No. 14-751

IN THE

Supreme Court of the United States

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; GENERIC PHARMACEUTICAL ASSOCIATION; BIOTECHNOLOGY INDUSTRY ORGANIZATION,

Petitioners,

v.

COUNTY OF ALAMEDA, CALIFORNIA; ALAMEDA COUNTY DEPARTMENT OF ENVIRONMENTAL HEALTH,

Respondents.

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

BRIEF IN OPPOSITION OF THE COUNTY OF ALAMEDA, CALIFORNIA, AND ALAMEDA COUNTY DEPARTMENT OF ENVIRONMENTAL HEALTH

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QUESTION PRESENTED

Whether the dormant Commerce Clause prohibits a local government from requiring manufacturers of prescription drugs sold within its borders to participate, on a proportionate basis, in a program with stipulated health, safety, and environmental benefits that enables local residents to dispose of unwanted and unused prescription drugs.

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INTRODUCTION

Alameda County's Safe Drug Disposal Ordinance, Alameda County Health and Safety Code Sections 6.53.010 through 6.53.120 ("Ordinance"), requires manufacturers of prescription drugs ("Producers") sold or distributed in Alameda County ("County") to take proportionate responsibility for the safe end-of-product-life disposal of those prescription drugs.[1] The Ordinance applies evenhandedly to all prescription drug Producers, including those located within Alameda County, and it neither discriminates against out-of-county Producers nor imposes any direct or significant burdens on interstate commerce. Like many Extended Producer Responsibility laws, *see infra* at 4 n.3, the Ordinance simply places responsibility for product waste disposal upon the manufacturers of those products, "allocating the costs of the program among the participants, such that the portion of the costs paid by each Producer is reasonably related to the amount of prescription drugs that Producer sells in Alameda County." *See* Pet. App. 61a-62a (Stipulated Fact 3). *See also* Pet. App. 42a (§6.53.050(A)(9)).

The unanimous Ninth Circuit panel carefully analyzed the Ordinance under this Court's well-established dormant Commerce Clause jurisprudence and concluded, based upon the stipulated facts, that: (1) the Ordinance neither discriminates against out-of-county Producers in favor of in-county competitors, Pet. App. 7a-10a, nor (2) directly regulates commerce outside the County, Pet. App. 10a-14a, and (3) any

[1] All statutory references herein are to the Ordinance, unless otherwise stated.

burden on interstate commerce is not "clearly excessive in relation to" the Ordinance's stipulated health, safety, and environmental benefits, Pet. App. 14a-16a (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Petitioners and their *amici* strain to characterize the Ordinance as a one-of-a-kind regulation that requires the Court to develop a new and greatly expanded standard of dormant Commerce Clause analysis. Petitioners would have this Court apply heightened scrutiny to any state or local regulation that has an adverse economic impact on interstate *actors*, even when the regulation neither discriminates against out-of-state competitors nor applies extraterritorially. Alternatively, petitioners would have the Court abandon the longstanding test for evaluating state and local regulation under the dormant Commerce Clause and replace it with the test used to evaluate the constitutionality of state and local tax laws, on the theory that any regulation that imposes compliance costs is "like" a tax.

This Court's longstanding approach to dormant Commerce Clause analysis establishes clear and workable standards that enable state and local governments to protect public health, safety, environmental, and other core governmental interests while prohibiting regulations that impose discriminatory or unreasonable burdens on interstate commerce. The Ninth Circuit applied those standards in a straightforward fashion that is entirely consistent with prior rulings of this Court and other circuits. There is no reason to grant certiorari, particularly under the circumstances of this case: a facial challenge, litigated on stipulated facts, to a local ordinance (1) that was enacted to address growing public health,

safety, and environmental hazards, (2) that imposes identical obligations on all affected manufacturers whether located in-county or out-of-county, (3) that confers no benefit on any existing in-county businesses, and (4) that allows prescription drug Producers to increase the prices of their regulated products to local pharmacies if they choose to pass through their minimal costs of compliance.

The Ordinance is a constitutional exercise of the County's police power authority to regulate commerce in an area of quintessential local concern – public health, safety, and environmental protection. *See, e.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) ("[W]aste disposal is both typically and traditionally a local government function." (quoting *United Haulers Ass'n, Inc. v. Oneida-Herkimer Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring)); *H.P. Hood & Sons Inc. v. Du Mond*, 336 U.S. 525, 535 (1949) (The dormant Commerce Clause permits states to "impose even burdensome regulations in the interest of local health and safety."). The Ordinance applies evenhandedly to all Producers of prescription drugs whose products are sold in the County – including Producers whose corporate headquarters, principal place of business, or prescription drug manufacturing facilities are located in Alameda County. The Ordinance does not restrict any Producer's out-of-county activities. The minimal costs of implementation are allocated among covered Producers in direct proportion to their in-county market share. Under these circumstances, there is no reason to expand the bounds of traditional dormant Commerce Clause doctrine or to review the

Ninth Circuit's straightforward application of this Court's settled precedents.[2]

STATEMENT OF THE CASE

A. Factual Background.

Alameda County enacted the Ordinance in 2012 after determining that the health and welfare of local residents – "particularly children and the elderly – are at significant and unnecessary risk of poisoning due to improper or careless disposal . . . and the illegal resale of prescription drugs" and that "the groundwater and drinking water are being contaminated by unwanted, leftover, or expired prescription drugs passing through wastewater and treatment centers. . . ." Pet. App. 61a (Stipulated Facts 2). To ameliorate these alarming environmental, health, and safety risks, the Ordinance requires all Producers "who sell, offer for sale, or distribute prescription drugs in Alameda County" to share proportionate responsibility for their drugs' safe end-of-life disposal and for public education about the program. Pet. App. 61a-62a (Stipulated Facts 1, 3-7); Pet. App. 42a (§6.53.050(A)(9)).[3]

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[2] Two Justices of this Court have already opposed expansion of the dormant Commerce Clause. *See Pharm. Research and Mfr. of Am. v. Walsh* ("*Walsh*"), 538 U.S. 644, 674-75 (2003) (Scalia, J., concurring in the judgment) (dormant Commerce Clause should be narrowly applied and not extended beyond limits required by *stare decisis*); *id.* at 683 (Thomas, J., concurring in the judgment) (rejecting dormant Commerce Clause analysis).

[3] More than 30 states have enacted statewide and/or local Extended Producer Responsibility ("EPR") laws, which hold manufacturers responsible for the end-of-life disposal of products such as batteries, paint, mercury-containing thermostats, carpet, pesticide containers, and mattresses. *See Map of State and Local EPR Laws*, PROD. STEWARDSHIP INST., http://www.product

While petitioners assert (among several misstatements of fact and law) that "the Ordinance produces no 'local benefit,' apart from impermissible cost shifting," Pet. 33, petitioners expressly stipulated to "the Ordinance's environmental, health and safety benefits . . . ," Pet. App. 69a (Stipulated Fact 37), which the Ordinance describes in detail, Pet. App. 33a-34a.

A Producer may fulfill its obligations under the Ordinance either by (1) operating a "product stewardship program" itself or in conjunction with other Producers; or (2) contracting with a new or existing "stewardship organization," which may be based in or out of the County. Pet. App. 61a (Stipulated Fact 3); *see* Pet. App. 38a-39a (defining terms). The collection services offered by an approved stewardship program must be "convenient to the public and adequate to meet the needs of the population . . . ," Pet. App. 41a, and may be accomplished either through local disposal kiosks or a "Mail-Back Program" that enables County residents to use preaddressed envelopes to mail their old prescriptions to a disposal facility (which need not be located in-county). Pet. App. 37a, 41a-42a. The Ordinance does not require Producers to establish, or conduct business with, any local commercial enterprise.

Three of petitioners' members have corporate headquarters or principal places of business in Alameda County, while two have manufacturing facilities there (which accounted for approximately $3 billion in prescription drug sales in 2011). Pet. App. 63a-64a (Stipulated Facts 12-13, 17). Petitioners

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stewardship.us/?State_EPR_Laws_Map (last visited Apr. 3, 2015).

stipulated that the Ordinance "does not impose different requirements on Producers within Alameda County and Producers outside of Alameda County" and that it only applies to Producers that actually "sell, offer for sale, or distribute prescription drugs in Alameda County . . . ." Pet. App. 62a (Stipulated Facts 4-8).

The Ordinance's annual compliance costs (including the County's "actual" administrative costs, Pet. App. 40a-41a (§6.53.040(B)(4)), which have *totaled* less than $20,000 to be paid collectively by all Producers to date)[4] are allocated among all covered Producers in "reasonabl[e] relat[ion] to the amount of prescription drugs that [each] Producer sells in Alameda County." Pet. App. 62a (Stipulated Fact 3). The annual costs of compliance (excluding the County's administrative costs) are estimated to be between $330,000 and $1 million, with a one-time total start-up cost of approximately $1.1 million. Pet. App. 66a-67a (Stipulated Facts 26-30). These costs are minimal in comparison to the industry's annual prescription drug sales in 2010 of more than $300 billion nationally and approximately $965 million in Alameda County, or to the industry's annual advertising budget of more than $10 billion. Pet. App. 67a-69a (Stipulated Facts 32-35). Put another way, the annual cost of compliance is at most 1¢ per every $10 of prescription medicine sold in Alameda County.

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[4] *See Safe Drug Disposal Program* (Mar. 2015), http://www.acgov.org/aceh/safedisposal/documents/SDD_status_update_March_ 2015.pdf.

B. The District Court's Decision.

Petitioners' lawsuit alleged that the Ordinance unconstitutionally burdens interstate commerce under the dormant Commerce Clause. Pet. App. 19a. After the parties stipulated to 38 undisputed facts, *see* Pet. App. 60a-70a, and filed cross-motions for summary judgment, the United States District Court for the Northern District of California (Seeborg, J.) entered judgment for the County, concluding that the Ordinance does not discriminate against out-of-state interests, directly regulate interstate commerce, or impermissibly burden such commerce. Pet. App. 18a-32a. Applying this Court's well-established "two-tiered approach to analyzing whether a state or local economic regulation violates the dormant Commerce Clause," Pet. App. 27a, the District Court found:

- "[T]he Ordinance does not discriminate against out-of-state actors in favor of local persons or entities, and does not otherwise impermissibly burden interstate commerce . . . ." Pet. App. 19a.
- "[T]the Ordinance here neither purports to regulate interstate commerce nor does so as a practical matter." Pet. App. 29a.
- "Nothing in the structure of the Ordinance targets producers on the basis of their location – they are being required to participate in providing take-back programs because they sell prescription drugs in the county, not because they are out-of-state actors." Pet. App. 29a-30a.
- "Nothing in the Ordinance will require, as a practical matter, any producer to alter its manner of doing business in any

jurisdiction outside Alameda County. . . ." Pet. App. 30a.

C. The Ninth Circuit's Decision.

The Ninth Circuit panel (N.R. Smith, J., with Christen, J., and Piersol, D.J.) unanimously affirmed. Pet. App. 1a-17a. Applying the traditional two-tiered analysis to the stipulated facts, the panel agreed that the Ordinance does not improperly interfere with interstate commerce. First, "it does not discriminate, because it 'treat[s] all private companies exactly the same.'" Pet. App. 8a (alteration in original) (quoting *United Haulers*, 550 U.S. at 342). Second, rejecting petitioners' characterization of the Ordinance as having the "real world effect of . . . a tariff," the panel ruled, "[g]iven that the Ordinance applies across the board, it does not discriminate at all, let alone in the same way as a tariff." Pet. App. 8a-9a. Third, the panel held that the Ordinance was non-discriminatory because it applied to in-county and out-of-county Producers alike and allowed any Producer to raise prices to cover the costs of regulatory compliance and to impose those higher prices on county residents (thus eliminating or mitigating any "political-restraint" concerns). Pet. App. 9a-10a. Finally, the Ordinance had no extraterritorial impacts because it does not "control conduct beyond the boundaries of the [County]." Pet. App. 11a (alteration in original) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)).

The panel rejected petitioners' efforts to establish a new *per se* category of dormant Commerce Clause analysis applicable to any state or local law that regulated "the in-state conduct of an out-of-state entity" by imposing "affirmative obligation[s]" that the

state or local government could have chosen to fund through taxpayer dollars. *See* Pet. App. 11a-14a. The panel pointed out that no dormant Commerce Clause case decided by this Court or the Ninth Circuit had ever "drawn such a distinction" and that petitioners' proposed approach would be inconsistent with several controlling precedents, including *United Haulers*, 550 U.S. at 345, and *Walsh*, 538 U.S. at 668-69. Pet. App. 13a.[5] The panel also rejected petitioners' efforts to extend the four-part Commerce Clause test for taxation to cases challenging local regulation when challengers claim that the costs of implementation could have been funded by local taxpayers. Pet. App. 13a-14a.

Turning to the *Pike* balancing test, which applies to laws that neither discriminate nor regulate extra-territorial conduct, the Ninth Circuit panel carefully weighed the Ordinance's considerable local benefits against its asserted interstate burdens. Pet. App. 14a-16a. Relying upon the parties' stipulations, the panel

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[5] Petitioners do not mention *Walsh* in their petition, despite having unsuccessfully argued most of these same points in their *Walsh* merits briefing. *See* Brief for Petitioners, *Pharm. Research and Mfr. of Am. v. Walsh*, 538 U.S. 644 (2001) (No. 01-188) 2002 WL 31120844 at *10-11, *26-27 (arguing that pharmaceutical manufacturers do not make any in-state sales, but sell through out-of-state distributors, which makes Maine's regulation "extra-territorial"); *26 (arguing that Maine could have funded the program by taxing residents rather than imposing compliance costs on manufacturers); *29 (Maine's rebate program "has an effect similar to that of a duty imposed at the state's border. . . ."); *30 (arguing that, if Maine prevails, any state could "send a bill to any manufacturer of any product located anywhere in the country any time that manufacturer's product is sold – not by the manufacturer, but by others – in [the state]"); *31-32 (claiming that state's law "resembles a sales tax" and would be invalid under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

concluded that the Ordinance's substantial local public health, safety, and environment benefits and the cost savings it provided to County residents (which are properly considered under *United Haulers* and *Pike*, *see infra*, at 29), outweighed any potential interstate burdens. Pet. App. 14a-16a. The panel further concluded that implementation of the Ordinance would not "interrupt, or even decrease, the 'flow of goods' into or out of Alameda" or otherwise "affect the interstate flow of goods . . . ." Pet. App. 14a-15a (emphasis omitted).

Petitioners did not seek en banc review.

REASONS FOR DENYING THE PETITION

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state *competitors*.'" *Dep't of Revenue of Ky. v. Davis* ("*Davis*"), 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)). That is why the dormant Commerce Clause only prohibits state or local laws that (1) discriminate against out-of-state businesses at the expense of similarly situated competing local businesses, (2) regulate extraterritorial commerce conducted entirely outside the jurisdiction (such as one state controlling prices in another state's markets), or (3) have substantial impacts on interstate commerce that significantly outweigh legitimate local benefits. As petitioners themselves acknowledge, the dormant Commerce Clause allows local "regulation [that] has the purpose and 'practical effect' of regulating a *product* to prevent harmful effects within the jurisdiction . . . even if it has an 'incidental' or 'indirect'

effect on the free flow of commerce." Pet. 16 (citing *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 394 (1994), and *Pike*, 397 U.S. at 142-43); *see also Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960) ("In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.'" (alteration in original) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876))).

Thus, where a regulation has only indirect effects on interstate commerce and regulates evenhandedly, it will be upheld as long as it furthers legitimate local interests and any burden on interstate commerce is not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142; *see Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).

1. The Alameda Ordinance Does Not Discriminate Against Interstate Commerce.

A state or local regulation discriminates against interstate commerce under the dormant Commerce Clause when it favors local companies at the expense of similarly situated out-of-state companies. Here, there is complete uniformity of treatment. Petitioners stipulated that the Ordinance applies to all Producers in the same way, wherever they may be headquartered or their manufacturing facilities located. *See* Pet. App. 62a (Stipulated Facts 4-8). Because the Ordinance does not provide any benefits, economic or otherwise, to in-county Producers or to those who might choose to

relocate into Alameda County, it does not discriminate under conventional dormant Commerce Clause analysis.[6]

The fact that many prescription drug manufacturers whose products cause in-county harm are based outside Alameda County does not mean that the Ordinance discriminates against interstate commerce. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). The Court has frequently rejected dormant Commerce Clause challenges to state and local regulations affecting non-resident companies, even when most (or *all*) of the regulatory burden falls on those companies; yet petitioners largely ignore those cases. *See, e.g.*, *id*. at 125-26 (concluding that a law prohibiting out-of-state petroleum refiners from operating in-state service stations and requiring them to provide uniform allowances to in-state service stations "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level," even

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[6] Petitioners make fleeting reference to the Ordinance not imposing "financial or programmatic" obligations on *local pharmacies*. Pet. 8. However, "any notion of discrimination assumes a comparison of substantially similar entities," *Davis*, 553 U.S. at 342 (quoting *United Haulers*, 550 U.S. at 342), and there can only be discrimination for dormant Commerce Clause purposes where there is "actual or prospective competition between the supposedly favored and disfavored entities in a single market . . . ," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Because drug manufacturers do not compete with local pharmacies (any more than they compete with local taxpayers, *see infra*, at 26-27), they are not "similar entities" for purposes of dormant Commerce Clause analysis. *See Walsh*, 538 U.S. at 670.

though the "burden of the divestiture requirements falls solely on interstate companies"); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 73-74, 88 (1987) (Indiana tender offer law does not discriminate against interstate commerce, even though "as a practical matter, most hostile tender offers are launched by offerors outside Indiana.").

The discrimination inquiry under the dormant Commerce Clause is not whether a regulation affects mostly out-of-state companies, but whether the regulation treats those companies differently than their in-state competitors. As this Court explained in *Walsh*, in concluding that a Maine pharmaceutical-rebate law that principally affected out-of-state prescription drug manufacturers did not discriminate:

> [T]he Maine Rx Program will not impose a disparate burden on any competitors. A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no benefit from the rebates even if it did so; the payments to the local pharmacists provide no special benefit to competitors of rebate-paying manufacturers.

538 U.S. at 670.

Here, notwithstanding petitioners' repeated assertions of discriminatory out-of-state burdens, the text of the Ordinance and petitioners' own stipulations establish that all competitors (all Producers) are treated equally regardless of where they are based. No benefit is conferred upon those that reside in, or may move into, the County. The Ninth Circuit was therefore undoubtedly correct in concluding that the Ordinance does not discriminate against interstate commerce.

2. The Alameda Ordinance Does Not Have Extraterritorial Application.

Heightened scrutiny is also required for state and local laws that are "extraterritorial," meaning that they "*control*[] commerce occurring *wholly outside* the boundaries of a State," such as laws that control pricing. *Healy*, 491 U.S. at 336, 337-39 (invalidating Connecticut law that had "the practical effect of controlling Massachusetts prices"); *Brown-Forman*, 476 U.S. at 579-84 (invalidating state law that had effect of controlling out-of-state prices); *Walsh*, 538 U.S. at 669 (A law that does not "regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect," is not extra-territorial.).

The parties' stipulations are again dispositive, as they confirm that the Ordinance does not require any extraterritorial conduct. Pet. App. 62a (Stipulated Facts 8, 9). The Ordinance does not dictate pricing at any stage of the distribution chain. To the contrary, any Producer, local or foreign, is free under the Ordinance to raise its price to cover the minimal costs of regulatory compliance, and nothing prevents any Producer from passing on its costs to consumers or pharmacies, either in-county or out-of-county. *See infra*, at 23-24.[7]

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[7] The Chamber of Commerce ("Chamber") argues in its *amicus* brief that the Ordinance is nonetheless extraterritorial because it "reaches back up" the interstate distribution chain, "across county and state lines, to regulate out-of-county actors for these out-of-county transactions." Chamber Br. 13 (emphasis omitted). The Ninth Circuit concluded otherwise based on the stipulated facts. Pet. 11a (concluding that the "stipulations . . . reveal that the Ordinance does not 'control conduct beyond the boundaries of

Because the Ordinance neither discriminates nor applies extraterritorially, the Ninth Circuit properly analyzed petitioners' claims under the balancing test required by *Pike* and correctly concluded that the limited burdens identified by petitioners were insufficient to overcome the stipulated local public health, safety, and environmental benefits. Pet. App. 14a-17a. Petitioners offer only token resistance to that conclusion, recognizing that a fact-based dispute over the Ninth Circuit's application of *Pike* would not support certiorari. That is why petitioners instead argue for a dramatic extension of the existing law governing dormant Commerce Clause challenges.

3. The Ninth Circuit Correctly Applied the *Pike* Balancing Test.

The Ninth Circuit and district court appropriately concluded that the Ordinance satisfies the constitutional standards established by *Pike*. In *Pike*, 397 U.S. at 139-40, a cantaloupe grower challenged Arizona's

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the [county]'" (alterations in original) (quoting *Healy*, 491 U.S. at 336)).

The structure of petitioners' "interstate distribution chain" is the same now as it was when petitioners unsuccessfully made the identical argument in *Walsh*, *see supra* at 9 n.5. In *Walsh*, petitioners submitted affidavits describing their members' chain of distribution and asserted that, with two exceptions, "all of their prescription drug sales occur outside of Maine." *See Walsh*, 538 U.S. at 656; Pet. App. 64a-65a (Stipulated Facts 18, 19, 24). The Chamber seeks to distinguish *Walsh* by contending that producers could choose *not* to enter into a rebate agreement under Maine's law but instead suffer a sanction. Chamber Br. 11. But this Court rejected that argument in *Walsh*, concluding that "the alleged harm to interstate commerce would be the same regardless of whether manufacturer compliance is completely voluntary or the product of coercion." 538 U.S. at 669.

law requiring in-state packing of all cantaloupes grown in Arizona for interstate markets. The grower, which had been packing its cantaloupes across the state line in California, stated that it would cost $200,000 to build a new packing plant in Arizona, and contended that the State's primary purpose – "to promote and preserve the reputation of Arizona growers" (not safety or consumer protection) – was insufficient to outweigh that burden on interstate commerce. *Id*. at 139-40, 143, 146.

The Court concluded that Arizona's in-state packing requirement neither discriminated against out-of-state competitors nor required extraterritorial conduct. *See Pike*, 397 U.S. at 142-46. Consequently, the Court did *not* apply heightened scrutiny. *Id*. Instead, it applied a balancing test, asking whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id*. at 142. Although the Court concluded that Arizona's interests were not sufficiently strong to "constitutionally justify the requirement that the company build and operate an unneeded $200,000 packing plant in the State," the Court nonetheless stated that the law's burden on interstate commerce could have been overcome if Arizona had a "more compelling" state interest than merely preserving the reputation of local growers. *Id*. at 145-46.

In the present case, the Ninth Circuit carefully applied the balancing test prescribed by *Pike* and concluded that the core police power purposes of the Ordinance, with its stipulated health, safety, and environmental benefits, far outweighed any potential burdens on interstate commerce. Pet. App. 14a-16a. That conclusion is unassailable, given the language of the Ordinance and the Stipulated Facts.

4. Petitioners Offer No Persuasive Reason for Extending the Well-Established Standards for Analyzing Dormant Commerce Clause Challenges.

Petitioners' principal argument is that the Court should create a new category of dormant Commerce Clause analysis – extending heightened scrutiny beyond local regulations that discriminate or apply extraterritorially, to any regulation that requires an out-of-county company to perform or fund any in-county service that local government could potentially provide or fund at taxpayer expense (which would encompass most local regulations affecting interstate actors). Such regulations have long been analyzed under the *Pike* balancing test, and petitioners offer no persuasive reason – certainly none rooted in the Commerce Clause – to explain why this case requires application of a different constitutional standard.

Petitioners' arguments for reformulating the dormant Commerce Clause standards are at least triply flawed. Factually, they misstate the purpose of the Ordinance and how it operates, ignoring the plain language and their own stipulations. Legally, they mischaracterize this Court's prior decisions, relying on short excerpted phrases quoted out of context and blurring distinctions between different categories of dormant Commerce Clause cases.[8] And logically,

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[8] The Ninth Circuit criticized petitioners for similar overreaching, stating:

> The problem with Plaintiffs' argument – aside from the fact that Plaintiffs cite not a single case to support this theory – is that it conflates the "direct regulation" doctrine and the second-tier, *Pike* balancing test, which asks whether the "state's interest is legitimate," *Brown-Forman*, 476 U.S. at 578-79.

petitioners' proposed new approach makes no sense because it would invalidate almost every regulation that affects interstate companies regardless of the regulatory purpose, the extent of any burden on interstate commerce, or the evenhandedness of its application.

1. Petitioners' proposed analysis rests upon a series of material misstatements about the Ordinance's purpose (which bears on the legitimacy and importance of the regulatory goals) and structure (which determines the allocation of benefits and burdens). We address those misstatements in turn.

First, petitioners insist that the real purpose of the Ordinance is not the stated police power purpose – protection of public health, safety, and the environment – but cost-shifting. *See, e.g.*, Pet. 16-17, 22 ("The Ordinance's avowed purpose and effect is to shift costs from Alameda taxpayers and consumers to interstate producers and consumers."). But petitioners confuse the purposes of the Ordinance with the mechanism for accomplishing those purposes. Imposing proportionate responsibility for end-of-product-life disposal is not the "purpose" of the Ordinance; it is simply the manner of its implementation. The purposes are those set forth in the Ordinance's statement of purpose and in petitioners' express stipulations, which the lower courts appropriately accepted as binding. *See, e.g.*, Pet. App. 11a, 30a, 61a (Stipulated Fact 2), 69a (Stipulated Fact 37). Like

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Pet. App. 12a; *see also* Pet. App. 13a n.3 (citations omitted) (rejecting petitioners' characterization of what the Ninth Circuit had "squarely stated," because "[t]he only thing 'this Court . . . squarely stated' concerning [petitioners'] quotation is that it 'is not controlling.'" (quoting *Nat'l Meat Ass'n v. Deukmejian*, 743 F.2d 656, 661 (9th Cir. 1984))).

many EPR laws, the Ordinance makes product manufacturers responsible for proper end-of-life disposal of their products sold in the jurisdiction and serves an important public purpose by mitigating the well-documented hazards caused by human and environmental exposure to prescription drug waste.[9]

Second, petitioners dramatically overstate the burdens imposed by the Ordinance, particularly when trying to analogize to cases such as *Carbone*, 511 U.S. 383, *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), and *Pike*, 397 U.S. 142 (although petitioners' reliance on *Pike* undercuts their position that *Pike's* traditional balancing analysis is inadequate). *See* Pet. 19.

Nothing in the language of the Ordinance or the analysis applied by the Ninth Circuit justifies petitioners' threat that in the absence of certiorari review,

> out-of-state producers of *any* product may be "affirmatively obligated" to enter *every* county where their product is sold to dispose of the product once a consumer elects not to use it[, and] virtually *all* interstate manufacturers can be converted into local collectors of unused products at the whim of local government [and] to perform *any* task, no matter how unrelated to the products they sell.

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[9] *See Protecting Our Health and the Environment: The Need for Sustainably Financed Drug Take-Back Programs*, PROD. STEWARDSHIP INST., 4-7 (July 27, 2012), http://fyi.uwex.edu/pharma/files/2012/10/Pharmaceuticals-White-Paper-on-EPR_Final.pdf.

Pet. 9. The Ninth Circuit held no such thing and neither did any of the cases that it cited. *Pike*, after all, requires a careful balancing of competing benefits and burdens, focusing on the purposes of the regulation, how they are furthered, and whether they are sufficient to justify whatever burdens the regulation might impose. While the Ordinance is plainly constitutional under *Pike*, other EPR laws serving different purposes and imposing greater burdens with lesser justifications might require a different result. For example, an ordinance requiring paper recycling, *see* Pet. 9, might serve less vital health and safety interests than an ordinance requiring proper disposal of pesticide containers or mercury.

Contrary to petitioners' assertion, no one is "conscripted" or "dragooned" by the Ordinance to set up a local presence in Alameda County. *See* Pet. i, 8, 9, 11, 30. The Ordinance poses no "threat" of retaliatory "Balkanization" marked by a "tit-for-tat trade war." *See* Pet. 12, 20, 24, 26. Nor does the Ordinance control "interstate companies' most basic business decisions – where to locate and with whom to contract . . . ." *See* Pet. 20. That is all hyperbole.

The Ordinance simply requires prescription drug Producers to take responsibility for their own post-consumer-use product waste. It does so by making available to residents a convenient way to dispose of their unwanted prescription drugs by providing reasonable access to mailing envelopes or in-county collection kiosks,[10] whose contents may be incinerated

[10] Contrary to Petitioners' assertion that Alameda County already operates a complete prescription drug disposal program, Alameda County presently maintains four collection sites, along with other voluntarily maintained sites, the permanence of which cannot be assured. *See*, *supra* at 6, n.4.

wherever the Producers and their stewardship programs choose.

Nothing in the Ordinance "benefit[s] local companies" or requires "out-of-state producers [to] contract with local entities instead of potentially less expensive outsiders." *See* Pet. 24. To the contrary, the Ordinance allows Producers to establish or expand their own stewardship programs or to contract with existing stewardship programs – which can be based anywhere in the world. In fact, many of the companies covered by the Ordinance currently contract with a stewardship program based in Washington, D.C.[11]

No burdensome local obligations are imposed on the stewardship programs either. The Ordinance simply requires those programs to provide information to County residents about drug disposal opportunities and to facilitate those residents' safe disposal of unused and expired prescription drugs, either by collecting returned drugs from local disposal kiosks (which need not be staffed, except for periodic emptying) or making postage pre-paid envelopes available for County residents to mail their prescription drugs back to be destroyed. Pet. App. 41a-43a, 47a-48a

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[11] *See A Product Stewardship Plan*, ALAMEDA_MED-PROJECT (Jan. 30, 2015), http://www.acgov.org/aceh/safedisposal/documents/Alameda MED-Project_APPROVED_PLAN_as_amended_2-23-2015.pdf. Contrary to the speculative assertion by *amici* Washington Legal Foundation and Allied Educational Foundation ("WLF") that the Ordinance imposes undue burdens on smaller Producers, *see* WLF Br. 24, the County has approved a plan that allows a small Producer to comply with the Ordinance by providing mailing envelopes and informational material directly to its County customer. *See Exelexis, Inc. Safe Drug Disposal Program Plan*, EXELIXIS, INC. (Jan. 30, 2015), http://www.acgov.org/aceh/safedisposal/documents/EXELIXIS_PLAN_as_amended.pdf.

(§§6.53.050(A), 6.53.070). Small wonder petitioners seek to avoid application of the traditional *Pike* balancing test, given the minimal burden of these "local presence" requirements and the countervailing (and stipulated) core police power benefits of the Ordinance.[12]

Third, petitioners misstate the facts concerning Section 6.53.040(B)(3), Pet. App. 40a, the Ordinance's prohibition of specifically designated point-of-sale and point-of-collection fees. Petitioners try to develop a political-restraint argument based on *United Haulers*, 550 U.S. at 345. *See* Pet. 17-18. They contend that local voters had no incentive to oppose the Ordinance (and were therefore more likely to have a discriminatory motive) because the prohibition of point-of-sale and point-of-collection fees shields local consumers from having to bear any portion of the regulatory compliance costs. *See* Pet. 2, 32; WLF Br. 7 ("Alameda drafted the Ordinance in a manner intended to ensure that the costs of the drug disposal program could not be passed along to residents of the County but instead would be borne almost exclusively by non-residents.").

Petitioners' political restraint argument would fail even if petitioners had accurately characterized the fee prohibitions. Not only are several prescription drug Producers based in Alameda County (and thus significant county taxpayers themselves, *see supra*, at 5), but so is every local pharmacy – the businesses that would have to absorb any wholesale price increase by Producers *if* the cited provisions actually

[12] Petitioners complain that they may be required to dispose of some over-the-counter drugs as well as their proportionate share of covered prescription drugs, but they acknowledge that nothing in the Ordinance requires them to do so. *See* Pet. 4.

prohibited Producers and pharmacies from raising retail prescription drug prices. All of these local taxpayers had ample incentive to object to the enactment of an ordinance that might increase their own costs. So even under petitioners' scenario, the Ordinance was subject to the usual political restraints.

But petitioners misconstrue the Ordinance. Section 6.53.040(B)(3), Pet. App. 40a, prohibits designated "specific point-of-sale" or "point-of-collection" fees but does not prohibit local pharmacies or prescription drug Producers (whether local or out-of-county) from selling covered prescription drugs at whatever price they choose. The Ordinance prohibits only a separate point-of-sale or point-of-collection fee, denominated as such: it is not a price control regulation, either retail or wholesale. Producers and local pharmacies may charge whatever they choose for their prescription drugs under the Ordinance.[13] And if the retail price is increased, consumers will have to bear the cost.

Ultimately, though, it makes no difference whether the local and foreign Producers pass through their *de minimis* compliance costs to local customers. Some local interests will necessarily be affected regardless of whether local taxpaying Producers or pharmacies are permitted to pass through any price increases; and those interests act as a political check on the local government's regulatory initiative. The fact that "interests within the [county]" share a portion of the economic burdens imposed by the Ordinance defeats petitioners' political-restraints argument (which

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[13] *See generally Follow the Pill: Understanding the U.S. Commercial Pharmaceutical Supply Chain*, KAISER FAMILY FOUNDATION (Mar. 2005), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/follow-the-pill-understanding-the-u-s-commercial-pharmaceutical-supply-chain-report.pdf.

would not be sufficient by itself to overcome the absence of actual discrimination in any event). *See United Haulers*, 550 U.S. at 345. And of course, if Producers are allowed to pass through the costs of regulatory compliance (as is the case under the Ordinance), any potential burden on interstate commerce is negligible at best.

2. Petitioners couple these factual misstatements with a series of highly misleading references to this Court's precedents, trying to fabricate support for their position that any regulation that shifts any costs onto interstate actors or imposes any in-jurisdiction responsibilities upon interstate actors requires heightened scrutiny (even in the absence of discrimination or extraterritorial application) if any portion of the costs of compliance could have been born by local taxpayers. The Court has never accepted such a sweeping view of the dormant Commerce Clause – including when petitioners made this same argument in their merits briefing in *Walsh*. *See supra* at 9 n.5.

Petitioners insist that *Pike* supports application of a *per se* standard to this case, even though *Pike* clearly holds that courts must balance local benefits against interstate burdens when considering non-discriminatory, non-extraterritorial regulation. According to petitioners:

> The most obvious application of these principles [*i.e.*, the principles set forth in the Petition that supposedly require heightened scrutiny] has been the Court's consistent condemnation, as "virtually *per se* illegal," of any effort to condition the production or sale of products on having the producer establish "business operations * * * in the home State." *Pike*, 397 U.S. at 145 . . . .

Pet. 19. *Pike*, of course, did not apply a "virtually *per se*" standard to Arizona's fruit-packing law, even though that law required cantaloupe growers to pack their fruit locally before shipping it out of state. 397 U.S. at 145-46. Nor does the quote from *Pike* mean what petitioners say, when critical language deleted by petitioners is re-inserted.

What has been deleted is a key phrase in *Pike* that makes clear that the Court was not talking about an omnibus prohibition against requiring the establishment of "business operations * * * in the home State," as petitioners represent, but the following: "[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State *that could more efficiently be performed elsewhere*." 397 U.S. at 145 (emphasis added). That non-controversial statement means that a state law is likely to violate the dormant Commerce Clause if it requires companies to establish an in-state commercial business *when the state has no legitimate justification for requiring that business to be conducted in-state rather than elsewhere*. Of course, that is not this case. The Ordinance permits Producers to establish or contract with stewardship programs based anywhere in the country and to incinerate discarded drugs anywhere the Producers might choose. The only possible required local activity is the periodic emptying of disposal kiosks (if the program is not conducted by mail) and local education. These activities have to be performed locally for the Ordinance to serve its stated purposes. *See supra* at 4-5.

Petitioners also cite three cases for the proposition that any state or local regulation "designed to directly benefit *local taxpayers* at the expense of outsiders"

requires heightened scrutiny because "eas[ing] the burden of local *taxpayers* plainly 'favor[s] in-state economic interests over out-of-state interests,' . . . and is an effort 'to gain for those within the [locality] an advantage at the expense of those without.'" Pet. 23 (second and third alterations in original) (citing and quoting *Gen. Motors*, 519 U.S. at 299; *Brown-Forman*, 476 U.S. at 579; and *S.C. State Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938)). None of the cited cases support petitioners' position.

The Court found no violation of the dormant Commerce Clause in *General Motors*, 519 U.S. at 310, because the challenged regulation did not discriminate between *competitors*. As the Court emphasized at the start of its analysis, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Id*. at 298-99; *accord, United Haulers*, 550 U.S. at 342-43 ("[C]ompelling reasons justify treating [laws favoring public entities] differently from laws favoring particular private businesses over their competitors."). The regulation in *Brown-Forman* was invalidated as extraterritorial because it dictated the terms of "out-of-state transactions of distillers who sell in-state," 476 U.S. at 579-84, not because it was discriminatory. The Court referred to laws that discriminate only in generally describing the applicable two-tiered test. *Id.* at 579. And in *Barnell Brothers*, 303 U.S. at 184 n.2, 196, a 1938 case upholding a regulation from constitutional challenge, the quoted language is from a footnote describing the general history of prior dormant Commerce Clause decisions. None of the cases cited by petitioners (or any others) construed the dormant Commerce Clause as immunizing out-of-state companies from having to pay regulatory costs that could potentially be paid by local consumers or

taxpayers – particularly where, as here, those costs are minimal and are narrowly targeted to remediate the significant in-county health, safety, and environmental harms caused by those companies' commercial activities.

3. Logically, petitioners' efforts to extend the dormant Commerce Clause to invalidate EPR laws like the Ordinance must also fail because their proposed standard has no reasonable bounds – least of all, bounds consistent with the underlying constitutional principles.

Petitioners' arguments ultimately rest upon their novel assertion that the dormant Commerce Clause prohibits local government from imposing regulatory compliance costs on out-of-state companies that could have been borne, in whole or in part, by local taxpayers. Even if "cost-shifting" were a purpose of the Ordinance, *see supra* at 18-19, that alone could not render it unconstitutional. This Court has never held that state and local governments are precluded from imposing responsibility on product producers for preventing or remediating the public health, safety, and environmental harms caused by those producers' products. If heightened scrutiny were mandated whenever a local regulation "requir[ed] interstate actors to shoulder the costs and responsibilities of traditional local regulatory functions . . . ," Pet. 17, no case involving police power regulation would ever be analyzed under the *Pike* balancing standard, and no local government could ever perform its "traditional . . . function[]" of protecting local residents from the hazards caused by locally sold products, *see, e.g.*, *United Haulers*, 550 U.S. at 344.

Almost every regulation imposes some costs of compliance. In many instances, those regulatory costs could theoretically be borne, or reimbursed, by the regulatory body. But this Court's cases make clear that an evenhanded application of regulatory costs to in-state and out-of-state actors does not violate the dormant Commerce Clause – even when the regulated parties' conduct did not give rise to those costs, as several cases demonstrate.

In *Exxon*, for example, a significant economic burden was imposed on the refiners and producers that were required to give up either valuable wholesale gas distribution or valuable retail gas sales. 437 U.S. at 119-21. In *United Haulers*, the costs of compliance included significant waste-hauling fees. 550 U.S. at 336-37. In *Walsh*, the state could have paid an amount equivalent to the required rebates in order to subsidize local pharmacies serving low-income customers (and in that case, unlike here, the rebate costs imposed on the manufacturers could not have been recouped from the customers who benefitted). 538 U.S. at 653-54, 669-70. In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, the Court held that although Mississippi could not discriminatorily ban milk products from states that had no reciprocal trade agreements with Mississippi, the state *could* "charge the actual and reasonable costs of such [milk] inspection to the importing producers and processors . . ." – *i.e.*, impose a cost of compliance instead of an outright ban. 424 U.S. 366, 377-78 (1976) (quoting *Dean Milk*, 340 U.S. at 355). And in *Pike*, this Court made clear that compliance costs were just one factor that may bear on the regulatory burden, without being dispositive. 397 U.S. at 145-46.

Thus, "[w]hile 'revenue generation is not a local interest that can justify *discrimination* against interstate commerce,' . . . it is a cognizable benefit for purposes of the *Pike* test." *United Haulers*, 550 U.S. at 346 (plurality opinion) (quoting *Carbone*, 511 U.S. at 393); *see also Carbone*, 511 U.S. at 429 (Souter, J., dissenting) ("Protection of the public fisc is a legitimate local benefit directly advanced by the ordinance and quite unlike the generalized advantage to local businesses that we have condemned as protectionist in the past.").[14]

While petitioners may disagree with how the Ninth Circuit applied *Pike* to the stipulated facts, certiorari is not appropriate for resolving a dispute over the application of settled legal standards. That is why petitioners pivot from arguing that this Court's cases already prohibit ordinances like Alameda's to arguing that the dormant Commerce Clause *should* prohibit such ordinances.[15] But as shown, none of the reasons petitioners advance to support their effort to radically

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[14] It makes no difference whether the local government could have performed, or previously did perform, the required services itself. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) ("[T]his chronology [of Maryland's previous program] does not distinguish the case, for Commerce Clause purposes, from one in which a State offered bounties only to domestic processors from the start.").

[15] *See, e.g.*, Pet. 10 ("Although no previous case has presented the precise factual situation here, that is only because no local government has ever before engaged in such obvious rent-seeking against the interstate market."); Pet. 23 ("To be sure, the particular *form* of local favoritism in the Ordinance differs from that in most of this Court's precedents, which is hardly surprising since it is a 'first-in-the-nation' effort to directly conscript interstate manufacturers to dispose of unused products.").

extend the prohibitory scope of the dormant Commerce Clause is at all persuasive.

Petitioners' proposed *per se* rule would invalidate any state or local regulation that requires any out-of-jurisdiction company to pay for any in-jurisdiction costs or engage in any in-jurisdiction conduct, without regard to the extent of the burden or the strength of the local interest. For the reasons set forth above and in the lower courts' opinions, the *Pike* analysis was and remains perfectly adequate for evaluating such regulations. To craft a new rule, holding that the dormant Commerce Clause is violated whenever a regulated company is required to bear ultimate responsibility for the consequences of its in-jurisdiction business activities, would be to curtail dramatically state and local regulatory authority to protect local health, safety, and environmental interests without regard to the benefits of that regulation.

5. Petitioners' Alternative Argument That This Court Should Apply The Four-Part *Complete Auto Transit* Analysis To Any State And Local Regulation That Acts "Like A Tax" Does Not Support A Grant Of Certiorari.

Petitioners also make an alternative argument in support of certiorari, urging this Court to analyze state and local regulations that benefit local taxpayers under the four-part test developed for actual interstate taxation in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), and *Quill*, 504 U.S. at 309-11 – again, just as they unsuccessfully argued in *Walsh*, *see supra* at 9 n.5. Petitioners offer no compelling basis for substituting the *Complete Auto Transit* test for the *Pike* balancing test whenever the

compliance costs of a local health, safety, or environmental regulation could be borne by local taxpayers instead of the responsible companies. As the Ninth Circuit concluded: "[Petitioners] cite no case, and we can find none, in which this court has applied the nexus and fairly apportioned requirements outside of the tax context. We decline the invitation to break this new legal ground." Pet. App. 14a.

In *Complete Auto Transit*, 430 U.S. at 274-75, the Court considered whether a local tax, as opposed to a non-tax regulation, violates the Commerce Clause. Petitioners and their *amici* repeatedly cite *Complete Auto Transit's* approach to analyzing sales and use *taxes* as an alternative to the longstanding current approach to analyzing *regulations*. *See* Pet.18, 25, 31; WLF Br. 19-24. But, of course, the Ordinance is not a tax – which petitioners and their *amici* concede. Pet. 25, 31; WLF Br. 20 (conceding that "the Ordinance is not a tax"); WLF Br. 2, 19, 20 (claiming that the Ordinance merely possesses "many of the attributes of a tax"). *But see, e.g.*, *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988) (listing various examples of taxes to which *Complete Auto Transit* has been applied, including "business and occupation taxes . . .; mineral severance taxes . . .; and the taxation of income received by an out-of-state corporation from its in-state subsidiaries . . ."). The Ordinance is a regulation that requires certain conduct to further the County's police power interests (which can be performed directly or through third parties, at the Producers' option); it is not a tax to raise revenue for the County's general fund. Moreover, even if Alameda County *could have* structured its EPR Ordinance as a "tax," it did not do so, and the Court must defer to the County's decision to achieve its goals by exercising its police power authority. *See United Haulers*, 550 U.S.

at 344 ("It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services.").

Petitioners also assert that the Ordinance should be invalidated because it operates as "the functional equivalent" of a tariff, Pet. 8, again as they argued in *Walsh*, *see supra*, at 9 n.5. But this assertion similarly ignores the distinct attribute of tariffs that make them invalid under the dormant Commerce Clause: tariffs tax the products of out-of-state companies without taxing the products of in-state companies. *See, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) (A tariff "taxes goods imported from other States, but does not tax similar products produced in State."). The Ordinance, of course, "does *not* impose a different requirement on Producers within Alameda County and Producers outside of Alameda County." Pet. App. 62a (Stipulated Fact 4) (emphasis added).

Petitioners and their *amici* offer no persuasive reason why *Pike* should be jettisoned after 45 years of effective service and replaced by a test for analyzing "tax" laws that requires a differently focused inquiry, given the difficulty of identifying and weighing the specific benefits of taxes paid into the general fund. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 104 (1994) (explaining that "[general] tax payments are received for the general purposes of the [government] and are, upon proper receipt, lost in the general revenues." (alterations in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting)). Nor have petitioners identified any reason to combine *Pike* and *Complete Auto Transit* into some mixed-use test that will be less effective in

analyzing *either* state regulatory laws *or* state tax laws. A state or local law that regulates conduct to protect state and local health and safety concerns affected by that conduct serves different purposes, and should be judged by a different standard, than a law that simply taxes in-jurisdiction sales for general revenue purposes. *See Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 748 (1978) ("[T]he balancing of safety interests naturally differs from the balancing of state financial needs . . . .").

The fact that a regulation may impose some compliance costs, or may be implemented at the option of the regulated entity by paying a third party to perform the required compliance, does not transform the regulation into a tax. Under petitioners' approach, every regulation that imposed any economic burden, no matter how small or variable, would be required to satisfy the four-part *Complete Auto Transit* test (and perhaps, under petitioners' view, the *Pike* balancing test as well), and almost a half-century of dormant Commerce Clause jurisprudence would have to be revisited to determine which cases can no longer be relied upon as controlling precedent. Petitioners have not advanced any persuasive reason for re-formulating the well-established two-tier standard, particularly under the circumstances of this case.

6. There Is No Conflict Between The Ninth Circuit's Decision And Decisions In Other Circuit Courts.

Citing a handful of appellate cases that involved regulations that discriminated against out of-state companies in favor of in-state competitors, petitioners assert that "the Ninth Circuit put itself at odds with multiple other circuits that have invalidated local

presence requirements that benefit local interests by imposing costs on outsiders." *See* Pet. 34-36. But the Ordinance does not discriminate, *see supra*, at 11-13, and there is no circuit conflict, as petitioners implicitly conceded by acknowledging those cases' "somewhat different factual settings." Pet. 12-13.

In *Tri-M Group LLC v. Sharp*, 638 F.3d 406, 428-29 (3rd Cir. 2011), the state discriminated against out-of-state contractors by requiring them to establish and maintain a permanent in-state office to be eligible to participate in the state's reduced wage apprentice program. The Third Circuit found that the regulations "would entail an assumption of costs not imposed upon in state contractors" and was intended as an economic protectionist measure to increase the operating costs of out-of-state competitors in order to preclude their competitive participation in the local market. *Id.* at 428.

Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders, 48 F.3d 701, 717-18 (3d Cir. 1995), simply followed *Carbone* in holding that New Jersey's waste flow regulations favored designated local facilities at the expense of out-of-state competitors and were therefore discriminatory. Similar discriminatory flow control regulations requiring out-of-state companies to use only designated in-jurisdiction waste disposal sites were subject to invalidation by the Sixth Circuit in *Waste Management, Inc. of Tennessee v. Metropolitan Government*, 130 F.3d 731, 735-37 (6th Cir. 1997), and *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-16 (6th Cir. 2000), and by the Eighth Circuit in *Waste Systems, Corp. v. County of Martin*, 985 F.2d 1381, 1386-89 (8th Cir. 1993).

In *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230, 1257 (11th Cir. 2012), another direct discrimination case, the Port of Miami steered all out-of-state ship-unloading business to local stevedores. The Eleventh Circuit applied *Pike* and concluded that "[t]he burden on interstate commerce . . . preserving [the stevedore market] for a select few privileged permit holders [was] significant . . . and did not further any local benefits." *Id.* at 1261-62.

Finally, the challenged law in *Milton S. Kronheim & Company, Inc. v. District of Columbia*, 91 F.3d 193, 195-96, 204 (D.C. Cir. 1996), required all alcoholic beverage licensees to store their beverages inside the District of Columbia, thus plainly burdening out-of-District storage facilities in favor of their in-District competitors (although the case was ultimately decided on 21st Amendment grounds).

None of these cases conflict with the Ninth Circuit's conclusion that the Ordinance is neither discriminatory nor extraterritorial and does not impose any significant burden on interstate commerce.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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