No. 12-461

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF OPTOMETRISTS & OPTICIANS; LENSCRAFTERS, INC.; EYE CARE CENTERS OF AMERICA, INC.,

Petitioners,

v.

KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California; CHARLENE ZETTEI, Director, Department of Consumer Affairs,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF WALGREEN CO., TECHAMERICA, NETCHOICE, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, STATE PRIVACY AND SECURITY COALITION, AND INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION IN SUPPORT OF PETITIONERS

HORVITZ & LEVY LLP
JASON R. LITT
MITCHELL C. TILNER (*Counsel of Record*)
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
mtilner@horvitzlevy.com
Tel: (818) 995-0800 • Fax: (818) 995-3157

Attorneys for Amici Curiae Walgreen Co., TechAmerica, NetChoice, Computer & Communications Industry Association, State Privacy and Security Coalition, and Information Technology and Innovation Foundation

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INTERESTS OF AMICI CURIAE[1]

Walgreen Co.

Founded more than 100 years ago, Walgreen Co. (Walgreens) has evolved from a traditional drugstore into a network of more than 8,000 health and daily living destinations across the 50 states, the District of Columbia, and Puerto Rico. Under its iconic Walgreens brand, the company offers a broad range of products and services designed to promote the health and well-being of its customers. In addition to its thousands of well-known brick-and-mortar retail locations, Walgreens offers healthcare products and services through many other channels of commerce.

For instance, Walgreens is the nation's leading operator of hospital outpatient pharmacies, serving about 180 health systems nationwide.

Walgreens also has been an innovator in providing the public with cost-effective alternatives to a visit to the doctor's office, offering a menu of medical services to its customers on a convenient walk-in basis at more than 350 "Take Care Clinics" across the country. At Take Care Clinics, licensed healthcare

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici curiae and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel for all parties received timely (10 day) notice of amicus curiae Walgreen Co.'s intention to file this brief, and all counsel consented to its filing. Copies of the written consents accompany this brief.

professionals offer diagnosis and treatment of minor ailments, immunizations, and a variety of health tests. In 2011, for instance, Walgreens began offering tests for total cholesterol, HDL (high-density lipoprotein), and blood glucose at more than 1,600 pharmacies in thirty-three states. Each test includes a free blood pressure reading and a personal consultation with a pharmacist.

Walgreens has also pioneered an innovative program for promoting employee health through its Take Care Employer Solutions unit. Take Care Employer Solutions operates health clinics, pharmacies, fitness centers, and related facilities on the premises of participating employers. Employees enjoy convenient and affordable access to healthcare services. Employers benefit from a healthier and more efficient workforce, reduced absenteeism, and lower healthcare costs.

Finally, Walgreens stands at the forefront of the e-economy. It operates Walgreens.com, drugstore.com, and other websites that cater to customers who prefer to shop online instead of visiting a brick-and-mortar store. At these websites, customers can purchase thousands of healthcare products and prescription medications at competitive prices.

Walgreens is alarmed by the Ninth Circuit's opinion in this case.[2] The Ninth Circuit held that a state

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[2] The Ninth Circuit heard two appeals and issued two opinions in this case. (Pet. Cert. 3 (Oct. 11, 2012).) Amici curiae focus

(Continued on following page)

legislature may, without offending the dormant Commerce Clause, effectively disable an out-of-state seller of prescription eyewear from competing with an in-state optometrist who sells the same eyewear to the same customers. The court reasoned that, because the competitors employ different business structures or models, they are not similarly situated. Consequently, legislation that advantages one at the expense of the other is not discriminatory and does not trigger strict scrutiny under the dormant Commerce Clause.

It is not difficult to imagine that, just as parochial interests were able to secure legislation disabling petitioners from competing in the local eyewear market, local interests could use the Ninth Circuit's opinion as a stepping stone to obtain legislation disabling Walgreens from, among other things, competing with doctors by providing healthcare services in a nontraditional retail setting. By allowing California, in effect, to discriminate against out-of-state companies that directly compete with local brick-and-mortar retailers for the same customers simply because the out-of-state entities employ different business structures or models, the Ninth Circuit has

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on the first opinion, which tackled the issue "whether the challenged California laws discriminate against out-of-state entities" and thus trigger strict scrutiny under the dormant Commerce Clause. *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009). References in this brief to the Ninth Circuit's "opinion" or "decision" refer to that opinion.

provided states with a roadmap for protectionist legislation.

Further, as a purveyor of healthcare products and prescription medications on the Internet, Walgreens shares petitioners' concern that

> [t]he potential for discrimination against e-commerce is particularly acute. Internet retailers, by definition, have a different "business model" from traditional brick-and-mortar stores, as do national chains from their local competitors. Under the Ninth Circuit's reasoning, these different business models would serve as a justification for deeming favored local businesses not "similarly situated" to interstate retailers who compete in the same market for the same customers.

(Pet. Cert. 37.)

At this critical moment in the nation's economic history, when new and innovative forms of e-commerce are flowering and consumers across the country (and around the world) are reaping the benefits, the Ninth Circuit's faulty understanding of this Court's dormant Commerce Clause jurisprudence threatens to slow or reverse the progress toward a robust, truly national economy.

Walgreens therefore joins petitioners in urging this Court to grant the petition for a writ of certiorari and to consider the serious nationwide implications of the Ninth Circuit's decision.

TechAmerica

TechAmerica is the technology industry's largest advocacy organization. It represents approximately 1,000 companies of all sizes from the public and commercial sectors of the economy. Its members include manufacturers and suppliers of broadband networks and equipment, consumer electronics companies, software and application providers, Internet and e-commerce companies, and Internet service providers, among others, all of whom have a vested interest in ensuring the online marketplace remains robust and is treated fairly.

NetChoice

NetChoice is a coalition of businesses, individuals, and trade associations who seek to promote convenience, choice, and commerce on the Internet. Its members range from some of the most prominent online businesses in the world to individual users of e-commerce services, and include companies whose online platforms bring together buyers and sellers from across the nation and around the globe. NetChoice has an interest in expanding the range of goods that can be sold safely and legally in markets where the Internet enables these markets to reach across state borders.

Computer & Communications Industry Association

The Computer & Communications Industry Association represents more than twenty large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than $250 billion in annual revenues.

State Privacy and Security Coalition

The State Privacy and Security Coalition (SPSC) is a coalition of nineteen major technology, communications, and media companies and five technology trade associations. The SPSC works for reasonable and reasonably consistent state privacy, security, and consumer protection regulation of commerce over the Internet.

Information Technology and Innovation Foundation

The Information Technology and Innovation Foundation (ITIF), based in Washington, D.C., is a nonprofit, nonpartisan research and educational institute dedicated to formulating and promoting public policies to advance technological innovation and productivity. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues.

ITIF publishes policy reports, conducts forums and debates, and assists policymakers at the federal and state levels to better understand the new innovation economy and the public policies needed to drive innovation, productivity, and prosperity for all Americans. ITIF develops new and creative policy proposals to advance innovation, and it analyzes existing policy issues with an eye toward advancing innovation and productivity.

ITIF opposes policies that hinder digital transformation and innovation. Because the Ninth Circuit's opinion in this case embodies such a policy, ITIF joins the other amici curiae in urging this Court to review the case on its merits.

SUMMARY OF ARGUMENT

This Court has long held that the dormant Commerce Clause, with rare exceptions, forbids a state from enacting legislation that, by design or effect, confers preferential advantages on in-state businesses to the detriment of out-of-state competitors. In this case, the Ninth Circuit upheld precisely that sort of legislation. The court reasoned that, although the in-state and out-of-state competitors offered the same products to the same customers in the same market, they were not "similarly situated" because they employed different "business structures." Consequently, the Ninth Circuit held, the California legislation was not discriminatory, did not trigger strict scrutiny

under the dormant Commerce Clause, and did not need to be justified by the state.

The Ninth Circuit's reasoning, which finds no support in this Court's jurisprudence, portends serious trouble for all out-of-state sellers, not merely the sellers of eyewear involved in this case. The opinion paves the way for more of precisely the sort of protectionist legislation the dormant Commerce Clause was designed to foreclose, legislation that could dramatically impair the ability of businesses that employ nontraditional (and often more efficient) structures and models to compete with local businesses for the same customers in the same market.

The Ninth Circuit's opinion carries serious implications for productive and innovative interstate businesses throughout the country and for the entire burgeoning digital economy. The opinion commands this Court's attention.

ARGUMENT

THE NINTH CIRCUIT'S OPINION COMMANDS THIS COURT'S ATTENTION BECAUSE IT PAVES THE WAY FOR PROTECTIONIST LEGISLATION THAT COULD STIFLE INTERSTATE COMPETITION AND E-COMMERCE IN ALL INDUSTRIES, NOT JUST EYEWEAR.

A. The Ninth Circuit misunderstood this Court's opinions to permit states to discriminate between local and out-of-state businesses that directly compete to sell the same products to the same customers simply because the businesses employ different "structures."

The "fundamental objective" of the dormant Commerce Clause is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). Preferential advantages for local interests, i.e., "differential treatment of in-state and out-of-state economic interests," amounts to discrimination against interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994).

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." This

> rule is essential to the foundations of the Union. . . . States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.

Granholm v. Heald, 544 U.S. 460, 472 (2005) (citations omitted).

Discriminatory laws are generally impermissible because they "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994).

Here, the Ninth Circuit held that, although interstate optical companies and in-state optometrists sell the same eyewear products to the same customers in the same market, they are not similarly situated because they employ different business structures. *Brown*, 567 F.3d at 527-28. According to the Ninth Circuit, optical companies are structured as commercial enterprises, and optometrists are structured as state-licensed healthcare providers. *Id.* at 526-27. Because optical companies and optometrists are not similarly situated, "the California laws are not discriminatory." *Id.* at 528.

Because the California laws are purportedly nondiscriminatory, the state does not bear the burden of justifying them, so it need not demonstrate they serve a legitimate interest that cannot be served by less discriminatory legislation. Instead, the laws are subject only to the less rigorous balancing test this Court

formulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under that test, the *challenger* bears the burden of showing that the legislation imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits."[3] *Id.* at 142.

The Ninth Circuit grounded its decision in part on this Court's opinion in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which the Ninth Circuit construed to permit states to discriminate against an out-of-state enterprise that employs a business structure different from its in-state competitor:

> [I]n *Exxon*, the Court distinguished between the entities based on their business structures, holding that a state may prevent businesses with certain structures or methods of operation from participating in a retail market without violating the dormant Commerce Clause. Other courts have applied the rule from *Exxon* to conclude that entities are not similarly situated and so state laws are

[3] The same district court judge who initially found the California legislation unconstitutionally discriminatory, *Nat'l Ass'n of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116 (E.D. Cal. 2006), *rev'd and remanded*, *Brown*, 567 F.3d 521, later upheld the legislation under the *Pike* balancing test. *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 709 F. Supp. 2d 968 (E.D. Cal. 2010), *aff'd*, 682 F.3d 1144 (9th Cir. 2012). These divergent rulings starkly illustrate how the Ninth Circuit's decision that the legislation was not discriminatory effectively preordained the outcome of petitioners' constitutional challenge.

> not discriminatory. Because states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated.

Brown, 567 F.3d at 527 (citations omitted).

The petition for writ of certiorari cogently demonstrates how the Ninth Circuit misunderstood *Exxon*. (*See* Pet. Cert. 28-31.) "[D]irect competition – not differential business models or regulatory regimes – is the touchstone of the discrimination inquiry" under the dormant Commerce Clause. (*Id.* at 19.) For this and the other reasons explicated in the petition, the Ninth Circuit's opinion undermines the dormant Commerce Clause's fundamental objective – prohibiting preferential advantages for local competitors – in the context of the retail eyewear market.

B. The Ninth Circuit's opinion permits state legislatures to stifle competition between entrenched local businesses and out-of-state competitors employing new and innovative business models.

The implications of the Ninth Circuit's opinion are profound; they extend far beyond the retail eyewear market. Of particular concern to amici curiae is what the Ninth Circuit's misreading of *Exxon* portends for other interstate businesses that seek to compete with local enterprises via different or non-traditional business structures.

Amicus curiae Walgreens, for example, competes with local doctors and other local healthcare providers through an innovative program under which it offers a menu of medical services to its customers on a walk-in basis at in-store clinics and through health clinics, pharmacies, fitness centers, and related facilities that Walgreens operates on the premises of participating employers.

These new business structures differ from those employed by many of the local doctors, pharmacies, and other healthcare providers with whom Walgreens competes. And these innovative business structures offer affordable alternatives that many consumers prefer. Yet under the Ninth Circuit's decision, these structural differences leave Walgreens vulnerable to protectionist legislation that, in design or effect, may impede Walgreens from competing. Under the Ninth Circuit's decision, so long as the state simply differentiates between business structures, the dormant Commerce Clause imposes no restraint.

No great leap of imagination is required to anticipate that politically influential state or local interests, unhappy with Walgreens' innovative and competitive models, may persuade legislators to enact legislation blocking Walgreens from using those models. Just as California, at the behest of local optometrists, effectively barred optical companies from offering eye examinations at their eyewear stores, the state could bar drugstore chains from offering medical services at their retail outlets. Under the Ninth Circuit's reasoning, this sort of discriminatory legislation would not

implicate the dormant Commerce Clause because local doctors and out-of-state drugstore chains employ different business structures – doctors are licensed healthcare providers and drugstore chains are corporations engaged in commercial enterprises.

Walgreens also competes with local pharmacies through its websites Walgreens.com, drugstore.com, and others, where customers from any state may purchase thousands of healthcare products and prescription medications at competitive prices. Legislators could be persuaded to target this nontraditional business model at the behest of politically influential local sellers who resent the competitive threat it poses. *See* Robert D. Atkinson, Progressive Policy Inst., *The Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers* (2001), *available at* www.dlc.org/documents/disintermediated.pdf (Middlemen whose livelihoods are threatened by the advent of Internet transactions "are not sitting by idly; they are using all the judicial, regulatory, and legislative means at their disposal to thwart competitors who would like to use the Net to sell a product or service.").

Internet sellers of other products in other sectors of the economy could meet the same fate. As petitioners correctly observe, "[t]he potential for discrimination against e-commerce is particularly acute" in the wake of the Ninth Circuit's decision. (Pet. Cert. 37.) "Internet retailers, by definition, have a different 'business model' from traditional brick-and-mortar stores, as do national chains from their local

competitors. Under the Ninth Circuit's reasoning, these different business models would serve as a justification for deeming favored local businesses not 'similarly situated' to interstate retailers who compete in the same market for the same customers." (*Id.*)

In addition to Internet retailers, millions of individual Americans list, buy, and sell millions of items daily through eBay, Etsy, Craigslist, and other digital marketplaces. Many of these transactions result in interstate shipments of goods.

The structures of these innovative digital marketplaces differ markedly from traditional auction and retail models. Users of these digital services, for example, save the cost of the middleman in their transactions.

Though sellers on eBay and similar platforms compete with local sellers of the same goods, under the Ninth Circuit's decision, those distant sellers are not similarly situated with local sellers because the two groups transact business through different structures. Consequently, in that court's view, legislation favoring local sellers and hindering out-of-state sellers would not be discriminatory. The Ninth Circuit's decision opens the door to legislation designed to favor local sellers, who likely carry the political clout required to secure such legislation, at the expense of out-of-state sellers, who may be far removed and carry little or no clout.

Amici curiae share petitioners' concern that the Ninth Circuit's opinion "provide[s] a roadmap for states to discriminate against national chains and internet businesses by deeming them not 'similarly situated' simply because they . . . have distinctive business models." (Pet. Cert. 3; *see id.* at 37.)

Protectionist legislation that impedes interstate commerce injures consumers by denying them commercial options they may find more convenient and economical. For example, the American Medical Association has reported that consumers perceive a number of advantages to health clinics located in retail settings, including convenience, shorter waiting times, longer operating hours, and lower prices. American Medical Association, Report 7 of the Council on Medical Service (A-06), Store-Based Health Clinics (June 2006), *available at* http://www.ama-assn.org/resources/doc/cms/a-06cmsreport7.pdf; *see Easy Access, Quality Care: The Role for Retail Health Clinics in New York*, Empire Center for N.Y. St. Pol'y (Feb. 16, 2011), *available at* http://www.empirecenter.org/SpecialReports/2011/02/retailclinics021611.cfm ("Total costs (to insurers and patients) of care at retail clinics appear to be significantly lower than those incurred by other types of providers such as physicians' offices, urgent-care centers, and emergency rooms."). Thus, if protectionist legislation denies consumers the benefit of Walgreens' and other interstate companies' alternative models for delivering healthcare services, those consumers will be left with two unattractive options:

obtain the same services elsewhere – at a much greater cost – or forgo the services altogether.

Society, too, will pay a steep cost. Without access to retail health clinics, "more people will seek non-emergency, even routine, treatment at emergency rooms, the most expensive venue for such care." *Easy Access*, *supra*. Moreover, by foreclosing less costly and more productive alternatives in the marketplace, protectionist legislation will result in lower rates of productivity growth, precisely at the time the American economy can least afford it given the coming rapid growth in the number of retirees outside the workforce.

Results such as these are contrary to sound public policy and should be foreclosed under the dormant Commerce Clause. The marketplace – not the state legislature – should determine the fate of interstate businesses who seek to compete by offering the same goods to the same consumers in the same market.

CONCLUSION

For the reasons discussed in the petition for writ of certiorari and in this brief, amici curiae urge this

Court to grant the petition and consider the important constitutional issues this case raises.

November 14, 2012

Respectfully submitted,

HORVITZ & LEVY LLP
JASON R. LITT
MITCHELL C. TILNER

Attorneys for Amici Curiae Walgreen Co., TechAmerica, NetChoice, Computer & Communications Industry Association, State Privacy and Security Coalition, and Information Technology and Innovation Foundation