judge Graber recognized in rejecting *Carlson*'s approach. In *Carlson*, as in this case, Alaska adopted differential fees for nonresident fishing permits set at a ratio of 3:1. *Compare* Pet.App.6a *with Carlson*, 798 P.2d at 1271. And in *Carlson*, as in this case, the State presented evidence that the differential helped to recoup State expenditures from which nonresident fishermen were benefitting, and the court accepted that evidence for purposes of the argument. *See Carlson*, 798 P.2d at 1272. But the Alaska Supreme Court reached the exact opposite conclusion on these same facts, creating the paradigmatic kind of disagreement this Court resolves. Simply put, there is no question that this very case would have been decided differently in the Alaska Supreme Court because it already has been.

In fact, the Alaska Supreme Court's reasoning expressly rejects the proposition at the heart of the Ninth Circuit's decision. With respect to the *Salorio* approach—endorsed by Judge Graber and adopted by the *en banc* majority—the Alaska court reasoned as follows:

We believe that the superior court erred in adopting *Salorio*. In our view, its focus is misplaced. Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their pro rata share of expenditures regardless of what percentage of their pro rata share residents are in fact paying. In other words, *Salorio*, as applied to this case, seems to add up to a general proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court.

The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' pro rata shares of state revenues to which nonresidents make no contribution are taken into account.

Carlson, 798 P.2d at 1278 (citing *Austin*, 420 U.S. at 625 and *Travis*, 252 U.S. at 60).

The question presented here is simply which court has it right. California says (with the Ninth Circuit's agreement) that it is perfectly constitutional for it to bestow a competitive advantage on its own resident fishermen by subsidizing their business and charging nonresidents who ply the same trade in the State higher fees in order to deny them access to the subsidy on the same terms. Alaska's Supreme Court says that is the very essence of a Privileges and Immunities Clause violation. This Court is the only one that can decide which of these views is correct.

And it is particularly important that the Court do so, because this disagreement causes two related and uniquely important problems. First, the legal effect of the Ninth Circuit's decision is to create two different approaches to the same question in the same jurisdiction based solely on whether the case proceeds in state or federal court. If, for example, Alaska chose to address California's self-serving regime by (re)enacting the same scheme to govern its own rich fisheries, it would win a challenge in federal court, but lose in state court. Substantive outcomes under our one federal Constitution should not turn on the choice of Alaska courthouses.

Second, the disagreement between California and Alaska is particularly unfair. Alaska has the most valuable fisheries in the Nation by far, *see* NOAA Fisheries Fact Sheet, https://goo.gl/ogvrSq, and—because of how its Supreme Court has (correctly) interpreted the Privileges and Immunities Clause—resident and nonresident fishermen pay

equally for access to it.[3] As a result, reports from Alaska's Commercial Fisheries Entry Commission indicate that "more and more non-residents hold fishing permits in Alaska," leading to greater economic mobility and access for workers, enhanced competition for nationwide consumers, and all the attendant benefits of a freer and fairer market. The only people who lose out under this arrangement are Alaska residents, who would prefer to exclude or up-charge their out-of-state competition. And while that, of course, is not an impulse the Constitution honors, unfairness surely arises when those same Alaska residents want to fish in other states' waters and lose out *again* because the Ninth Circuit permits California, Oregon, Hawaii, and Washington (another top-five fishery) to keep their discriminatory fees. Meanwhile, California residents can have their fish and eat them too: If they fish California's waters in the winter and Alaska's in the summer, the rule favors them both at home and abroad.

2. This untenable disagreement among the lower courts, acknowledged in the opinions below, requires this Court's resolution without regard to which side is right. But the need for certiorari is nonetheless strengthened by the obvious tension between the

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[3] Alaska's courts have approved surcharges on nonresident fishermen approximating the per-capita contribution each Alaska resident makes to fishery-management costs. *See Carlson v. Alaska*, 919 P.2d 1337 (Alaska 1996); *Carlson v. Alaska*, 65 P.3d 851 (Alaska 2002); *Carlson v. Alaska*, 191 P.3d 137 (Alaska 2008). Here, that amount would be trivially small. *See, e.g.*, Pet.App. 68a-69a n.1.

Ninth Circuit's decision and the holdings of this Court. As the district court, panel majority, and *en banc* dissenters all explained, the essence of this Court's Privileges and Immunities Clause precedents is a requirement of "substantial equality" in the treatment of residents and nonresidents with respect to those privileges covered by the Clause. *See, e.g.*, Pet.App.34a, 63a, 119a-120a. Accordingly, this Court has rejected differential fee regimes on nonresident fishermen remarkably like these, as well as tax regimes that ask nonresidents to pay duties that residents do not. *See supra* p.7.

In so doing, this Court has laid out an approach to the Privileges and Immunities Clause that is worlds apart from the Ninth Circuit's. This Court's leading discussion of the Clause and its purpose comes from *Austin*, where Justice Marshall explained its roots in the Articles of Confederation and the critical role it plays in maintaining "the structural balance essential to the concept of federalism." *See* 420 U.S. at 662, *supra* pp.5-6. "Since nonresidents are not represented in the taxing State's legislative halls, judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but 'to prevent (retaliation) was one of the chief ends sought to be accomplished by the adoption of the Constitution.'" *Id.* Indeed, because protection of those without political redress represents the strongest case for judicial review—including through certiorari—this Court has shown "heightened concern for the integrity of the Privileges and Immunities Clause." *Id.* at 663; *see also* Ely, DEMOCRACY AND

DISTRUST 83 (1980) ("[T]he reason inequalities against nonresidents and not others were singled out for prohibition in the original document is obvious: nonresidents are a paradigmatically powerless class politically …. [B]y constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after.").

The Ninth Circuit's approach could hardly be more different. Its starting premise is that a State *may* spend from its general revenue to benefit only its own citizens in their pursuit of economic privileges governed by the Clause, and *may* charge nonresidents higher taxes or fees accordingly—that is, for the precise purpose of *preventing* them from obtaining the same, equal benefits as state residents, and so creating a substantial *in*equality of treatment. That view is wrong from the very outset, and so the majority's error is unaffected by any of the mathematical manipulations it tries. If California wants to prevent nonresident fishermen from "free riding" on the money it spends to maintain the fishery, it can stop spending tax money on the fishery and charge all fishermen equal fees to cover the costs, or it can charge fees tied to each fisherman's actual usage, or it can use Alaska's per-capita approach, *see supra* n.3, or it can choose from any number of other regimes actually tailored to address the issue at

hand.[4] The one thing it certainly cannot do is create a system *designed* to advantage state residents' commercial use of the State's natural resources relative to their out-of-state competitors based on the "mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396. Such a regime is "closely drawn" not to a legitimate state interest, but to the fundamentally illegitimate one that gave rise to the Privileges and Immunities Clause.

To hold otherwise, as the Ninth Circuit did, not only violates the "rule of substantial equality of treatment," *Austin*, 420 U.S. at 665, but also this Court's holding that the Privileges and Immunities Clause is at least as protective of nonresidents as the fourth Article of Confederation, *id.* at 660-61. The latter expressly required that United States citizens would, "in the several States … enjoy … all the privileges of trade and commerce, *subject to the same duties, impositions and restrictions as the inhabitants thereof*."" *Id.* at 660 (emphasis added). The Ninth Circuit's decision rejects that exact rule, expressly allowing states to impose *different* duties on nonresidents for the sole purpose of preferentially subsidizing their own inhabitants. That is not what the Framers intended.

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[4] For example, it can charge an income tax on equal terms to all those residents and nonresidents who derive income from fishing in the State—*as it already does*. *See supra* p. 9.

II. The Question Presented Is Important And Should Be Resolved In This Case.

The *en banc* proceedings below and the closely divided vote suffice to show that this case presents an important issue on which this Court's guidance is needed. There are nonetheless four specific reasons why this Court should take up the question presented without further delay.

1. First, as has already been explained, by disregarding the equal-treatment norm this Court's cases require, the Ninth Circuit's holding invites the exact kind of tit-for-tat retaliation that the Privileges and Immunities Clause was intended to prevent. That is a dangerous dynamic to leave in place. Judge M. Smith's dissent explains that the Ninth Circuit's permissive rule is easily extended to roads, ports, and countless other "subsidized" benefits that a State typically provides in common to residents and visitors alike. Meanwhile, California frequently struggles to raise revenue because of its constitutional restrictions on increasing resident taxes. *See, e.g.,* Cal. Const. Art. XIII A. As this very case makes clear, the politically easy solution to such shortfalls is to find nonresident sources of revenue, because nonresidents lack the political power to protect themselves. And if the Nation's largest economy is (as here) granted the power to protect its own citizens from out-of-state competition and derive more revenue from out-of-state competitors at the same time—in a high-profile, *en banc* case, no less—California's sister states can only be expected to follow suit.

2. That said, this is not just a case of risking a new problem; it is a case of taking an already serious problem and entrenching it or making it much worse. Many states already have discriminatory fee regimes on the books for activities like commercial fishing. That includes Washington and Oregon—Ninth Circuit States where existing fee differentials are relatively low, *see, e.g.*, ORS §§508.285, 508.235, 508.921; Rev. Code Wash. (ARCW) §77.65.200—and others where the fee differentials are already quite high. Maine, for example, is the Nation's second-most-valuable fishery and its minimum commercial fishing license fee on nonresidents is up to *ten times higher* than the nominal $48.00 minimum fee on solo residents, *see* 12 M.R.S. §6051—despite the fact that this Court has *already* struck down a statute imposing a ten-times-higher fee on out-of-state fishermen. *See Mullaney*, 342 U.S. at 419 (holding Alaska's ten-times-higher fee plainly violated the Clause in light of *Toomer*). This issue thus demands attention: The Court's existing doctrine ought to be enforced, and the high-profile holding of the Ninth Circuit in this case will only exacerbate the reality that many States are already flouting the holdings of *Toomer* and *Mullaney*.

Indeed, given the lack of clear guidance or frequent litigation in this area, the Ninth Circuit's decision will quickly become the leading precedent. And because of the political dynamic described above, States' only incentive is to either maintain their existing, discriminatory fees or else increase them to the new ceiling the Ninth Circuit's decision suggests—at least if they are located outside the

Fourth Circuit or aren't named "Alaska." In fact, other states that continue to impose discriminatory fees like California's had been poised to equalize them following the panel decision in this case, only to reconsider after the Ninth Circuit changed its mind. *See, e.g.*, Shane Harms, *Cal. Court Case Could Disrupt WDFW Initiative*, Ballard News-Tribune (Jan. 3, 2017), https://goo.gl/1afCQ0 (discussing Washington State fees). And this is not surprising, because these fees are driven not by actual subsidy recoupment, but instead by simple protectionism or the inexorable drive to retaliate for the protectionism of other states.

Alabama is a particularly striking example in this regard. Its nonresident fees vary by State, and are explicitly calibrated to the nonresident fee each State imposes on Alabamans operating there. Code of Ala. §9-11-56.1. In other words, Alabama's statute is *expressly retaliatory*, demonstrating that the exact evil the Clause anticipates is already coming to pass. *See Austin*, 420 U.S. at 667.

3. Ironically, however, the fact that this issue is already widespread and likely to get worse does not guarantee that this Court will get another good opportunity to address it. In fact, it suggests the opposite. The reason state regimes in direct tension with this Court's holdings have persisted so long is that these cases are very hard to bring: The fee differentials at issue are small relative to the time and expense of suit, and prospective plaintiffs can ill-afford the distraction from their frequently all-consuming profession. Meanwhile, sovereign immunity will mean that the most a plaintiff (or even

a large class of plaintiffs) can secure in relief is an injunction against further differential fees—even modest refunds are foreclosed. It is thus unsurprising that countless dubious regimes persist unchallenged.

It gets worse. Most of these fee regimes are set without regard to how large or profitable a fishing interest may be. Accordingly, these fees are of little concern to the largest and most profitable nonresident fishermen; if anything, they *benefit* from the differentials because the starting deficit facing a nonresident in California's waters will chase off many smaller nonresident competitors while making no perceptible dent in a large operator's bottom line. *See* Pet.App.30a. Those most harmed by these discriminatory fees live hand to mouth in the literal sense—struggling some seasons to make any profit at all, and often living off part of their catch.[5] They are sometimes too busy to sleep, let alone hire lawyers and give depositions.

Accordingly, the most likely result if the decision below remains in place is that discrimination against nonresident fishermen and other migratory workers will only get worse, but without generating another opportunity for this Court to address the issue. Particularly because this constitutional provision was

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[5] This, of course, explains why there was little evidence in the record that the class representatives paid substantial state income tax. But—because it conducted no comparative analysis at all—the majority failed to recognize that the same is of course true of most in-state fishermen as well.

designed to *prevent* a festering problem of interstate protectionism and retaliation, it makes little sense for this Court to wait and see if it can address this already unfortunate reality after it festers a little longer.

4. Finally, even on the dangerous assumption that other vehicles will eventually arise, this case would still be a uniquely good opportunity to address the question presented. The best arguments on both sides of this case have already been developed in the multiple, carefully considered opinions below (six in total). Meanwhile, the particular facts of this case clearly demonstrate both the stakes of the Ninth Circuit's approach and the error in its result. As explained above, *supra* pp.10-13, the record is replete with direct evidence that California's fee differentials were motivated by—and obviously calculated to produce—simple economic protectionism: Higher fees on nonresidents were imposed to both limit out-of-state competition and suppress the fees that in-state fishermen would have to pay. This case thus demonstrates particularly well how a "subsidy recoupment" rationale like the Ninth Circuit's can operate as an excuse for the *exact* behavior the Founders intended to foreclose.

Future cases may not frame the issue so clearly. For example, future cases may involve disputes about whether the activity at issue is actually governed by the Privileges and Immunities Clause, whereas here, all the opinions accept that commercial fishing certainly is. Similarly, states in future cases are likely to contest the real motivation for their differential fees. Here, however, the Ninth Circuit

held for the State even though all the opinions below accept that California was in fact trying to provide a richer subsidy to its own residents than it was willing to provide to nonresidents. That isolates the question presented with uncommon precision: All this Court needs to decide is whether that kind of favoritism for residents is constitutional or not.

III. This Particular Area of Law Will Benefit From Development In This Court.

Although the foregoing reasons provide a more-than-sufficient basis for certiorari, there is an additional reason to grant this petition. For some time, members of this Court have criticized its dormant Commerce Clause doctrine, pointing to its unwieldy breadth, lack of textual grounding, and tendency to embroil the judiciary in unbounded policymaking. *See, e.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1808-09 (2015) (Scalia, J. dissenting); *id.* at 1811-13 (Thomas, J. dissenting); *id.* at 1823 (Ginsburg, J. dissenting); *Direct Mktg. Ass'n v. Brohl*, 834 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J. concurring); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614-17, (1997) (Thomas, J., dissenting). The historically and textually anchored guarantees of the Privileges and Immunities Clause represent a firmer basis on which to ground many accepted aspects of dormant Commerce Clause doctrine, including paradigmatic violations like tariffs, exclusionary trade barriers, and other "rank discrimination against citizens of other States" attempting to conduct commerce on equal terms with state residents. *Tyler Pipe Indus. v. Wash. Dep't of Rev.*, 483 U.S. 232, 265 (1987)

(Scalia, J., dissenting in part and advocating the Privileges and Immunities Clause as an alternative to dormant commerce clause doctrine).

Among the many virtues of such a doctrinal shift is that it replaces *ad hoc* judgments about commercial policy with a simpler but potentially wider-reaching principle of structural federalism: States can always comply with the Clause by simply providing to nonresidents the same fundamental benefits and opportunities that citizens enact for themselves. *See, e.g.*, Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-47 (1982) ("If we are willing to redirect judicial energies from preserving commerce to protecting process, the express commands of the 'privileges and immunities clause' of Article IV … seem a more appropriate foundation … then the silences of Article I."). Notably, this process principle at the heart of the Founders' project would be a solid foundation for not only important economic freedoms, but fundamental civil and political rights as well. *See McBurney*, 133 S. Ct. at 1716 (discussing *Paul*, 75 U.S. at 180, and *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1825)).

If this Court is to embark on this textualist and originalist turn, however, it will need to give real teeth to the guarantees that actually are codified in Article IV. Yet it has not had a case enforcing the Privileges and Immunities Clause in decades—allowing the doctrine to sit ignored, even as states are apparently engaged in widespread violations. This case thus provides a timely chance to breathe fresh life into an important and overlooked aspect of

our federal design at a moment where the states seem ever more at odds.

The Privileges and Immunities Clause is one of the most important structural ways the Founders attempted to guarantee that those who become citizens of the *United* States would not be mistreated because of their lack of political power in any one of the States in which they might come to visit or seek to earn a living. It thus deserves attention both in the States and in this Court—attention it has not regularly received, as Judge Graber noted below. Correcting the Ninth Circuit's far-too-permissive approval of California's favoritism towards its own resident fishermen presents a key opportunity to reinvigorate this core constitutional doctrine. This Court should take it.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN MARILLEY; SALVATORE PAPETTI; SAVIOR PAPETTI, on behalf of themselves and similarly situated,
Plaintiffs-Appellees,

v.

CHARLTON H. BONHAM, in his official capacity as Director of the California Department of Fish and Game,
Defendant-Appellant.

No. 13-17358
D.C. No.
4:11-cv-02418-DMR

OPINION

Appeal from the United States District Court
for the Northern District of California
Donna M. Ryu, Magistrate Judge, Presiding

Argued and Submitted En Banc June 21, 2016
San Francisco, California

Filed December 21, 2016

Before: Sidney R. Thomas, Chief Judge, and Stephen Reinhardt, Kim McLane Wardlaw, William A. Fletcher, Marsha S. Berzon, Milan D. Smith, Jr., Mary H. Murguia, Jacqueline H. Nguyen, Andrew D. Hurwitz, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge Milan D. Smith, Jr.;
Dissent by Judge Reinhardt

SUMMARY[*]

Civil Rights

The en banc court reversed the district court's summary judgment in favor of plaintiffs and remanded for the district court to enter summary judgment for California in an action brought by a class of nonresident commercial fishers challenging California's nonresident fee differential for four commercial fishing licenses, vessel registration and permits.

The en banc court first held that California's fee differentials for commercial fishing vessel registrations, fishing licenses, Dungeness crab

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

permits, and herring gill net permits fell within the purview of the Privileges and Immunities Clause. The en banc court determined that whether the calculation was made at the general level of all nonresident commercial fishers, or at the specific level of nonresident commercial fishers for Dungeness crab and herring, the fee differentials charged by California were less than the amount by which California subsidized the management of the nonresidents' portions of its commercial fishery. The en banc court therefore held that the fee differentials survived the Privileges and Immunities Clause challenge because the differentials were justified by a substantial reason that was closely related to the differential fees.

The en banc court held that the fees survived an Equal Protection Clause challenge because California's interest in receiving compensation for its commercial fishery management provided a "rational basis" for its fee differentials.

Dissenting, Judge M. Smith, joined in full by Hurwitz and Owens and by Reinhardt and Berzon as to Part III, stated the majority assumed away the major defect in its analysis: the fact that nonresident fishermen pay multiple California taxes too, yet nonetheless commence each fishing season thousands of dollars in the hole by virtue of California's discriminatory differentials. In Judge M. Smith's view, the fee differentials are illegal under the Privileges and Immunities Clause.

Dissenting, Judge Reinhardt, joined by Judge Berzon, concurred in Part III of Judge M. Smith's dissent and agreed that California failed to carry its

burden of demonstrating that the differential fees it charges to nonresidents were closely drawn to the achievement of a substantial state objective.

COUNSEL

M. Elaine Meckenstock (argued) and Gary Alexander, Deputy Attorneys General; Annadel A. Almendras, Supervising Deputy Attorney General; Robert W. Byrne, Senior Assistant Attorney General; Kamala D. Harris, Attorney General; Office of the Attorney General, Oakland, California; for Defendant-Appellant.

Stuart G. Gross (argued) and Jared M. Galanis, Gross Law, San Francisco, California; Todd R. Gregorian and Tyler A. Baker, Fenwick & West LLP, Mountain View, California; for Plaintiffs-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

California charges nonresident commercial fishers higher fees for vessel registrations, licenses, and permits than it charges resident commercial fishers. A certified class of nonresident commercial fishers challenges the fee differentials under the Privileges and Immunities Clause and the Equal Protection Clause. We hold that California's fee differentials do not violate either clause.

I. Background

California requires both resident and nonresident commercial fishers to register their vessels and to purchase licenses and permits in order to engage in commercial fishing in the waters of the state. *See* Cal. Fish & Game Code §§ 7852, 7881 (2013). For many years, California has managed its

commercial fishery at a substantial loss. *See* Cal. Fish & Game Code §§ 710.5(a), 710.7(a)(1) (2007). In Fiscal Year (FY) 2010–11, the year for which we have the most extensive documentation in the record, California's Department of Fish and Game spent approximately $20 million managing its commercial fishery. In the same year, California received approximately $5.8 million in fees—including registration, license, and permit fees paid by residents and nonresidents—from participants in its commercial fishing industry. The approximately $14 million shortfall was covered by California's general tax revenues.

California has statutorily mandated fees for commercial fishing vessel registrations, licenses, and permits. *See* Cal. Fish & Game Code §§ 713, 7852, 7881, 8280.6, 8550.5. Fees are adjusted annually based on inflation. Beginning in 1986, California charged nonresidents more than residents for certain commercial fishing registrations, licenses, and permits. In 1986, California for the first time charged nonresidents more than residents for herring gill net permits. In 1993, California for the first time charged nonresidents more for commercial fishing vessel registrations and commercial fishing licenses. In 1995, California for the first time charged nonresidents more for Dungeness crab permits.

In license year 2010, the fees for resident and nonresident commercial fishers were as follows:

Commercial fishing vessel registration:
Resident: $317.00
Nonresident: $951.50

> Commercial fishing license:
> Resident: $120.75
> Nonresident: $361.75
>
> Dungeness crab vessel permits:
> Resident: $254.00
> Nonresident: $507.50
>
> Herring gill net permits:
> Resident: $336.00
> Nonresident: $1,269.00

Cal. Dep't Fish & Game, *Digest of California Commercial Fishing Laws and Licensing Requirements* (2010). Dungeness crab and herring were (and are) limited entry fisheries for which a limited number of permits was (and is) available.

Depending on the activity in question, a commercial fisher in California could be required to pay several fees. For example, a fishing vessel owner who personally engaged in fishing for herring was required to pay a vessel registration fee, a commercial fishing license fee, and a herring gill net permit fee. For a California resident holding a single permit, the total cost in 2010 would have been $773.75. For a nonresident, the total cost would have been $2,582.25, or 3.3 times as much as for a resident. A vessel owner who personally engaged in fishing for Dungeness crab was required to pay a vessel registration fee, a commercial fishing license fee, and a Dungeness crab permit fee. For a California resident, the total cost in 2010 would have

been $691.75; for a nonresident, the total cost would have been $1,820.75, or 2.6 times as much as for a resident. Of the approximately $5.8 million in fees paid to California in FY 2010–11 by the commercial fishing industry, approximately $435,000 came from fee differentials paid by nonresidents.

Plaintiffs, a class of nonresident commercial fishers, challenge the four nonresident fee differentials—for commercial fishing vessel registrations, commercial fishing licenses, Dungeness crab permits, and herring gill net permits. Plaintiffs brought a class action in district court against California's Director of the Department of Fish and Game (for convenience, "California"), challenging the fee differentials as violating the dormant Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause. Plaintiffs voluntarily dismissed their dormant commerce clause claim. The parties filed cross-motions for summary judgment on the remaining two claims. The district court ruled for the plaintiff class on its privileges and immunities claim, did not reach its equal protection claim, and entered judgment under Federal Rule of Civil Procedure 54(b). California appealed the grant of Plaintiffs' motion for summary judgment and the denial of its own motion for summary judgment. A divided three-judge panel of this court affirmed. *Marilley v. Bonham*, 802 F.3d 958 (9th Cir. 2015). We granted rehearing en banc. *Marilley v. Bonham*, 815 F.3d 1178 (9th Cir. 2016).

For the reasons that follow, we reverse the grant of summary judgment to Plaintiffs. We remand with directions to grant summary judgment to California.

II. Standard of Review

We review de novo a district court's decision granting or denying a motion for summary judgment. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1086 (9th Cir. 2013).

III. Discussion

A. Privileges and Immunities

Article IV, Section 2, clause 1, of the Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause's "primary purpose . . . was to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The Clause "establishes a norm of comity" between citizens of separate states. *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).

A challenge under the Privileges and Immunities Clause entails "a two-step inquiry." *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 64 (1988); *United Bldg. and Constr. Trades Council v. Camden*, 465 U.S. 208, 218 (1984); *see also Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008). At step one, the plaintiff bears the burden of showing that the challenged law "fall[s] within the purview of the Privileges and Immunities Clause." *Friedman*, 487 U.S. at 64 (quoting *Camden*, 465 U.S. at 221–22); *see also Schoenefeld v. Schneiderman*, 821 F.3d 273, 279 (2d Cir. 2016) (quoting *Friedman*, 487 U.S. at 64). If the plaintiff makes the required step-one showing, at step two the burden shifts to the state to show that the challenged law is "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65 (citing *Sup. Ct. of N.H. v.*

Piper, 470 U.S. 274, 284 (1985)); *see also Schoenefeld*, 821 F.3d at 279 (quoting *Friedman*, 487 U.S. at 67).

We address these two steps in turn.

1. Purview of the Clause

The "threshold matter" in any Privileges and Immunities Clause case is whether a challenged law "fall[s] within the purview" of the Clause. *Camden*, 465 U.S. at 218 (quoting *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978)). A plaintiff must show that the challenged law treats nonresidents differently from residents and impinges upon a "fundamental" privilege or immunity protected by the Clause. *Camden*, 465 U.S. at 218. Because California charges higher fees to nonresident commercial fishers, *see* Cal. Fish & Game Code §§ 7852, 7881, 8280.6, 8550.5, we easily conclude that Plaintiffs' interests are "facially burdened." *McBurney v. Young*, 133 S. Ct. 1709, 1715 (2013); *see also Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66–67 (2003); *Carlson v. State*, 798 P.2d 1269, 1274 (Alaska 1990) ("[L]icense fees which discriminate against nonresidents are *prima facie* a violation of [the Privileges and Immunities Clause]."). Further, an unbroken line of authority characterizes commercial fishing as a "common calling" that is protected by the Privileges and Immunities Clause. *See Mullaney v. Anderson*, 342 U.S. 415, 417–19 (1952) (striking down Alaska's differentials for commercial fishing licenses as violating the Privileges and Immunities Clause); *Toomer*, 334 U.S. at 403 ("[C]ommercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause."); *Connecticut*

ex rel. Blumenthal v. Crotty, 346 F.3d 84, 96 (2d Cir. 2003) (holding that "commercial lobstering" falls within the purview of the Privileges and Immunities Clause); *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 266 (4th Cir. 1993) (explaining that commercial fishing is a "protected privilege" because it implicates "'the right to earn a living'" (quoting *Toomer*, 344 U.S. at 403)); *Carlson*, 798 P.2d at 1274 ("Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause.").

We therefore conclude that California's challenged fee differentials fall within the purview of the Privileges and Immunities Clause.

2. Closely Related to the Advancement of a Substantial State Interest

a. Commercial Fishing Fees and State Subsidy

California's differential fees for nonresident fishers have not reduced the percentage of nonresidents obtaining permits. In license year 1986, the year differential fees were introduced for herring gill net permits, nonresidents held 17.5% of these permits in California. In license year 2012, the most recent year for which we have information in the record, nonresidents held 19% of these permits. In license year 1993, the year differential fees were introduced for commercial fishing vessel registrations and commercial fishing licenses, nonresident commercial fishers held 7.2% of all commercial fishing vessel registrations and 6.6% of all commercial fishing licenses in California. In license year 2012, nonresident commercial fishers registered 9.4% of all commercial fishing vessel registrations

and 12.9% of all commercial fishing licenses in California. In license year 1995, the year differential fees were charged for Dungeness crab permits, nonresidents held 9.8% of these permits. In license year 2012, nonresidents held 13.9% of these permits.

According to a declaration of Tony Warrington, Assistant Chief of the Law Enforcement Division of California's Department of Fish and Game ("DFG") (now the Department of Fish and Wildlife), a "reasonable and conservative estimate" of commercial fishing enforcement expenditures by the Law Enforcement Division in FY 2010–11 is $10,320,963. According to a declaration of Helen Carriker, Deputy Director of Administration of DFG, additional FY 2010–11 expenditures by the License and Revenue Branch of DFG and by the Marine Region of DFG were $9,499,000. Carriker states, however, that these numbers do "not capture all of DFG's commercial fishing costs," and that "all DFG programs benefit commercial fishermen in some way." These numbers also do not include fishing-related conservation expenditures by other California agencies, such as the California Coastal Commission. Based on the numbers provided by Warrington and Carriker, a conservative estimate is that California spent approximately $20,000,000 in FY 2010–11 on enforcement, management, and conservation activities benefitting commercial fishers.

Warrington estimated the FY 2010–11 expenditures by the Law Enforcement Division of DFG attributable to the Dungeness crab fishery as $921,394, and attributable to the herring gill net fishery as $75,094. He noted, however, that these

numbers "likely underestimate the enforcement costs for these two fisheries" because not all personnel costs (in terms of both numbers of people and numbers of overtime hours) were included, and because some equipment expenses were not included. Carriker estimated the FY 2010–11 expenditures by the License and Revenue Branch of DFG attributable to the Dungeness crab fishery as $83,921, and attributable to the herring gill net fishery as $97,431. According to a declaration by Marci Yaremko, Environmental Program Manager for DFG, FY 2010–11 expenditures by the Marine Region of DFG attributable to the Dungeness crab fishery were "at least" $109,797, and attributable to the herring gill net fishery were "at least" $285,981. Combining the expenditures by the Law Enforcement Division, the License and Revenue Branch, and the Marine Region, in FY 2010–11 California's DFG spent at least $1,115,112 attributable to the Dungeness crab fishery and at least $458,506 attributable to the herring gill net fishery.

During FY 2010–11, California residents registered 2,812 commercial fishing vessels; nonresidents registered 304 vessels. Nonresidents' vessels thus accounted for approximately 10% of the total registrations in that year. California residents purchased 5,618 commercial fishing licenses; nonresidents purchased 775 licenses. Nonresidents accounted for approximately 12% of the total licenses. California residents paid the yearly fee for 500 Dungeness crab permits; nonresidents paid the fee for 76 permits. Nonresidents accounted for approximately 13% of the total Dungeness crab

permits. California residents paid the yearly fee for 180 herring gill net permits; nonresidents paid the fee for 39 permits. Nonresidents accounted for approximately 18% of the total herring gill net permits.

During FY 2010–11, California received, from residents and nonresidents, a total of approximately $2,415,000 for commercial vessel registrations, commercial fishing licenses, Dungeness crab permits, and herring gill net permits. Of that amount, approximately $435,000 was due to fee differentials paid by nonresident fishers. Broken down by category, the fee differentials were approximately $193,000 for commercial fishing boat registrations; approximately $187,000 for commercial fishing licenses; approximately $19,000 for Dungeness crab permits; and approximately $36,000 for herring gill net permits.

Overall, during FY 2010–11 California received approximately $5,800,000 in commercial fishing revenues, including revenues from resident and nonresident fishing vessel registrations, fishing licenses, Dungeness crab permits, and herring gill net permits. Using $20,000,000 as the conservative estimate of California's overall commercial fishery expenditures, the FY 2010–11 shortfall was slightly over $14,000,000. If we exclude from the calculation fee differentials paid by nonresidents, the shortfall in FY 2010–11 was approximately $14,435,000. The shortfall was covered by California's general tax revenues. This shortfall was a subsidy, or benefit, provided by California taxpayers to the commercial fishing industry in California. The question before us

is whether, or to what degree, nonresident commercial fishers may be required to pay differential fees to account for their proportionate share of that subsidy, or benefit.

b. Advancement of a Substantive State Interest

i. State Expenditures and Compensation by Nonresidents

(a) State Expenditures

The Supreme Court has decided two cases in which differential fees were charged to nonresident commercial fishers. First, in *Toomer v. Witsell*, 334 U.S. 385 (1948), South Carolina charged a license fee of $25 for commercial shrimp boats owned by state residents. It charged a license fee of $2,500—one hundred times greater—to commercial shrimp boats owned by nonresidents. *Id.* at 389. The Court wrote that "South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually exclusionary." *Id.* at 396–97; *see also id.* at 398 (noting "a near equivalent of total exclusion"). The Court struck down the fee differential as a violation of the Privileges and Immunities Clause. *Id.* at 403. The Court was careful, however, to endorse differential fees that were compensation or reimbursement for state-provided benefits as to which nonresidents would otherwise be free riders. The Court wrote that the Clause allows a state "to charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any

conservation expenditures from taxes which only residents pay." *Id.* at 399.

Second, in *Mullaney v. Anderson*, 342 U.S. 415 (1952), the Tax Commissioner of Alaska charged a commercial fishing license fee of $5 to residents and a $50 fee—a ten times greater fee—to nonresidents. Alaska sought to justify the fee differential based on enforcement costs attributable to nonresident commercial fishers, but the record did not support its attempted justification. Indeed, wrote the Court, the Tax Commissioner and his Deputy "specifically disclaimed any knowledge of the dollar cost of enforcement." *Id.* at 418. Applying the Privileges and Immunities Clause to a Territory (as Alaska then was), the Court struck down the fee differential. The Court quoted the language from *Toomer* endorsing differential fees that prevent nonresidents from free riding on state-provided enforcement and conservation efforts, *id.* at 417, and the Court was careful to say that precise cost and reimbursement figures were not required in order to justify differential fees, *id.* at 418 ("Constitutional issues affecting taxation do not turn on even approximate mathematical determinations.").

To justify the fee differentials challenged in this case, California points to the approximately $14 million yearly shortfall in its expenditures in managing its commercial fishery. As noted above, without the revenue produced by the fee differentials, the yearly shortfall would be an additional $435,000. California contends that the fee differentials charged to nonresident commercial fishers appropriately compensate it for costs incurred in enforcement and

conservation efforts attributable to nonresidents as their proportionate share, and that the fee differentials reduce (though do not entirely eliminate) the free-rider problem that would otherwise exist.

On several occasions, the Supreme Court has stated that a state's expenditures may justify discrimination against nonresidents that would otherwise be impermissible under the Privileges and Immunities Clause. As just noted, the Court stated in *Toomer* and *Mullaney* that a state may charge differential fees to nonresident commercial fishers in order to recover the state's expenditures in enforcement and conservation measures that are attributable to the nonresidents. In *Camden*, a municipal ordinance required that at least forty percent of workers employed on city construction projects be residents of Camden, New Jersey. The Court wrote, "The fact that Camden is expending its own funds or funds it administers in . . . terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause." *Camden*, 465 U.S. at 221.

The Court's decisions under the Commerce Clause make much the same point about state expenditures. Commerce Clause decisions are relevant to the Privileges and Immunities Clause because the two clauses share the same underlying concerns. *See*, *e.g.*, *Hicklin v. Orbeck*, 437 U.S. 518, 531–32 (1978) ("[T]he mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause—a relationship that stems from their common origin in the Fourth

Article of the Articles of Confederation and their shared vision of federalism . . . —renders several Commerce Clause decisions appropriate support for our conclusion [under the Privileges and Immunities Clause]." (internal citation omitted)). In *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), South Dakota built and owned its own cement plant. When demand for cement exceeded supply, South Dakota instituted a policy of satisfying all orders from South Dakota customers first, relegating out-of-state customers to the end of the line. The Court sustained the policy against a dormant Commerce Clause challenge, writing:

> The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve . . . . Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.

Id. at 442. Similarly, in *McBurney v. Young*, 133 S.Ct. 1709 (2013), the Supreme Court rejected a dormant Commerce Clause challenge to a Virginia Freedom of Information Act provision under which only Virginia residents were allowed to compel production of state government documents. Citing *Reeves*, the Court wrote, "Insofar as there is a 'market' for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole

manufacturer." *Id.* at 1720. The Court therefore held that Virginia could reserve for its citizens the benefits of the product it had created through the expenditure of state funds.

(b) Compensation by Nonresidents for State-provided Benefits

The core principle of the foregoing cases is that when a state makes an expenditure from a fund to which nonresidents do not contribute, and when the state provides a benefit through that expenditure to both residents and nonresidents, the state may exclude nonresidents from the benefit either in whole or in part, or it may seek compensation from nonresidents for the benefit conferred. When the benefit at issue is access to a natural resource, the state may not exclude nonresidents, but it may seek reimbursement for money spent to manage and preserve the resource. In such cases, as the Court wrote in *Toomer*, the Privileges and Immunities Clause allows a state "to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399.

Several related principles come from these same cases. First, the benefit provided to a nonresident, and the appropriate amount of compensation from the nonresident, need not be determined with mathematical precision. The constitutional question "do[es] not turn on even approximate mathematical determinations." *Mullaney*, 342 U.S. at 418. Second, we accord states deference in determining the benefit

provided and the appropriate amount of compensation. A privileges and immunities inquiry "must . . . be conducted with due regard for the princip[le] that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer*, 334 U.S. at 396. Third, in seeking compensation from nonresidents, a state must treat nonresidents and residents with "substantial equality." *Id.* at 396 ("[I]t was long ago decided that one of the privileges which the [Privileges and Immunities Clause] guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.").

Consistent with these principles, we may calculate at a general level the benefit provided by California and the appropriate compensation from nonresident fishers. California spent approximately $20,000,000 managing its commercial fishing industry in FY 2010–11. Not including the fee differentials paid by nonresident fishers, California received a total amount of approximately $5,365,000 in fees from the commercial fishing industry. This amount includes all fees, not limited to commercial fishing license fees, commercial fishing vessel registration fees, Dungeness crab permits, and herring gill net permits. Of that total amount (again excluding the amount paid in fee differentials), approximately $1,980,000 came from registration, license, and permit fees paid by commercial fishers. The remaining approximately $3,385,000 came from fish landing taxes and from licensing fees paid by fish buyers, sellers, and importers. The shortfall in

revenues (excluding nonresident differentials) in FY 2010–11 was approximately $14,635,000, or approximately 73% of the entire amount spent by California in managing its commercial fishery. The shortfall was a subsidy, or benefit, provided by California to its commercial fishing industry, paid by California taxpayers. All commercial fishers in California—residents and nonresidents alike—benefited from this subsidy.

We will assume, as a rough estimate, that commercial fishers as a whole benefited from the states' subsidy in proportion to the amount they paid in fees. Excluding fee differentials, the amount paid to California by commercial fishers ($1,980,000) was 37% of the total amount paid to California by the entire commercial fishing industry ($5,365,000). Thirty-seven percent of the state's $14,635,000 subsidy is approximately $5,341,000. That amount went to commercial fishers as their proportionate share of the subsidy in FY 2010–11. Nonresident commercial fishers in California were 12% of all commercial fishers in FY 2010–11. Twelve percent of the $5,341,000 subsidy that went to all commercial fishers is approximately $641,000. California could have charged up to that amount to nonresident fishers in FY 2010–11, as their proportionate share of the subsidy, or benefit, provided to them by California out of its general fund. In actual fact, nonresident fishers paid a total of $435,000 in fee differentials in FY 2010–11, substantially less than the amount of their proportionate share of the subsidy, or benefit, provided to them by California.

We may also calculate the subsidies provided to the two specific fisheries for which California charges fee differentials—Dungeness crab and herring. As described above, in FY 2010–11 California's DFG spent approximately $1,115,000 attributable to the Dungeness crab fishery and approximately $460,000 attributable to the herring fishery. As noted above, the overall subsidy provided by California to its commercial fishery is 73% of California's total expenditures for managing its commercial fishery. We will assume, as a rough estimate, that 73% of the amount spent on the Dungeness crab and herring fisheries is the amount by which those specific fisheries were subsidized in FY 2010–11.

Seventy-three percent of the subsidy provided to the Dungeness crab fishery is approximately $814,000. Nonresidents were 13% of the Dungeness crab permit holders in FY 2010–11. Thirteen percent of $814,000 is approximately $106,000, which is the proportionate share of the subsidy provided to nonresident Dungeness crab fishers in FY 2010–11. The differential fee charged to nonresident Dungeness crab fishers in FY 2010–11 was approximately $19,000, substantially less than the $106,000 subsidy, or benefit, provided to them.

Seventy-three percent of the subsidy provided to the herring fishery is approximately $335,000. Nonresidents were 18% of the herring gill net permit holders in FY 2010–11. Eighteen percent of $335,000 is approximately $60,000. The differential fee charged to nonresident herring gill net fishers in FY 2010–11 was $36,000, substantially less than the $60,000 subsidy, or benefit, provided to them.

Thus, whether the calculation is made at the general level of all nonresident commercial fishers, or at the specific level of nonresident commercial fishers for Dungeness crab and herring, the fee differentials charged by California are less than the amount by which California subsidizes the management of the nonresidents' portions of its commercial fishery.

In contrast to the fee differential charged in *Toomer*, California commercial fishing differentials are not "virtually exclusionary." *Toomer*, 334 U.S. at 397. Indeed, quite the contrary. As the numbers given above demonstrate, the percentages of nonresident fishing vessel registrations, nonresident commercial fishing licenses, nonresident Dungeness crab permits, and nonresident herring gill net permits have all increased since the institution of differential fees for nonresidents. Further, in contrast to the fee differentials in *Toomer* and *Mullaney*, the multiples of the fees charged to residents are relatively modest. In *Toomer*, South Carolina charged nonresident shrimpers one hundred times what it charged residents. In *Mullaney*, Alaska charged nonresident fishers ten times what it charged residents. In California, the multiples ranged from about two to slightly less than four.

We therefore conclude that the fee differentials charged by California are permitted under the Privileges and Immunities Clause.

ii. California Taxes Paid by Nonresident Fishers

The above analysis is premised on the nonresident fishers in this case not having paid "taxes which only [California] residents pay." *Toomer*, 334 U.S. at 399. Plaintiffs did not argue in the

district court or in their briefs to us that they have paid California income tax on their earnings from commercial fishing in California, and that they are therefore protected by the Privileges and Immunities Clause from having to pay fee differentials. Plaintiffs made this argument for the first time during oral argument before our en banc panel. Our dissenting colleagues use Plaintiffs' late-raised argument as the central rationale of their dissent. We could hold Plaintiffs' argument waived for failure to raise it in the district court and for failure to raise it in their briefs to us. However, we address it on the merits, for there is enough uncontested information in the record to allow us to consider and reject it. Because we reject the argument, there is no unfairness to California resulting from Plaintiffs' failure to raise it until oral argument before our en banc panel.

If Plaintiffs paid more than *de minimus* income tax to California, such that they should be assimilated, either entirely or in part, to California resident taxpayers for purposes of the Privileges and Immunities Clause, we would have to modify our analysis. However, we do not need to do so because the three named plaintiffs have paid either no or minimal California income tax. One of the named plaintiffs has fished commercially in California for many years and has never paid California income tax. The other two named plaintiffs have fished commercially in California for many years; each has paid income taxes in California for only three of those years.

Named plaintiff Savior Papetti lives in McKinney, Texas. He owns two commercial fishing

boats. He uses one of them to fish in Alaska. He has kept the other boat in San Francisco since 2000. He does not own any herring gill net permits, but has fished regularly for herring in California, missing only a few years, by leasing permits from others. He has fished for Dungeness crab regularly since 2006 except for a "couple [of] years." He stated in his deposition that he has filed California tax returns "every year." He specifically stated that he has not paid California income tax since 1992. There is nothing in the record to indicate that he paid California income taxes before 1992.

Named plaintiff Salvatore Papetti, Savior's father, lives in Bellingham, Washington. He states in his deposition that he has worked as a commercial fisherman since 1963. He owns two commercial fishing boats. He keeps one of them in Alaska. He now uses it to fish for salmon, but in the past has used it to fish for Dungeness crab and herring in California. At the time of his deposition, his other boat was in Washington for repairs. He uses that boat to fish for herring in Alaska and in California, and for salmon in Washington. He fished for Dungeness crab in California as late as 2007. About five or six years ago, he sold his crab permit to his son Savior. He has never missed a herring season in California except the year the season was closed due to an oil spill in San Francisco Bay. He has filed California income tax returns "every year," but has paid income taxes to California in only three of those years. He paid $331 in 2004, $652 in 2009, and $2,273 in 2010.

Finally, named plaintiff Kevin Marilley lives in Lynden, Washington. He has worked as a commercial fisherman since 1974. He owns three commercial fishing boats. He keeps two in Alaska and uses them to fish there. He keeps the third boat in Bellingham, Washington, and uses it to fish for salmon in Alaska and herring in California. He fished for squid and herring in California between 1989 and 2005, and fished for squid in California in 2009. He regularly fished for herring in California through 2007. He stated in his deposition that he intended to fish for herring in California in 2013. He stated in his deposition that he "believe[d]" he filed a California tax return for every year he fished in California up through 2003. The last time he filed a tax return in California was 2003. He paid income tax in California in only three years. He paid $153 in 1994, $3,161 in 1995, and $845 in 1996. He last paid California income tax twenty years ago.

Our dissenting colleagues do not ask to alter our analysis based on the non-existent or minimal California income taxes paid by the three named plaintiffs. Rather, they ask us to do so based on an unsupported assumption that unnamed class members paid substantially more in California income taxes than did the named plaintiffs.

The record contains no evidence of California income taxes paid by any of the unnamed class members. Attorneys for the plaintiff class had an opportunity in the district court to present evidence of California income taxes paid by unnamed class members, but they failed to present any such evidence. Nor did they make any argument in the

district court based on payment of California income taxes by any class member, named or unnamed. An assumption that unnamed class members paid substantially more than the named plaintiffs is inconsistent with the basic premises of class certification. Federal Rule of Civil Procedure 23(a)(3) requires that the "claims . . . of the representative parties [be] typical of the claims . . . of the class." That is, a claim by an unnamed member of the class must match a "typical" claim by a named plaintiff. In this case, there is no such "typical" claim in the complaint because the named plaintiffs made no claim whatsoever based on their payment of California income taxes. Rule 23(a)(2) also requires that there be "questions of law or fact common to the class." If a claim based on the payment of California income taxes had been made in the district court (which it was not), that claim was required to have been based on law or fact "common to the class." To the extent there were facts common to such a claim, if it had been made, the only facts in evidence were those recounted above.

In short, our dissenting colleagues ask us to make an assumption, based on sheer speculation, that unnamed class members paid substantially more in California income taxes than did the named plaintiffs. We respectfully decline to make that assumption.

B. Equal Protection

Plaintiffs also challenged California's commercial fishing fee differentials under the Equal Protection Clause. The district court struck down the fee differentials as a violation of the Privileges and

Immunities Clause and did not reach the equal protection question. We could remand to the district court to address that question in the first instance, but in the interest of judicial efficiency we decide the question ourselves.

Because California's commercial fishing fee differentials do not "classify persons based on protected characteristics, such as race, alienage, national origin, or sex" or "affect the exercise of fundamental rights," rational basis review applies. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955 (9th Cir. 2005); *see also Country Classic Dairies, Inc. v. State of Mont., Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) ("[T]he right to pursue a calling is not a fundamental right for purposes of the Equal Protection Clause." (citing *New Orleans v. Dukes*, 427 U.S. 297, 303–05 (1976) (per curiam))); *see also Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005) ("The right to 'make a living' is not a 'fundamental right,' for either equal protection or substantive due process purposes."). Therefore, in order to succeed Plaintiffs must "negat[e] every conceivable basis which might support the legislative classification" between residents and nonresidents. *Fields*, 413 F.3d at 955. As explained above, California has a "substantial reason" for charging nonresident differentials. It has an obvious interest in recovering from nonresident commercial fishers their share of the benefit provided to them by its management of its commercial fishery. Congress has recognized this interest as legitimate. *See* Pub. L. No. 109-13, § 6036(b)(1), 119 Stat. 231. But even absent such congressional endorsement, California's interest

in receiving compensation for the benefit its management confers provides a "rational basis" for its fee differentials.

Conclusion

We reverse the district court's grant of summary judgment to Plaintiffs. California's fee differentials for commercial fishing vessel registrations, fishing licenses, Dungeness crab permits, and herring gill net permits survive the Privileges and Immunities Clause challenge because the differentials are justified by a substantial reason that is closely related to the differential fees. The fees survive the Equal Protection Clause challenge because California has a rational basis for charging the differential fees. California is therefore entitled to summary judgment on both of Plaintiffs' claims. We remand with directions to the district court to enter summary judgment for California.

REVERSED and **REMANDED**.

M. SMITH, Circuit Judge, with whom HURWITZ and OWENS, Circuit Judges, join in full, and REINHARDT and BERZON, Circuit Judges, join as to Part III, dissenting:

The majority assumes away the major defect in its analysis: the fact that nonresident fishermen pay multiple California taxes too, yet nonetheless commence each fishing season thousands of dollars in the hole by virtue of California's discriminatory differentials. To avoid dealing with this problem, the majority employs the analytical head fake of fixating on the named plaintiffs and ignoring the rest of the class. It then opines that the named plaintiffs' tax

liability is *de minimus*, assumes that finding is representative, and concludes that its analysis need go no further.

That approach is deeply flawed. Our analysis cannot properly ignore the bevy of taxes nonresident fishermen pay collectively to the State. Moreover, the majority improperly transposes the evidentiary burden: it is California that must demonstrate that the differentials recoup a subsidy funded only by its residents. Hence, any purported lack of evidence on the tax liability of nonresident fishermen *counts against* the State, not the other way around. The majority shrugs this off, and thereby fails to require California to bear the burden the Privileges and Immunities Clause demands.

California, like the majority, overlooks how nonresident taxes defray the costs of any subsidy for conservation, and thereby fails to meet its burden to show its discrimination is "closely drawn" to the achievement of a substantial state objective. *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 68 (1988). For that reason, I would affirm the district court's judgment in favor of the plaintiffs, and I respectfully dissent.

I.

Salvatore Papetti and his wife Nancy fish for herring together in a two person team. They make the trip to San Francisco from Bellingham, Washington, to fish on their boat, the "Pacman." It is tough work—"being on the ocean day and night, your body wears out" because "when there's fish, you just got to go go go go . . . they're here today and they're gone tomorrow. . . . You got to catch as much as you can when you can." They fish "five days a week, 24

hours a day, Sunday sundown till Friday noon." They land their catch every day while the fish are still fresh to ensure the bounty does not spoil.

They hold two commercial fishing licenses, three herring gill net permits, and one commercial fishing vessel registration. This would cost them $1566.50 in license fees if they were California residents, using the majority's numbers from 2010. California, however, extracts $5482.00 from the Papettis, based simply on their status as nonresidents. So, Salvatore and Nancy start the season with a $3915.50 deficit, relative to their in-state competitors. Adding insult to injury, every year it gets worse because commercial fishing fees are automatically indexed for inflation. Cal. Fish & Game Code § 713 (2013). The effect of the indexing is to widen the gap between resident and nonresident fishing license fees each season.

Savior Papetti—Nancy and Salvatore's son—must endure the same built-in headwinds. He registers a boat in California, obtains a fishing license, and secures permits to fish for herring and crab. But since he hails from McKinney, Texas, he starts each season $2062.00 behind his California resident competitors. Kevin Marilley is no different. He sets sail on the "Sundance Kid" near San Francisco to fish for herring. He registers his boat, obtains a fishing license, and has three herring gill net permits, so he starts $3674.50 in the red, unlike his California resident competitors. Frustrated by the disadvantage, Marilley and the Papettis challenge four of California's differential fees under the Privileges and Immunities Clause of the U.S. Constitution.

A.

The Privileges and Immunities Clause is one of the cornerstones upon which our nation was built. Its origins add an important perspective on the State's burden in this dispute.

After the revolution, "[t]he strong sympathies . . . which bound the States together during a common war, dissolved on the return of peace." *Gibbons v. Ogden*, 22 U.S. 1, 223 (1824) (Johnson, J. concurring). For the first time, the states found themselves "in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted." *Id.* at 224. State parochialism "began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States." *Id.*

New York, for instance, obtained firewood from Connecticut and goods from the farms of New Jersey, but because such trade harmed domestic industry, the State required "every Yankee sloop" and "Jersey market boat" to pay an entrance fee and a duty. JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789 150S52 (1897). New Jersey retaliated by laying a tax on property New York had acquired in Sandy Hook. *Id.* at 152. Connecticut's merchants refused "to send any goods whatever into the hated state for a period of twelve months." *Id.* Yet, as three other New England states "closed their ports to British shipping," Connecticut saw fit to "thr[ow] hers wide open, an act which she followed up by laying duties upon imports from Massachusetts." *Id.* at 148S49. Connecticut's practice

of "denying to outlanders the treatment that its citizens demanded for themselves was widespread." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). "This came to threaten at once the peace and safety of the union." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation marks omitted).

The new country initially tried to solve the problem with the toothless Articles of Confederation, which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof . . . .

Art. IV. Since no state could unilaterally enforce this provision, the economic interaction of the several states became more and more fraught. Ultimately, this internecine, economic fratricide became "the immediate cause[] that led to the forming of a [constitutional] convention." *Gibbons*, 22 U.S. at 224; *see also* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 82 (17th ed. 2010) ("The poor condition of American commerce and the proliferating trade rivalries among the states

were the immediate provocations for the calling of the Constitutional Convention.")

The Privileges and Immunities Clause was primarily aimed at "creat[ing] a national economic union," *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279S80 (1985), and was taken from the Articles of Confederation "with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation," *Austin*, 420 U.S. at 661. It affirms "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Alexander Hamilton referred to the Clause quite simply as "the basis of the Union." The Federalist No. 80, at 502 (B. Wright ed., 1961). It "place[d] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1868). The Court found it gave outsiders "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield v. Coryell*, 6 F.Cas. 546, 552 (No. 3,230) (Cir. Ct. E.D. Pa. 1823). "It has been justly said that no [other] provision in the Constitution has tended so strongly to constitute the citizens of the United States one people . . . ." *Paul*, 75 U.S. at 180.

B.

In light of this background, when states erect barriers that impair our national economic unity, they bear a significant burden of justification: laws implicating the Clause must serve a "substantial state interest" and be "closely related" to the

advancement of that interest to be valid. *Friedman*, 487 U.S. at 65. A substantial interest does not exist "unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." *Hicklin v. Orbeck*, 437 U.S. 518, 525S26 (1978) (quotation marks omitted, brackets in original). States of course do have some flexibility in prescribing appropriate cures for local ills and, when levying fees, need not demonstrate mathematical precision. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948). But citizens of State A must be allowed to do business in State B "on terms of *substantial equality* with the citizens of that State." *Id.* (emphasis added).

C.

The "evil" the fee differentials target in this case is the potential for nonresidents to "free ride" on California's investment in its fisheries.[1] The State's

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[1] The California legislature never articulated this aim, but the State insists the fee differentials were passed to close a budget gap. It is undisputed that nonresident fishermen were never actually identified as a unique source of any problem that would justify charging them a differential. Additionally, as "the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment," it is appropriate to examine whether the differentials were enacted for a protectionist purpose. *McBurney v. Young*, 133 S. Ct. 1709, 1716 (2013). Here, California's enactment of the Dungeness crab fee differential bears the hallmarks

valid interest thus lies in seeking reimbursement for a benefit funded exclusively by California residents. In this situation, California may exact only "a differential which would merely compensate the State for [1] any added enforcement burden [nonresidents] may impose or [2] for any conservation

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of economic protectionism. As the district court observed, the California Assembly Committee on Water, Parks, and Wildlife opposed an early version of the bill, noting it "provided[d] an unfair advantage to the sponsors of the bill – the Pacific Coast Federation of Fisherman [sic] [a resident fishermen advocacy group] – by making it very difficult for any new crab fishers to obtain permits and enter the market." The Department of Fish and Game ("DFG") later commented "[t]his bill is an attempt to . . . control competition to California fishermen and processors from out of state." DFG's enrolled bill report described the legislation as "an industry sponsored bill to prevent out-of-state commercial fishermen from moving into California and getting an undue share of the California Dungeness crab resource." When the fee was renewed in 2006, Senate Republican analysis of the bill observed "where resource management crosses the line into economic protectionism it should be opposed . . . DFG should explore other management options that focus on maintaining the crab population instead of the industry population."

expenditures from taxes *which only residents pay*." *Toomer*, 334 U.S. at 399 (emphasis added).[2]

California elected to put all of its eggs in the second basket, as it never asserted, much less provided any evidence, that nonresident commercial fishermen impose any added enforcement or management burden on the State.[3] In conducting our analysis, we thus look to the aggregate benefits nonresident fishermen receive at the expense of California's taxpayers. To calculate that benefit, I will leverage, but do not endorse, the majority's handiwork.

The majority assumes the $20 million spent on licensing and enforcement is akin to conservation.

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[2] The majority suggests that "a state's expenditures may justify discrimination against nonresidents." Maj. Op. at 15. But the cases it cites involve the Commerce Clause, not the Privileges and Immunities Clause, and assume that nonresidents do not "fund the state treasury." *Reeves, Inc. v. Stake*, 447 U.S. 429, 224 (1980); *McBurney v. Young*, 133 S. Ct. 1709, 1712S13 (2013) (quoting *Reeves*, 447 U.S. at 224).

[3] The State concedes it did not analyze the impact of nonresident commercial fishermen on its fisheries generally, nor identify any savings it would realize if nonresidents were excluded from participating in its fisheries. As such, there is no evidence in the record that the differentials compensate for any added burden or expense nonresidents impose on commercial fisheries.

Maj. Op. at 18–19. It then finds a $14,635,000 shortfall, after accounting for $5,365,000 received in fees, not including differentials. *Id.* Next, the majority assumes commercial fishermen benefitted from the subsidy in proportion to the amount they paid in fees ($1,980,000 / $5,365,000).[4] *Id.* That equals thirty-seven (37) percent of the $14,635,000 shortfall, meaning fishermen were subsidized to the tune of $5,341,000. *Id.* at 19. Since nonresidents account for twelve percent of commercial fishermen, the majority tags them with twelve percent of that amount. *Id.* at 19. In other words, according to the majority, nonresident fishermen received a $641,000 "subsidy." *Id.*

This analysis fails because it assumes that the State's subsidy derives from "taxes which only residents pay," *Toomer*, 334 U.S. at 399, notwithstanding the fact that the record shows that nonresident commercial fisherman pay California taxes as well. Nonresident fishermen, in other words, must "be assimilated, either entirely or in part, to California resident taxpayers for purposes of the Privileges and Immunities Clause," Maj. Op. at 22, because—like Golden State residents—they too pay taxes to fund the State's conservation expenditures.

II.

A.

The State's expert, Dr. Carriker, says commercial fishermen in California earned $150 million in 2009,

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[4] The State never advanced, let alone justified, this assumption.

$179 million in 2010, and $204 million in 2011. The State also consistently represented it could charge fees to nonresident fishermen in relation to their percentage of overall fishermen. Thus, taking the majority's number, we can attribute twelve percent of those earnings to the efforts of out-of-state fishermen. By that account, nonresident fishermen paid personal income taxes to the State on earnings approximating $18–$24 million.[5]

We can also consider it in another way. Using the landings data submitted both for residents and nonresidents, Dr. Carriker submits that the "average per-fisherman income" in California was $91,293.03 in 2009, $105,858.00 in 2010, and $105,070.28 in 2011. If we assume nonresident fishermen are comparable to their in-state counterparts, nonresidents would be liable for at least 9.3 percent in personal income taxes on roughly those amounts. *See* Franchise Tax Board, 2014 ANNUAL REPORT tbl.A1-B (2014), *available at*

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[5] To be clear, California taxes the income of nonresidents "derived from sources within this state," Cal. Rev. & Tax. Code § 17041(i)(1)(B), "including income from a business, trade, or profession carried on within this State." Cal. Code Regs. tit. 18, § 17951-2. California also imposes a property tax on boats, including those registered in California but located outside of it. *See* California State Board of Equalization, Frequently Asked Questions – Personal Property, https://www.boe.ca.gov/proptaxes/faqs/personal.htm.

https://www.ftb.ca.gov/Archive/AboutFTB/Tax_Statistics/Reports/2014/Annual_Report.shtml#Tax_Rates (showing personal income tax rates for each income level from 1935 to 2014) [hereinafter 2014 FTB Report].

Alternatively, if we divide the aggregate earnings (approximately $24 million) by the number of nonresident fishermen (775), nonresidents would be paying California taxes on $31,000 per year on average. This estimate, however, assumes income is distributed evenly, notwithstanding the fish will bite for some fishermen more than others. Accordingly, $31,000 might be construed as the median income, meaning half of nonresident fishermen would make more each year, and the other half less. In that scenario, it would not be surprising for the named plaintiffs to have made modest in-state tax payments, even where nonresident fisherman collectively contribute substantially.

California never contemplated, much less accounted for, the contributions nonresident fishermen make in personal income taxes.[6] Based on the evidence in the record, however, we can reasonably infer nonresident fishermen's incomes contribute meaningfully in the aggregate to the

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[6] Regardless of when the issue was raised, the above evidence has always been in the record, and we review a district court's decision granting a motion for summary judgment de novo. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1086 (9th Cir. 2013).

State's conservation expenditures. *See, e.g.*, SER 20 ("[A] substantial portion of General Fund revenue comes from nonresident sources, including personal income tax paid by nonresidents, including nonresident commercial fishermen.").

Consider also the fact that California derives close to thirty percent of the General Fund from sales and use tax revenue. Nonresident fishermen like the Papettis pay those taxes just as California residents do—to purchase food, fuel, and other necessary materials in California. I assume that nonresident fishermen are also a salty bunch, and likely pay excise taxes too, on cigarettes, beer, wine, and alcohol, thereby adding further to the State's general revenue. Yet California makes no effort to account for any of these nonresident funds in justifying its fee differentials, or to explain how nonresidents remain on the "same footing" as residents in spite of them. That simply is unjustifiable; under the Privileges and Immunities Clause California is required to do more. *See Mullaney v. Anderson*, 342 U.S. 415, 418 (1952) ("[S]omething more is required than bald assertion to establish a reasonable relation between the higher fees and the higher cost[s] to the [State]."); *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993) (finding differential not "closely related" to asserted interest because, among other things, State gave "no recognition" to sales and use taxes paid by nonresident fishermen); *Carlson v. State*, 798 P.2d 1269, 1278 (Alaska 1990) (reading *Toomer* "to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out

of which conservation expenditures were made, then differential fees would not be permissible").

The majority concedes its analysis would have to be "modif[ied]" if nonresident fisherman "paid more than *de minimus*" taxes to California, Maj. Op. at 22, but it shrugs off the few thousands of dollars the named plaintiffs paid to California as being insufficient to meet its novel standard. By itself, this is error—the State must demonstrate "a reasonable relationship between the danger represented by non-citizens, *as a class*, and the severe discrimination practiced upon them." *Toomer*, 334 U.S. at 399 (emphasis added). In this case, California has failed to make any such showing.

Apparently unable to respond more adequately to our argument, the majority steps purposefully to the plate, swings as hard as it can, and whiffs, by fixating on Rule 23's class certification standards. Emphatically, those standards do not require that class members be carbon copies of each other. They therefore cannot excuse the majority's failure to grapple with the hole in its argument. For instance, the majority invokes "commonality," but "[t]he existence of shared legal issues with *divergent factual predicates* is sufficient" to meet that "permissive" standard. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1988) (emphasis added). Likewise, "typicality" requires "only that [the named plaintiffs'] claims be 'typical' of the class, not that [the named plaintiffs] be identically positioned to each other or to every class member." *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011)

("Differing factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality.").

Here, the district court found both elements satisfied because the plaintiffs "articulated a common constitutional issue at the heart of each proposed class member's claim for relief," and resolution of that issue "would inform similar claims by other proposed class members regardless of factual differences among class members." This finding by no means warrants the majority's factual assumption that every class member paid the same amount as the named plaintiffs in state taxes to California. Maj. Op. at 25. Indeed, Rule 23 requires only that each class member here pay fees higher than those charged to in-state residents. And, though the extent of nonresident tax liability might be a common question, Rule 23 permits certification even where the answer varies based on the unique factual circumstances of each nonresident fisherman. In short, neither "commonality" nor "typicality" mean the majority must assume every nonresident fisherman, across all species, location, and circumstance, earned the same income as the named plaintiffs and owed the same taxes to the state of California. Maj. Op. at 24–25. In fact, the opposite conclusion is more reasonable given some nonresidents fish for herring, others for crab, and still others for both, to say nothing of the fishermen who add outings for crayfish or lobster, amongst many other commodities. Were it not evident enough that the majority is seeking to avoid the elephant in the room, it bemoans the absence of any information

about the income taxes nonresident fishermen pay to California, *id.* at 24, without even considering the aggregate statistics cited above, and the reasonable inferences drawn from those data.[7]

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[7] The majority asserts our inferences are unsupported, but that is incorrect. Our assessment derives from the aggregate earnings statistics California placed into the record, which were taken from landings data submitted both for resident and nonresident commercial fishermen. *See supra* II.A. We do *not* claim, as the majority states, that every unnamed class member makes "substantially more" than the named plaintiffs. Maj. Op. at 24. Our argument is that the record reasonably reflects that nonresident fishermen—taken collectively, across the full range of their income distribution—pay taxes that contribute materially to the State's conservation expenditures (a fact California completely ignores). Unlike the majority's hypothesis, under which unnamed class members are clones of the named plaintiffs, our assessment comports with common sense. We appreciate that 775 fisherman—some of whom fish the whole year in California, others of whom fish part-time—will earn incomes that fall along a distribution, such that some will owe California income taxes, and others will not. Given that point, the majority has no basis, under Rule 23 or otherwise, to assume the California tax liability of the three named plaintiffs is broadly representative. More importantly, it is California's burden to demonstrate our understanding is untrue in order to

Even if we accept the majority's framing, the named plaintiffs can *still* "be assimilated . . . to California resident taxpayers." Maj. Op. at 22. We have no reason to believe that fishermen are any different from resident and nonresident tax-filers in the State more generally. And whereas fifty-eight (58) percent of resident filers owe personal income taxes to California, *sixty* (60) percent of nonresident filers owe them.[8] *Compare* 2014 FTB Report tbl.B-4A (showing 58.4 percent of residents returns were taxable in 2013), *with id.* tbl.B-4G (showing 60.2 percent nonresident returns were taxable in 2013). So, like ordinary Californians, some nonresident fishermen pay the State more in personal income

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justify its discriminatory differentials. It has made no such showing in this case.

Next, while it is true that "[i]f a claim based on the payment of California income taxes had been made in the district court, that claim was required to have been based on law or fact 'common to the class,'" Maj. Op. at 25, that observation affords the majority no help. The law common to the class is the constitutional issue under the Privileges and Immunities Clause, and Rule 23(a)(2), stated in the disjunctive, requires nothing more. In other words, the only common "claim" that is required by Rule 23 to appear in the complaint is the one the plaintiffs advanced—that each class member pays fees higher than those charged to California residents.

[8] The Franchise Tax Board's 2014 Annual Report is the most recent available data.

taxes than others, but like Californians generally, nonresident fishermen contribute meaningfully to the State's coffers collectively. All told, the majority improperly focuses on a few fishermen whose contributions it deems insignificant on the overall tax liability spectrum, but the record reflects, and common sense dictates, nonresident fishermen's taxes contribute materially to conservation expenditures.

B.

By chalking up to a rounding error the taxes nonresidents pay, the majority effectively shifts the applicable burden. Yet, any purported lack of evidence on the tax liability of nonresident fishermen is a strike against California, not against the plaintiffs. It is California that shoulders the burden to demonstrate that its discrimination "bears a close relation to the achievement of substantial state objectives." *Friedman*, 487 U.S. at 70. Moreover, it is California that must demonstrate its differentials "merely compensate" for expenditures that derive from taxes "which only residents pay." *Toomer*, 334 U.S. at 399. Finally, it is California that must demonstrate it permits nonresident fishermen to do business "on terms of substantial equality" with citizens of the State. *Id.* at 396. Unfortunately, the majority lets California off the hook, for while the State is owed some deference, it made no effort to account for nonresident taxes whatsoever. California simply fails to meet its burden. The upshot is that nonresident fishermen stand on different footing than residents, whether fisherman or not. They alone

pay differentials but must also pay the same taxes on income earned within the State.

To illustrate, the 775 nonresident fishermen can be charged for a $641,000 "subsidy," even though they pay state taxes to cover this conservation expenditure. In-state fishermen, by contrast, receive a $4,700,080 subsidy, but California's 15,000,000 taxpayers collectively foot the bill. Accordingly, using the majority's numbers, California residents, whether fisherman or not, pay about thirty cents on average towards the subsidy to in-state fishermen, whereas nonresident fishermen are charged over $800 each on average for the "subsidy" they receive.[9]

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[9] Notably, *Carlson* rejected the "proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment." 798 P.2d at 1278. The court found such a system "economically indistinguishable from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions." *Id.* It declined to strike down the differential imposed by Alaska on this basis because state taxes were not "substantially the sole revenue source" for conservation expenditures. *Id.* (noting 86 percent of state revenues derived from petroleum production). The opposite is true here—personal income tax and sales tax made up 86 percent of General Fund revenues for the year ending June 30, 2015. *See* California State Controller's Office,

It bears repeating: California shoulders the burden of showing the additional fees charged to nonresidents are closely related to the "taxes which only residents pay," *Toomer*, 334 U.S. at 399, and California must permit nonresident fishermen to do business on terms of substantial equality with citizens of the State. By overlooking how the taxes nonresident fishermen pay the State defray the costs of any subsidy for conservation, California fails to meet its burden. The fee differentials must accordingly be struck down.

C.

If left to stand on this showing, we have no reason to think interstate fee differentials will not proliferate. Indeed, California could, for example, charge nonresident truckers and commercial airline pilots fees for earning a living off state-subsidized highways and airports. And why wouldn't states seek to recoup from those professions conservation expenditures aimed at maintaining air quality? As in this case, they need only intend to close a budget gap and need not identify any relationship between the shortfall and nonresident truckers or pilots. Further, they need not determine what burdens nonresidents impose, if any, on the state's air, roads, and other infrastructure. Nor would they need to identify any

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COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2015 42 (2016), *available at* http://www.sco.ca.gov/Files-ARDLocal/LocRep/cafr15web.pdf.

savings the state would realize if nonresident truckers and pilots were excluded. Finally, they could, like California, ignore nonresident taxes in setting the fee, so long as a few of the truckers or pilots earned incomes that led to modest in-state tax payments. The Privileges and Immunities Clause should preclude such barriers because they disrupt interstate economic harmony unjustifiably. The majority unfortunately holds otherwise, and thereby subverts one of the most important economic compacts that initially bound us together.

III.

This country is more than a league of confederated states—it is a nation. Yet the enactment of discriminatory fee differentials promotes our economic balkanization. We must be mindful of competing interests when evaluating such measures, but they require ample justification. California's showing in this case does not come close to meeting its burden, so the fee differentials are illegal under the Privileges and Immunities Clause. I respectfully dissent.

REINHARDT, Circuit Judge, dissenting, in which BERZON, Circuit Judge, joins.

I concur in Part III of Judge M. Smith's dissent and agree that California failed to carry its burden of demonstrating that the differential fees it charges to nonresidents are "closely drawn" to the achievement of a "substantial state objective." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 68 (1988). Permissible state objectives include "compensat[ing] the State for any added enforcement burden they

may impose or for any conservation expenditures from taxes which only residents pay." *Toomer v. Witsell*, 334 U.S. 385, 399 (1948). Here, California does not contend that nonresident fishermen impose any sort of added enforcement burden. Nor does the state provide persuasive evidence that its fee differentials bear a "reasonable relationship" to its legitimate interest in receiving compensation from nonresidents for its "conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399 (1948). Therefore, I agree with Judge M. Smith that the state has failed to make the requisite showing to justify *any* differential. That conclusion does not embrace either of the views expressed by the original panel as to how a differential should be calculated when it is in fact justified. *See Marilley v. Bonham*, 802 F.3d 958, 966–68 (9th Cir. 2015), *reh'g en banc granted*, 815 F.3d 1178 (9th Cir. 2016) (Graber., J., dissenting) (comparing the "per capita" and "fair share" approaches to calculating a justified fee differential).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN MARILLEY; SALVATORE PAPETTI; SAVIOR PAPETTI, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

CHARLTON H. BONHAM, in his official capacity as Director of the California Department of Fish and Game,
Defendant-Appellant.

No. 13-17358
D.C. No.
4:11-cv-02418-DMR

OPINION

Appeal from the United States District Court for the Northern District of California
Donna M. Ryu, Magistrate Judge, Presiding

Argued and Submitted
July 7, 2015—San Francisco, California

Filed September 18, 2015

Before: Susan P. Graber and Paul J. Watford, Circuit Judges, and Paul L. Friedman, District Judge.[*]

Opinion by Judge Friedman;
Dissent by Judge Graber

SUMMARY[**]

Constitutional Law

The panel affirmed the district court's summary judgment in favor of a plaintiff class of non-resident commercial fishers who contended that California's discriminatory fishing fees violated the Privileges and Immunities Clause of the United States Constitution.

The panel held that California's differential commercial fishing license fees, Cal. Fish & Game Code §§ 7852, 7881, 8550.5, and 8280.6, which charged non-residents two or three times more in fees than residents, violated the Privileges and Immunities Clause because California failed to offer

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[*] The Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

a closely related justification for its discrimination against nonresidents.

Judge Graber dissented because she would hold that further evidentiary development is necessary to determine whether the differential fees are permissible under the Privileges and Immunities Clause, and she would reverse the summary judgment and remand for further proceedings.

COUNSEL

Kamala D. Harris, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Annadel A. Almendras, Supervising Deputy Attorney General, Gary Alexander and M. Elaine Meckenstock (argued), Deputy Attorneys General, Office of the Attorney General, Oakland, California, for Defendant-Appellant.

Stuart G. Gross (argued) and Jared M. Galanis, Gross Law, P.C., San Francisco, California; Todd R. Gregorian and Tyler A. Baker, Fenwick & West LLP, Mountain View, California, for Plaintiffs-Appellees.

OPINION

FRIEDMAN, District Judge:

Commercial fishers in California are subject to a bevy of fees. For certain fees, however, non-residents are charged two to three times more than residents. Plaintiffs represent a class of non-resident commercial fishers who contend that California's discriminatory fees violate the Privileges and Immunities Clause of the United States Constitution. Because California has failed to offer a closely related justification for its discrimination against non-residents, we agree with plaintiffs and therefore

affirm the district court's grant of summary judgment to the plaintiff class.

BACKGROUND

The named plaintiffs are commercial fishers residing outside California. They represent a class of non-residents who, since 2009, have purchased commercial fishing licenses, registrations, or permits from California and paid higher fees than residents. Plaintiffs sued Charlton Bonham, in his official capacity as the Director of the California Department of Fish and Game, alleging that the differential fees violate the Privileges and Immunities and Equal Protection Clauses of the United States Constitution.

Plaintiffs challenge four specific fees: general commercial fishing license fees, commercial fishing vessel registration fees, Herring Gill net permit fees, and Dungeness Crab vessel permit fees. *See* Cal. Fish & Game Code §§ 7852, 7881, 8550.5, 8280.6. While the parties dispute the prevalence of Herring Gill and Dungeness Crab permits, it is undisputed that, at a minimum, non-resident commercial fishers must purchase the general license to fish in California waters and a vessel registration to do so from a boat they own or operate. *See id.* §§ 7852, 7881. In 2012–13, the relevant fees were as follows:

- Commercial fishing license: $130.03 for residents; $385.75 for non-residents;
- Commercial fishing vessel registration: $338.75 for residents; $1,002.25 for nonresidents;
- Herring Gill net permit: $359.00 for residents; $1,334.25 for non-residents;

- Dungeness Crab vessel permit: $273.00 for residents; $538.00 for non-residents.

All four licenses would set a resident back $1,100.78, but a non-resident $3,260.25.

Following discovery, the parties filed cross-motions for summary judgment. The district court concluded that California had failed to demonstrate a genuine issue of material fact and granted summary judgment to the plaintiff class on its Privileges and Immunities Clause claim. The district court then entered final judgment as to plaintiffs' Privileges and Immunities Clause claim pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[1]

STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment de novo. *See Pac. Shore Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013). Viewing the evidence in the light most favorable to the State, we must decide whether there are any genuine disputes of material fact and whether the district court correctly applied the substantive law. *See Olsen v. Idaho St. Bd. Of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

DISCUSSION

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to

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[1] The district court expressly did not reach or enter final judgment on plaintiffs' Equal Protection Clause claim. We therefore lack jurisdiction over that claim. *See* 28 U.S.C. § 1291.

all Privileges and Immunities of Citizens in the several States." U.S. Consti. art. IV, § 2, cl. 1. This clause "was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)); *see also Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (The Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."). The Clause thus "establishes a norm of comity" between residents and non-residents of a State, *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975), to create "a national economic union," *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008) (quoting *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985)).[2]

The Clause, however, "is not an absolute." *Molasky-Arman*, 522 F.3d at 934 (quoting *Toomer*, 334 U.S. at 396). "While it bars 'discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States . . . it does not preclude disparity of treatment in the many situations where there are perfectly valid

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[2] "While the Privileges and Immunities Clause cites the term 'Citizens,' for analytic purposes citizenship and residency are essentially interchangeable." *Friedman*, 487 U.S. at 64.

independent reasons for it." *Id.* (quoting *Toomer*, 334 U.S. at 396). We therefore employ a two-part test to determine whether disparate treatment violates the Clause. "First, the activity in question must be 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause." *Friedman*, 487 U.S. at 64 (quoting *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 221–22 (1984)). "Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest." *Id.* at 65 (citing *Piper*, 470 U.S. at 284). California contends that the differential license fees pass muster under both parts of this test. We disagree.

A

California does not dispute that plaintiffs' right to pursue "a common calling is one of the most fundamental of those privileges protected by the Clause." *Camden*, 465 U.S. at 219; *see also Toomer*, 334 U.S. at 403 ("Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause."). It instead argues that, in addition to demonstrating that the affected activity is protected, plaintiffs must make two additional showings.

First, California argues that our decision in *International Organization of Masters, Mates, & Pilots v. Andrews*, 831 F.2d 843 (9th Cir. 1987), requires plaintiffs to show that the differential fees

exclude them, in whole or in part, from commercial fishing. This showing cannot be made, California claims, because the percentage of non-resident commercial fishers in California has increased, not decreased. In *Andrews*, we held that the Clause was not violated by a statute regarding cost of living wage adjustments because the statute was "designed to provide equity between the wages of [citizen] and non-[citizen] workers." *Andrews*, 831 F.3d at 846. The statute in *Andrews* thus created equality, not inequality, and therefore did not run afoul of the Privileges and Immunities Clause because, we said, "the appellants ha[d] not shown that they are prevented or discouraged by the State from pursuing employment." *Id.*

California contends that our choice of the words "prevented or discouraged" upset decades of precedent and added an exclusion requirement to the first part of the test. We disagree. As we recited in *Andrews* just two paragraphs before, the first step requires only that "we determine first whether [the statute] burdens" rights protected under the Clause. *Id.* at 845. An exclusion requirement would undermine the purpose of the Clause because permitting a State to freely discriminate against non-residents up to the point they are driven out would not "place the citizens of each State upon the same footing with citizens of other States." *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul*, 75 U.S. (8 Wall.) at 180). And, to any extent that *Andrews* may have implied that a plaintiff must demonstrate exclusion from pursuing their common calling, the Supreme Court's

subsequent statement in *Friedman* makes clear that "[n]othing in [its] precedents . . . supports the contention that the Privileges and Immunities Clause does not reach a State's discrimination against nonresidents when such discrimination does not result in their total exclusion from the State." 487 U.S. at 66.[3]

Second, California argues that *McBurney v. Young*, 133 S. Ct. 1709 (2013), the Supreme Court's most recent Privileges and Immunities Clause decision, requires that plaintiffs show that the differential fees were enacted for a "protectionist purpose." The Supreme Court in *McBurney* did note that prior cases "struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." *Id.* at 1715. California urges us to read that statement to mean that proof of a protectionist purpose always is required to meet step one of our privileges and immunities inquiry. We cannot accept that interpretation of *McBurney*.

When the Court determines that the Privileges and Immunities Clause does not apply at all, it says

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[3] Our conclusion is supported by the fact that, as the district court noted, our "most recent Privileges and Immunities Clause decision, *Molasky-Arman*, contains no discussion at all — at either step of the inquiry — of the extent to which the challenged law's increased burden on nonresidents led to any deterrence or exclusion."

so. For example, in *Baldwin v. Fish & Game Commission*, 436 U.S. 371, 388 (1978), the Court held that, because elk hunting was "not basic to the maintenance or well-being of the Union," the state's decision to charge non-residents more than residents for elk-hunting licenses "simply [did] not fall within the purview of the Privileges and Immunities Clause." In *McBurney*, the Court rejected one of McBurney's arguments — that Virginia's law denied them "the right to access public information on equal terms with citizens" of Virginia — for similar reasons, holding that the Privileges and Immunities Clause did not "cover[] this broad right." 133 S. Ct. at 1718.

By contrast, with respect to McBurney's common calling argument, the Court held that the Virginia law at issue did not "abridge [non-residents'] ability to engage in a common calling *in the sense prohibited by the Privileges and Immunities Clause*." *Id.* at 1715 (emphasis added). The Court reached that conclusion because the statute had only an "incidental effect" on the pursuit of a common calling, and because the distinction it made between citizens and non-citizens had a "distinctly nonprotectionist aim." *Id.* at 1716. This reasoning, along with the Court's discussion of earlier cases involving statutes with protectionist purposes, is a part of step *two* of the inquiry, which requires the state to point to a "substantial reason[]" for the discrimination. *Friedman*, 487 U.S. at 67. "Part and parcel to this analysis is determining whether [the state has] demonstrated a substantial factor unrelated to economic protectionism to justify

the discrimination." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 97 (2d Cir. 2003).

Requiring proof of a legislature's protectionist purpose at the *first* step of the inquiry, as California urges, would negate the *second* step's burden on the state to provide a valid justification for the discrimination against non-residents. Moreover, an intent requirement would undermine the Clause's purpose to "plac[e] the citizens of each State upon the same footing with citizens of other States," *Lunding*, 522 U.S. at 296 (quoting *Paul*, 75 U.S. (8 Wall.) at 180), by mandating different outcomes depending upon a State's motive. We therefore reject California's invitation to read *McBurney* as a dramatic overhaul of the first step of the settled two-step inquiry.

To reiterate, contrary to California's arguments, the first step of the Privileges and Immunities Clause inquiry asks only whether the challenged statute directly burdens a protected activity. It is undisputed that California's commercial fishing license fees are significantly higher for non-resident fishers than for residents. And it is common sense that commercial fishing license fees directly affect commercial fishing. Those facts alone satisfy plaintiffs' burden at the first step of the inquiry. *See Toomer*, 334 U.S. at 396 (a statute that charged $25 to residents for commercial shrimping licenses, but charged $2,500 to non-residents "plainly and frankly discriminate[d] against non-residents" and thus satisfied the first step); *Mullaney v. Anderson*, 342 U.S. 415, 417–18 (1952) (holding that the Privileges and Immunities Clause "would bar any State from imposing" a $5 license fee

on resident fishers and a $50 fee on non-residents unless a State offered a substantial, closely related justification at the second step of the inquiry).

B

At the second step, the burden shifts to the State to demonstrate that "substantial reasons exist for the discrimination and [that] the degree of discrimination bears a close relation to such reasons." *Friedman*, 487 U.S. at 67.[4] To determine whether the State's proffered justifications bear a close relation to the discrimination, we must "consider[] whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Id.*

The Supreme Court has noted that "[t]he State is not without power . . . to charge non-residents a differential which would merely compensate the

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[4] California argues that the district court applied a purportedly different rule taken from the Supreme Court's "tax" cases, as opposed to its "common calling" cases, and failed to consider California's justifications for the discrimination. The Supreme Court, however, has employed the same two-step inquiry for both "tax" and "common calling" cases. *Compare Friedman*, 487 U.S. at 64–65 (challenge to a residency requirement for admission to the State bar), *with Lunding*, 522 U.S. at 296–98 (challenge to a differential income tax deduction). The district court applied the correct test and properly considered California's asserted State objectives.

State . . . for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 398–99. California argues that it is doing just that — merely compensating itself for expenditures on conservation and enforcement efforts from which non-residents benefit. But California claims that *Toomer* allows for inequality at step two and therefore *any* fee differential is permissible so long as the State does not "overcompensate" itself *in the aggregate*, which, according to California, means only that the amount collected from nonresidents cannot exceed their collective "fair share" of the State's expenditures. These differential fees thus are permissible, according to California, because the total additional amount collected from non-residents (approximately $400,000) constitutes a mere 3% of the budget shortfall between costs and revenues (approximately $14.6 million) but non-residents comprise approximately 11% of the commercial fishers in California.

We are unpersuaded. Although we agree that obtaining compensation for expenditures the State makes for conservation or enforcement is a permissible state objective, the additional fees charged to non-residents must bear a close relation to the "taxes which only residents pay." *Toomer*, 334 U.S. at 399; *see also Molasky-Arman*, 522 F.3d at 934 (noting that "a 'substantial reason' for discrimination does not exist 'unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed'") (quoting *Toomer*, 334 U.S. at 398). In other words, a State may justify a differential fee by showing either that it is closely

related to the costs of addressing a burden non-residents uniquely impose or that it approximates the amount in "taxes which only residents pay" towards the relevant State expenditures from which non-residents also benefit. *Toomer*, 334 U.S. at 399; *see also Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993) (*Toomer* permits state to discriminate against non-residents where state "establishes an 'advancement of a substantial state interest' as a reason for the disparate treatment, and, in the facts of this case, evenly or approximately evenly distributes the costs imposed on residents and nonresidents to support those programs benefiting both groups."). Such a differential would "bear[] a close relation to the achievement of [a] substantial state objective[]," *Friedman*, 487 U.S. at 70, because it would address the particular evil non-residents present, unfairly benefiting from residents' tax expenditures. It also would place non-residents "upon the same footing with," *id*. at 64, or at least in "substantial equality" with California residents, *Toomer*, 334 U.S. at 396, by forcing an individual non-resident who benefits from the State's expenditures to contribute an amount substantially equal to that which an individual resident contributes across all fees and related taxes.

California does not claim, however — nor has it presented any evidence that shows — that the fee differential approximates the amount in taxes a resident contributes to the State's expenditures related to commercial fishing. *Mullaney*, 342 U.S. at 418; *see also Hicklin v. Orbeck*, 437 U.S. 518, 527 (1978) ("[T]he discrimination the [statute] works

against nonresidents does not bear a substantial relationship to the particular 'evil' they are said to present."). California alone bore the step two "burden of showing that the discrimination is warranted by a substantial state objective and closely drawn to its achievement." *Friedman*, 487 U.S. at 68. It failed to carry that burden, despite ample opportunity to develop and support its offered justification and "all the facts . . . in [its] possession." *Mullaney*, 342 U.S. at 418–19.

CONCLUSION

For the above reasons, we hold that California's differential commercial fishing license fees, Cal. Fish & Game Code §§ 7852, 7881, 8550.5, and 8280.6, violate the Privileges and Immunities Clause. Charging non-residents two to three times the amount charged to residents plainly burdens non-residents' right to pursue a common calling, in this case commercial fishing. Such discrimination violates the Privileges and Immunities Clause unless the State carries its burden to show "that such discrimination bears a close relation to the achievement of substantial state objectives." *Friedman*, 487 U.S. at 70. Although its stated objective, compensation for State expenditures for conservation or enforcement, is valid, California has failed to show that the differential fee charged to a non-resident is closely related to a resident's share of the State's expenditures.

AFFIRMED.

GRABER, Circuit Judge, dissenting:

I respectfully dissent. Although I agree fully with the majority's analysis at step one of the inquiry, I would hold, at step two, that the differential fees survive summary judgment. Further evidentiary development is necessary to determine whether the nonresident fees "merely compensate the State for any added enforcement burden [nonresidents] may impose or for any conservation expenditures from taxes which only residents pay." *Toomer v. Witsell*, 334 U.S. 385, 399 (1948).

We have little guidance to assist us in determining what the United States Supreme Court meant in the foregoing passage from *Toomer*. Only twice since *Toomer* has the Court quoted the phrase "taxes which only residents pay" in a privileges and immunities context, and in neither case did it explain the meaning of those words. *Baldwin v. Fish & Game Comm'n* , 436 U.S. 371, 401 (1978); *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952). As I explain in more detail below, two state supreme courts have reached different conclusions about the proper interpretation of that phrase. But we do not know which (if either) of those courts got it right, because the Supreme Court denied certiorari in *both* cases. *Carlson v. Alaska Commercial Fisheries Entry Comm'n*, 519 U.S. 1101 (1997); *Glaser v. Salorio*, 449 U.S. 874 (1980). Further complicating our interpretive task, the Privileges and Immunities Clause of Article IV "is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789." *Baldwin*, 436 U.S. at 379.

Acknowledging those limitations, we must decide how to interpret the phrase "taxes which only residents pay." *Toomer*, 334 U.S. at 399. On the one hand, as the State urges, the phrase could be read to refer to residents' aggregate tax contribution to commercial fishing. Under that reading, California permissibly could charge differential fees to nonresidents so long as those fees do not exceed the nonresidents' fair share of the portion of commercial fisheries management costs that California residents' tax dollars fund.

The New Jersey Supreme Court has interpreted *Toomer* in this way. In *Salorio v. Glaser*, 414 A.2d 943 (N.J. 1980), the plaintiffs challenged New Jersey's imposition of an Emergency Transportation Tax, which applied only to nonresident users of the state highway system. Although it found the record insufficiently developed to render a final decision, the New Jersey Supreme Court held that a tax that applied only to nonresidents could, in theory, pass constitutional muster, because "[t]he Constitution does not entitle nonresident commuters to a 'free ride.' The State may exact from them a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause." *Id.* at 954. The court read *Toomer* and other Supreme Court cases to authorize a state to "impose upon non-residents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state." *Id.* at 953.

Applying the *Salorio* court's reasoning here, nonresidents are on "equal footing" with residents so

long as they are not charged more than their "fair share" of commercial fisheries management expenses that residents' tax dollars fund. California introduced evidence that nonresidents purchased 11% of commercial fishing licenses, while the differential fees for out-of-state licenses equaled only 3% of the net general fund contributions to the Department of Fish and Wildlife ("DFW") budget. The State asserts that it constitutionally could charge differential fees that total up to 11% of the DFW's general fund-supported commercial fishing expenditures, so the smaller fee that California actually charges is—*a fortiori*— permissible.

On the other hand, Plaintiffs read "taxes which only residents pay," *Toomer*, 334 U.S. at 399, very differently. They contend that the phrase requires a per capita calculation of a California resident's tax burden related to DFW's commercial fishing budget. The Alaska Supreme Court adopted this alternative interpretation in *Carlson v. State*, 798 P.2d 1269 (Alaska 1990). There, the plaintiffs challenged Alaska's commercial fishing fees, which were three times higher for nonresidents than for residents. The state urged the court to follow *Salorio*. But the Alaska Supreme Court rejected the New Jersey Supreme Court's interpretation of *Toomer*:

> Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying. In other words, *Salorio*, as applied to this case, seems to add up to a general

> proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment.

Carlson, 798 P.2d at 1278. The court held that the proper inquiry was "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contributions are taken into account." *Id.*

Under the *Carlson* court's approach, the state would have to divide general fund expenditures for commercial fishing management by the total number of California taxpayers; the quotient would represent the maximum permissible differential fee. The State introduced evidence that net annual general fund outlays for commercial fisheries management total at least $12 million. Thus, for instance, if there were 12 million taxpayers in California, the per capita formula would limit the permissible differential fee to $1 per nonresident fisher.[1] According to Plaintiffs,

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[1] This illustrative example likely is a generous estimate, as the population of California was nearly 39 million in 2014. U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/06000.html. Thus, the permissible differential likely would be less

this formula puts residents and nonresidents on "equal footing" because their out-of-pocket costs to support commercial fisheries are the same.

I would reject the per capita formula. The purpose of the Privileges and Immunities Clause is to "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). In my view, the per capita approach does not advance that goal. The per capita formula attributes to each resident a pro rata contribution to every program and activity supported by a state's general fund expenditures. But that sort of rigid across-the-board calculation does not accurately reflect the real benefit that a taxpayer obtains through his or her tax dollars. Taxpayer dollars support a large number of state-funded programs. Education, natural resources management, healthcare services, corrections and rehabilitation, infrastructure, and transportation all are at least partially funded with state tax revenues in California. In a given year, an individual taxpayer likely receives no direct benefit from some of those programs, but a benefit that far exceeds his or her pro rata contribution from others. This is the deal that we make when we pay taxes: We all put a portion of our income into a big pot and it is spent in

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than $1 under the per capita formula, even though a substantial number of California residents—for example, minor children—are not taxpayers.

a variety of ways, some of which benefit us directly and some of which do not.

California residents subsidize each other with their taxes. For example, suppose that each taxpayer's share of state support for secondary schools is $1 per year. A certain California taxpayer has a teenager who attends public high school. That taxpayer's per capita "payment" for the educational benefit is $1, but the benefit to the taxpaying parent is worth much more than that. The parent agrees to subsidize a number of other activities in the state, including commercial fishing. In exchange, taxpayers without school-age children subsidize public education.[2] The per capita formula permits a nonresident fisher to obtain the same benefit as a resident fisher, but the nonresident does not have to subsidize *any* other programs or activities in California in exchange. The per capita formula thus *systematically disadvantages the resident* vis-à-vis the nonresident.

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[2] Of course, some commercial fishers are parents whose children attend public school. But that fact just demonstrates that each taxpayer benefits directly from a different set of state programs supported by his or her tax dollars. The value of the taxpayer-funded investment in a given program to each individual taxpayer who benefits from that program varies. The value is less than the taxpayer's total tax bill, but more—generally, significantly more—than the taxpayer's strict pro rata contribution to the program.

Instead of using a per capita formula, I would adopt the *Salorio* court's "fair share" approach. At step two of the privileges and immunities inquiry, the state must show that the discrimination against nonresidents is "closely related to the advancement of a substantial state interest." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 65 (1988). We recently reiterated that "[a] 'substantial reason' for discrimination does not exist 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008) (quoting *Toomer*, 334 U.S. at 398)). Nonresidents increase the amount of commercial fishing activity in California's coastal waters. That increased activity, in turn, requires the state to spend more money than it otherwise would spend on commercial fisheries management, including enforcement and conservation. Because nonresidents are a "peculiar source" of those additional costs, I would hold that not subsidizing nonresident participation in an activity funded with residents' tax dollars is a substantial reason for discrimination. *See Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 268 (4th Cir. 1993) (assuming, without deciding, that such an interest is permissible under the Privileges and Immunities Clause).

Turning to the "close relationship" requirement, I would hold that the State has the burden to show three things. First, it must isolate the state

expenditures that benefit only the licensees.[3] *See id.* (rejecting Virginia's differential license fee in part because it unfairly charged nonresident commercial fishers "for programs funded by all taxpayers to benefit all fishermen, whether commercial or sport fishermen"). Second, it must determine what portion of those expenditures fairly may be characterized as deriving "from taxes which only residents pay." *Toomer*, 334 U.S. at 399; *see Tangier*, 4 F.3d at 267 (striking down Virginia's differential commercial fishing license fees in part because the state calculated the fee without considering nonresident fishers' payment of state sales and use taxes); *Salorio*, 414 A.2d at 955 (discussing whether property and sales taxes are "taxes imposed upon residents alone" in light of the fact that some nonresidents pay them). And third, it must assess what portion of qualifying expenditures is fairly allocable to the nonresidents as "the additional

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[3] These expenditures would include any costs associated with programs or activities in which only licensees participate—for example, the cost of enforcing rules such as size of fish or season limits. They also would include conservation expenditures made necessary by licensees' activities. If the state engages in conservation activities designed to keep fish stocks at a certain level, some of those activities benefit only licensees. To count those costs, the state must separate general conservation activities from conservation activities directed to the effect of commercial fishing.

expenses occasioned by their activities within the state."[4] *Salorio*, 414 A.2d at 953; *see also Tangier*, 4 F.3d at 267 (holding that "the record does not disclose that the Commonwealth of Virginia has shown that it created any credible method of allocating costs as between residents and nonresidents").

I would hold that the "close relationship" requirement of step two is satisfied so long as the state charges a differential fee that, in the aggregate, does not exceed[5] the amount that the state spends

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[4] It may be, as the State asserts, that multiplying the qualifying expenditures by the percentage of commercial fishers who are nonresidents is the appropriate way to calculate those nonresidents' fair share, but that is not necessarily the case. *See Salorio v. Glaser*, 461 A.2d 1100, 1106 (N.J. 1983) ("Although the State has not shown that New York commuters cause higher average costs per commuter than New Jersey commuters, the New York commuter does exacerbate the peak load. Accordingly, both incremental and average costs are pertinent factors in determining the costs attributable to the New York commuter."); *Salorio*, 414 A.2d at 955 (questioning a "strict percentage computation" that assumed equal transportation costs for nonresident and resident commuters).

[5] Because the Privileges and Immunities Clause neither bars the residents of a state from deciding to use their tax dollars to subsidize the activities of nonresidents nor precludes a state from providing a greater benefit to nonresidents than it provides to

that (1) benefits only licensees, (2) derives from taxes that only residents pay, and (3) is fairly allocable to nonresidents.[6] This test puts residents and nonresidents on "substantially equal footing" with respect to commercial fishing: Residents reap the benefit of the tax dollars that they alone pay, and nonresidents cannot be required to pay more than their "fair share" of the benefits they enjoy that are subsidized by those resident-paid tax dollars.

This fair share approach accurately reflects the relative benefit that residents and nonresidents obtain from a state's general fund expenditures. Suppose that a state charges a $50 license fee to resident commercial fishers. Over and above the revenue collected from those fees, the state spends $1 million in tax-supported funds on commercial

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residents, it is permissible for a state to charge *less* than the maximum allowable differential.

[6] The test here is one of "substantial equality of treatment," not absolute equality. *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975). So long as the state "fairly attempts to distribute the burdens and costs of government to those receiving its benefits" pursuant to a reasonable methodology, I would hold that the requirements of the Privileges and Immunities Clause are met. *Salorio*, 414 A.2d at 952; *see also Travelers' Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902) ("It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.").

fisheries management. If 10,000 people per year obtain licenses, the benefit of the $1 million subsidy to each fisher is $100. Thus, a nonresident may be charged the $50 fee that residents pay, plus a $100 differential. If only 5,000 people obtain licenses, each nonresident may be charged a $200 differential. This variance makes sense, because the benefit to each fisher of the tax-supported outlay decreases as more people use the resource. The per capita approach makes less sense because it is unresponsive to such changes; so long as a state's tax rate and general fund outlay on the commercial fisheries program remain unchanged, the permissible differential is fixed. It is the same whether 10 or 10,000 people obtain licenses and use the resource.

Plaintiffs raise the specter of a year in which only one nonresident purchases a commercial fishing license. They argue that the state's approach would permit California to collect hundreds of thousands of dollars from that single licensee. Not so. The fair share formula accounts for this possibility. Assuming the scenario described above, in a year in which a single nonresident and 4,999 residents obtain licenses the permissible differential for that nonresident would remain $200.[7]

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[7] The only way the permissible differential charged to a nonresident would skyrocket is if the overall number of fishers obtaining licenses plunged to single digits. But if that happened, the state likely would slash its commercial fisheries management spending. And if it did not cut spending, it is hard to

Finally, Plaintiffs challenge the "fair share" approach because, using it, the state could set nonresident license fees ten, twenty, or even a hundred times higher than resident license fees. They point out that the Supreme Court has rejected nonresident fees at such ratios before. *See Mullaney*, 342 U.S. at 418 (invalidating nonresident fees ten times higher than resident fees); *Toomer*, 334 U.S. at 389 (striking down nonresident fees one hundred times higher than resident fees). And they urge us to rely on the ratio of nonresident to resident fees here (roughly three to one)[8] to reject the "fair share" analysis. Plaintiffs' argument is flawed for two reasons.

First, the Supreme Court did not reject the differential fees because of the *size* of the ratio. Rather, it rejected the nonresident fees because Alaska and South Carolina had failed to show any *connection* between the differential and state spending on services to the nonresidents. *See*

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see how the State could prove that the full $1 million in my example benefitted just a handful of fishers, because it is not reasonable to attribute hundreds of thousands of dollars in enforcement and conservation costs to a single fisher.

[8] The ratio of nonresident fees to resident fees for commercial fishing licenses and commercial boat registrations is three to one. For Dungeness crab vessel permits, the ratio is lower (two to one); and for herring gill net permits, the ratio is higher (nearly four to one).

Mullaney, 342 U.S. at 418 & n.1 (rejecting the state's argument that the differential fees merely compensated the state for enforcement against nonresidents because the state had not calculated the cost of that enforcement and the total amount of differential fees collected "may easily have exceeded the entire amount available for administration" of the office in charge of enforcement); *Toomer*, 334 U.S. at 398 (noting that "[n]othing in the record indicate[d] . . . that any substantial amount of the State's general funds [was] devoted to shrimp conservation" and that, even if there had been such evidence, it "would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion").

Second, focusing on the size of the ratio requires consideration of fees in a vacuum. That isolation makes little sense in light of the Supreme Court's statement that a state may charge a fee designed to "compensate [it] for any added enforcement burden [nonresidents] may impose or for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. In *Salorio*, the tax at issue applied *only* to nonresidents. On appeal after remand, the New Jersey Supreme Court ultimately invalidated the tax—but not because the nonresident-to-resident ratio was too high. The problem was that, during a period of two decades, the revenues collected by the state through the tax had exceeded the costs attributable to nonresidents by a factor of more than two. *Salorio v. Glaser*, 461 A.2d 1100, 1107 (N.J. 1983). Focus on the size of the ratio per se is misplaced; the privileges and immunities inquiry requires consideration of all taxes and fees

paid by residents and nonresidents in support of commercial fishing.

Because it applied a different test, the district court did not address whether the net general fund outlay benefits only licensees, whether that outlay derives solely from taxes that only residents pay, or what portion of qualifying costs is properly allocable to nonresident fishers. Thus, on the current record, I would hold that we cannot determine whether the differential fees are permissible under the Privileges and Immunities Clause. Accordingly, I would reverse the summary judgment of the district court and remand for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN MARILLEY, *et al.*,
Plaintiffs,

v.

CHARLTON BONHAM,
Defendant.
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No. C-11-02418 DMR

ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT [DOCKET NOS. 201, 205] AND EVIDENTIARY MOTIONS [DOCKET NOS. 215, 216, 218, 219, and 227]

I. Introduction

Plaintiffs represent a class of commercial fishermen who ply their trade in California's waters, but who are not California residents. The plaintiff class challenges California's commercial fishing licensing statutes, which charge them two to three times more than the fees assessed on their competitors who are California residents. Plaintiffs assert that these differential fees are

unconstitutional. Before the court are the parties' cross motions for summary judgment, as well as related motions challenging expert and other testimony submitted in support of these motions. [Docket Nos. 201, 205, 215, 216, 218, 219, and 227.] Having carefully considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the court hereby grants Plaintiffs' motion for summary judgment and denies Defendant's motion for summary judgment.

II. Background

California requires commercial fishermen to have a state-issued license to "take fish or amphibia for commercial purposes." Cal. Fish & Game Code § 7850(a). In addition, California requires "[e]very person who owns or operates a vessel in public waters in connection with fishing operations for profit in this state" to obtain a commercial boat registration. Cal. Fish & Game Code. § 7881(a). At issue in this lawsuit are four California statutes which establish differential fees for nonresidents to fish commercially in California. *See* Cal. Fish & Game Code §§ 7852 (commercial fishing licenses), 7881 (commercial fishing vessel registrations), 8550.5 (herring gill net permits), 8280.6 (Dungeness Crab vessel permits). In the 2012-2013 license year, which ran from April 1, 2012 through March 31, 2013, the fees at issue were as follows:

- Commercial fishing license $130.03 (residents); $385.75 (nonresidents)
- Vessel registration $338.75 (residents); $1002.25 (nonresidents)

- Herring gill net permit $359.00 (residents); $1,334.25 (nonresidents)
- Dungeness Crab vessel permit $273.00 (residents); $538.00 (nonresidents)

(Corrected Gross Decl. ("Corr. Gross Decl."), March 14, 2013, ¶ 2, Ex. 1.) These are the only California commercial fishing fees that differentiate between residents and nonresidents.[1] (Corr. Gross Decl. Ex. 1.)

Plaintiffs are nonresident commercial fishermen. They represent a class of individuals who, since 2009, have purchased or renewed commercial fishing licenses, permits, and/or registrations and were required to pay nonresident fees. Plaintiffs challenge the constitutionality of California's differential fees under the Privileges and Immunities Clause and the Equal Protection Clause of the United States Constitution. Defendant Charlton Bonham is the Director of the California Department of Fish and

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[1] To illustrate, in the 2012-2013 license year, a nonresident herring fisherman who held three herring gill net permits and harvested herring from his or her own boat paid $5,390.75 in fees for the required permits, license, and boat registration. A resident herring fisherman paid a total of $1,545.78 for the same required permits, license, and registration, a difference of $3,844.97. (*See* Corr. Gross Decl. Ex. 1.)

Game ("DFG")[2], which has authority to administer and enforce policies and provisions of the California Fish and Game Code and associated regulations.

III. Statutory History

California established the first commercial fishing fee differential in 1986. The bill that established the differential, AB 3081, set the herring gill net permit fee at $300 for nonresidents and $200 for residents and increased a number of other commercial fishing fees. (Supplemental Neill Decl. ("Suppl. Neill Decl."), May 6, 2013, ¶¶ 7, 16; Corr. Gross Decl. ¶ 20, Ex. 19.[3][4]) A bill analysis by the

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[2] Effective January 1, 2013, the Department of Fish and Game was renamed the "Department of Fish and Wildlife." Cal. Fish & Game Code § 700. The court will use DFG throughout this order.

[3] Defendant objected to this and to nearly all of Plaintiffs' exhibits on the ground that Plaintiffs did not properly authenticate them because the authenticating declarant lacked personal knowledge. After reviewing the supplemental declarations of Stuart G. Gross and Isaac Neill the court is satisfied that all of the documents submitted in connection with Plaintiffs' motion and opposition to Defendant's motion are what they purport to be. *See* Fed. R. Evid. 901(b); *see also* Supplemental Gross Decl. ("Suppl. Gross Decl."), May 9, 2013; Supplemental Neill Decl. ("Suppl. Neill Decl."), May 6, 2013. Accordingly, Defendant's authenticity objections are overruled.

[4] The bill also established a differential fee structure for round haul permit fees. Gill nets and

Senate Committee on Natural Resources and Wildlife indicates that the fee changes were driven by a shortfall between expenditures and revenues for commercial fishing programs, as DFG relied "almost exclusively on revenues from commercial fishing and fish business licenses, permits, and taxes to support its commercial fishing programs." (Suppl. Gross Decl. ¶ 22; Corr. Gross Decl. Ex. 11 at 2.)

In 1990, the legislature passed AB 2126, which increased the herring gill net permit fees for residents and nonresidents. (Suppl. Gross Decl. ¶ 53; Corr. Gross Decl. Ex. 57.) An Assembly Committee on Water, Parks, and Wildlife analysis of a companion bill, AB 3158, indicates that DFG was again facing a budget deficit. (Suppl. Neill Decl. ¶ 17; Corr. Gross Decl. Ex. 22.) At the time the bills were before the legislature, Vern Goehring was the legislative coordinator for DFG and Maria Mechiorre was an Associate Government Program Analyst in DFG's License and Revenue Branch. (Corr. Gross Decl. Ex. 270 (Goehring Dep., Dec. 21, 2012), 21-22, 55, 69; Ex. 271 (Melchiorre Dep. Vol. I, Jan. 10), 2013, 67-68.) Goehring and Melchiorre each testified that they did not recall any connection between the budget issues and nonresident herring fishermen or nonresident fishermen in general at the time the bills were

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round haul nets are used to harvest herring. (Corr. Gross Decl. ¶ 241, Ex. 240.) The use of round haul nets in California's fisheries is now prohibited and this fee is not at issue in this case. *See* Cal. Code Regs tit. 14 § 163(f)(2) (2013).

pending. (Goehring Dep. 103, 138-39; Corr. Gross Decl. Ex. 272 (Melchiorre Dep. Vol. II, Jan. 24, 2013), 239-41, 250.)

The provision of the 1990 bill that increased the herring gill net permit fees contained a "sunset" provision by which it was to expire on January 1, 1992. (Corr. Gross Decl. Ex. 57.) DFG acted to restore the differential fees, and in March 1992, in a document titled "Commercial Fishing Funding Alternative," DFG described the disparity between estimated commercial fishing program expenditures and revenues if the fees established in 1986 were not replaced. (Suppl. Gross Decl. ¶ 70; Corr. Gross Decl. ¶ 75, Ex. 74.) Nothing in the document or in the record identifies a relationship between the projected budget shortfall and nonresident commercial fishermen. Later that year, the legislature passed a bill that more than doubled the nonresident herring gill net permit fee from $400 to $1,000,[5] while leaving

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[5] Plaintiffs submitted evidence that earlier proposed amendments to the bill contemplated raising the nonresident gill net permit fee to $660 and the nonresident round haul net permit fee to $1,000. (*See* Supp. Gross Decl. ¶¶ 84, 86; Corr. Gross Decl. Exs. 88, 90.) Plaintiffs argue that SB 1565 ultimately raised the nonresident herring gill net permit fee to $1,000 as the result of a typographical error during the legislative process, whereby the numbers for the gill net permit fee and round haul net permit fee were mistakenly transposed on a chart. (*See* Pls.' Mot. 18-24.) Plaintiffs argue that the

the resident fee unchanged at $265. The bill also established higher nonresident fees for commercial fishing vessel registrations and commercial fishing licenses. (Suppl. Gross Decl. ¶ 104; Corr. Gross Decl. Ex. 110.) Neither Goehring nor Melchiorre identified nonresidents as the source of any increased burden on the fisheries to explain why the legislature mandated that they pay higher fees. (Goehring Dep. 180; Melchiorre Dep. Vol. II 240-41, 266-68, 272, 289.)

In 1994, the legislature established differential fees for the Dungeness crab fishery. AB 3337 created a limited entry structure for the Dungeness crab fishery and set the Dungeness crab vessel permit fee at $400 for nonresidents and $200 for residents. (Suppl. Gross Decl. ¶ 145; Corr. Gross Decl. Ex. 170.) There is no evidence in the record that nonresident Dungeness crab fishermen were identified as the source of any added fishery enforcement or

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nonresident herring gill net permit fee's genesis in a clerical error is evidence that the fee was arbitrary and therefore unconstitutional. Defendant disputes Plaintiffs' claim that there was a clerical error, arguing that Plaintiffs' evidence is inadmissible and inconclusive on the issue. The court concludes that whether the nonresident herring gill net permit fee was set at $1,000 as the result of a clerical error is a genuine dispute of fact which cannot be resolved on a motion for summary judgment. The disputed fact, however, is not material to reaching a decision on these cross motions.

management burden. Instead, the legislative history of the bill suggests a market or economic protectionist purpose to the limited entry structure and differential fees. The Assembly Committee on Water, Parks, and Wildlife recommended a "no" vote on an early version of the bill, noting that it "provide[d] an unfair advantage to the sponsors of the bill – the Pacific Coast Federation of Fisherman [sic] [a resident fishermen advocacy group] – by making it very difficult for any new crab fishers to obtain permits and enter the market." (Suppl. Neill Decl. ¶ 55; Corr. Gross Decl. Ex. 127 at 4; Ex. 273 (Grader Dep., Aug. 21, 2012), 233.) In its analysis of a later version of the bill, DFG commented, "[t]his bill is an attempt to . . . control competition to California fishermen and processors from out of state." (Suppl. Neill Decl. ¶ 75; Corr. Gross Decl. Ex. 153 at 3.) In its Enrolled Bill Report for the final version of the bill, DFG described it as "an industry sponsored bill to prevent out-of-state commercial fishermen from moving into California and getting an undue share of the California Dungeness crab resource . . ." (Suppl. Neill Decl. ¶ 85; Corr. Gross Decl. Ex. 168 at 3[6].)

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[6] Defendant objected to this exhibit as improper legislative history on the grounds that there is no evidence that the document was considered by the entire legislature. The objection is overruled. *See Elsner v. Uveges*, 34 Cal. 4th 915, 934 n.19 (2004) (noting that "we have routinely found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing,

AB 3337 contained a sunset provision effective April 1, 1998. The sunset applied to, *inter alia*, the bill's provisions regarding the Dungeness crab differential fees. (Suppl. Gross Decl. ¶ 145; Corr. Gross Decl. Ex. 170.) The legislature has extended the sunset five times, most recently in 2011. (Suppl. Neill Decl. ¶¶ 88, 96, 103, 107, 112; Corr. Gross Decl. Exs. 173 (text of AB 666, 10/16/95), 181 (text of AB 2482, 9/12/00), 188 (text of AB 601, 3/31/06), 193 (text of AB 1442, 10/11/09), 201 (text of SB 369, 9/26/11).) There is no record evidence that the legislature examined the basis for the differential fees or considered nonresident Dungeness crab fishermen's particular impact on the fishery at any point when extending the sunset. In fact, the legislative history of the bills contains further evidence of a protectionist purpose. For example, a Senate Republican Analysis of AB 601, passed in 2006, notes that "Republicans generally support the proper management of important natural resources, but where resource management crosses the line into economic protectionism it should be opposed . . . DFG should explore other management options that focus on maintaining the crab population instead of the industry population." (Suppl. Neill Decl. ¶ 100; Corr.

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instructive on matters of legislative intent.") (citations omitted). Defendant's hearsay objection is also overruled; the document is not offered for the truth of the matters asserted therein but as evidence of legislative intent.

Gross Decl. Ex. 185 at 2[7].) Similarly, a Senate Republican Floor Commentary regarding AB 1442, which passed in 2009, comments that the Dungeness crab fishery's "restricted access" structure "appear[ed] to be more about market protection for fishermen rather than the conservation of crab." (Suppl. Neill Decl. ¶ 105; Corr. Gross Ex. 191 at 2.)

In 2003, the legislature raised nonresident fees for commercial fishing licenses and commercial fishing vessel registration permits, setting them at three times the amounts paid by residents. In addition, the legislature mandated that commercial fishing fees be subject to automatic yearly indexing for inflation starting in 2005. (Suppl. Neill Decl. ¶

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[7] Defendant objected to this exhibit and to Exhibit 191, a Senate Republican Floor Commentary regarding another bill, as improper legislative history, again asserting that there is no evidence that the documents went before the entire legislature. The objection is overruled. Both Senate Republican Caucus reports and Senate Floor Republican Commentaries on assembly bills may properly be considered as legislative history. *See People v. Allen*, 88 Cal. App. 4th 986, 995 n.16 (2001) (considering Senate Republican Caucus report); *Pac. Gas & Elec. Co. v. State Dep't of Water Res.*, 112 Cal. App. 4th 477, 498 (2003) (considering Senate Republican Floor Commentaries). Defendant's hearsay objections are also overruled, as the documents are offered as evidence of legislative intent, not for the truth of the matters asserted therein.

124; Corr. Gross Decl. Ex. 230.) To determine the annual fee, DFG multiplies each current fee by the rate published by the U.S. Commerce Department; the sum of the result and the existing fee constitutes the new indexed fee. *See* Cal. Fish & Game Code § 713(b)(1). Because nonresident fees are higher than resident fees, the effect of indexing is to increase the amount of the differential between the fees every year.[8] There is no sunset provision applicable to indexing, but California Fish & Game Code section 713 mandates that at least every five years, DFG "shall analyze all fees for licenses . . . to ensure the appropriate fee amount is charged," and where appropriate, shall recommend that fees be adjusted. *See* Cal. Fish & Game Code § 713(g).

IV. Evidentiary Motions

The parties filed five motions to exclude evidence submitted in support of the cross motions for summary judgment. Plaintiffs filed motions to exclude the opinions offered by Defendant's expert witnesses, Tony Warrington and Chiara Trabucchi, and a motion to strike the declaration of Defendant's lay witness, Helen Carriker. [Docket Nos. 218, 219, 227.] Defendant filed a motion to exclude the opinion offered by Plaintiffs' expert witness, Douglas Larson,

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[8] For example, in 2004, the resident herring gill net permit fee was $265 and the nonresident fee was $1,000, for a differential of $735. In 2012, as a result of automatic indexing, the differential had grown to $975.25 ($351.50 resident fee and $1,326.75 nonresident fee). (*See* Corr. Gross Decl. ¶ 3, Ex. 2.)

as well as a motion for sanctions regarding Larson's expert report. [Docket Nos. 215, 216.] In general, the challenged evidence relates to California's investment in its commercial fisheries as well as resident and nonresident participation in the fisheries. The court will address the evidentiary motions before turning to its analysis of the parties' cross motions for summary judgment.

A. Plaintiffs' Motion to Strike the Declaration of Helen Carriker

Defendant submitted a declaration by Helen Carriker, DFG's Deputy Director of Administration. Her declaration covers several topics, including DFG licensing statistics for the licenses, permits, and registrations at issue, as well as DFG's commercial fishing revenues and expenditures. Plaintiffs move pursuant to Federal Rules of Civil Procedure 26 and 37 to strike certain portions of her declaration on the grounds that her declaration contains new data, analysis, and conclusions that were not disclosed to Plaintiffs during the course of discovery. [Docket No. 227 (Pls.' Mot. to Strike).]

1. Legal Standard

Federal Rule of Civil Procedure 26 provides that a party must supplement or correct its discovery responses if the disclosing party learns that the responses are "incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties" during discovery. Fed. R. Civ. P. 26(e)(1). If a party fails to supplement its discovery responses as required by Rule 26(e), "that party is not allowed to use that information or witness to supply evidence on

a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

2. Analysis

Plaintiffs argue that Defendant has "revealed for the first time new data and analysis regarding the financial impact of the State's management of its commercial fisheries and the corresponding benefits to commercial fishermen." (Pls.' Mot. to Strike 8.) Specifically, Plaintiffs contend that they propounded numerous interrogatories seeking all facts regarding California's expenditures and revenues related to commercial fishing and Defendant's theories regarding why higher nonresident fees are justified. However, Plaintiffs argue, Carriker presents, *inter alia*, "new assessments of the percentage of nonresident commercial fishermen who hold the disputed licenses" and new evidence regarding annual commercial fishing revenues. (Pls.' Mot. to Strike 8; *see* Carriker Decl., Apr. 11, 2013, ¶¶ 9-27, 38.) Accordingly, Plaintiffs assert that pursuant to Rule 37, the court should strike portions of her declaration based upon Defendant's failure to supplement its discovery responses.

First, Plaintiffs argue that they propounded an interrogatory seeking the identification of the total numbers of residents and nonresidents who participated in California's commercial fisheries, including all facts to support these figures. Defendant responded that the information could be derived from documents it produced in discovery. (Pls.' Mot. to Strike 3.) In her declaration, Carriker set forth her calculations of the percentages of each of the disputed

licenses held by nonresidents. (Carriker Decl. ¶¶ 9-27.) For example, for the 2012 license year, Carriker states, "nonresidents made up 12.9% of licensed commercial fishermen. I calculated this figure, using Exhibit X, by dividing 875 (nonresidents) by 6,750 total licenses (5875 + 875)." (Carriker Decl. ¶ 15.) According to Plaintiffs, "Defendant failed to disclose this new analysis of nonresident participation in California fisheries and the calculations on which it relies in his discovery responses." (Pls.' Mot. to Strike 3.) The court finds this argument unavailing. Plaintiffs do not assert that Defendant did not disclose the licensing data upon which Carriker relied to calculate the percentage of each disputed license held by nonresidents. Translating previously-disclosed data into percentages using basic mathematics is not equivalent to failing to disclose the data itself.

The court also finds unpersuasive Plaintiffs' argument regarding Defendant's purported failure to disclose Carriker's calculations of an annual "average of total commercial fishing revenues . . . of $5,800,491." (Carriker Decl. ¶ 38.) This estimate is based on the total of Carriker's six-year averages of landing taxes and license revenue (including commercial fishing licenses and commercial fish business licenses). (Carriker Decl. ¶¶ 28-38.) In response to an interrogatory seeking all facts supporting Defendant's contention that California subsidizes nonresidents, Defendant stated that annual commercial fishing revenues were "generally under $6 million." (Pls.' Mot. to Strike 4.) Plaintiffs argue that Defendant did not disclose the yearly data

for each category, nor the methodology she used to calculate the averages for each category. However, Defendant identified the data sources for the "under $6 million" figure as documents provided to Plaintiffs, and produced a spreadsheet of landing tax revenue data. (Def.'s Opp'n to Mot. to Strike 6; *see* Meckenstock Decl., Apr. 11, 2013, ¶ 48; Carriker Decl. ¶¶ 30, 33, 37.) Further, Carriker described her methodology; she used simple averages for each type of revenue. (*See* Carriker Decl. ¶ 32 ("The average annual revenue [from commercial fishing licenses] during that period was $3,753,223 ($22,519,337 divided by 6 years).").) The court concludes that Defendant did not fail to disclose the information underlying Carriker's calculations. Accordingly, Plaintiffs' motion to strike paragraphs 9-27 and 30-39 of Carriker's declaration is denied.[9]

B. Plaintiffs' Motion to Exclude the Expert Testimony of Tony Warrington

In his motion, Defendant makes arguments using high and low estimates of DFG's total commercial fishing expenditures (not including offsetting revenues) in fiscal year 2010-11.[10] (*See*

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[9] As the court does not rely on the remainder of Carriker's declaration in ruling on the parties' cross motions for summary judgment, it need not reach Plaintiffs' motion to strike paragraphs 56-59 and 74-77 of her declaration.

[10] Defendant's two estimates vary depending on which set of funding sources are used. The higher number takes into account all funding sources, while

Def.'s Mot. 4-6; *see also* discussion, *infra*, at § VI(A)(2).) A large portion of DFG's estimated expenditures represents commercial fisheries management expenditures that the state tracks in the Governor's Budget under the code "25.20." (Carriker Decl. ¶¶ 40-42, 46, 49.) The remaining amount is based upon Defendant's estimate of enforcement costs, which is the largest single DFG expenditure that is not represented in the 25.20 figure. (Carriker Decl. ¶ 47.)

Defendant submitted a declaration by Tony Warrington, an Assistant Chief with DFG's Law Enforcement Division, in which he stated that his "reasonable and conservative" estimate of DFG's commercial fishing enforcement costs for fiscal year 2010-11 is $10,320,963.[11] (Warrington Decl., Apr. 11,

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the lower number is limited to only the three most significant state funds, the Fish and Game Preservation Fund, the General Fund, and the Environmental License Plate Fund. (Def.'s Mot. 6-7.)

[11] Warrington also calculates a lower estimate of enforcement costs, $9,100,013.88, which is based on the three primary state funds alone. Warrington's two estimates of enforcement costs for fiscal year 2010-11, along with commercial fishing expenditures reported under code 25.20 in the Governor's Budget and Carriker's estimate of average commercial fishing revenues, (*see* Carriker Decl. ¶¶ 38, 48, 49), form the basis for Defendant's estimate that California invests $12-14 million, after revenues, in

2013, ¶ 91.) Warrington calculated this amount in part by estimating the percentage of hours DFG's Law Enforcement Division ("LED") employees spend on commercial fishing enforcement tasks. Warrington divided all LED sworn law enforcement personnel into three groups based on their connection to commercial fishing enforcement: 1) crews on large patrol boats; 2) other coastal officers; and 3) remaining sworn personnel. (Warrington Decl. ¶ 24.) He estimated that the three groups spend 80%, 30%, and 5%, respectively, of their time on commercial fishing enforcement activities. (Warrington Decl. ¶¶ 25-39.) He then calculated the total annual personnel-related expenses based on his estimates, as well as other enforcement-related expenses, such as operating expenses; boat, aircraft, and facilities expenses; and equipment costs, to arrive at his estimate for the total amount DFG spends on commercial fishing enforcement. (*See* Warrington Decl. ¶¶ 59-90.)

Plaintiffs move to exclude Warrington's testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). [Docket No. 218.]

1. Legal Standard for Exclusion of Expert Evidence

Under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant,

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its commercial fisheries. (*See* Def.'s Mot. 4-7, 32, and discussion *infra*, at § VI(A)(2).)

but reliable." *Daubert*, 509 U.S. at 589. The objective of this requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999). Under Federal Rule of Evidence 702, a qualified expert may testify only if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Rule 702 sets forth three distinct but related requirements: "(1) the subject matter at issue must be beyond the common knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion." *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (citation omitted).

The threshold for qualification is low; a minimal foundation of knowledge, skill, and experience suffices. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015-16 (9th Cir. 2004). The court retains "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire,* 526 U.S. at 152. The gatekeeping inquiry must be tailored to the facts of the case and the type of expert

testimony at issue. *Id.* "[A] trial court not only has broad latitude in determining whether an expert's testimony is reliable, but also in deciding *how* to determine the testimony's reliability." *Hangarter*, 373 F.3d at 1017 (citing *Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir. 2002) (quotation marks omitted) (emphasis in original).

2. Analysis

Plaintiffs contend that Warrington is not qualified to opine on the subject of his offered testimony, and make several arguments that his estimates are not based on a reliable methodology or foundation. Plaintiffs challenge Warrington's opinions about the percentage of time each of the three groups of wardens spends on commercial fishing enforcement activities. Plaintiffs do not challenge Warrington's translation of the estimated hours that DFG employees spend on enforcement activities into his estimate of actual costs. Essentially, Plaintiffs argue that Warrington offered an opinion about how wardens spend their time that should have been grounded in statistical reasoning, and that he did not employ any recognized statistical methodology nor is he qualified to do so. Therefore, Plaintiffs argue, Warrington's opinion is not reliable under Rule 702.

The court disagrees. As the Supreme Court has recognized, certain types of expert testimony "'rests upon scientific foundations, the reliability of which will be at issue in some cases . . . . In other cases, the relevant reliability concerns may focus upon *personal knowledge or experience*.'" *Hangarter*, 373 F.3d at 1017 (quoting *Kumho Tire*, 526 U.S. at 150)

(emphasis in original); *see also* Fed. R. Evid. 702(a)(1) (experts may qualify based on "scientific, technical, or *other specialized knowledge*." (emphasis added)). To determine if an expert is qualified, the court must consider "the expert's particular expertise, and the subject of his testimony." *Kumho Tire*, 526 U.S. at 147. Here, Warrington has offered his opinion regarding DFG's enforcement costs. His opinion is based upon, *inter alia*, his estimates of how much time DFG sworn law enforcement personnel spend on commercial fishing enforcement tasks. Warrington's extensive experience qualifies him to testify to such matters. Having been a DFG law enforcement officer for 23 years, with a significant amount of experience in the marine environment, Warrington has performed the duties in question himself. (Warrington Decl. ¶¶ 4-11.) In addition to his direct experience in "near shore and offshore" enforcement, he spent seven years as the Assistant Chief responsible for "statewide marine coordination" and eight months managing all marine programs and personnel statewide. (Warrington Decl. ¶¶ 5, 6, 9, 10.) The court finds that Warrington is qualified to opine on the job duties performed by DFG sworn law enforcement personnel, and correspondingly, on the proportion of time they spend performing duties related to commercial fishing enforcement. Moreover, Warrington has prepared numerous estimates of DFG enforcement costs "for internal DFG use, for reports to the California Legislature, and for reports to the California Fish and Game Commission," and has presented such estimates to the Legislature and to the Fish and Game Commission. (Warrington Decl.

¶ 12.) Based on Warrington's knowledge and experience, both in law enforcement and estimating enforcement costs, the court finds his opinion reliable. *See Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 368 n.14 (9th Cir. 2005) (for non-scientific, non-technical testimony, "reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it." (emphasis in original) (internal quotation omitted)). Plaintiffs' motion to exclude Warrington's testimony is denied.[12]

V. Legal Standards

A. Summary Judgment

A court shall grant summary judgment "if . . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

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[12] Plaintiffs also move to exclude the testimony of Defendant's retained expert witness, Chiara Trabucchi. [Docket No. 219.] Defendant moves to exclude the testimony of Plaintiffs' retained expert witness, Douglas Larson, and also moved for sanctions in the form of an order striking portions of Larson's report on the grounds that Plaintiffs improperly disclosed him as a rebuttal expert instead of as an affirmative expert. [Docket Nos. 215, 216]. As the court does not rely on the opinions of Trabucchi or Larson in ruling on the parties' cross motions for summary judgment, it need not reach the *Daubert* motions as to these two experts. Defendant's motion for sanctions regarding Larson is denied as moot.

law." Fed. R. Civ. P. 56(a). The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), and the court must view the evidence in the light most favorable to the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted). A genuine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, sufficient evidence favors the non-movant such that a reasonable jury could return a verdict in that party's favor. *Id.* at 248. The court may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See id.* at 249.

To defeat summary judgment once the moving party has met its burden, the nonmoving party may not simply rely on the pleadings, but must produce significant probative evidence, by affidavit or as otherwise provided by Federal Rule of Civil Procedure 56, supporting the claim that a genuine issue of material fact exists. *TW Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In other words, there must exist more than "a scintilla of evidence" to support the non-moving party's claims, *Anderson*, 477 U.S. at 252; conclusory assertions will not suffice. *See Thornhill Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Where the defendant has the ultimate burden of proof, the plaintiff may prevail on a motion for summary judgment simply by pointing to the defendant's failure "to make a showing sufficient to establish the existence of an element essential to [the defendant's] case." *Celotex*, 477 U.S. at 322.

B. Privileges and Immunities Clause

The Privileges and Immunities Clause ("the Clause") states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The drafters of the Constitution intended the Clause "'to create a national economic union,'" *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008) (quoting *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 (1985)), by "'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'"[13] *Id.* (quoting *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988)). The Clause "seeks to ensure the unity of the several states by protecting those interests of nonresidents which are fundamental to the promotion of interstate harmony," *Int'l Org. of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843, 845 (9th Cir. 1987) (quoting *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984)) (internal quotation marks omitted), and "protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney v. Young*,

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[13] The Supreme Court has held that citizenship and residency are "'essentially interchangeable'" under the terms of the Privileges and Immunities Clause. *Molasky-Arman*, 522 F.3d at 933 (quoting *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988)).

133 S. Ct. 1709, 1715 (2013) (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)). While the Clause "forbids a State from intentionally giving its own citizens a competitive advantage in business or employment," *id*. at 1716, it does not prohibit differential fee structures, or other "'disparity of treatment in the many situations where there are perfectly valid independent reasons for it.'" *Molasky-Arman*, 522 F.3d at 934 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)).

Courts employ a two-step test to determine whether residency classifications run afoul of the Clause. First, a court must determine "whether the activity in question is 'sufficiently basic to the livelihood of the nation . . . as to fall within the purview of the Privileges and Immunities Clause.'" *Id.* (quoting *Friedman*, 487 U.S. at 64) (ellipses in original) (emphasis removed). If the court finds that the contested restriction falls within the Clause's ambit, the court will deem the restriction unconstitutional if the state cannot show that it is "'closely related to the advancement of a substantial state interest.'" *Id.* (quoting *Friedman*, 487 U.S. at 65). A substantial reason for state residency-based discrimination exists if evidence indicates that "'non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Id.* (quoting *Toomer*, 334 U.S. at 398). Therefore, "the inquiry . . . must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Toomer*, 334 U.S. at 396 (footnote omitted). The court may find the discriminating restriction not closely related to a substantial state

interest if there exist "less restrictive means" to achieve that objective. *Piper*, 470 U.S. at 284.

C. Equal Protection Clause

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It embodies the ideal that "all persons lawfully in the United States shall abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). The first inquiry in the equal protection analysis is whether the legislation "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *see Barber v. Haw.*, 42 F.3d 1185, 1197 (9th Cir. 1994) ("To infringe upon a fundamental right, the regulation must impose a penalty effecting a genuinely significant deprivation such as a denial of the basic necessities of life or the denial of a fundamental political right."). If strict scrutiny is applied, the court will strike down the legislation unless the classification drawn by the legislation is "suitably tailored to serve a compelling state interest." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). If strict scrutiny does not apply, the court will presume the challenged classification to be constitutional so long as the classification is rationally related to a legitimate governmental purpose. *Id.* Nonresidents

are not a suspect class. *See Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 389 (1978).

VI. Discussion

A. The Privileges and Immunities Clause

1. Whether the Activity in Question Falls Within the Purview of the Privileges and Immunities Clause

At the first step of the analysis, a court must determine whether the activity in question falls within the purview of the Clause. Plaintiffs argue that the activity affected by California's differential fee structure – commercial fishing – involves the ability to earn a living, one of the most fundamental privileges that receives the Clause's protection. *See, e.g., Toomer*, 334 U.S. at 403 (holding that "commercial shrimping . . . like other common callings, is within the purview of the privileges and immunities clause."); *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 266 (4th Cir. 1993) ("[T]he privilege involved in this case [commercial fishing] is a protected privilege, being termed . . . 'the right to earn a living.'" (citation omitted)). Defendant advances three arguments in support of his position that the challenged activity does not trigger constitutional protection. None of them is persuasive.

To begin with, Defendant argues that at the first step of the inquiry, Plaintiffs must make a showing that California fails to treat nonresidents on terms of substantial equality with residents. Defendant asserts that the protected privilege at stake is "'that of [citizens of State A] doing business in State B on terms of substantial equality with the citizens of that State.'" (Def.'s Mot. 20 (quoting *Friedman*, 487 U.S.

at 65 (internal quotations omitted)).)[14] This strained interpretation of the legal standard lacks merit, and Defendant offers no supporting authority. The first inquiry examines the quality of the affected activity and asks whether it is "sufficiently basic to the livelihood of the nation," such as a common calling. *Friedman*, 487 U.S. at 64. There is no requirement

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[14] Defendant also argues that the step one inquiry varies between what it terms "tax cases" and "common calling cases." According to Defendant, in tax cases, any distinction in income or property taxes between residents and nonresidents fails the first step of the inquiry, whereas in "common calling" or livelihood cases, the question of "substantial equality of treatment" is part of the first step inquiry. However, case law does not support the existence of a different test for the Clause based upon the right asserted. *See, e.g., Austin v. N.H.*, 420 U.S. 656, 663-666 (1975) (drawing no distinction between so-called "tax" and "common calling" cases; discussing *Ward v. Md.*, 79 U.S. 418 (1870) (higher nonresident license fee to trade goods); *Toomer*, 334 U.S. at 396 (higher nonresident commercial shrimping fee); *Travelers' Ins. Co. v. Conn.*, 185 U.S. 364 (1902) (tax on value of stock in local insurance corporations calculated differently for residents and nonresidents); *Shaffer v. Carter*, 252 U.S. 37 (1920) (tax on income derived from local property and business); and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (tax system which granted personal exemptions for residents)).

that a plaintiff make a quantitative showing of substantial *in*equality at the first step.

In a similar vein, Defendant next argues that Plaintiffs must demonstrate at step one that nonresident fishermen have been excluded from participating in commercial fishing in California, citing *McBurney*, 133 S. Ct. at 1715, and *Andrews*, 831 F.2d at 846.[15] At oral argument, Defendant

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[15] According to Defendant, the differentials have not resulted in nonresident exclusion, as evidenced by the fact that the percentage of nonresident commercial fishing licenses and permits in California has risen over time. (*See* Carriker Decl. ¶¶ 9-27.) Such a connection is overly simplistic, as the number of nonresident licenses and permits says nothing about the number of potential nonresidents who may have been deterred from commercially fishing in California due to higher nonresident fees. Further, there is no evidence before the court that the number of nonresident licenses and permits actually correlates with the number of nonresidents actively participating in the fisheries. For example, both the herring and Dungeness crab fisheries are subject to a limited entry system; if a nonresident fails to renew a permit one year, he or she may not be able to obtain a permit in the future. This may encourage "place holder" permit renewals even if a nonresident does not intend to commercially fish for herring or Dungeness crab in California due to higher costs. Carriker's declaration regarding percentages of nonresident licenses, registrations, and permits over

conceded that *McBurney* contains no explicit language that supports the existence of the standard they urge this court to adopt. Rather, Defendant invites the court to infer such a requirement from the *McBurney* Court's citation of three cases – *Hicklin*, 437 U.S. at 524; *Toomer*, 334 U.S. at 395; and *Camden*, 465 U.S. at 221.

In *McBurney*, the Supreme Court's most recent Privileges and Immunities Clause case, plaintiff challenged Virginia's Freedom of Information Act ("VA FOIA"), which provides that all state public records are open to inspection and copying, but limits the scope of the statute to Virginia citizens. *McBurney*, 133 S. Ct. at 1714-15. Plaintiff, a nonresident proprietor of a business that "request[ed] real estate tax records on clients' behalf from state and local governments" across the country, challenged the VA FOIA as violative of the Clause, arguing that it abridged his ability to earn a living; "namely, obtaining property records from state and local governments on behalf of clients." *Id*. at 1715. The Court held that the VA FOIA did not come within the purview of the Clause, finding that the statute "differ[ed] sharply" from the statutes at issue in *Hicklin*, *Toomer*, and *Camden*.[16] *Id*. In each of

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time is the only evidence Defendant submitted in support of its argument that nonresidents have not been excluded from commercial fishing in California. (*See* Def.'s Mot. 13-14.)

[16] In *Hicklin*, the court struck down a statute containing an Alaska resident hiring preference for

those cases, "the clear aim of the statute at issue was to advantage in-state workers and commercial interests at the expense of their out-of-state counterparts." *Id*. In contrast, the VA FOIA had only the "incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records." *Id*. at 1716. The *McBurney* Court held that "[w]hile the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." *Id*. at 1716.

Because the statutes challenged in the three cases cited in *McBurney* resulted in some exclusion of nonresidents from engaging in a common calling, Defendant posits that Plaintiffs must present some evidence of exclusion at the first step. Defendant's tortured interpretation overstates *McBurney*. As was the case in *Toomer*, the statutes at issue here directly

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employment relating to the state's oil and gas resources, and in *Toomer*, the court struck down a differential commercial shrimping fee that had a "virtually exclusionary" effect on nonresident shrimpers. *Hicklin*, 437 U.S. at 533-34; *Toomer*, 334 U.S. at 396-97. In *Camden*, the Court held that an ordinance requiring that at least 40% of jobs on city-funded construction projects be held by city residents "facially burdened out-of-state citizens' ability to pursue a common calling." *McBurney*, 133 S. Ct. at 1715 (discussing *Camden*, 465 U.S. at 221-22).

affect commercial fishing; the fee differentials are not "incidental" to that common calling.

Moreover, Defendant's "exclusion" requirement runs counter to the fundamental principle of the Clause, which is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned" in order to "strongly . . . constitute the citizens of the United States one people." *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quotation marks omitted) (quoting *Paul v. Va.*, 8 Wall. 168, 180 (1868)); *see also Toomer*, 334 U.S. at 396 (noting that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that state."). Defendant's "exclusion" test turns this principle on its head, for such a requirement would lead to the result that it would be constitutionally permissible to require citizens of State B to do business in State A on terms of substantial *in*equality, as long as State A does not drive them out of the state.

Contrary to Defendant's argument, *McBurney* supports Plaintiffs' position, for it makes clear that the court should consider legislative history as part of its analysis.[17] The legislative history of the

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[17] Defendant asserts that legislative history "is rarely, if ever, relevant to a Privileges and Immunities Clause claim," arguing that instead, the court must focus on "the practical effect of the

challenged fee differentials suggests that California targeted nonresidents for higher fees in order to close budget gaps, rather than to address any burdens specifically attributable to them. With respect to the Dungeness crab fishery, it appears that the state targeted nonresidents for explicitly protectionist reasons. (*See, e.g.*, Corr. Gross Decl. Exs. 185, 191.) California's fee differentials are similar to statutes that courts have found to "discriminate[] against a protected privilege." *Camden*, 465 U.S. at 222; *see also McBurney*, 133 S. Ct. at 1715 (discussing purposes and effects of the statutes at issue in *Hicklin*, *Toomer*, and *Camden*); *Tangier Sound*, 4 F.3d at 266-67 (holding that differential commercial fishing fees purportedly enacted to recover nonresidents' share of resource management expenses restrict a "protected privilege").

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challenged law." (Def.'s Mot. 37-38.) However, in concluding that the VA FOIA statute did not abridge the plaintiff's "ability to engage in a common calling in the sense prohibited by [the Clause]," *McBurney* noted that other laws had been struck down as violating the privilege of pursuing a common calling where they had been *"enacted for the protectionist purpose* of burdening out-of-state citizens." 133 S. Ct. at 1715 (emphasis added). Legislative intent is thus relevant to the Privileges and Immunities inquiry. *See also Lunding*, 522 U.S. at 308-09 (examining the purported rationale for challenged tax provision); *Piper*, 470 U.S. at 285 (discussing purported and possible reasons for challenged rule).

Defendant also cites *Andrews*, 831 F.2d at 846, to support his argument that Plaintiffs must demonstrate that nonresidents have been excluded from participating in commercial fishing. In *Andrews*, the challenged statute provided for cost of living adjustments to Alaska residents working for the Alaska Marine Highway System ("AMHS"); nonresident AMHS workers were not eligible for the adjustments. *Id*. at 844-45. The Ninth Circuit held that the Clause did not apply because the plaintiffs "[had] not shown that they [were] prevented or discouraged by the State from pursuing employment with AMHS," noting that the statute did not "limit the number of nonresident workers, favor the hiring of Alaskan workers, or make employment with AMHS unprofitable for nonresidents." *Id*. at 846 (citations omitted).

It appears that *Andrews*, decided in 1987, is no longer valid to the extent that it suggests that the Clause is violated only upon a showing that non-residents have been excluded as a result of a discriminatory law that affects a common calling. The following year, in *Friedman*, the Supreme Court rejected a state's contention that bar admission on motion was not a privilege protected by the Clause because nonresidents had alternative means to bar membership in the state. 487 U.S. at 65-66. The *Friedman* Court noted that "[n]othing in our precedents . . . supports the contention that the Privileges and Immunities Clause does not reach a State's discrimination against nonresidents when such discrimination does not result in their total exclusion from the State." *Id*. at 66. Indeed, the

decision contains no discussion of the extent of any exclusion caused by the bar admission rules at issue.

Further, the Ninth Circuit's most recent Privileges and Immunities Clause decision, *Molasky-Arman*, contains no discussion at all – at either step of the inquiry – of the extent to which the challenged law's increased burden on nonresidents led to any deterrence or exclusion. In that case, the Nevada law at issue precluded nonresident insurance agents and brokers "from finalizing insurance contracts without the countersignature of a resident agent." *Molasky-Arman*, 522 F.3d at 934. At the step one inquiry, the court found the "ability of licensed nonresident agents and brokers to ply their trade in Nevada on substantially equal terms with resident agents falls within the purview" of the Clause. *Id*. The Ninth Circuit's conclusion was consistent with the requirement that courts focus on the activity burdened in Privileges and Immunities Clause cases, not the extent to which the activity is burdened. *See Friedman*, 487 U.S. at 67 (noting that at the first step, "[t]he issue . . . is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency.").

Defendant's final argument at the first step of the Privileges and Immunities Clause inquiry relies on a contorted reading of *Camden.* In *Camden*, the Court described the issue at step one as "an out-of-state resident's interest in employment on public works contracts in another State," instead of simply

identifying employment (or common calling) as the burdened activity. 465 U.S. at 218. Defendant latches on to this wording to argue that in cases where privileges involve state-funded benefits, the court must frame the step one inquiry by examining the interest at stake – here, a nonresident commercial fishermen's interest in an equal subsidy to utilize California's state-funded commercial fisheries. This reads too much into *Camden.* The Court described the step one issue in this manner because it distinguished public employment as "qualitatively different" from private sector employment, and noted that "[p]ublic employment . . . is a subspecies of the broader opportunity to pursue a common calling." *Id*. (reiterating that "there is no fundamental right to government employment for purposes of the Equal Protection Clause); *see also Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 270 (3d Cir. 1994) (holding that "direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause"). In *Camden*, the Court ultimately concluded that the "opportunity to seek employment with . . . private employers is 'sufficiently basic to the livelihood of the Nation' as to fall within the purview of the Privileges and Immunities Clause," even though the private employers were contractors working on city-funded projects. 465 U.S. at 221-22 (citation omitted). Public employment is not at issue in this case.

In sum, Defendant's arguments that the differential fees do not fall within the purview of the Clause are not persuasive. Commercial fishing, the activity directly affected by California's differential

fees, involves the right to earn a living, "one of the most fundamental of those privileges protected by the Clause." *See Camden*, 465 U.S. at 219. In addition to *Toomer* and *Tangier Sound*, other cases have reached the same result specifically concerning commercial fishing. *See Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (higher license fee for nonresident commercial fishermen); *Blumenthal v. Crotty*, 346 F.3d 84, 96 (2d Cir. 2003) (limitation of certain lobster fishing grounds to residents); *Carlson v. Alaska*, 798 P.2d 1269, 1274 (Alaska 1990) (higher commercial fishing license fees for nonresidents). Therefore, California's differential commercial fishing fees "may be called to account under the Privileges and Immunities Clause." *See Camden*, 465 U.S. at 221.

2. Whether the Restriction is Closely Related to the Advancement of a Substantial State Interest

At the second step of the Privileges and Immunities Clause inquiry, Defendant must show that the differential fees are "closely related to the advancement of a substantial state interest." *Friedman*, 487 U.S. at 65 (citing *Piper*, 470 U.S. at 284).

The Ninth Circuit's articulation of this standard suggests that the state can only satisfy this test by demonstrating that the differential statute targets a specific burden caused by non-residents: "a 'substantial reason' for discrimination *does not exist* 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Molasky-Arman*, 522

F.3d at 934 (quoting *Toomer*, 334 U.S. at 398) (emphasis added).[18] The circumstances of *Molasky-Arman* gave no cause for the Ninth Circuit to explore whether a state can satisfy the second-step inquiry by identifying a substantial reason that is not tied to a specific burden caused by Defendant argues that the "peculiar source of evil" formulation of the second step inquiry "appears to be falling out of favor," (Def.'s Mot. 30 n.22), as the Supreme Court did not mention it in *Friedman* and *Piper*. The Supreme Court has never repudiated the standard, and it remains good law in the Ninth Circuit. *See Molasky-Arman*, 522 F.3d at 934.

In *Tangier Sound*, the state purportedly enacted differential commercial fishing fees in order to recover the nonresidents' share of the state's resource management expenses. 4 F.3d at 267. Without deciding whether the state had in fact asserted a "substantial state interest," the court noted that the "rationale of *Toomer* permits a state to make judgments resulting in discrimination against nonresidents . . . and . . . evenly or approximately evenly distributes the costs imposed on residents and nonresidents to support those programs benefitting

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[18] Defendant argues that the "peculiar source of evil" formulation of the second step inquiry "appears to be falling out of favor," (Def.'s Mot. 30 n.22), as the Supreme Court did not mention it in *Friedman* and *Piper*. The Supreme Court has never repudiated the standard, and it remains good law in the Ninth Circuit. *See Molasky-Arman*, 522 F.3d at 934.

both groups." *Id*.; *see also Toomer*, 334 U.S. at 399 (holding that a state may "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay."). In *Carlson*, the Alaska Supreme Court considered the constitutionality of that state's commercial fishing license fee differentials, which the state justified on grounds that it sought to have nonresidents "pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries." 798 P.2d at 1273. The court held that "where residents pay proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference," noting that "[t]he point of *Toomer* . . . is that the state may equalize the economic burden of fisheries management." *Id*. at 1278.

Here, Defendant asserts three state interests which he claims justify the imposition of higher fees for nonresidents. The first two are closely related: California's interest in recovering a reasonable share of its investment in its fisheries, and California's interest in minimizing the subsidization of nonresidents. Defendant also identifies California's interest in maintaining its own natural resources. *See* Cal. Fish & Game Code § 7050 (declaring legislative finding that "the Pacific Ocean and its rich marine living resources are of great environmental, economic, aesthetic, recreational, educational, scientific, nutritional, social, and historic importance to the people of California."). With respect to the

"peculiar source of evil" formulation of the standard, Defendant argues that the "evil" posed by nonresidents is their potential to obtain a free ride.[19]

Defendant's argument at the second step of the constitutional inquiry boils down to the following. The fee differentials are closely related to the advancement of California's interests because the state can require nonresidents to pay their "fair share" of the costs of enforcing, managing, and conserving its fisheries. California invests substantial funds in its commercial fisheries. The revenue collected through license fees does not cover that investment, resulting in a shortfall. According to Defendant, California may seek reimbursement from nonresidents to cover a "fair share" of that shortfall. Defendant further contends that California's fee differentials are constitutionally permissible as long

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[19] In this litigation, Defendant identified an added burden on California's commercial fisheries by nonresidents in the form of time spent by DFG communicating with nonresidents regarding fisheries rules and procedures and obtaining information from other agencies regarding out-of-state boat registries. (Corr. Gross Decl. Ex. 275 (Yaremko Dep., Jan. 16, 2013), 65-69, 71.) However, this is purely anecdotal; Defendant conceded that DFG has never quantified these purported higher costs caused by nonresidents, (H'rg Tr. July 12, 2013, 34:25-35:10), nor has it ever attempted to quantify the burdens on the commercial fisheries, in general or on individual fisheries, caused by nonresidents. (Tr. 39:8-14.)

as they meet two limitations: the nonresident fee differentials cannot 1) overcompensate the state for nonresidents' share of the state's investment, or 2) result in the exclusion of nonresidents from commercial fishing.

Defendant relies on the following facts to demonstrate that the differentials meet its two articulated constitutional limitations. First, Defendant estimates that California invests at least $12-14 million each year, after revenues, in its commercial fisheries. (Def.'s Mot. 10; Carriker Decl. ¶¶ 46-49; Warrington Decl. ¶ 91.) This $12-14 million annual shortfall between costs and revenues constitutes the "value of the subsidy or State-funded benefit provided through DFG alone to all commercial fishermen operating in California." (Def.'s Mot. 10.) In the three most recent license years, nonresidents made up over 11% of licensed commercial fishermen in California. (Carriker Decl. ¶¶ 13-15.) Therefore, applying a conservative 10% figure for nonresident participation to the minimum annual estimate of $12 million in investment, nonresidents' share of the state's investment in its fisheries is $1.2 million. (*See* Def.'s Mot. 32.) According to Defendant, the average amount of total differentials paid by nonresidents in the last six years is approximately $391,000, or 33% of their $1.2 million share of the state's investment. (*See* Trabucchi Decl., Apr. 10, 2013, p. 8, Table 2, Exs. T-2, T-3 (six-year average of differentials collected for each fee); *see also* H'rg Tr. July 12, 2013, 46:15-20.) Defendant contends that the state does not overcompensate itself because the total amount of

annual collected fee differentials (approximately $400,000) is far less than the nonresidents' share of the state's annual investment in its commercial fisheries ($1.2 million). (Def.'s Mot. 32.) Moreover, Defendant argues that the differentials have not resulted in exclusion of nonresidents from participation in California's commercial fisheries. (*See* n.15, *supra.*) Therefore, according to Defendant, the differential fees are constitutional because they do not result in overcompensation of the state's subsidy of nonresidents, or exclusion of nonresidents.[20]

There are significant problems with Defendant's analysis. First and foremost, Defendant's argument fails to compare the treatment of nonresident commercial fishermen with their California resident counterparts. By so doing, Defendant ignores the question at the heart of the Privileges and Immunities Clause: whether nonresident commercial fishermen are able to do business in California "on terms of substantial equality" with California residents. *See Toomer*, 334 U.S. at 396. Defendant's approach – to analyze the amount of nonresident fee differentials in reference to nonresidents' share of the state's investment, without comparison to the treatment of residents – contradicts basic Privileges and Immunities Clause jurisprudence. The court

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[20] It bears noting that Defendant created these two limits himself; no case law supports this articulation of his proposed constitutional boundaries.

must compare the burden on residents and nonresidents, for the Clause "was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Friedman*, 487 U.S. at 64 (quoting *Paul*, 8 Wall. at 180); *see also McBurney*, 133 S. Ct. at 1716 (noting that the Privileges and Immunities Clause "forbids a State from intentionally giving its own citizens a competitive advantage in business or employment."); *Carlson*, 798 P.2d at 1278 (holding that "[t]he point of *Toomer* . . . is that the state may equalize the economic burden of fisheries management").

Using Defendant's same analysis but applying it to residents as well as nonresidents results in the following comparative analysis[21]: according to

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[21] By using Defendant's approach but extending it into a comparative analysis, the court does not endorse its legitimacy. In fact, Defendant's approach may well be flawed. To begin with, in determining how much nonresidents pay toward their "share" of California's investment, Defendant's analysis credits nonresidents solely with the amount of differentials that they pay, rather than their total fees (i.e., the base fees that everyone must pay, plus the differential amount that only nonresidents pay). This has the effect of understating the nonresident contribution, which in turn makes it appear that the percentage nonresidents pay toward their share of the state's investment is lower, and therefore closer,

Defendant, nonresidents' share of the state's $12 million investment is $1.2 million. Therefore, residents' share of the investment is $10.8 million. According to Defendant's data, the average total amount of annual fees for the four disputed items paid by residents in the last six years was approximately $1.65 million, or 15% of their $10.8 million share of the state's investment. (*See* Ex. T-3 to Trabucchi Decl. (six-year average of revenues collected from residents).) In comparison, nonresidents paid an annual average of $391,000 in differentials, or 33% of their $1.2 million share of the state's investment. Thus, from a comparative perspective, non-resident commercial fishermen pay more than double of what their resident competitors pay toward covering their share of the shortfall in the state's investment. Contrary to Defendant's characterization, this is not a "fair share."

Moreover, using Defendant's reasoning, it would be constitutionally permissible for California to

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to the percentage share paid by residents. Defendant's approach also appears mathematically flawed in another way. Defendant calculated California's investment shortfall by subtracting commercial fishing revenues (including total resident and nonresident fees) from total expenditures. Defendant then examines the amount of differentials paid by nonresidents – but this is an amount that Defendant has already taken into account in deriving the shortfall figure.

charge nonresidents any higher amount in fees – double, triple, or ten fold what is charged to their California competitors – as long as the differentials do not overcompensate California for the nonresident share of its investment and do not exclude nonresidents. This ignores the requirement that a state must demonstrate that a discriminating restriction "bears a close or substantial relationship" to a substantial state interest, a requirement that the Court has never abandoned. *See Piper*, 470 U.S. at 284. A court may find that a restriction is not closely related to a substantial state interest if there exist "less restrictive means" to achieve the objective. *Id*. By its own terms, Defendant's assertion that it can charge nonresidents far more than it charges residents, subject only to two broad limits, fails the "less restrictive means" test.

To the extent that Defendant must demonstrate that "non-citizens constitute a peculiar source of the evil at which the statute is aimed,'" *Molasky-Arman*, 522 F.3d at 934, Defendant has failed to do so. At oral argument, Defendant explained that in the years the legislature enacted the differentials, DFG faced budget shortfalls because it was spending more on its commercial fisheries than it was collecting from commercial fishing licenses, permits, and taxes. Therefore, the state turned to fee differentials in an effort to spread the burden of the shortfalls and to recover a portion of its investment in its commercial fisheries from nonresidents. (Tr. 34:8-15.) However, there is no evidence that lawmakers considered nonresidents a particular source of any budget shortfall. Indeed, Defendant conceded that there is no

record evidence 1) that California conducted any analysis of nonresidents' impact on its commercial fisheries; 2) that the differentials compensate California for any added burden on its commercial fisheries or expenses caused by non-residents; or 3) that California has identified any savings that it would realize if nonresidents were excluded from participating in commercial fishing in California. (Tr. 38:15-41:2.)

Defendant argues that where a state's investment in natural resources is at issue, a comparison of the amounts paid by residents and nonresidents is irrelevant and unnecessary, citing *McBurney* and *Hicklin*. Defendant reads *McBurney* to stand for the proposition that because "'the essential and patently unobjectionable purpose of state government [is] to serve the citizens of the State," a state "[may] deny out-of-state citizens a benefit that it has conferred on its own citizens." *McBurney*, 133 S. Ct. at 1720 (citation omitted). In other words, Defendant contends that it is constitutionally permissible for a state to subsidize its residents at a greater level than nonresidents, regardless of whether this results in substantial inequality of treatment with respect to a common calling. To begin with, the language quoted by Defendant is from *McBurney*'s discussion of the Commerce Clause, and has no bearing on the Privileges and Immunities Clause analysis. Moreover, *McBurney* does not support Defendant's position. There, the Court unequivocally stated that the Privileges and Immunities Clause "forbids a State from intentionally giving its own citizens a competitive

advantage in business or employment." *Id*. at 1716. A license fee that is two to three times less expensive than what nonresidents have to pay for the same license is undeniably a "competitive advantage."

In *Hicklin*, Alaska contended that because it owned the oil and gas that were the subject of the "Alaska Hire" statute at issue, "this ownership, of itself, [was] sufficient justification for the Act's discrimination against nonresidents." 437 U.S. at 528. The Court disagreed, noting that "'the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute.'" *Id*. at 528-29 (quoting *Baldwin*, 436 U.S. at 385). Instead, "a State's ownership of the property with which the statute is concerned is a factor – although often *the crucial factor* – to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause." *Id*. at 529 (emphasis added). Defendant argues that *Hicklin* supports his argument that as long as California does not overcompensate itself and does not exclude nonresidents from participating in its fisheries, it may charge nonresidents any amount for commercial fishing fees because it owns the natural resources at issue. While the Court has never clarified what it meant by describing a state's ownership of property as "the crucial factor," no cases support that California's ownership of its commercial fisheries gives it the right to provide preferential treatment to its residents with respect to the use of that resource. Under *Toomer*, a state may seek fair compensation from nonresidents for its investments in natural resources. *Toomer*, 334 U.S. at 398-99 ("[t]he State is

not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay."); *see also Mullaney*, 342 U.S. at 417. However, the object of the higher fee charged to nonresidents must be to "place the burden so that it will bear as nearly as possible equally upon [residents and nonresidents]." *Travelers' Ins. Co. v. Conn.*, 185 U.S. 364, 368-69, 372 (1902) (holding constitutional tax on local insurance corporations calculated differently for residents and nonresidents where purpose of method "was to approximate a general equality in the burden" for state's expenses). As the Third Circuit noted in *Tangier Sound*,

> [t]he rationale of *Toomer* permits a state to make judgments resulting in discrimination against nonresidents where the state establishes an 'advancement of a substantial state interest' as a reason for the disparate treatment, and in the facts of this case, *evenly or approximately evenly* distributes the costs imposed on residents and nonresidents to support those programs benefiting both groups.

4 F.3d at 267 (emphasis added). By deeming a state's ownership of the resource as "the crucial factor," the Court appeared to acknowledge that a state may treat nonresidents differently in order to recover a portion of its investment in its natural resources. Harmonizing this principle with the Court's Privileges and Immunities Clause jurisprudence, a state must do so in a way that fulfills the Clause's

goal of substantial equality of treatment of residents and nonresidents. Defendant offers no facts to support that the state has done so.

In sum, as Defendant has failed to meet its burden to show the existence of a genuine dispute of fact regarding whether its differential fees are closely related to a substantial state interest, summary judgment must therefore be granted to Plaintiffs.

B. Equal Protection Clause

Because the court concludes that the differential fees violate the Clause, it need not reach Defendant's arguments that he is entitled to summary judgment on Plaintiffs' equal protection claim.

VII. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is denied. Plaintiffs' motion for summary judgment is granted.

Plaintiffs seek declaratory and injunctive relief in this matter. (4th Am. Compl. (prayer).) The parties shall meet and confer as to the form of a proposed judgment and shall jointly submit a proposed judgment within fourteen days of the date of this order. If the parties are unable to agree, Plaintiffs shall submit a proposed judgment within fourteen days of the date of this order. Any objections to the proposed judgment by Defendant are due within seven days of Plaintiffs' filing.

This order disposes of Docket Nos. 201, 205, 215, 216, 218, 219, and 227.

IT IS SO ORDERED.

Dated: October 16, 2013

/s/ Donna M. Ryu
DONNA M. RYU
United States Magistrate Judge