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; DENISE BROWN, in her official capacity as Director of the Department of Consumer Affairs,

RESPONDENTS.

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

REPLY BRIEF FOR PETITIONERS

BARRY FRIEDMAN
Room 317
40 Washington Square South
New York, NY 10012
(212) 998-6293

PAUL D. CLEMENT
Counsel of Record
KELSI BROWN CORKRAN
BANCROFT PLLC
1919 M St., NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel for Petitioners

January 29, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

California's opposition brief underscores the need for this Court's review. As the Petition made clear, this Court's dormant Commerce Clause jurisprudence demands that states justify favoritism for their own entities that compete with out-of-state entities for the same customers in the same market. Faithfully applying those precedents, the District Court found "overwhelming" evidence that California in-state optometrists compete for the same customers as out-of-state opticians, that California's regulatory regime indisputably favored its in-state optometrists by allowing them alone to provide the one-stop shopping customers demand, and that there was no justification for this discrimination.

The Ninth Circuit swept all this aside, misinterpreting this Court's decisions in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), to mean that in-state optometrists and out-of-state opticians are not "similarly-situated" despite indisputable evidence that the two compete in the same market for the same customers. And because the two were not "similarly situated," the Ninth Circuit held that the rank discrimination required no justification.

California's opposition disputes none of this, and instead doubles down on the Ninth Circuit's errors. It reads *Tracy* as a watershed decision, inviting courts to deem direct competitors not "similarly-situated" based on an ill-defined "multi-factored test." Opp.2. What Petitioners described as a roadmap for evading meaningful Commerce Clause analysis, California endorses as *Tracy's* "blueprint" to allow states to avoid

scrutiny of asserted health and safety reasons for discriminating between direct competitors. Opp.9-14. California even goes so far as to suggest that congressional inaction—a necessary pre-condition in every *dormant* Commerce Clause case—somehow authorizes states to discriminate against direct competitors. Fully embracing the Ninth Circuit's misguided approach, California offers a view of the Commerce Clause that only a state bent on protectionism could love.

The extensive findings by the District Court, which California essentially ignores, make clear why this case matters. This Court's cases, *Tracy* included, require a state to justify in-state favoritism when it discriminates between direct competitors. The District Court found direct competition, and that optometrists sell eyewear no differently from opticians. And when California was put to the burden of justifying its favoritism, it failed miserably. California expressed its concern that the profit-making potential of eyewear sales might skew eyecare decisions. But while that concern might justify a complete separation of eye examinations and eyewear sales, it could not remotely justify allowing only in-state optometrists to integrate the two functions (and thus keep all those tempting profits for themselves). Despite those findings, the Ninth Circuit gave California a free pass on justifying its discrimination by concluding that, notwithstanding direct competition, it would defer to California's judgment that optometrists and opticians are differently situated.

The need for this Court's review is urgent. The Ninth Circuit's novel reading of *Tracy* and *Exxon* provides a recipe for gutting any meaningful Commerce Clause analysis. That is why a remarkably diverse group of 43 amici curiae—including constitutional scholars, traditional retailers, internet businesses, wine merchants, and two former Commissioners of the Federal Trade Commission—filed six briefs urging review in this case. What is more, California has now eliminated the last available mechanism for opticians to compete with optometrists on a level field. If this Court does not grant certiorari, the result will not be business as usual, but the closing of stores and the shifting of hundreds of millions of dollars in sales to in-state businesses, all in flat violation of the Commerce Clause.

I. California's Opposition Confirms The Conflict Between The Ninth Circuit's Decision And This Court's Precedents

A. California Joins the Ninth Circuit in Badly Misreading This Court's Dormant Commerce Clause Decisions

California boldly declares that *Tracy* imposed a new "fact sensitive" and "multi-factored test" to determine whether direct competitors are similarly situated for Commerce Clause purposes. Opp.2, 9-10. According to the state, *Tracy* ended the *ancien regime* in which identifying discrimination was a simple matter of finding favoritism for in-state entities when two groups compete directly against each other for the same customers in the same market. Under California's view of *Tracy,* such discrimination between direct competitors is necessary but no longer

sufficient; courts must consider "other factors" suggesting the entities are "not comparable." Opp.12. According to California, whenever this "multi-factored test" is satisfied, states may favor in-state businesses over their direct competitors without any need to justify the discrimination under the dormant Commerce Clause.

Although California's "blueprint" accurately reflects the Ninth Circuit's reasoning, it is wholly contradicted by this Court's precedents. This Court has specifically rejected the notion that an asserted health and safety rationale for differential treatment relieves states of the burden of proving the discrimination is necessary to further that rationale. Pet.22-23. Rather, this Court's dormant Commerce Clause test is a two-step: plaintiffs first must prove discrimination, then the burden shifts to the state to justify it. At step two, states bear the burden of demonstrating that laws favoring local businesses over interstate competitors for the same customers in the same market actually further a legitimate purpose. Pet.16-22.

And all plaintiffs have ever been required to prove at step one is favoritism for local entities that compete directly with out-of-state businesses for the same customers in the same market. Pet.16-22 (citing cases). California dismisses this wall of precedent as either uninformative, because the in-state and out-of-state businesses at issue were "identical," or inapposite, because the decisions "predate" *Tracy*. Opp.17. But the assertion that the pre-*Tracy* cases all involved "identical" competitors is simply not accurate. Although a few cases involved in-state and

out-of-state entities that were otherwise identical, others involved distinct businesses, and most did not address the question of "identicalness" at all because the relevant question is not choice of business model, but whether the state favors in-state entities over out-of-state firms that compete for the same customers. *See* Pet. 16-23 (citing cases). This Court has always looked beyond superficial "identicalness" and ignored superficial differences to determine whether there is favoritism between direct competitors. Purveyors of pineapple wine and okolehao and vendors of more conventional alcoholic beverages are not "identical" in some *a priori* sense, but because they compete for the same customers, *see Bacchus Importers, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984); the same is true, *a fortiori*, of interstate shippers and Alaskan salmon canners.[1] Pet.16-22.

California also would ignore decisions that "predate" *Tracy*, claiming that *Tracy* supplanted them, Opp.17, but *Tracy* says nothing of the sort.

---

[1] California confuses the holding of *Alaska v. Arctic Maid*, 366 U.S. 199 (1961). Opp.18-19. The interstate canned salmon shippers were not similarly situated to "those who freeze fish for the retail market" precisely because the two groups "do not compete" in the same market; instead the interstate shippers "take their catches south for canning." *Arctic Maid*, 366 U.S. at 204. But as the petition explains, the Court also found that the interstate shippers *are* similarly situated to their true "competitors . . . [the] Alaskan canners" and accordingly focused on whether the challenged tax preference resulted in a competitive advantage for the Alaskan canners over the interstate shippers. *Id.* *Tracy* itself makes this same point. 519 U.S. at 301-02.

Like the cases before it, *Tracy* looked beyond the surface to determine whether superficially "identical" entities—both sold natural gas—actually competed in the same relevant market. The Court found they did not because the "core market" was that in which local gas distribution companies (LDCs) sold gas to residential customers subject to universal service obligations. *Tracy*, 519 U.S. at 301-02. The Court found no competition because the out-of-state companies selling "unbundled" gas to business customers had no interest in entering that market or shouldering costly universal service burdens. Indeed, the Court went so far as to reserve the question whether Ohio could limit that market to in-state entities. *Id.* at 310-11. This case is the polar opposite. Here, Petitioners desperately want to compete in the lucrative market for bundled eyecare and eyewear, and the state reserves that market for in-state optometrists. To read *Tracy* as sanctioning that favoritism turns the decision on its head.

Although California's efforts to defend the decision below focus primarily on its misguided *Tracy* analysis, the state also embraces the Ninth Circuit's erroneous holding that under *Exxon*, two groups that directly compete in the same market are nonetheless differently situated under the Commerce Clause if they have different "business structures." Opp.15-16; A.42-43. And just like the Ninth Circuit, California attempts to support this misinterpretation of *Exxon* by citing portions of the decision that plainly say nothing about the similarly-situated inquiry. Opp.15-16 (citing *Exxon*, 437 U.S. at 125-28).

As *Exxon* explains, the challenged vertical integration ban was upheld because it applied equally to in-state and out-of-state competitors, 437 U.S. at 126—akin, for example, to California requiring complete separation of all eyecare and eyewear sales. Under those circumstances, that Petitioners might prefer the "one-stop shopping" model that prevails elsewhere would be irrelevant. The playing field between in-state and out-of-state entities, neither of which could offer the benefits of integrated eyewear and eyecare, would be level, and the Constitution would not entitle Petitioners to employ their favored business model. But not one word in *Exxon*—or any other precedent—suggests that Maryland could reserve the benefits of vertical integration to Maryland companies alone, yet that is precisely what the Ninth Circuit has endorsed.

B. The Novelty of California's "Other Factors" Highlights its Departure from *Tracy*

If further evidence of the California/Ninth Circuit error were needed, California's effort to apply its "other factors" test supplies it. Based on its misguided premise that *Tracy* requires something more than favoritism for in-state businesses over their direct competitors, California attempts to extract "other factors" from *Tracy* that bear upon whether in-state and out-of-state entities are "similarly-situated." That effort is wholly misguided. *Tracy* requires nothing more than direct competition in the relevant market, and California's supposed "other factors" are antithetical to this Court's cases and the animating premise of the *dormant* Commerce Clause.

First, and most remarkably, California contends that *congressional silence blesses state discrimination*. California suggests that because states have been discriminating against opticians since the days of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), and Congress has never intervened, opticians and optometrists are not similarly situated. Opp.13. This argument is apparently a nod to *Tracy*'s observation that in the Natural Gas Act, Congress explicitly carved out natural gas distribution for state rather than federal regulation. *See* 519 U.S. at 290-91. But there is a world of difference for Commerce-Clause purposes between congressional action and inaction. Given Congress' pre-eminent role under the Commerce Clause, Congress' affirmative decision to treat two markets differently, as in *Tracy*, is highly relevant. By contrast, congressional inaction in the face of state discrimination is precisely what the dormant Commerce Clause and all this Court's cases presuppose. That is why it is the *dormant* Commerce Clause.

California fares no better in suggesting that *Lee Optical* indicates that optometrists and optical companies are not similarly situated. *Lee Optical* was an equal protection case without allegations of discrimination in favor of in-state businesses. Accordingly, the Court simply held that an Oklahoma law prohibiting opticians from fitting eyewear lenses without a prescription had a rational basis. But this Court's dormant Commerce Clause cases have always subjected state laws favoring in-state entities to a higher standard. Thus, *Lee Optical*'s equal protection holding is irrelevant to this Commerce Clause challenge; not even the Ninth Circuit suggested

otherwise. But the great vice of the California/Ninth Circuit misreading of *Tracy* is that once a state has a merely rational basis for differential regulation of optometrists and opticians for *one* purpose, that becomes sufficient to deem them differently situated under the Commerce Clause for *all* purposes, and to escape altogether the more demanding scrutiny the Commerce Clause requires.

And that highlights the problem with California's final "other factor," namely, the state's "health and safety" reason for distinguishing between the entities. Under this Court's two-step test, if a state has a legitimate "health and safety" justification for its specific discrimination, which cannot be furthered in a non-discriminatory way, it will win *at step two*. But the state bears the burden of proof at the second step, and this Court has warned about conflating the two steps. Pet.22-23. Moreover, a "health and safety" justification for *some* differential treatment between opticians and optometrists does not remotely render them differently situated so that *all* discrimination avoids meaningful scrutiny. Yet that is precisely what the Ninth Circuit's analysis provides, namely, what amounts to a blank check to favor in-state businesses.

II. California's Opposition Confirms That The Circuits Are Divided And This Court's Review Is Imperative

As explained above, the Ninth Circuit's decision conflicts with *Tracy* and *Exxon* and a host of other precedents requiring discrimination between direct competitors to be justified and imploring courts not to conflate the two-step inquiry. *See also* Pet.16-22. But the Ninth Circuit/California view equally conflicts

with decisions of the First, Seventh, and Eleventh Circuits, which correctly apply *Tracy* and *Exxon*.

California's efforts to reconcile the Ninth Circuit's decisions with that contrary circuit precedent suffer from the same flawed logic as its efforts to distinguish this Court's pre-*Tracy* precedent: California distinguishes contrary cases on either the misleading ground that they involved competition between "identical" competitors or the irrelevant ground that they "predate" *Tracy*.

California attempts to distinguish *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), arguing that the challenged debt collection restriction in that case more severely impacted the out-of-state debt collectors than the co-location ban at issue here. Opp.21-22. Differentiating *Violet* based on the *degree* of the burden actually highlights the problem with the Ninth Circuit's analysis. The degree of burden and whether that burden advances the state's regulatory justification are relevant to the second stage of the Commerce Clause inquiry, and wholly irrelevant at the first. But under the Ninth Circuit test, one never gets to step two. No one doubts that lawyers and non-attorney debt-collectors are different for *some* purposes. Under the Ninth Circuit test, that would be enough to treat them as differently situated for *all* purposes and to avoid any inquiry into whether the extent of the burden is justified by the State's regulatory needs.[2]

---

[2] California attempts to suggest some inconsistency in the First Circuit law by citing a footnote in *Wine and Spirit Retailers, Inc.*

Although California takes comfort in Second, Fifth, and Sixth Circuit cases misapplying *Tracy* and *Exxon* in ways similar to the decision below, Opp.19-24, those cases only confirm the depth of the split. As explained in the petition, numerous lower courts have misinterpreted *Tracy* and *Exxon* in ways that significantly threaten interstate commerce. Pet.34-36. The decision below does not stand alone, but is the *non plus ultra* of this disturbing trend.

III. California's Attempt To Manufacture Vehicle Problems Is Meritless

California's efforts to assert vehicle problems with the Petition are easily dismissed. As an initial matter, the District Court squarely rejected California's contention that Petitioners are not "interstate" entities, and the Ninth Circuit likewise repeatedly treats LensCrafters as "out-of-state opticians." A.38, 77. Nor can California dispute that the group that benefits from its favoritism are in-state optometrists. California can only repeat this rejected argument because it ignores the District Court's factual findings.

California also claims that Petitioners needed to petition from the specific portion of the second Ninth Circuit decision finding no burden on interstate

---

v. Rhode Island, 481 F.3d 1 (1st Cir. 2007) dismissing "out of hand" a "rather feeble" dormant Commerce Clause claim. *Id*. at 14 n.4. That footnote hardly detracts from the conflict between the Ninth Circuit and *Violet* and merely underscores the confusion in wine and alcohol cases after *Granholm v. Heald*, 544 U.S. 460 (2005). *See* Br. of Specialty Wine Retailers Association.

commerce despite the massive transfer of profits from national optical companies to local optometrists. Opp.24-25. California's contention is doubly mistaken. First, the petition expressly encompasses both Ninth Circuit decisions, *see, e.g.*, Pet.28-31, and the "no burden" holding is part and parcel of Petitioners' challenge to the Ninth Circuit's misreading of *Exxon*. A.66-69. Second, the Ninth Circuit's "no burden" determination is relevant only to that court's application of the *Pike* balancing test, which applies to laws that do *not* discriminate against interstate commerce. A.45 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). If Petitioners are correct that the Ninth Circuit erred in finding no discrimination, then, consistent with the original District Court opinion, the issue of *Pike* balancing is never reached. In short, whether a law would flunk the notoriously indeterminate *Pike* balancing test has no relevance to the logically anterior question of whether the law is discriminatory, and the Ninth Circuit erred in its analysis of that anterior question.

Finally, California's ability to make a "no burden" argument in a case involving the transfer of hundreds of millions of dollars in eyewear sales to in-state optometrists depends entirely on the Ninth Circuit's breathtakingly erroneous claim that the dormant Commerce Clause protects only the flow of goods in interstate commerce. This Court's decisions quite obviously focus on favoring in-state entities over out-of-state competitors and are not limited to flow-of-goods cases. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

Far from having any vehicle problems, this case presents an almost ideal vehicle for this Court's review of an important and recurring question. Rarely will this Court see a District Court opinion making so plain that the State's justification for its discrimination is a *non sequitur*. Rarely will this Court see a Court of Appeals opinion so clearly giving the state a blank check to discriminate. And rarely will the stakes be so high, as California has made clear it will foreclose the last remaining avenue for opticians to provide the one-stop shopping demanded by customers. The numerous amici have recognized that the decision below poses a clear and present danger to interstate commerce. The time for this Court's intervention is now.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
KELSI BROWN CORKRAN
BANCROFT PLLC
1919 M St., NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

BARRY FRIEDMAN
Room 317
40 Washington Square South
New York, NY 10012
(212) 998-6293

Counsel for Petitioners

January 29, 2013