No. _____

In The
Supreme Court of the United States

CHARLES BROWN, *et al.*,

Petitioners,

v.

DAVID HOVATTER, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. MELLOR
CLARK M. NEILY, III*
JEFFREY T. ROWES
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

TIMOTHY F. MALONEY
JOSEPH, GREENWALD, & LAAKE
6404 Ivy Lane, Suite 400
Greenbelt, Maryland 20770
(240) 553-1206

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Virtually alone among the states, Maryland forbids corporate ownership of funeral homes and allows only Maryland-licensed funeral directors to own funeral homes. Together, this functional residency requirement and corporate-ownership ban substantially burden the ability of national funeral chains and nonresident entrepreneurs to participate in the Maryland funeral market. The questions presented are:

1. Are commerce-burdening laws immune from challenge under the dormant Commerce Clause so long as they only restrict the interstate flow of capital rather than physical goods?

2. The balancing test established by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), requires courts to determine whether the burden on interstate commerce caused by a challenged regulation is clearly excessive in relation to its "putative local benefits." Must those benefits be real or will purely speculative benefits suffice?

PARTIES TO THE PROCEEDING

The Petitioners are Charles Brown, Joseph B. Jenkins, III, Brian Chisholm, and Gail Manuel.

The Respondents are the members of the Maryland State Board of Morticians, David Hovatter, Faye Patterson, Michael Ruck, Sr., Gladys Sewell, Donald V. Borgwardt, Marshall Jones, Jr., Michael Kruger, Brian Haight, Robert Bradshaw, Jeffrey Pope, and Vernon Strayhorn, in their official capacities.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing en banc without opinion. The panel decision of the court of appeals is reported at 561 F.3d 357 and is reprinted in the Appendix (App.) at 1-29. The decision of the District Court is reported at 516 F. Supp.2d 547 and is reprinted at App. 30-72.

JURISDICTION

The Court of Appeals denied the petition for rehearing en banc on April 24, 2009. On July 8, 2009, Chief Justice Roberts granted Petitioners' motion to extend the deadline for this Petition to August 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. App. 87. The challenged statute is the Maryland Morticians Act, Md. Health Occ. Code § 7-101 *et seq.*, the relevant portions of which are reproduced at App. 88-103.

STATEMENT

A. Factual Background

The facts of this case are simple, clear, and, with respect to the burdens on interstate commerce, undisputed. Petitioner Brian Chisholm is a Maryland-licensed funeral director who now lives in Celebration, Florida. He wants to invest financial and human capital into the Maryland funeral market and bring the profits back to his home in Florida. Like countless entrepreneurs across the country, Chisholm wants to engage in interstate commerce – putting his capital and talents to their most productive use where they will be most rewarded.

To accomplish this, Chisholm needs to do the one simple thing that makes complex interstate enterprises possible: form a corporation. As the evidence established, owning an interstate business as a corporation is a practical necessity in the funeral home context for the same reason it is a necessity in every other context. Corporations have advantageous attributes that direct personal ownership of a business cannot provide – perpetual existence, superior ability to raise capital, limited liability, ease of transferability, and others. The nation has a robust and integrated funeral home market because the ability to structure successful funeral home businesses as corporations allows them to grow and to serve customers across the country.

Maryland, however, has largely isolated itself from this interstate market by forbidding entrepreneurs like

Chisholm from owning funeral homes in Maryland as corporations. Md. Morticians Act, Health Occ. Code § 7-309(a) (hereafter "Morticians Act § 7-___"). App. 100-101. For all practical purposes, this nearly unique ban on corporate ownership[1] sets aside the Maryland funeral home market exclusively for Marylanders by requiring a prospective funeral home owner to do two things that will almost invariably require Maryland residency: (1) become a Maryland-licensed mortician (which requires not only two years of mortuary school but also a lengthy *in-state* apprenticeship[2]); and (2) own the desired Maryland funeral home in his or her personal capacity. *Id*. at § 7-310. App. 102-103 (providing that only a "licensed individual" – i.e., a Maryland-licensed mortician – may obtain the funeral establishment license needed to operate a funeral home).

Maryland does allow a small amount of inter-state investment to seep into its domestic funeral home market through a provision in the Morticians Act that "grandfathered" 58 funeral homes that were

---

[1] Only New Hampshire similarly prohibits corporations from owning funeral homes. N.H. Rev. Stat. Ann. § 325:15.

[2] *See* Morticians Act § 7-303 (qualifications for licensure). New morticians must serve an apprenticeship of at least one year and experienced morticians relocating from other states must serve a 1,000-hour apprenticeship. Morticians Act §§ 7-303(b)(2), 7-305(b)(3). App. 94-96. These apprenticeships must be served at a Maryland funeral home because the statute defines an "apprentice sponsor" as a Maryland-licensed mortician. *Id.* § 7-101(c)(1). App. 88.

operating as corporations before 1945. Morticians Act §§ 7-309, 7-310(c)(2). App. 100-103. These corporate licenses are freely transferable, and they have become highly valuable because they represent the special privilege of operating a business as a corporation in an environment where most people cannot. App. 41-42.

These "grandfathered" corporate licenses represent the only way that nonresidents, including the major national funeral chains, may participate in the otherwise closed Maryland funeral home market. National chains have acquired 30 of the 58 grandfathered corporate funeral homes, meaning that only 30 of Maryland's roughly 270 funeral homes are owned by out-of-state enterprises, while the rest remain in the hands of local owners. Professor David Harrington, the nation's leading funeral industry economist, confirmed the startling degree to which Maryland has sealed itself off from the national funeral home market by offering unrebutted testimony that the rate of investment in Maryland by national funeral chains is drastically lower than it is in other states.

And that is precisely the point. The Respondents themselves acknowledged in the proceedings below that Maryland's restrictions on corporate ownership "have prevented the [domestic] funeral industry from becoming as saturated by national chains as the rest of the national funeral market." They also quoted approvingly a letter from the chief lobbyist for the Maryland State Funeral Directors Association, Jim Doyle, in which he observed that "[t]he potential

expansion of national conglomerates . . . has also undoubtedly played a substantial role" in the legislature's refusal to eliminate the corporate ownership ban. Mr. Doyle also testified that:

- The ownership ban "places a check on the ability of . . . publicly traded corporations . . . to thrive or spread in Maryland"; and
- Legislators resisted efforts to amend the law because they "were concerned about what would happen if the conglomerates were given a green light to simply be able to move into Maryland."

Respondent Gladys Sewell, a fourth-generation Maryland-licensed mortician, testified that the corporate prohibition is valuable precisely because it protects her from having to compete with the national funeral chains. As a result of these and other admissions, the district court correctly concluded that "the Maryland funeral home industry has benefitted from the most blatantly anticompetitive state funeral home regulation in the nation." App. 68.

B. Proceedings Below

Petitioners filed suit in 2006 under 42 U.S.C. § 1983 alleging that Maryland's restrictions on funeral home ownership by corporations violate the dormant Commerce Clause. Specifically, Petitioners argued that the Maryland Morticians Act: (1) discriminates against interstate commerce in practical

effect; and (2) fails the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because the burdens on interstate commerce are enormous and the local benefits literally nonexistent.

On cross-motions for summary judgment, the District Court ruled that Maryland's corporate ownership ban violates the dormant Commerce Clause because it "severely limits the ability of out-of-state businesses from opening a funeral home in Maryland." App. 69. Characterizing the state's claims of consumer protection as "no more than entirely speculative," App. 65-66 (internal quotations and citation omitted), the Court held that the corporate ownership ban's burdens on interstate commerce were "intolerable and clearly excessive in relation to any benefits proffered by the [Respondents]." App. 69.

The Fourth Circuit reversed. Judges Niemeyer and Traxler ruled as a matter of law that this case does not even implicate the dormant Commerce Clause. In their view, Maryland's restrictions on funeral home ownership by corporations constitute only "local regulation of a localized profession where services are performed for clients entirely in Maryland." App. 21. The fact that the challenged restrictions indisputably limit the ability of non-resident entrepreneurs like Petitioner Chisholm to invest capital and expertise into the Maryland funeral market – and obtain profits in return – was irrelevant, they said, because the Morticians Act "is not aimed at any interstate flow of goods, materials, or other articles of commerce," which, according to

Judges Niemeyer and Traxler, is all the dormant Commerce Clause protects. *Id*. ("Because the Morticians Act does not place a barrier or burden on the flow of interstate commerce, it does not violate the dormant Commerce Clause.")

Then, in the only portion of the opinion that Judge Shedd joined, the panel performed a perfunctory *Pike* analysis, holding that even if the dormant Commerce Clause did apply, the Petitioners could not prevail because the burdens on interstate commerce from prohibiting corporate funeral home ownership are not clearly excessive when weighed against the entirely speculative benefits of: (1) greater accountability to government regulators; and (2) encouraging familiarity with the day-to-day workings of the funeral business. App. 23-24.

The Petitioners sought rehearing en banc on the grounds that the panel's holding that the interstate movement of investment capital, expertise, and profits are not protected by the dormant Commerce Clause directly conflicts with rulings of this Court and because the panel's acceptance of illusory local benefits for which there was no supporting evidence directly conflicted with Fourth Circuit precedent and with this Court's application of *Pike* balancing. The petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS REQUIRED BECAUSE THE FOURTH CIRCUIT DRASTICALLY NARROWED THE SCOPE OF THE DORMANT COMMERCE CLAUSE, CAUSING A SPLIT OF AUTHORITY AND CREATING A BLUEPRINT FOR ECONOMIC PROTECTIONISM.

The record in this case is clear: the Maryland funeral industry has been caught red-handed advancing the parochial interests of its members at the expense of the national market in funeral services. The undisputed record evidence – and indeed the admissions of the Respondents themselves in the proceedings below – make clear that Maryland maintains its virtually unique restrictions on corporate ownership of funeral homes in order to limit the ability of nonresidents to invest in and derive profits from the local funeral industry. As uncontroverted expert testimony from the nation's leading funeral economist made clear, that effort has been quite successful, rendering Maryland a virtual island in the national stream of funeral commerce.

But instead of squarely confronting that fact, the Fourth Circuit narrowed the dormant Commerce Clause in two distinct ways. First, the court of appeals held that the dormant Commerce Clause does not even apply to the challenged restrictions because limiting the ability of nonresidents to own funeral homes in Maryland does not affect the "*flow of interstate commerce* – the flow of goods, materials, and other articles of commerce across state lines."

App. 15 (emphasis in original). According to the Fourth Circuit's holding below, the dormant Commerce Clause is triggered only when a statute is "aimed at the interstate flow of goods, materials, or articles of commerce," such as the motorcycles at issue in the most recent – and relevant – Fourth Circuit precedent. App. 21 (citing *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005)). Second, the Fourth Circuit also narrowed the dormant Commerce Clause by holding that it does not apply when the challenged restrictions involve the structure or method of doing business, such as operating a funeral home as a corporation. App. 17-18 (holding that "the matter of which the [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause").

This sort of formalism has no place in dormant Commerce Clause analysis, particularly given this Court's oft-repeated admonition that "[t]he principal focus of inquiry must be the *practical operation* of the statute." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (emphasis added). By restricting the dormant Commerce Clause to physical articles of commerce, App. 17, and insulating from review demonstrably protectionist state laws involving corporate ownership of ordinary businesses, App. 17-18, the Fourth Circuit severely curtailed the scope of the dormant Commerce Clause. In doing so, the court created a split of authority with grave implications for the national common market.

A. The Fourth Circuit's Holding That Investment Capital, Profits, And Professional Expertise Are Not Articles Of Commerce Directly Conflicts With Decisions Of This Court And Other Circuits.

The Fourth Circuit's primary holding in the decision below was that the "Maryland Morticians Act does not place a barrier or burden on the flow of interstate commerce" because the statute "is not aimed at any interstate flow of goods, materials, or articles of commerce." App. 21. In an opinion for the panel joined only by Judge Traxler, Judge Niemeyer ruled in effect that intangible articles of commerce such as investment capital and business expertise are not articles of commerce at all. Quoting this Court's decision in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976), Judge Niemeyer suggested that the dormant Commerce Clause is so narrow that it applies only to the interstate movement of "raw materials and finished goods." App. 15-16 (internal quotations omitted).

Judge Niemeyer's opinion is in direct conflict with *Lewis*, *supra*, which invalidated a Florida banking statute that prohibited out-of-state banks from establishing bank-holding companies in Florida to offer investment advice to Floridians. 447 U.S. at 38-39. Although *Lewis* did not expressly hold that interstate investment capital and professional expertise are articles of commerce, that was a necessary premise of its holding.

The Fourth Circuit's elevation of form over substance – by holding that the movement of investment capital and profits across state lines is not interstate commerce – is fundamentally inconsistent with *Lewis*. It is also inconsistent with the holdings of cases in other circuits that the dormant Commerce Clause protects not merely the interstate movement of physical goods, but also the ability of nonresidents to invest in local markets.[3] Because the Fourth Circuit's unduly narrow view of the dormant Commerce Clause

[3] *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-47 (11th Cir. 2008) (holding that a village zoning provision that effectively precluded any new interstate chain retailer from establishing a store in the village had the practical effect of discriminating against interstate commerce and violated the dormant Commerce Clause); *Jones v. Gale*, 470 F.3d 1261, 1264-65 (8th Cir. 2006) (striking down on dormant Commerce Clause grounds a law that prohibited corporate ownership of farms in Nebraska); *Walgreen Co. v. Rullan*, 405 F.3d 50, 57-58 & n.5 (1st Cir. 2005) (holding that a Puerto Rico law that limited the ability of nonresidents to own local pharmacies burdens interstate commerce sufficiently to trigger dormant Commerce Clause scrutiny despite the fact the law did not regulate the flow of actual physical goods into Puerto Rico); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 914 (7th Cir. 2003) (holding that the opportunity for nonresidents to invest in local utility companies constitutes an "article of interstate commerce" under the dormant Commerce Clause); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (striking down on dormant Commerce Clause grounds provisions of the Texas Alcoholic Beverage Code that prohibited nonresidents from obtaining permits to operate in-state alcoholic beverage enterprises and from obtaining majority ownership of corporations possessing such permits).

is explicitly grounded in a subsidiary line of this Court's jurisprudence starting with *Hughes*, review is necessary to prevent the Fourth Circuit decision from becoming a blueprint for economic protectionism – one ostensibly approved by this Court.[4]

B. There Is A Split Of Authority On Whether The Dormant Commerce Clause Reaches State Regulation Of The Form Of Doing Business Such As The Use Of Corporations.

Granting review to clarify what constitutes an "article of commerce" would also provide the Court with the opportunity to clarify its holding in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which has been a source of great confusion in the case

[4] The Fourth Circuit opinion also conflicts with decisions of this Court holding that the negative and affirmative Commerce Clauses are equal in scope. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (compiling cases). By concluding that the dormant commerce power does not apply because "the Maryland Morticians Act is a local regulation of a localized profession where services are performed for clients entirely in Maryland," 561 F.3d at 366-67, the Fourth Circuit implicitly concluded that Congress lacks the authority under its affirmative commerce power to regulate the local funeral home industry. While that is consistent with the original, and what many would regard as proper, understanding of the affirmative commerce power, it is inconsistent with this Court's jurisprudence and inconsistent with federal regulations such as the Federal Trade Commission's "Funeral Rule," 16 C.F.R. § 453.1, *et seq.*, which minutely regulates how funeral establishments interact with their customers.

law, as the decision below illustrates. Citing *Exxon*, the Fourth Circuit held that "the matters of which [Petitioners] complain – the manner of professional practice in Maryland – are not matters protected by the dormant Commerce Clause." App. 17-18. The Fourth Circuit's opinion, in other words, categorically places state restrictions on the use of corporations beyond the scope of the dormant Commerce Clause, a rule that would have disastrous consequences for national markets if widely accepted.

But *Exxon* plainly does not stand for the proposition that state regulation of the form of doing business, such as restrictions on the use of corporations in certain industries, can *never* violate the dormant Commerce Clause. Its holding is far more prosaic. In *Exxon*, Maryland forbade vertical integration in the petroleum industry, which required oil refiners with retail gas stations to shut down their gas stations in Maryland. 437 U.S. at 121. The oil refiners proved that the challenged statute would force them out of the local retail gas market, but did not prove that less gasoline would flow into Maryland as a result. *Id.* at 123, 127-28. In other words, the refiners established only an individual impact, rather than an injury to the interstate market. This Court, therefore, held that they had not established a violation of the dormant Commerce Clause because the Clause protects interstate markets, not market participants.

Exxon's unremarkable holding – that the dormant Commerce Clause requires proof of an actual

burden on interstate commerce – is being dangerously transformed. Thus, in *CTS Corp. v. Dynamics Corp. of America*, this Court invoked *Exxon* in holding that state regulation of tender offers for state corporations was essentially immune from dormant Commerce Clause review because the Clause does not reach state regulation of the form or structure of doing business. 481 U.S. 69, 90-94 (1987). *CTS*, in other words, treated *Exxon* as though it stands for something much larger than it does; namely, that state regulation of the form or structure of doing business is necessarily outside the scope of the dormant Commerce Clause in all cases.

The Court's later view of *Exxon*, as expressed in *CTS*, has been a source of significant confusion among the lower courts. For example, the Fourth Circuit seems to have understood *Exxon* as standing for the proposition that no matter how substantial the burden on interstate commerce, and no matter how invidious a state's motives might be, so long as the state is regulating only the form of business, it is effectively immune from dormant Commerce Clause challenge. The Third and Fifth Circuits have also indicated that *Exxon* stands for the proposition that state restrictions on the form of doing business are beyond the reach of the dormant Commerce Clause.[5]

---

[5] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001) (car manufacturers forbidden from owning car dealerships) (quoting *Exxon*, 437 U.S. at 127); *Ford Motor Co. v.*

(Continued on following page)

Other courts, for the time being at least, hew to a generally proper reading of the case.[6]

C. The Split Of Authority On The Scope Of The Dormant Commerce Clause Has Grave Implications For The National Economy.

The purpose of the Commerce Clause is to ensure a common national market. As the Court's decisions have long recognized, the thirteen former colonies were untenable as a nation under the Articles of Confederation because, with the dissipation of the British threat, the unity of the revolutionary era gave way to ever-multiplying trade barriers. *See, e.g.*, *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949) (examining historical basis of Commerce Clause). The Constitution, and the Commerce Clause in particular, were the Founders' solution to the atomizing effect of state economic protectionism. *Id.* Accordingly, the Commerce Clause has always been understood to have a negative aspect that protects the access of all citizens to the domestic markets of every state.

Muir, 874 F.2d 926, 944-45 (3d Cir. 1989) (insurance companies may not affiliate with savings and loans).

[6] *E.g.*, *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 450-451 (6th Cir. 2009); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 23-24 (10th Cir. 2009); *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 397 (9th Cir. 1995); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992).

By narrowing the scope of the dormant Commerce Clause on the basis of tensions within this Court's jurisprudence, the Fourth Circuit's opinion presents a serious danger to the national common market. Thus, states in the Fourth Circuit, along with industry groups like the Maryland State Funeral Directors Association, can now favor local economic interests at the expense of nonresidents with impunity so long as barriers to interstate commerce only affect intangibles such as investment capital or the form of doing business.

Such economic protectionism will be nearly impossible to stop because legislatures and industry groups will adorn their activities with the necessary fig leaf of legitimacy. If the Fourth Circuit's holding stands, states will be able to disguise their economic protectionism as long as local interests are willing to tolerate a few inconveniences, like the inability to operate certain businesses as corporations, to enjoy the benefits of a restricted market. By restricting corporate ownership, states could shield local businesses from virtually every national-level enterprise. For instance, if local businesses suddenly decided they did not wish to compete with McDonald's, or Starbucks, or Best Buy, they need only persuade the legislature to enact for them the exact same corporate ownership ban that Maryland has for funeral homes. But allowing that would produce precisely the sort of "Balkanization" the Commerce Clause was intended to prevent.

II. THE DECISION BELOW EXACERBATED AN ACUTE AND GROWING SPLIT AMONG THE CIRCUITS CONCERNING THE "LOCAL BENEFITS" ELEMENT OF THE *PIKE* TEST.

A state law that burdens interstate commerce without overt discrimination is evaluated under the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That test asks whether the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id*. at 142. The circuits are sharply divided on a simple but fundamental question: must the local benefits be real, or will purely speculative benefits suffice?

The Court has never resolved that question, and the result has been a growing split, with four circuits on one side, four on the other, and three that appear to vacillate. The lower courts need guidance, and this Court will eventually have to provide it. Further delay will only lead to more inconsistent results.

A. How Much Deference A State's Assertion Of Local Benefits Should Receive Under *Pike* Remains Unclear.

The *Pike* test contains an inherent tension concerning the issue of local benefits. That tension has never been resolved, and, as documented below, it has caused a pronounced split among the circuits. This case presents an opportunity to reduce the tension – and bring greater consistency to circuit law

– by indicating whether courts should automatically defer to a state's assertion of a local benefit or require at least some proof that it exists.

Pike requires courts to determine whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. But there is an inherent tension between the terms "clearly excessive" and "putative." "Excessive" indicates comparison, and, particularly when coupled with "clearly," implies some actual, quantitative analysis. By contrast, the word "putative" means "supposed, believed, reputed." Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 721 (2d ed. 1995). It is a term of supposition, of conjecture. Thus, *Pike* itself sends mixed signals concerning the parties' respective burdens in challenging and defending commerce-burdening laws.

Two conflicting lines of authority have emerged. One line requires proof that the asserted local benefits be both genuine and "credibly advanced" by the commerce-burdening regulation. The other requires no evidence and will instead accept any "rational" assertion of benefit by the state. Naturally, those approaches yield different results, which means that a regulation with no demonstrable local benefits – like the one at issue here – will be upheld in some circuits, struck down in others, and a toss-up in the rest.

The divergent lines of authority may be traced to this Court's fractured decision in *Kassel v.*

Consolidated Freightways Corp., 450 U.S. 662 (1981). For purposes of this petition, *Kassel* is more important for the basic point on which the Justices agreed than on their various disagreements, involving how much deference the courts should give to a state's justifications for commerce-burdening regulations. The point on which all three opinions appear to have agreed was that the local benefits asserted in support of a commerce-burdening law should be real and not merely speculative. Simply reaffirming that principle – from which a number of circuits have strayed with no explicit warrant from this Court – would substantially clarify the *Pike* test and harmonize, at least to a degree, the decisional law in the circuits.

Kassel involved a dormant Commerce Clause challenge to an Iowa law that restricted the use of 65-foot double tractor trailers within the state. *Id*. at 665. Recognizing the special deference normally accorded to matters of traditionally local concern like highway safety, Justice Powell, in a plurality opinion joined by Justices Stevens, Blackmun, and White, nevertheless concluded that the truck-length restrictions "unconstitutionally burden interstate commerce." *Id*. at 671. In reaching that conclusion, the plurality considered the competing evidence offered by the parties and concluded that the asserted safety interest was "illusory," *id*., and that the state had imposed a substantial burden on interstate commerce "without any significant countervailing safety interest." *Id*. at 678.

Justice Brennan wrote a concurring opinion joined by Justice Marshall in which he argued that it was clear Iowa had adopted the truck-length restriction for the improper purpose of promoting the interests of Iowa residents at the expense of neighboring states. *Id*. at 687 (Brennan, J., concurring in judgment). Justice Brennan emphasized his view that the relevant inquiry is the legislature's *actual* purpose in passing the law, *id*. at 680-81, and when that purpose is apparent – as he believed it was in *Kassel* – then courts should not consider *post hoc* justifications. *Id*. at 682.

Justice Rehnquist, joined by the Chief Justice and Justice Stewart, dissented. Unlike the concurring Justices, he did not believe the restriction was motivated by an improper purpose, *id*. at 705, and, unlike the plurality, he concluded that "there was sufficient evidence presented at trial to support the legislative determination that [truck] length is related to safety. . . ." *Id*. at 696.

The point on which all three opinions appear to agree is that the "local benefits" asserted by the state in justifying its commerce-burdening restrictions must be real and must find at least some support in the evidentiary record. *Compare id*. at 671-74 (plurality opinion) (assessing evidentiary record); *with id*. at 686 (concurring opinion) (court will not second-guess legislature so long as safety justifications are not "illusory") *and id*. at 693-96 (dissenting opinion) (reviewing trial record and finding "sufficient evidence" to support safety justification). Indeed, even

writing in dissent, Justice Rehnquist emphasized three separate times that the relevant question is whether the local benefits from a challenged regulation are so "slight or problematical" as to undercut the state's asserted justifications. *Id*. at 692, 696, 698. The only way to make that determination, of course, is to consider the actual evidence, if any, of local benefits, as both the plurality and dissenting opinions did in *Kassel*.

This Court has not deviated from *Kassel*'s teaching that local benefits must be supported with evidence that is neither "illusory," *id*. at 671, 686, nor "pretext[ual]," *id*. at 692, nor "slight or problematical." *Id*. Nevertheless, a line of cases has developed in the circuits in which courts will accept purely speculative local benefits unsupported by any evidence – something this Court has never approved and that cannot be reconciled with *Kassel* or with any of the Court's subsequent *Pike* cases.

B. There Is Disarray Among And Within The Circuits As To Whether Local Benefits Must Be Proven Or Merely Asserted.

The circuits are profoundly divided over a simple question in applying the *Pike* test: whether states must demonstrate the existence of actual local benefits, or whether they may rely instead on raw assertions, as Maryland did in this case. The disarray is further accentuated by the existence of several intracircuit splits, including one in the Fourth Circuit

caused by the decision below. The question is one of profound importance because it is difficult to imagine any regulation for which some merely "putative" local benefit cannot at least be hypothesized. And if that is all that is required to immunize a commerce-burdening regulation – as it now appears to be in at least four circuits – then the *Pike* test will cease to be a test in any meaningful sense of the word. If that is the Court's intention, then perhaps it would be best to say so explicitly. If that is not the Court's intention, then lower courts should know that as well.

The fundamental point of disagreement among – and in some cases within – the circuits is whether evidence matters when it comes to the "putative local benefits" prong of the *Pike* test. The circuits may be grouped as follows:

I. No evidence required: 1st, 5th, 9th, and D.C.

II. Evidence required: 2d, 3d, 8th, and 10th

III. Intracircuit splits: 4th, 6th, and 7th

Those groupings are explained below and are represented graphically in the following chart on the next page.

ACTUAL EVIDENCE REQUIRED	NO EVIDENCE / "RATIONAL JUSTIFICATION"
2ND	
• *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602 (1996) • *Southold v. E. Hampton*, 477 F.3d 38 (2007)	
3RD	
	• *Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099 (1997) • *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780 (1997)
• *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201 (2002) • *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (2008)	
8TH	
• *Burlington N. R.R. Co. v. Neb.*, 802 F.2d 994 (1986) • *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (2000) • *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (2002)	
10TH	
• *ACLU v. Johnson*, 194 F.3d 1149 (1999) • *Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499 (1994)	
4TH	
• *Medigen of Ky., Inc. v. Pub. Serv. Comm'n of W.Va.*, 985 F.2d 164 (1993) • *Psinet, Inc. v. Chapman*, 362 F.3d 227 (2004) • *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (2005)	• *Brown v. Hovatter*, 561 F.3d 357 (2009)
6TH	
• *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (1986) • *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429 (2000)	• *Interstate Towing Ass'n Inc. v. City of Cincinnati*, 6 F.3d 1154 (1993) • *Reynolds v. Buchholzer*, 87 F.3d 827 (1997)
7TH	
• *Gov't Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267 (1992) • *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (2005) • *Wiesmueller v. Kosobucki*, 571 F.3d 699 (2009)	• *Amanda Acquisition Corp. v. Universal Food Corp.*, 877 F.2d 496 (1989) • *K-S Pharm., Inc. v. Am. Home Prod. Corp.*, 962 F.2d 728 (1992) • *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (1995) • *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551 (2007)
	1ST
	• *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (2005)
	5TH
• *Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (1980)	• *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (2001) • *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717 (2004) • *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (2007)
	9TH
	• *Spoklie v. Mont.*, 411 F.3d 1051 (2005)
	D.C.
	• *Electrolert Corp. v. Barry*, 737 F.2d 110 (1984)

1. No evidence required: 1st, 5th, 9th, and D.C.

The spirit of the no-evidence approach is aptly summarized in the First Circuit's observation that "under *Pike*, it is the *putative* local benefits that matter. It matters not whether these benefits actually come into being at the end of the day." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005). Similarly, while it once required evidence that the challenged restriction actually produce the asserted local benefits,[7] the Fifth Circuit has since adopted a more deferential standard akin to rational basis review. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007) (explaining that "we credit a putative local benefit 'so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes'") (quoting *Kassel*, 450 U.S. 662, 680-81 (Brennan, J., concurring)).[8]

---

[7] *See Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 75-76 (5th Cir. 1980) (explaining that under *Pike* "a court must examine the benefits that supposedly result from the local law, and not rely merely on the assertion of an accepted local interest" that is "illusory").

[8] *See also Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir. 2004) (same); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 503-04 (5th Cir. 2001) (citing *Kassel* concurrence for proposition that it is not for courts to decide whether challenged regulation "in fact" promotes the stated purpose and concluding that there was "evidence from which a reasonable legislator could believe" that the benefits would result).

The Ninth Circuit has also adopted what amounts to a rational basis standard in applying the *Pike* test, invoking *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) for the proposition "states 'are not required to convince the courts of the correctness of their judgments.'" *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005).[9] Finally, while the D.C. Circuit has had little occasion to consider the issue, it too has adopted the no-evidence approach. Indeed, in the one *Pike* case that research revealed, it appears that the plaintiffs challenging Washington, D.C.'s ban on the possession of radar detectors were not even permitted to introduce evidence to support their claim that the ban would be ineffective in reducing speeding. *Electrolert Corp. v. Barry*, 737 F.2d 110, 112 (D.C. Cir. 1984). The court upheld the law on the grounds that the government's safety rationale was not "'illusory'" or "'nonexistent,'" apparently in the absence of any evidence that the ban actually promoted that interest as a matter of fact. *Id*. at 113.

2. Evidence required: 2d, 3d, 8th, and 10th.

The Second Circuit explicitly requires actual evidence of local benefits in *Pike* cases. In fact, in a

[9] *Clover Leaf Creamery* involved both equal protection and dormant Commerce Clause claims. The quoted passage comes from the portion of the opinion dealing with equal protection under the rational basis standard. 449 U.S. at 464.

recent decision remanding a case to the district court, the panel specifically noted conflicting expert testimony in the proceedings below and pointed out that "[i]n applying the Pike balancing test, the District Court did not refer to the conflicts in these expert affidavits or engage in any meaningful examination of the claimed local benefits conferred by the [challenged] Ferry Law." *Southold v. E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007). The panel observed that on the basis of the summary judgment record before the district court, "a reasonable fact finder could conclude that the Ferry Law *does not actually produce any of its intended benefits* so as to justify the potential burden on interstate commerce." *Id*. (emphasis added).[10]

The Eighth Circuit also requires evidence of actual local benefits. For example, *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), involved a Missouri law requiring propane suppliers to maintain a minimum storage capacity of 18,000 gallons. *Id*. at 733. The state characterized the regulation as a public health and safety measure designed to protect people who rely on propane to heat their homes from shortages. *Id*. at 735. But the

[10] *See also Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams,* 84 F.3d 602, 612-13 (2nd Cir. 1996) (reversing grant of summary judgment upholding New York law requiring certain disclosures about automobile bumpers and noting that "the validity of the legislative assumption . . . is debatable" and that conflicting evidence "reveal[s] substantial questions as to whether in fact significant benefits are created" by the statute).

Eighth Circuit rejected that argument on the grounds that "the local benefit *actually derived* from the statute is minimal or nonexistent." *Id.* at 735 (emphasis added). That conclusion was based in part on the fact that the state "presented no evidence" that existing propane storage capacities were insufficient. *Id*.[11]

The Tenth Circuit requires evidence of actual local benefits too. Thus, in upholding the preliminary injunction of a New Mexico law regulating speech on the Internet in *ACLU v. Johnson*, 194 F.3d 1149, 1161-62 (10th Cir. 1999), the court acknowledged New Mexico's compelling interest in protecting minors from sexually explicit materials, but found that the "local benefits" of the restriction were "not huge," that enforcement of the law "is beset with practical difficulties," and that the "actual benefit" of the law would be extremely small.[12]

---

[11] *See also U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1070-71 (8th Cir. 2000) (striking down local waste ordinance where the alleged benefits of the statute were "sheer speculation"); *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986) (observing that it would not be difficult to imagine a nondiscriminatory, commerce-burdening regulation "that advances some legitimate safety objective only slightly, yet imposes massive burdens on interstate commerce").

[12] *See also Blue Circle Cement, Inc. v. Bd. of County Comm'rs of County of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (remanding case involving challenge to hazardous waste ordinance and noting the absence of evidence in the record concerning whether the ordinance addressed any "significant health or safety hazard," as well as no evidence whether the

(Continued on following page)

While the Third Circuit was initially more deferential,[13] its more recent rulings place it within the pro-evidence camp as well. Thus, in *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008), the Third Circuit mirrored the approach of the Second Circuit in *Southold*, *supra*, remanding when the factual record was insufficient. As the panel explained, "the record is incomplete regarding the burden on interstate commerce and, *more importantly, the putative local benefits*." *Id*. at 252 (emphasis added).[14]

Finally, the Eleventh Circuit does not appear to have had a *Pike* case in which the outcome turned on the existence or nonexistence of local benefits. But the court did strike down a county landfill restriction based on its conclusion that the county could have achieved its public welfare objectives "'as well with a lesser impact on interstate activities.'" *Diamond*

---

restriction was "reasonably related" to any such hazards, and no evidence whether the county's interest could be advanced as well with a lesser impact on commerce).

[13] *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 788-89 (3d Cir. 1999) (upholding New Jersey securities law on the basis of admittedly speculative future harms); *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1109-10 (3d Cir. 1997) (asserted benefits "rationally related" to challenged restriction).

[14] *See also Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (explaining that the government defendants could not "simply rely on the Milk Law's stated purpose. They must provide evidence that the wholesale price floors have the benefits contemplated by the General Assembly.").

Waste, Inc. v. Monroe County, 939 F.2d 941, 945 (11th Cir. 1991) (quoting *Pike*, 397 U.S. at 142). That approach seems more in keeping with the ethic of circuits that require some evidence of actual local benefits.

3. Intracircuit splits: 4th, 6th, and 7th.

The Fourth, Sixth, and Seventh Circuits all have conflicting decisions from which it is difficult to extract a consistent principle or trend.

While the Seventh Circuit's tone in applying *Pike* is consistently deferential,[15] the decisions themselves are more nuanced. For example, Judge Posner recently wrote an opinion reinstating a dormant Commerce Clause challenge to a Wisconsin law that allows graduates of Wisconsin law schools – but not

---

[15] *See, e.g.*, *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 555 (7th Cir. 2007) (expressing doubt whether *Pike* balancing is available to plaintiffs without showing of at least "mild" discrimination against interstate commerce); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (citing *Amanda Acquisition*, *infra*, for proposition that "the dormant commerce clause does not replace the rational-basis inquiry with a broader, all-weather, be-reasonable vision of the Constitution") (internal quotations and citations omitted); *K-S Pharm., Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 731 (7th Cir. 1992) (arguing that "dormant commerce clause does not call for proof of a law's benefits" when the subject of the challenged law is trade); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989) (arguing that *Pike* test may actually be concerned only with discrimination and not "baleful effects").

schools in other states – to be admitted to practice law in Wisconsin without passing the state bar. *Wiesmueller v. Kosubucki*, 571 F.3d 699, 701 (7th Cir. 2009). Finding no overt discrimination, the panel sought to apply *Pike* balancing but found that it could not because of the "evidentiary vacuum" created by the early dismissal of the case. *Id*. at 704. The panel reasoned that Wisconsin's diploma privilege would only make sense if Wisconsin law were in fact a greater part of the curriculum of the two accredited Wisconsin law schools (Marquette and Madison) than it is of various out-of-state law schools like Harvard or Yale. *Id*. Recognizing that the law's actual effects on commerce might well be small, the panel noted that not much would be required to justify it, but explained that "[o]ur concern is that there may be nothing at all to justify it." *Id*. at 705.

Thus, in *Wiesmueller* at least, evidence regarding the actual existence or non-existence of local benefits mattered. Otherwise, the panel could simply have *assumed* that Wisconsin law schools are more likely than others to teach Wisconsin law (or, more to the point, the panel could have assumed that the *legislature* had made such an assumption). That certainly seems to be what the First, Fifth, Ninth, and D.C. Circuits would have done, and yet the Seventh did not: it remanded the case to the district court because "the plaintiffs were denied an opportunity to try to prove their case" – presumably with evidence that the challenged law did not in fact

produce the putative local benefits asserted by the state. *Id*. at 707.[16]

The Sixth Circuit's application of *Pike* is similarly unsettled,[17] and the Fourth Circuit, though previously consistent in requiring at least some evidence of local benefits,[18] now has an intracircuit split as a result of

---

[16] *See also Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 663 (7th Cir. 1995) (finding Wisconsin recycling statute impermissibly discriminatory but also noting that the law could not pass muster under *Pike* because the state had not "demonstrated" the need to pursue its environmental policies in the manner that it did); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1286 (7th Cir. 1992) (rejecting discriminatory Indiana waste disposal statutes and noting that they also flunked the *Pike* test because the statutes "will further their stated purposes only marginally").

[17] *Compare McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000) (striking down "protectionist" Ohio vehicle manufacturer licensing law and finding that it also failed *Pike* balancing due to "lack of any significant local benefit") *and ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 237 (6th Cir. 1986) (striking down Michigan utility law because "[a]n analysis of the alleged benefits reveals that they do not further important state interests") *with Reynolds v. Buchholzer*, 87 F.3d 827, 831 & n.4 (6th Cir. 1997) (refusing to consider plaintiffs' arguments that original purpose of fishing restrictions was "no longer viable" and observing that "[t]his question is better submitted to the legislature") *and Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154 (6th Cir. 1993) (upholding Cincinnati towing ordinance on the basis of an assumption that asserted benefits would arise, but without actual evidence).

[18] *See Psinet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (rejecting Virginia law prohibiting dissemination of material harmful to minors over the Internet where asserted local benefits, though compelling, "have not been proven"); *Medigen of*

(Continued on following page)

the decision below upholding a law, apparently for the first time in the Fourth Circuit, for which the asserted local benefits were "no more than 'entirely speculative.'" App. 65-66 (district court quoting *Medigen*, 985 F.2d at 167).

C. Confirming That States Must Provide Some Evidence Of Actual Local Benefits Would Restore A Significant Measure Of Consistency To The Lower Courts' Application Of *Pike*.

This Court has never squarely addressed whether the "putative local benefits" element of the *Pike* test requires actual evidence or may instead be satisfied with "rational" speculation. Although the Court reached an implicit consensus on that point in *Kassel*, the absence of more specific guidance has engendered a profound split among and within the circuits.

Such differing standards threaten the unity of the nation's common market, which it is the purpose of the dormant Commerce Clause to protect. The Court will eventually need to resolve that split, and this case is a good place to start.

Ky., Inc. v. Pub. Serv. Comm'n of W. Va., 985 F.2d 164, 167 (4th Cir. 1993) (striking down medical waste hauling restriction where asserted local benefits were "entirely speculative").

CONCLUSION

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

Respectfully submitted,

WILLIAM H. MELLOR
(DC Bar No. 462072)
CLARK M. NEILY, III
(DC Bar No. 475926)
JEFFREY T. ROWES
(NY Bar No. 4211991)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320

TIMOTHY F. MALONEY
(MD Bar No. 03381)
JOSEPH, GREENWALD, & LAAKE
6404 Ivy Lane, Suite 400
Greenbelt, Maryland 20770
(240) 553-1206

Counsel for Petitioners

August 21, 2009