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

BRIEF OF *AMICI CURIAE* TIMOTHY J. MURIS AND CHRISTINE A. VARNEY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici are former commissioners of the Federal Trade Commission (FTC). Ms. Varney also has served as head of the U.S. Department of Justice's Antitrust Division. The Antitrust Division and the FTC are the two principal institutions of the Federal Government responsible for enforcing federal antitrust law. The FTC is charged by statute with enforcing laws prohibiting unfair methods of competition and unfair or deceptive trade acts or practices in or affecting commerce. 15 U.S.C. § 45. The Antitrust Division enforces the major Federal antitrust statutes: the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27.

Over the course of recent decades, the FTC has undertaken substantial investigations into the effects of state restrictions (such as those challenged in this litigation) on the delivery of optometric services and the sale of eyewear. Those investigations resulted in reports detailing the often deleterious impact of such state regulations on consumers and competition in the retail eyewear market. Moreover, the Antitrust Division has been involved in numerous investigations and prosecutions of anticompetitive practices similar to those at issue in this case.

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amici* timely informed all parties of their intent to file a brief in support of the petition for a writ of certiorari. All parties consent to the filing of this brief. Letters from the parties consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

Timothy J. Muris has held four positions at the FTC and was Chairman from June 2001 to August 2004. He is the only person to have directed both of the FTC's enforcement arms, the Bureau of Competition and the Bureau of Consumer Protection. During his tenure, Mr. Muris served on a task force studying occupational licensure and regulation, including in the eye-care industry. He also supervised an FTC Bureau of Consumer Protection rulemaking focusing on state restrictions on competition in the eye-care and eyewear industries.

Christine A. Varney served as a Commissioner of the FTC from October 1994 through August 1997. From April 2009 until August 2011, Ms. Varney was the Assistant Attorney General for the Antitrust Division. She is the only person to have served in both of these roles.

Based upon their experience with the FTC and the Antitrust Division, *Amici* seek to offer their views on the anticompetitive effects of the California regulatory scheme at issue, including the danger that deference to that scheme poses to consumers and to competition. Mr. Muris previously filed a brief in support of petitioners before the Ninth Circuit.

INTRODUCTION

Optometrists and ophthalmologists are medical professionals that provide eye care such as eye exams and prescriptions for eyeglasses and contact lenses; they also sell eyewear. *See* Advertising of Ophthalmic Goods and Services, FTC Final Trade Regulation Rule, 43 Fed. Reg. 23,992, 23,993 (June 2, 1978). Opticians, including large optical chains, sell eyewear but are not licensed to provide eye care. *Id.* In the market for prescription eyewear, optometrists and ophthalmologists compete directly with opticians.

Throughout the last four decades, the FTC has conducted extensive investigations into anticompetitive practices in the eye-care and prescription eyewear markets that are relevant to the issues raised in the petition. On the basis of these investigations, the FTC concluded that certain state laws helped optometrists and ophthalmologists retain eye-care patients as retail prescription eyewear customers, limited competition, and harmed consumers of eye care and eyewear.

In the 1970s, the FTC commenced the first relevant investigation (*Eyeglasses I*). *Eyeglasses I* studied state professional licensing restrictions that limited opticians' ability to advertise in the eye-care market. *Id*. at 23,992. *Eyeglasses I* produced significant evidence of efforts by optometrists and ophthalmologists to impede competition. To begin, optometrists and ophthalmologists were behind the passage of the anticompetitive advertising bans at the center of the investigation. *Id.* at 23,994. Optometrists also took direct measures to "retain patients who might otherwise have gone elsewhere" to make their retail eyewear purchases. *Id.* at 24,003. These measures included refusing to release customers' prescriptions, or, at a minimum, requiring that customers pay a fee to obtain their prescriptions—steps that hindered consumers from comparing prices and selections offered by opticians when shopping for eyewear. *Id.* at 23,998. The FTC responded to these measures by declaring them unfair trade practices in the Ophthalmic Practices Rule ("Prescription Release Rule"). 16 C.F.R. § 456.2. The FTC required optometrists and ophthalmologists to release patients' prescriptions to them so they could shop elsewhere for prescription eyewear. Ophthalmic Practice Rules,

FTC Final Trade Regulation Rule, 54 Fed. Reg. 10,285, 10,288-90 (Mar. 13, 1989).

Eyeglasses I also engaged in an initial examination of restrictions on the ability of optometrists and opticians to co-locate. *Id*. at 10,287. The FTC found that these limitations stifled competition, drove up prices, and decreased the frequency with which consumers sought eye care. *Id.*

To confirm these findings, the FTC conducted a second investigation (*Eyeglasses II*). The FTC found that location restrictions prevented opticians from offering "one-stop shopping"—the ability to get an eye-care exam and purchase eye wear in the same place. *Id.* at 10,286. These restrictions insulated local optometrists and ophthalmologists from competition from interstate optical chains by precluding "access to local markets." *Id.* at 10,298. The resulting increase in prices transferred millions of dollars from eyewear customers to in-state optometrists and ophthalmologists and fostered an overall decrease in competition in the relevant market. *Id.*

In 1989, the FTC issued a rule based on its findings that banned those anticompetitive regulations. *Id.* at 10,285. Although the rule was vacated on the ground that the FTC lacked statutory authority to invalidate state laws, *see Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir 1990), the court did not question the accuracy of the FTC's findings, s*ee id*. at 979. The FTC continues to rely on the findings that led to its invalidation of co-location bans when advocating for increased competition in the retail eyewear market.[2]

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[2] *See, e.g.*, FTC Staff Comment to the Hon. Harry R. Purkey, Concerning Va. H.B. 2518, H.B. 160, and S.B. 272 Relating to the

ARGUMENT

I. The Ninth Circuit's Decision Rests on a Serious Mischaracterization of the Retail Eyewear Market

California prohibits licensed opticians from co-locating with licensed optometrists and ophthalmologists. Cal. Bus. & Prof. Code § 655(a)-(b). Because opticians are largely out-of-state optical chains, the law has the effect of shifting business from out-of-state companies to in-state optometrists and ophthalmologists. Petitioners brought suit alleging that the law violates this Court's dormant Commerce Clause jurisprudence. The district court invalidated the law after finding that the co-location ban discriminated against out-of-state commerce, *Nat'l Ass'n of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116, 1127-30 (E.D. Cal. 2006), and that the State did not demonstrate a legitimate interest in restricting co-location, *id.* at 1136.

The Ninth Circuit reversed and remanded. The court concluded that optometrists and ophthalmologists are not similarly situated to opticians because the former are medical professionals licensed by the State. *Nat'l Ass'n of Opticians v. Brown*, 567 F.3d 521, 525 (2009). Because it concluded that the

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Practice of Optometry (Mar. 9, 2005), *available at* www.ftc.gov/os/closings/staff/05039vaoptometristcarecomment.pdf; FTC Comment to the Hon. Ward Crutchfield Concerning Tenn. H.B. 855 To Regulate the Relationships of Commercial Entities and Optometrists (Apr. 29, 2003), *available at* www.ftc.gov/be/v030009.shtm; FTC Staff Comment to the Hon. Gary A. Merritt Concerning Kansas H.B. 2164 To Clarify the Conditions Under Which Optometrists and Non-Optometrists Can Enter Into Lease Agreements (Feb. 10, 1995), *available at* www.ftc.gov/be/v950004.shtm.

groups were not similarly situated, the court did not consider the State's justification for the law. *Id.* at 528. Following remand, the Ninth Circuit upheld the law. The court concluded that there is no significant burden to interstate commerce simply because a non-discriminatory regulation precludes a preferred business model. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154 (9th Cir. 2012).

The decision below rests on an erroneous conclusion that ophthalmologists, optometrists, and opticians are not "similarly situated." *See Harris*, 682 F.3d at 1146 (relying on holding of *Brown*, 567 F.3d at 525-28). While recognizing that these entities compete in the retail prescription eyewear market, the court concluded that ophthalmologists and optometrists are "health care providers," while opticians are "commercial interests . . . who do not have healthcare responsibilities." 567 F.3d at 525. According to the court, because ophthalmologists and optometrists possessed a state-issued license to practice in the *medical* eye-care market, those groups were not similarly situated to opticians, even in the context of the *retail* eyewear market. Based on this erroneous conclusion, the court held that the law did not impermissibly discriminate against out-of-state commerce. *Id.* at 527-28.

The FTC's investigations of the retail eyewear market demonstrate that the Ninth Circuit relied on a false distinction between ophthalmologists and optometrists as healthcare providers and opticians as commercial interests. In *Eyeglasses I*, the FTC found that optometrists "are in direct competition [with optical chains] at the retail level of dispensing." 43 Fed. Reg. at 23,992. Indeed, the premise of the resulting Prescription Release Rule is that an optom-

etrist's skill is not necessary for the sale of eyewear. At the retail level, both opticians on the one hand and optometrists and ophthalmologists on the other sell a product for profit. *See* 54 Fed. Reg. at 10,288-90; *id*. at 10,290 n.62.

In *Eyeglasses II*, the FTC expanded its investigation into other restrictions on the market for eye care and eyewear. The Commission concluded that restrictions that limited the ability of opticians to offer "one-stop shopping" were part of a set of commercial barriers that unjustifiably restricted competition. *Id*. at 10,285. The FTC found that, when participating in this separate retail market, there was no material difference between the type of retail service offered by ophthalmologists, optometrists, and opticians: all three groups participated in the retail market to make a profit. *Id.* at 10,290 n.62.

The basic premise behind both FTC rulemakings was that the market for medical eye care is distinct from the retail eyewear market. The fact that some market participants have a license to provide eye-care examinations does not vitiate those participants' profit motive. The FTC's investigations and the resulting rules directly contradict the Ninth Circuit's conclusion and cast doubt on the purported distinction between "health care providers" and "commercial interests" in the retail eyewear market.

The ostensible purpose of the co-location ban that the petitioners challenge is to prevent profit seeking from influencing the eye-examination process. The FTC's findings show that for purposes of evaluating competition, the Ninth Circuit relied on an artificial distinction that in no way furthers the law's stated purpose. This Court should not permit artificial dis-

tinctions to justify discrimination against out-of-state commerce.

II. The FTC's Experience Refutes the Purported Justification for the Co-Location Ban.

The Ninth Circuit's decision rested heavily on California's purported health justification for the law—that preventing co-location of eye-care providers and opticians would insulate eye-care providers from commercial pressures that could interfere with their provision of eye care. 567 F.3d at 526. The results of the FTC's investigation refute this purported health justification.

The FTC found that "there is no a priori reason why one would expect [co-location restrictions] to affect the quality of professional care." 54 Fed. Reg. at 10,290 n.62. Nor did *Eyeglasses I* yield any evidence that would support California's fears about such effects on eye care. When the FTC compared the quality of medical care in markets that restricted co-location with markets that did not, it found that "[t]here is no difference in the average quality of care available to consumers in restrictive and nonrestrictive markets." *Id.* at 10,290-91.

The demand for eye care is a function of the eye-care provider's ability to meet consumer demands and provide an acceptable level of care. *See id.* at 10,290 n.62. If the eye-care provider sacrifices these responsibilities in pursuit of retail eyewear profits, customers' demand for the eye-care provider's services will decline. Moreover, optometrists' professional and ethical responsibilities mitigate any concern that they will neglect their duties. *See id*.

Indeed, location restrictions may actually lower the quality of eye care provided in a given market. Depressed competition results in higher prices and fewer choices for individuals in need of eye care and eyewear.

The FTC found that this has two detrimental health effects. First, "consumers obtain eye care less frequently than they otherwise would . . . as a result of the higher prices in restrictive markets." *Id.* at 10,289. Other customers may forgo purchases of those services entirely. *Id.* at 10,289-90. Second, location restrictions reduce consumers' access to care and the frequency with which they consume it by preventing optometrists and ophthalmologists from practicing in more convenient locations and at more convenient times. *Id.* at 10,290.

The Ninth Circuit's conclusion that health concerns, rather than economic protectionism, animated the co-locating restriction is contrary to the FTC's investigations, which reveal a pattern of protectionism in the passage of similar laws. In *Eyeglasses I*, the FTC concluded that the advertising restrictions placed on opticians were enacted in part "to eliminate the economic threat posed by free competition." 43 Fed. Reg. at 23,994. At the end of its investigations, the FTC succinctly summarized its findings: "[t]he goal of restraints on commercial practice generally is the elimination of the chain or volume practice." Bureau of Consumer Protection, Federal Trade Commission, *State Restrictions on Vision Care Providers: The Effects on Consumers* 9 (1980).

Similarly, the FTC and several state Attorneys General, including California's, identified a strong protectionist purpose behind optometrists' refusal to release eyewear prescriptions. Seventeen state

Attorneys General reaffirmed the need for the Prescription Release Rule when the FTC reauthorized the rule in the late 1990s. The state Attorneys General found a similar anticompetitive purpose behind the optometrists' refusal to release contact lens prescriptions to their customers. In their testimony in support of an extension of FTC's ban on those practices, the state Attorneys General identified a wide-ranging conspiracy to impede competition by refusing to release prescriptions or, where release was required by law, making the prescriptions less useful.[3]

The FTC's investigations cast doubt on the purported health justification California offers for the co-location ban. In fact, the evidence the FTC has collected suggests that protectionism is the true motive behind the regulation at issue.

III. The Ninth Circuit's Deference to the State's Choice of Regulation Is Inappropriate.

Although the Ninth Circuit acknowledged that "a bald assertion that laws are directed toward legitimate health and safety concerns is not enough to withstand a dormant Commerce Clause challenge," 567 F.3d at 526 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997)), it nonetheless interpreted this Court's precedent as requiring "deference" to state decisions regarding health and welfare, *id.* at

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[3] *See* Comments of the Attorneys General of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin, *In the Matter of 16 CFR Part 456*, at 2-5 (Sept. 2, 1997), *available at* http://www.fda.gov/ohrms/dockets/dailys/04/jan04/011504/03p-0291-c00061-02-Tab-01-vol3.pdf.

526. The FTC's experience with regulating professional services industries, including eye care and eyewear, reveals the problem with giving deference to the state's choice of regulation in this context.

Professional services associations frequently control the barriers to entry and can provide a clearinghouse for standards and regulations that depress competition. Those associations also can serve as an influential point of contact with legislatures, producing a variety of laws that benefit their professional constituents—some more subtly then others. The FTC and the Department of Justice have repeatedly needed to intervene to protect competition from the misuse of professional regulations. For example, the FTC has vigorously opposed restrictions in the funeral services industry that prohibited anyone who is not a licensed funeral director from selling a casket, which is typically the most expensive component of a funeral.[4] Similarly, both the FTC and the Department of Justice have opposed efforts by lawyers' associations to "use[] the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups."[5]

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[4] William Blumenthal, Background Materials: A Primer on the Application of Antitrust Law to the Professions in the United States 20 (Sept. 29, 2006), *available at* www.ftc.gov/speeches/blumenthal/20060929CBABlumenthalmaterials.pdf.

[5] Letter from DOJ and FTC to the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.shtm; *see also* FTC Staff Comment to Carl E. Testo, Rules Committee of the Superior Court of Connecticut 2 n.5 (May 17, 2007), *available at* www.ftc.gov/be/v070006.pdf (citing FTC comments to states, the ABA, and state bar associations regarding restrictions on competition between attorneys and non-attorneys).

The FTC's efforts to protect competition in the eyewear market are part of a much larger effort to prevent the use of professional status to depress competition. The Ninth Circuit's focus on deference to States' decisions related to healthcare could potentially create a significant gap in dormant Commerce Clause jurisprudence that could turn healthcare licensing regimes into powerful tools for discriminating against out-of-state commerce. *Cf. Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986).

While the FTC possesses strong evidence that laws such as the California co-location ban unlawfully inhibit competition, the FTC's rulemaking authority does not extend to invalidating state laws. *See Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir 1990). As a result, the FTC is powerless to remedy the type of restrictions at issue here. The decision below to uphold a protectionist state law was mistaken and represented a missed opportunity to remedy an unlawful anticompetitive regime. Respectfully, this Court should grant the petition for writ of certiorari and reverse the decision below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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