No. 16-1391

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 official capacity as Director of the California Department of Fish & Game,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

A state may not impose "any higher taxes or excises" on nonresidents "than are imposed by the State upon its own citizens." *Ward* v. *Maryland*, 79 U.S. 418, 430 (1870). A limited exception to that rule may apply when differential fees are necessary to compensate the state for "expenditures from taxes which *only* residents pay." *Toomer* v. *Witsell*, 334 U.S. 385, 399 (1948) (emphasis added). The Fourth Circuit has held that when a state claims that that exception applies, *all* taxes and fees paid to the state by affected nonresidents must be taken into account. *Tangier Sound Waterman's Ass'n* v. *Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993). Accordingly, the question presented here is:

May California impose discriminatory fees on nonresident fishermen who pay income and other taxes to California?

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

One of the liberties protected by the Constitution is the right to do business in other states, free from discrimination. That right is enshrined in the Privileges and Immunities Clause, Art. IV, § 2, one of the handful of individual rights that the Framers saw fit to safeguard even before the Bill of Rights was adopted. In fact, ensuring the opportunity to do business out-of-state on equal terms with a state's residents was one of the principal motivations for holding the Constitutional Convention in the first place. But the Ninth Circuit has condoned California's violation of that right.

California has enacted a set of commercial-fishing license fees that require nonresidents to pay several times more for those licenses than residents. Its system is explicitly discriminatory, harshly regressive, and intentionally protectionist. Under decisions of this Court and the Fourth Circuit in substantively identical circumstances, that is impermissible: States must charge commercial-fishing license fees equally to residents and nonresidents alike, or else bear the burden of

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[1] No one other than *amicus curiae* and its counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. *Amicus* provided notice to all parties pursuant to Supreme Court Rule 37.2(a), and all parties have consented to this filing.

justifying their discrimination (which California made little real effort to do below).

But an *en banc* majority of the Ninth Circuit quite literally imposed the opposite rule. Not only did it uphold California's discrimination, but it supported its holding with guesstimates and rough calculations of state finances that the state itself had never supplied. The result is conflict between two federal circuits, and an open door for new methods of discrimination that the Constitution has always forbidden.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*.

Cato objects to California's use of discriminatory license fees to deny opportunity to nonresident fishermen, and to the Ninth Circuit's reasoning that condones it. This Court should grant review and reverse.

STATEMENT

This case presents the Court with an exceptionally clear-cut example of a state that discriminates against business conducted there by nonresidents. The California Fish and Game Code, which governs fees for commercial fishermen in state waters, explicitly classifies fishermen by state residence—listing one set of fees for residents and a different, higher set of fees for nonresidents. See Cal. Fish & Game Code §§ 7852(a), (b) (commercial fishing licenses); 7881(b), (c) (vessel registrations); 8280.6(a) (Dungeness crab permits); 8550.5(a)(1), (2) (herring net permits). That is the essence of facial discrimination. See *Toomer* v. *Witsell*, 334 U.S. 385, 396–97 (1948) (observing that similar differential fishing license fees "plainly and frankly discriminate against non-residents"); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 575–76 (1997) (explaining that a state law is facially discriminatory when "[i]t is not necessary to look beyond the text of this statute to determine that it discriminates") (applying the Commerce Clause).

Under that system of discriminatory fees, nonresident commercial fishermen must pay two to four times as much as residents, a differential totaling $2,000 to $4,000 each year. See Pet. App. 30a (M. Smith, J., dissenting). The burden of discriminatory fees, moreover, falls most heavily on nonresident fishermen who only derive a portion of their fishing income from California waters (or who earn only a modest living in their chosen profession). For them,

the added fees are potentially enough to make California fishing uneconomical.

Compare the added fees to the named Petitioners' California tax payments. California requires nonresidents whose income "derive[s] from sources within this state" to file California income taxes. Cal. Rev. & Tax Code § 17041(i)(1)(B); see also *id.* § 17041(b)(1) ("There shall be imposed for each taxable year upon the taxable income of every nonresident . . . a tax[.]"); 18 Cal. Code Regs. § 17951-2 ("Income from sources within this State includes . . . income from a business, trade, or profession carried on within this State."). Nonresident fishermen, including the named Petitioners, accordingly file California income taxes and pay the amount assessed. Petitioners Savior Papetti, Salvatore Papetti, and Kevin Marilley testified in their depositions that over their decades of fishing, they have filed California income tax returns "'every year'" they were required to. Pet. App. 24a–25a.

The income the named Petitioners earn by fishing in California, however, is not large. See Pls.' Supp. Excerpts of Record at 758 (Doc. 19-3) (deposition testimony regarding Mr. Marilley's income in California). As a result, the state has never assessed any tax liability from Savior, and has taxed Salvatore and Mr. Marilley only three times each. Even in those years, the amounts that California required them to pay are small. Salvatore has paid a grand total of $3,256 in his years of fishing; Mr. Marilley, $4,159. Pet. App. 24a–25a. Yet in comparison, Salvatore,

Savior, and Mr. Marilley respectively pay $3,915.50, $2,062, and $3,674.50 more *each year* than they would if they were California residents. Pet. App. 30a (M. Smith, J., dissenting). Petitioners' incomes, in other words, are rarely large enough for California to tax at all, but California saddles them with thousands of dollars of extra fees annually, now amounting in aggregate to many times more than the total of their state income tax bills.

The same problem appears when one looks at nonresident fishermen more generally. According to data submitted by California's own witness, 775 nonresident fishermen purchased California commercial fishing licenses in FY 2011, and paid taxes on approximately $24 million in income—an average of approximately $31,000 each. Pet. App. 12a; *id.* 38a–39a (M. Smith, J., dissenting). Even making the unlikely assumption that their income was evenly distributed, California required an average nonresident fisherman to pay 10 percent of his in-state income, more or less, in extra fees.

These figures, importantly, include only the self-selecting group of nonresident fishermen who *do* find it economical to fish in California despite the discriminatory fees: They leave out an unknown number of nonresident fishermen who may *want* to fish in California but whom the state has driven off. At the margin, particularly for fishermen of limited means or a small stake in California waters, the result is a heavy disincentive against commercial fishing in the state. That, in turn, means less competition for

California resident fishermen, and less opportunity for their nonresident counterparts.

The record indicates that discouraging commercial fishing by nonresidents was exactly what California wanted. As the district court showed (and as Judge Smith repeated in his dissent), the legislative history of the fee differentials contains strong evidence of protectionist intent. Pet. App. 86a–88a; see also *id.* 34a–35a (M. Smith, J., dissenting). The California Department of Fish and Game referred to one version of the bill creating discriminatory fees for Dungeness crab as "'an attempt to . . . control competition to California fishermen and processors from out of state,'" and to the final enrolled law 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[.]'" *Id.* 86a.

Use of licensing and permitting requirements to cartelize favored occupations and protect them from competition is nothing new. Government entities use those tools regularly—and perhaps increasingly so. See generally Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209 (2016); Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L.

Rev. 1093 (2014).[2] But California, by some measures, is among the worst state offenders in its imposition of burdensome licensing requirements, "costing its would-be workers an average of $300 in fees, 549 days in education and experience and one exam over the 62 occupations it licenses." See Dick M. Carpenter, *et al.*, *License to Work: A National Study of Burdens from Occupational Licensing* 18, Inst. For Justice (2012).

SUMMARY OF ARGUMENT

This Court has held for more than a century that the Privileges and Immunities Clause prohibits states from discriminating against nonresidents who wish to do business in-state. See, *e.g.*, *Chalker* v. *Birmingham & N. W. Ry. Co.*, 249 U.S. 522, 527 (1919); *Ward* v. *Maryland*, 79 U.S. 418, 430 (1870). The Supreme Court has *twice* applied that rule to prohibit states from discriminating against nonresident fishermen by charging them higher license fees than residents. *Mullaney* v. *Anderson*, 342 U.S. 415 (1952); *Toomer*, 334 U.S. at 385. There is no dispute in this case that, on its face, California's discriminatory fishing license regime conflicts with that rule. The *only* question is whether California has justified its discrimination in some way—a question on which California bears the burden of proof. *Sup. Ct. of Va.* v. *Friedman*, 487 U.S. 59, 68 (1988).

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[2] As shown by the Petition, California is not even alone in using license fees to discriminate against nonresident fishermen. Pet. at 32–33.

The Ninth Circuit majority held that California's discriminatory fees serve the permissible purpose of compensating the state for its expenses in regulating commercial fishing. That holding was error, and creates a conflict with both this Court and the Fourth Circuit. See *Toomer*, 334 U.S. 385; *Tangier Sound Waterman's Ass'n* v. *Pruitt*, 4 F.3d 264 (4th Cir. 1993). The circuit split created by the Ninth Circuit majority opens the door for expanded discrimination by California and other states, to the detriment of economic liberties and the Union's economic fabric.

ARGUMENT

I. California's Fee System Infringes the Fundamental Right to Do Business Across State Lines

States use their licensing regimes to cartelize favored local businesses: That is well understood. This Court in recent years has recognized the anticompetitive effects of state licensing regimes and the importance of subjecting them to judicial scrutiny—for example, under federal antitrust law. *N.C. Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015) (only case yet in which *amicus* filed a brief supporting the federal government). But one cartelization tool that has long been considered categorically off-limits for states is shielding in-state business from competition against nonresidents. California's commercial-fishing licensing fees facially conflict with that rule.

The principle that states cannot further their parochial economic interests by walling themselves off from each other is one of the main ways that the Constitution protects economic liberties.[3] This Court has treated a form of that rule as implicit in the Commerce Clause. See *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 273 (1988) ("[T]he Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."); *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 n.9 (1994) (justifying that rule based on the original understanding of the Commerce Clause). But the Privileges and Immunities Clause makes the rule textually clear: It "guarantees to citizens of State A [the right] of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer*, 334 U.S. at 396. Accordingly, "a citizen of State A who ventures into State B" to pursue business enjoys "the same privileges which the citizens of State B enjoy." *Id.* at 395; see also *Chalker*, 249 U.S. at 527 ("Under the federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states

[3] It has also long been considered one of the most important guarantors of the nation's economic union, which allows largely free flow of labor, goods, and services across state lines. Economic discrimination by states against each other under the Articles of Confederation, in fact, "was the immediate cause, that led to the forming of" the Constitutional Convention. *Gibbons* v. *Ogden*, 22 U.S. 1, 223 (1824) (Johnson, J., concurring).

equality of commercial privileges with their citizens[.]").

When a state discriminates by denying equal business rights to nonresidents, the Privileges and Immunities Clause assigns the state the burden of showing that its treatment of nonresidents is "closely drawn" to fulfill a substantial state objective. *Friedman*, 487 U.S. at 68. This Court has relied on that rule to strike down a wide range of state business regulations that deny nonresidents the equal right to compete. See *id.* (limitation on admission of nonresident attorneys to the bar); *Sup. Ct. of N. H.* v. *Piper*, 470 U.S. 274 (1985) (prohibition on bar membership by out-of-state attorneys); *Hicklin* v. *Orbeck*, 437 U.S. 518, 529 (1978) (discriminatory government leasing rule). That principle applies in the context of state spending and business contracting, where the Privileges and Immunities Clause's protections are broader in some respects than the Commerce Clause's. *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity* v. *Mayor & Council of City of Camden*, 465 U.S. 208, 221 (1984) (explaining that discriminatory state contracting rules that do not violate the Commerce Clause still "may be called to account under the Privileges and Immunities Clause"); see also Pet. App. 36a n.2 (M. Smith, J., dissenting).

As especially relevant here, the right to do business on equal terms in another state entails not just opportunity to pursue one's calling there, but protection against "being subjected … to taxes more

onerous than the citizens of the latter State are subjected to." *Lunding* v. *N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quotes omitted); see also *Ward*, 79 U.S. at 430 (explaining that under the Privileges and Immunities Clause nonresidents are "exempt from any higher taxes or excises than are imposed by [a] State upon its own citizens"). State discrimination against nonresidents that takes the form of discriminatory monetary exactions has also been repeatedly invalidated in this Court. See, *e.g.*, *Lunding*, 522 U.S. 287 (denial of alimony tax deductions to nonresidents); *Austin* v. *New Hampshire*, 420 U.S. 656 (1975) (four percent tax on nonresidents' locally-derived income); *Mullaney* v. *Anderson*, 342 U.S. 415 (1952) (discriminatory commercial-fishing license fees); *Toomer*, 334 U.S. 385 (same); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (state income tax exemptions that were available to residents but not nonresidents); *Chalker*, 249 U.S. 522 (differential tax on railroad construction that was four times higher for nonresidents than residents); *Ward*, 79 U.S. 418 (requirement that nonresidents purchase additional permit to sell goods other than locally-produced agricultural products).

In fact, some of this Court's seminal cases concerning that aspect of the Clause arose in the very context of this case: states imposing discriminatory fees on nonresident commercial fishermen. Coastal states have long tried to favor in-state fishing industries by burdening or excluding nonresident competitors—and continue to do so to this day, in

California and elsewhere. See Pet. at 32–33. But in *Toomer* v. *Witsell*, 334 U.S. 385, and *Mullaney* v. *Anderson*, 342 U.S. 415, this Court reviewed South Carolina and Alaska laws that set one license fee on resident commercial fishermen and another, higher fee on nonresidents, and invalidated both. As a result of *Toomer* and *Mullaney*, when discriminatory fees on nonresident commercial fishermen are challenged under the Privileges and Immunities Clause, they have consistently been invalidated both by lower-federal[4] and state courts.[5]

Viewed in historical perspective, then, it is not unusual that California would try to make it harder for nonresident fishermen to conduct their business in California waters. What is new here is that the *en banc* Ninth Circuit has allowed California to get away with it.

II. The Ninth Circuit's Reasoning Guts the Privileges and Immunities Clause's Protections

There is no real question in this case that California denies Petitioners the right to do business on equal terms with California residents. Indeed,

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[4] *E.g.*, *Connecticut ex rel. Blumenthal* v. *Crotty*, 346 F.3d 84 (2d Cir. 2003); *Tangier Sound*, 4 F.3d 264; *Brown* v. *Anderson*, 202 F. Supp. 96 (D. Alaska 1962); *Gospodonovich* v. *Clements*, 108 F. Supp. 234 (E.D. La. 1951); *Russo* v. *Reed*, 93 F. Supp. 554 (D. Me. 1950).

[5] *E.g.*, *State* v. *Carlson*, 191 P.3d 137 (Alaska 2008); *Salorio* v. *Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983).

every judge involved in this case has agreed that it does, including those in the *en banc* majority. *See* Pet. App. 9a–10a. The critical question, then, is whether California has borne its burden of justifying discrimination as "closely drawn" to fulfill a substantial state objective. *Friedman*, 487 U.S. at 68.

The state has not done so. In holding to the contrary, the *en banc* majority took Supreme Court dicta recognizing a qualification to the Privileges and Immunities Clause, stretched it beyond recognition, and used it to authorize conduct that has always been treated as forbidden.

A. The majority's opinion conflicts with decisions of this Court and the Fourth Circuit

The *en banc* majority purported to apply this Court's decision in *Toomer*, which holds that when a state discriminates against nonresident commercial fishermen by imposing discriminatory fees, the differential offends the Clause unless nonresident fishermen "constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398. The *Toomer* Court suggested in dicta that such a circumstance might exist when additional fees on nonresidents are necessary to "compensate the State for any added enforcement burden [nonresidents] may impose or conservation expenditures from taxes *which only residents pay*." *Id.* at 399 (emphasis added).

California did not argue that nonresident fishermen impose any unique enforcement burden

justifying additional fees. Instead, it argued simply that it was entitled to extract extra money from nonresidents in order to support regulatory expenditures related to commercial fishing. Pet. App. 36a (M. Smith, J., dissenting) ("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.").

The *en banc* majority agreed. It characterized California's regulatory expenditures as a "subsidy" for commercial fishermen, Pet. App. 10a, 13a–14a, 20a–22a, and held that the need to "compensate" the state for that subsidy justifies California's imposition of extra fees on nonresident fishermen, Pet. App. 22a.[6] It

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[6] The notion that California's conservation efforts are a subsidy on commercial fishermen is itself a highly doubtful proposition. Although the *en banc* majority calculated a sum of California's "enforcement, management, and conservation activities benefitting commercial fishers," Pet. App. 11a, it stands to reason that some regulatory expenditures benefit the regulated industry and some do not. Much fishery regulation is inefficient, reducing yields without achieving conservation or sustainability goals. See generally Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, 31 UCLA J. Envtl. L. & Pol'y 150 (2013). Some regulatory expenses may be intended to serve political purposes other than benefiting the industry, or stakeholders—sport fishermen, charter boat operators, ocean shippers—other than commercial fishermen. At a minimum, in order to demand compensation for a supposed subsidy, California should be expected to *prove* how particular regulatory activities benefit the

then undertook a series of rough mathematical calculations intended to show that the discriminatory fees accomplished that purpose. Pet. App. 10a–14a, 19a–22a.

The majority's holding is impossible to reconcile with the plain text of *Toomer*. California's conservation expenses are funded in part from general tax revenues, *id.* 5a, including income and sales taxes. See *id.* 40a (M. Smith, J., dissenting).[7] And those are not "taxes which only residents pay." *Toomer*, 334 U.S. at 399. It is undisputed that the named Petitioners *do* file California income taxes for the income they earn in California waters each year, and that they pay whatever California assesses, just like California resident fishermen do. Pet. App. 24a–25a. California also never disputed that, as one might predict, when Petitioners are in California they pay sales and other

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targeted industry in a cost-effective manner, rather than simply adding up the spending of particular state departments.

[7] The majority exaggerated the state's reliance on tax revenues for fishery management. Of the $20 million in annual fishery management expenses estimated by the majority, Pet. App. 11a (adding estimates from the chief of the Department of Fish ang Game's Law Enforcement Division and Director of Administration), only $4.5 million came from the general fund, while more than $13.2 million came from the Fish and Game Preservation Fund. See Excerpts of Record 3:513 (Doc. 12-4) (breakdown of administrative costs); *id.* 4:575 (9th Cir. Doc. 12-5) (breakdown of enforcement costs). The Preservation Fund, in turn, comes largely from user fees—including the discriminatory license fees themselves. See *id.* 4:496 (breakdown of Preservation Fund revenue).

taxes that support fishery conservation. Pet. App. 40a (M. Smith, J., dissenting).

The named Petitioners' tax payments thus place this case outside the scope of the exception identified in *Toomer*: If a state tax is not paid "*only*" by residents, then there is no basis for the state to demand extra compensation from nonresidents in the form of licensing fees. 334 U.S. at 399 (emphasis added). Subsequent Supreme Court authority confirms that *Toomer* means what it says. See *Austin*, 420 U.S. at 665 (invalidating tax on nonresidents that was "not offset . . . by other taxes imposed upon residents *alone*") (emphasis added).

Besides conflicting with *Toomer*, the majority decision splits with the Fourth Circuit, which has applied *Toomer* according to its express terms. In *Tangier Sound Waterman's Association* v. *Pruitt*, the court addressed Virginia's discriminatory commercial-fishing license fees. The Commonwealth relied on *Toomer* in defense, citing it "for the proposition that it may impose a tax or fee on nonresidents to compensate for moneys spent for conservation efforts which benefit resident and nonresident alike but which, absent that fee or tax on nonresidents, would be paid for wholly by residents, by their contribution to the general fund of the Commonwealth." 4 F.3d at 267. The court rejected that argument, explaining that "the evidence here simply does not bring the application of the statute within that portion of *Toomer*." *Id.*

Specifically, the evidence in *Tangier Sound* did not demonstrate that the Commonwealth had considered *all* of the fees and taxes paid by the nonresident fishermen. *Id.* "While these . . . taxes *may be less than those paid by resident commercial fisherman*, they are nevertheless a factor . . . to be accounted for in bringing the statute within this interpretation of this portion of *Toomer.* No evidence before us indicates that this has been done." *Id.* (emphasis added). The Commonwealth, in other words, had to *prove* that it considered *all* taxes and fees paid by nonresidents, *regardless* of amount, or it could not rely on *Toomer* to justify discrimination.

The Ninth Circuit's holding conflicts with *Tangier Sound* in several distinct ways.

First, and most obviously, the Fourth and Ninth Circuits reached substantively inconsistent results on indistinguishable facts. In both cases a state imposed higher fees on nonresident fishermen without considering all of the taxes they paid, then defended the discrimination based on *Toomer*. The Fourth Circuit held that the discrimination was invalid under the Privileges and Immunities Clause, while the Ninth Circuit upheld the state's treatment of nonresidents. That irreconcilable divergence creates a straightforward circuit split for the Supreme Court to resolve. *See* S. Ct. R. 10(a) (review appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Second, the Ninth Circuit split from this Court and the Fourth Circuit by shifting the burden of proof. This Court's Privileges and Immunities Clause jurisprudence places the burden on the *state* to justify discrimination. *Friedman*, 487 U.S. at 68. *Tangier Sound* accordingly asked whether the Commonwealth had taken all taxes and fees into account, and invalidated the discriminatory fees because "[n]o evidence before us indicates that this has been done." 4 F.3d at 267.

Although the *en banc* majority acknowledged that California should bear the burden, its reasoning showed that in actually placed the burden on Petitioners. Pet. App. 8a–9a; *id.* 29a (M. Smith, J., dissenting) (explaining that "the majority improperly transposes the evidentiary burden"). Just as in *Tangier Sound*, the state never argued that it had taken into account all the taxes and fees paid by nonresident fishermen. California's appellate briefing never discussed the amount of income taxes paid by nonresident fishermen, nor did it mention sales taxes or other sources of revenue nonresident fishermen pay to the state. See Cal. Opening Br. (9th Cir. Doc. 12-1). It certainly did not undertake any of the calculations necessary to prove "equality of treatment between resident and nonresident." *Tangier Sound*, 4 F.3d at 267. The *en banc* majority instead supplied such an analysis *sua sponte*, providing page after page of its own back-of-the-envelope analysis. Pet. App. 10a–14a,

19a–22a.[8] The majority faulted Petitioners for failing to bring sufficient proof of their tax payments, *id.* 23a, which they had no obligation to do. *Id.* 45a (M. Smith, J., dissenting) ("[A]ny purported lack of evidence on the tax liability of nonresident fishermen is a strike against California, not against the plaintiffs.").

In the Fourth Circuit, in other words, when the state fails to provide proof justifying discrimination against nonresidents, it loses. In the Ninth Circuit, the court provides the argument *for* the state, making the relevant calculations and scouring the record for evidence to support them even when the state has not. That, too, is a plain conflict of authority.

Third, the majority's explanation why it did not consider the named Petitioners' income tax payments significant enough for the state to take into account—that they could be disregarded as "*de minimus* [sic]," Pet. App. 23a—creates conflicts of its own. *Toomer* itself attached no importance to the exact amount of state tax particular nonresidents might have paid. *Toomer*, 334 U.S. at 399. Nor did the Fourth Circuit in *Tangier Sound*; to the contrary, it held that tax

[8] The majority was explicit that the calculations were its own, not the state's. See Pet. App. 19a ("[W]e may calculate at a general level the benefit provided by California and the appropriate compensation from nonresident fishers"); *id.* 20a ("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."); *id.* 21a ("We may also calculate the subsidies provided to the two specific fisheries for which California charges fee differentials[.]").

payments by nonresident fishermen must be taken to account even when they are "less than those paid by resident commercial fisherman." *Tangier Sound*, 4 F.3d at 267. To hold that some tax payments are too small to count for Privileges and Immunities Clause purposes therefore diverges from *Toomer* and *Tangier Sound*.

The rule of *Toomer* and *Tangier Sound* makes more sense than the majority's *de minimis* rule. If nonresident fishermen pay taxes when they engage in their in-state business, they do not free-ride on the state budget, and so there is no need for them to "compensate" the state. *Toomer*, 334 U.S. at 399. By the same token, if the state considers the taxable activity of nonresident fishermen to be negligible, it should not be able to assert that their in-state business imposes a burden on the state that justifies discriminatory fees.

At the very least, the tens of millions of dollars in total income tax paid by nonresident fishermen are surely not *de minimis*, Pet. App. 12a; *id.* 38a–39a (M. Smith, J., dissenting), yet the majority's rule allows California to disregard the total because the named Petitioners' own payments were small. And then there is the puzzling fact that under the majority's approach a nonresident fisherman who pays *more* in taxes than most residents must also pay extra for his license—all supposedly to "compensate the State" for "conservation expenditures from taxes which only residents pay," *Toomer*, 334 U.S. at 399—simply

because others' tax payments are smaller. There is no logic in any of this.

For all of these reasons, the Ninth Circuit's *en banc* decisions diverges from this Court's Privileges and Immunities Clause precedents, and creates a split with the Fourth Circuit's more faithful approach. Review is warranted on that basis alone.

B. The Ninth Circuit's reasoning opens the door for discrimination in many other contexts

The conflicts between the Ninth Circuit's decision and the prior Supreme Court and Fourth Circuit decisions in *Toomer* and *Tangier Sound* provide ample justification for this Court to grant review. What makes review particularly important is that the Ninth Circuit's decision establishes a roadmap for other states to discriminate against nonresidents in a variety of additional contexts.

The Ninth Circuit majority opinion rests on the assumption that whenever a state spends money regulating a licensed occupation, it "subsidizes" the license holders, and can use license fees to extract extra money from nonresidents who (in the aggregate) pay less in taxes. Pet. App. 22a. That presents states with a potentially extraordinary opportunity. Virtually every licensed occupation, presumably, is subject to regulation that the Ninth Circuit would now consider a "subsidy." It seems unexceptionable to predict that in most professions where residents and nonresidents compete, the nonresidents will generally

earn most of their income out-of-state and so pay less state income tax. At a minimum, the total taxes paid by the residents will surely exceed the total paid by nonresidents. And if those premises are true, then a state can virtually *always* impose extra fees on nonresidents on the theory that they are not paying as much to support the state's regulations as residents do.

It will not take much imagination for states to take that opportunity. Given the proliferation of occupational licensure, it is easy to see how California's methods for discrimination against fishermen could be exported to other industries now requiring licenses or permits. California, for example, now requires occupational licenses for many professions where business is likely to cross state lines—for example, building and construction contractors, animal trainers, garden and tree workers, and vehicle drivers and operators. *License to Work*, *supra*, at 44–45. Every member of those professions who does not live in California should consider himself on notice that the state now has vastly expanded discretion to raise his fees to levels that make in-state activity unprofitable. Nor would it be difficult for a state to identify new industries where it spends heavily on regulation and enforcement and create additional licensing requirements, each one more expensive for nonresidents.

Judge Smith's dissent points to one example. California now licenses truck drivers, *id.* at 45, and spends heavily on air quality regulation. Pet. App.

47a–48a. It is only a small step from the Ninth Circuit's *en banc* majority opinion to a new law multiplying the license fees for nonresident drivers.

Just as is the case here, the burden will always fall most heavily on nonresidents who do a small amount of in-state business. For them, doing an ounce of in-state business would bring on a pound of taxation, and put their livelihoods at risk. It goes without saying that states could use that rationale to put a veneer of fairness on economic protectionism and schemes to exclude nonresidents.

Imposing that kind of disproportionate burden on out-of-state competitors will create disincentives for doing business across state lines, less competition, and ruptures in the nation as an economic union. This Court should not let that stand without review.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Ninth Circuit.

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