

NO. 13-17358

In the United States Court of Appeals
for the Ninth Circuit

**KEVIN MARILLEY; SALVATORE PAPETTI;
SAVIOR PAPETTI**, on behalf of themselves and similarly situated,
Plaintiffs-Appellees,

v.

CHARLTON H. BONHAM, in his official capacity as
Director of the California Department of Fish and Game,
Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of California, Oakland Division
No. 4:11-cv-02418-DMR
The Honorable Donna M. Ryu, Judge

PETITION FOR REHEARING/REHEARING EN BANC

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INTRODUCTION

In a divided decision under the Privileges and Immunities Clause of Article IV of the United States Constitution, this Court invalidated four long-standing California statutes that set higher commercial fishing fees for nonresidents than for residents. This decision may have implications well beyond California because virtually all States with commercial fisheries charge higher fees to nonresidents. And Congress has declared it to be “in the public interest” that they continue to do so. 119 Stat. 289-90 (2005) (Pub. Law 109-13, May 11, 2005).

California manages its commercial fisheries to assure that they continue to provide “economic, recreational, ecological, cultural, and social benefits” to the people of the State. Cal. Fish & Game Code § 7055(a). The primary question presented here is whether California may recover a reasonable share of its expenditures in furtherance of this objective from the nonresidents who profit from those expenditures.

The Supreme Court has indicated that States may “charge non-residents a differential” commercial fishing fee, where that fee “merely compensate[s] the State” for its expenditures. *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948). California spends more than \$14 million each year, from its own funds, to manage its commercial fisheries. The nonresident differential fees

represented less than 3 percent of that amount (approximately \$400,000), although nonresidents comprise more than 10 percent of licensed commercial fishers. This is precisely the sort of compensation contemplated in *Toomer*.

Yet, the majority concluded that California's differentials are unconstitutional, interpreting *Toomer* to require "substantial equality" for residents and nonresidents. Opinion at 12-13. This rule essentially precludes California from collecting any nonresident differentials and, thus, from obtaining any compensation for expenditures made on behalf of its citizens and from its own funds. *Id.* at 18 (dissent). This interpretation conflicts irreconcilably with *Toomer*.

Indeed, the Supreme Court has never applied a "substantial equality" requirement in a case, like this one, that involves nonresidents' opportunities to pursue a common calling. In such cases, as in *Toomer*, the Court has consistently indicated that inequality may be justified. It has also specifically directed courts to consider the expenditure of a State's own funds a "crucial factor" in assessing the State's justification. *United Bldg. & Const. Trades Council of Camden Cnty v. City of Camden*, 465 U.S. 208, 221, 223 (1984).

The majority's decision here conflicts with directly applicable Supreme Court precedent. Rehearing or rehearing en banc is warranted to resolve these conflicts and their significant implications for state resource management decisions.

FACTUAL BACKGROUND

Having found that its “fisheries, and the resources upon which they depend, are important to the people of the state,” California takes numerous steps to protect its “marine living resources for the benefit of all citizens of the state.” Cal. Fish & Game Code §§ 7055(a), 7050(b).

California's Department of Fish and Wildlife, alone, spends approximately \$20 million each year managing the State's commercial fisheries.¹ The State collects less than \$6 million each year in commercial fishing revenues, including all license fees. ER 4:650 at 39, 3:318 (Table 2). Thus, California spends more than \$14 million per year of its own funds on its commercial fisheries. Opinion at 12.

Nonresidents constitute more than 10 percent of commercial fishers in California. ER 4:646 at ¶¶ 13-15. This percentage has increased with the differential fees in effect. *Id.*

¹ See ER 4:576-77 at ¶¶ 21-23; 4:650-52 at ¶¶ 40-48; 4:706-09.

LEGAL BACKGROUND

The Privileges and Immunities Clause protects nonresidents from unreasonable discrimination with respect to fundamental privileges.

McBurney v. Young, 133 S. Ct. 1709, 1714 (2013). Among those are “the opportunity to pursue a common calling, the ability to own and transfer property,” *id.* at 1715, and the right to equal property and income taxes, *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998). The privilege at issue here is the opportunity to pursue the common calling of commercial fishing. Opinion at 7.

Courts analyze Privileges and Immunities Clause claims in two steps. First, they ask whether “the challenged restriction deprives nonresidents of a protected privilege.” *Virginia v. Friedman*, 487 U.S. 59, 65 (1988). Second, courts will invalidate the challenged restriction only if it “is not closely related to the advancement of a substantial state interest.” *Id.*

Here, the panel held the first step was satisfied because “it is common sense that commercial fishing license fees directly affect commercial fishing.” Opinion at 10.

At the second step, the panel split. The majority invalidated California’s fees because the differentials were not “substantially equal to

[the amount] an individual resident contributes,” through his or her taxes, toward fishery management expenditures. Opinion at 13; *see also id.* at 12.

As the dissent noted, the majority adopted the Alaska Supreme Court’s “per resident” or “per capita” interpretation of *Toomer*, which differs from the New Jersey Supreme Court’s “fair share” interpretation. Opinion at 15-18 (dissent); *see also Carlson v. State*, 798 P.2d 1269 (Alaska 1990); *Salorio v. Glaser*, 414 A.2d 943 (N.J. 1980). The dissent would have adopted the latter interpretation under which States may recover from nonresidents a fair share of the state-fund expenditures from which the nonresidents benefit.

The majority’s second-step analysis is the primary focus of this rehearing petition. But the panel’s first-step analysis also warrants rehearing, as discussed in the final section below.

REASONS FOR GRANTING THE PETITION

I. THE MAJORITY’S DECISION CONFLICTS WITH THE SUPREME COURT’S *TOOMER* RULE FOR COMMERCIAL FISHING FEES

A. The *Toomer* Rule Authorizes Differential Fees to Compensate the State While Precluding Over-Compensation and the Exclusion of Nonresidents

In 1948, in its first commercial fishing fee decision under the Privileges and Immunities Clause, the Supreme Court considered a license fee that was 100 times higher for nonresidents. The first-step inquiry was satisfied

because the “virtually exclusionary” fee “plainly and frankly discriminate[d] against non-residents.” *Toomer*, 334 U.S. at 396-97. At the second step, the Court expressly recognized that certain State interests can justify differential fees: “The State is not without power ... to charge non-residents a differential which would merely compensate the State” for “added enforcement burden[s]” imposed by nonresidents or “any conservation expenditures from taxes which only residents pay.” *Id.* at 398-99.

However, “[n]othing in the record indicate[d] ... that the cost of enforcing the laws against [nonresidents was] appreciably greater, or that any substantial amount of the State’s general funds [was] devoted to shrimp conservation.” *Id.* at 398. In any event, such expenditures “would not necessarily” have justified the “total exclusion” of nonresidents from the fishery. *Id.* Accordingly, the Court invalidated the fee.

The Court has applied its *Toomer* rule in only one other case. There, the Court rejected the argument that a differential was justified by the “higher cost of enforcing the license law against nonresident fishermen” because the amount collected from nonresidents “may easily have exceeded” the State’s *entire* enforcement budget. *Mullaney v. Anderson*, 342 U.S. 415, 417-18 (1952). In other words, the differential exceeded the mere compensation allowed by the *Toomer* rule.

Toomer and *Mullaney* establish that a State may justify differential fees, where the fees are below exclusionary levels, if the State can show sufficient qualifying expenditures such that the differentials collected amount to mere compensation. In contrast, as discussed below, the majority's rule precludes differentials even where the fees have no exclusionary effect and where state-fund expenditures vastly exceed the differentials collected.

B. In Conflict with the *Toomer* Rule, the Majority's Rule Prohibits Differential Fees and State Compensation, Even Where Nonresidents Are Not Excluded

Although the *Toomer* rule expressly authorizes States "to charge non-residents a differential," the majority read that rule as requiring "substantial equality." *Toomer*, 334 U.S. at 399; Opinion at 13. Under this interpretation, the only permissible differential fees are those that approximate the contribution each resident makes, through general taxes, to the State's fishery management expenditures. Opinion at 12-13. This per-resident-contribution rule conflicts directly with *Toomer*.

As the dissent correctly noted, under the majority's rule, California could collect less than \$1 from each nonresident fisher because California's \$14 million in state-fund expenditures would be divided by its population (39 million) or its taxpayer base (15 million) to calculate the per-resident

contribution that defines the permissible differential. Opinion at 17-18 (dissent). Thus, the majority's rule effectively precludes differentials in, and compensation for, California. Indeed, even if California had shown \$150 million in qualifying expenditures, the majority's rule would limit the differential to, at most, \$10 per nonresident (\$150 million divided by 15 million resident taxpayers).

Rather than permitting compensation for the State, the majority attempts to equalize the relative contributions of individual residents and nonresidents. Opinion at 13. But the *Toomer* Court never even alluded to this comparison of individual contributions, let alone to the per-resident calculation the majority interprets *Toomer* to require.

The relevant question in *Toomer* was whether “the State’s conservation program for shrimp requires expenditure of funds beyond those collected in license fees,” or, put another way, whether “any substantial amount of the State’s general funds is devoted to shrimp conservation.” *Toomer*, 334 U.S. at 398, 399. The focus is on the amount of state expenditures, not individual contributions, because the rule prohibits *over*-compensation for the State. *See Mullaney*, 342 U.S. at 417-18.

Notably, the *Toomer* rule also protects against the “total exclusion” of nonresidents, even where a State could show that the nonresident

differentials amount to mere compensation: “[A]ssuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion.” *Toomer*, 334 U.S. at 398. This additional limitation on the differential amount confirms that the *Toomer* rule is not a per-resident contribution rule. Fees that place residents and nonresidents “upon the same footing,” as the majority requires, could not create the exclusion about which the *Toomer* Court was concerned. Contrary to the majority’s interpretation, the *Toomer* rule is not an attempt to level the playing field.

Indeed, given the *Toomer* Court’s first-step finding that the differential was so high as to be “virtually exclusionary,” it seems highly unlikely that the Court’s second-step inquiry asked whether such a differential produced “substantial equality.” *See Toomer*, 334 U.S. at 396-97. In fact, the Court was considering a \$2,475 differential in 1948 when median incomes ranged from \$425 to \$5,267.² Put simply, the majority’s per-resident-contribution rule could never conceivably have been satisfied in *Toomer*. The *Toomer*

² U.S. Dept. of Commerce, Bureau of the Census, *Consumer Income* (1970) at p. 82 (Table A-3), available at <http://www2.census.gov/prod2/popscan/p60-069.pdf>, last visited October 24, 2015.

Court’s failure to note this, even in passing, underscores that the Court did not have a per-resident-contribution rule in mind.

In sum, neither the majority’s rule nor its analysis can be reconciled with *Toomer*.

C. The Majority’s Reading of the Phrase “Taxes Which Only Residents Pay” Conflicts with *Toomer* and Other Supreme Court Precedent

The majority rests its per-resident-contribution rule on the use of the phrase “taxes which only residents pay” to describe the State’s “conservation expenditures.” Opinion at 12; *Toomer*, 334 U.S. at 399. But that phrase is not a hidden instruction to divide conservation expenditures by the number of residents or taxpayers in the State. Rather, that phrase simply describes the qualifying expenditures, as do other, similar phrases in *Toomer*, including “funds beyond those collected in license fees—funds to which residents and not non-residents contribute” and “the State’s general funds.” *Toomer*, 334 U.S. at 398.

These are all shorthand ways of indicating the same thing—that the Court expected South Carolina to show expenditures of its own, discretionary funds—“funds beyond those collected in license fees” or “the State’s general funds”—and that the Court anticipated that such funds would come primarily from residents. *See id.* at 398-99.

Notably, the *Toomer* Court was well aware that South Carolina’s “general funds” would contain some taxes from nonresidents, including taxes on income “from operations in South Carolina waters.” *Id.* at 392. In fact, the Court had expressly provided, 28 years earlier, that States could tax nonresident income earned within their borders. *See Shaffer v. Carter*, 252 U.S. 37, 52-53 (1920). And States frequently did so as early as 1911. *Maryland v. Wynne*, 135 S. Ct. 1787, 1816 (2015) (Ginsburg, J., dissenting).

In referring to “taxes which only residents pay,” the *Toomer* Court was simply acknowledging, albeit imprecisely, that “[s]tate taxes are ordinarily paid by in-state businesses and consumers.” *Wynne*, 135 S. Ct. at 1798 (modification in original). The Court has repeatedly used the phrase “those who fund the state treasury” as an equally imprecise reference to residents but not nonresidents. *McBurney*, 133 S. Ct. at 1720 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)); *see also id.* at 1716 (affirming residency requirement in part because “taxpayers foot the bill”). The Court did not mean that residents are the *only* people “who fund the state treasury,” any more than the *Toomer* Court meant that *only* South Carolina residents contributed to the State’s general funds.

These shorthand phrases simply recognize that residents pay the lion’s share of state taxes. Thus, the phrase “taxes which only residents pay” is

neither a hidden command to calculate a per-resident contribution nor an indication that the State must separate out the small fraction of taxes paid by nonresidents (including the perhaps inseparable amounts paid in sales taxes) to apply the *Toomer* rule. Rather, this shorthand phrase refers to expenditures from “funds beyond those collected in license fees,” funds the State *chooses* to spend on its commercial fisheries rather than on other programs, including programs that might benefit residents only. *See Toomer*, 334 U.S. at 398.

This understanding is consistent with the Court’s guidance that expenditures of the State’s “own funds or funds it administers [are] perhaps the crucial factor” at the Clause’s second step. *Camden*, 465 U.S. at 221. That guidance does not distinguish between funds contributed by residents and other funds. Rather, that guidance recognizes that state-fund expenditures reflect the State’s exercise of its sovereign discretion, on behalf of its citizens, to fund one program (e.g. commercial fishing) over another. Accordingly, when that sovereign decision provides a commercial benefit to nonresidents, the State may obtain fair compensation from those nonresidents. The majority’s decision precludes that compensation, in conflict with *Toomer*, and rehearing is warranted.

II. THE MAJORITY’S DECISION CONFLICTS WITH OTHER SUPREME COURT COMMON CALLING DECISIONS AND WITH A CORE PRINCIPLE OF FEDERALISM

A. Contrary to the Majority’s Holding, Inequality May Be Justified at Step Two in Common Calling Cases

The majority’s second-step analysis also conflicts with the express purpose and function of the second step as described and applied in cases involving common calling opportunities. The second step exists to allow States to justify inequality by showing “a ‘substantial reason’ for the difference in treatment.” *Camden*, 465 U.S. at 222. The majority acknowledged this, Opinion at 11, but nonetheless held that no differential treatment is, in fact, allowed because the Clause requires “substantial equality” even at the second step, *id.* at 12. *See also id.* at 13. Thus, the majority rejected Defendant’s interpretation of the *Toomer* rule because it “allows for inequality.” *Id.* at 12.

However, by the time courts reach the second step in a common calling case, they have already found that the challenged restriction deprives nonresidents of the privilege to pursue common calling opportunities “on terms of substantial equality” with residents. *Toomer*, 334 U.S. at 396. For example, this Court held that the first step was satisfied where “the ability of [nonresident agents] to ply their trade ... *on substantially equal terms* with

resident agents” was compromised. *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008) (emphasis added). The majority’s second-step question—whether the State’s treatment of nonresidents is substantially equal—has already been asked and answered at the first step. *See, e.g., Toomer*, 334 U.S. at 396-97.

Camden illustrates this well. That case involved an ordinance reserving 40 percent of public construction jobs for residents. *Camden*, 465 U.S. at 210. At the first step, the Court concluded that the ordinance “bias[ed] the employment decisions of private contractors and subcontractors against out-of-state residents.” *Id.* at 221-22. At the second step, the Court considered Camden’s justification for the ordinance—that nonresidents working in Camden “live off” Camden without “living in” Camden” and that the “residency requirement [was] carefully tailored to alleviate this evil without unreasonably harming nonresidents, who still have access to 60% of the available positions.” *Id.* at 222. While the Court could not complete the second step analysis in the absence of a factual record, its remand instructions recognized the legitimacy of Camden’s interest in securing benefits for its residents from its own public expenditures. *Id.* at 223.

If, as the majority held here, States are required to provide common calling opportunities on terms of “substantial equality,” no remand would

have been necessary in *Camden*. The Court had already found the absence of “substantial equality” at step one.

The *Camden* Court’s discussion of *Hicklin v. Orbeck*, 437 U.S. 518 (1978) further underscores the point. In that case, Alaska had argued that its “resident hiring preference for all employment related to the development of the State’s oil and gas resources” was justified by the State’s ownership of those resources. *Camden*, 465 U.S. at 220-21. The Court rejected that justification not because it allowed for inequality, but because the hiring preference swept too wide, “attempt[ing] to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska’s decision to develop its oil and gas resources to bias their employment practices in favor of the State’s residents.” *Id.* at 223.

Notably, the degree of differential treatment here is far less extreme than in *Camden*, where nonresidents were barred from 40 percent of the relevant jobs. Thus, the majority’s rejection of the justification that nonresident fishers “live off” California’s investment in its fisheries without “living in” California conflicts starkly with the Court’s express recognition of that justification as legitimate. *See id.* at 222-23; *see also Salorio*, 414 A.2d at 954 (holding Clause “does not entitle nonresident[s] to a ‘free ride’”).

That recognition, like the *Toomer* rule, reflects a core principle underlying our system of federalism—that “the essential and patently unobjectionable purpose of state government [is] to serve the citizens of the State.” *See McBurney*, 133 S. Ct. at 1720 (quoting *Reeves*, 447 U.S. at 442). Thus, States may “limit[] benefits generated by ... state program[s] to those ... whom the State was created to serve.” *Id.* Indeed, States fund all kinds of programs that are limited to residents only, even though nonresidents pay some small fraction of total taxes collected. *See Wynne*, 135 S. Ct. at 1814 (Ginsburg, J., dissenting). The majority’s rejection of the compensation authorized by *Toomer* conflicts with this core principle.

B. Application of a “Substantial Equality” Rule from Tax Cases Here Conflicts with Supreme Court Precedent

As discussed above, the Supreme Court has never required “substantial equality” at step two in a common calling case. The Court has, however, applied “a rule of substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers” in a line of cases involving a different privilege—the right to equal taxation of income and property. *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975). Under this rule, income or property taxes that appear to be unequal can be upheld if, in light

of the full taxation scheme, the taxes are substantially equal. *Id.* at 664.

That rule is not the *Toomer* rule, and it is inapplicable here.

Notably, this substantial equality rule for taxes pre-dates *Toomer*, yet went unmentioned by the *Toomer* Court. In 1902, the Court upheld a tax on stock values that “appear[ed] to be a wrongful discrimination” against nonresidents because, upon review of the full taxation scheme, the State had “secured a reasonably, fair distribution of burdens” between residents and nonresidents. *Travelers’ Ins. Co. v. State*, 185 U.S. 364, 365, 371 (1902). And, in 1920, the Court invalidated an income tax exemption available only to residents because it was not sufficiently “counterbalanced” by other tax provisions. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 81 (1920).

The *Toomer* Court never mentioned *Travelers* and cited *Travis* only for basic principles of the Clause (not for a substantial equality analysis). *Toomer*, 334 U.S. at 395-97. And when the Court announced the *Toomer* rule authorizing higher license fees for nonresidents, it cited no cases at all. *Id.* at 399. The *Toomer* rule is not a “substantial equality” rule.

Further, the Court has left no doubt that its “rule of substantial equality” is applicable specifically to income and property taxes, calling it “a rule of substantial equality of treatment for resident and nonresident taxpayers.” *Lunding*, 522 U.S. at 298 (internal quotation omitted, emphasis

added); *see also Austin*, 420 U.S. at 665. The rule was developed and applied in cases challenging “nonresident *income tax provisions*.” *Lunding*, 522 U.S. at 299 (emphasis added). The Court has never suggested what the majority held here—that the *Toomer* rule and the tax rule of substantial equality are one and the same.

In fact, the Court analyzes claims involving each distinct privilege in accordance with precedent concerning that privilege. *See McBurney*, 133 S. Ct. at 1715-18 (analyzing three asserted privileges in three separate sections relying on privilege-specific cases); *Lunding*, 522 U.S. at 299. This case, like *Toomer*, is a common calling case, involving limitations “on a State’s power to bias employment opportunities in favor of its own residents.” *Hicklin*, 437 U.S. at 525 (describing *Toomer*); *see also McBurney*, 133 S. Ct. at 1715 (describing *Toomer*, *Hicklin*, and *Camden* as involving “the privilege of pursuing a common calling”); *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371, 387 (1978) (referring to *Toomer* and *Mullaney* as “commercial-livelihood case[s]”). Substantial equality is not required at step two in such cases.

Put simply, the Court does not conflate limitations on the State’s power to tax with limitations on “the State’s power to bias employment opportunities in favor of its own residents” or on the State’s power to spend.

Hicklin, 437 U.S. at 525; *Camden*, 465 U.S. at 221. Rather, the Court recognizes that each protected privilege implicates different interests for both the State and the nonresidents and analyzes each accordingly.

In sum, the majority's second-step analysis conflicts with *Toomer* and all of the Court's common calling cases and, in so doing, infringes on state sovereignty. According to the Court, an ordinance reserving 40 percent of common calling opportunities for residents could be justified, largely by the fact that the opportunities rely on government expenditures; and a resident hiring preference for positions directly involved in the exploitation of a State's natural resources could be justified by the State's ownership of those resources. *Camden*, 465 U.S. at 221-23. California's differential fees are justified, then, because they reserve *no* commercial fishing opportunities exclusively for residents and affect only those common calling opportunities directly resulting from commercialization of the State's natural resources and directly benefiting from state expenditures. "Substantial equality" is no more required here than it was in *Camden*, *Hicklin* or *Toomer*. The majority's decision to the contrary has significant implications for California and, potentially, for States across the country. Defendant respectfully requests rehearing to address these serious issues.

III. THE PANEL’S FIRST-STEP ANALYSIS ALSO CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND THIS COURT

In common calling cases, courts have held that the first step is satisfied where nonresidents are excluded, in whole or in part, from common calling opportunities. *E.g.*, *Toomer*, 334 U.S. at 397 (“virtually exclusionary” fees); *Camden*, 465 U.S. at 221 (ordinance reserving 40 percent of positions for residents). Yet, without citing a single case where nonresidents may freely engage in their common calling, as they may here, the panel held that “add[ing] an exclusion requirement to the first [step]” would “upset decades of precedent.” Opinion at 8. It is true, as the panel noted, that *Friedman* indicates that “total exclusion” is not required at the first step. *Id.* But that does not mean the first step can be satisfied absent *any* exclusion. Indeed, the presence of the word “total” conveys the opposite meaning.

Notably, the law invalidated in *Friedman* excluded some nonresidents by requiring them to pass the bar exam (an exam some would fail). *Friedman*, 487 U.S. at 61. Similarly, this Court has found the first step satisfied where nonresidents are excluded from one key component of their common calling. *Molasky-Arman*, 522 F.3d at 934. These partial exclusion cases do not establish that the common calling privilege is infringed absent any exclusion.

Indeed, this Court has required a first-step showing that nonresidents “are prevented or discouraged” from pursuing a common calling, and the Supreme Court recently confirmed a similar requirement. *Int'l Org. of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843, 846 (9th Cir. 1987); *McBurney*, 133 S. Ct. at 1715. The panel rejected this first-step requirement by concluding, erroneously, that *McBurney* is a second-step case. Opinion at 9. *McBurney* held that the law did not “abridge [plaintiff’s] ability to engage in a common calling” and faulted the plaintiff, not the State, for failing to provide the requisite proof. *See McBurney*, 133 S. Ct. at 1715. Those are first-step holdings.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests rehearing or rehearing en banc.

Dated: November 16, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 13-17358**

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc is:

X Proportionately spaced, has a typeface of 14 points or more and contains 4,195 words (petitions and answers must not exceed 4,200 words).

November 16, 2015

Dated

/s/ M. Elaine Meckenstock

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Deputy Attorney General

No. 13-17358

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KEVIN MARILLEY, *et al.*,

Plaintiffs-Appellees,

v.

CHARLTON BONHAM,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Hon. Magistrate Judge Donna M. Ryu
Case No. 4:11-cv-02418-DMR

**PLAINTIFFS-APPELLEES' RESPONSE TO PETITION FOR PANEL
REHEARING/REHEARING EN BANC**

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INTRODUCTION

This case involved four commercial fishing licenses for which California charged nonresidents two to three times more than it charged residents. The panel, like the district court before it, determined that these fees violate the Privileges and Immunities Clause of the Constitution. They discriminate against nonresidents in the pursuit of a common calling, and California failed to show the discrimination closely relates to achievement of a substantial state interest.

Defendant describes the panel decision as divided, however no member of the panel endorsed Defendant's view of the law. Defendant argued that because California invests more in the fisheries than it collects from license fees, it may seek reimbursement by charging nonresidents more. Further, it can charge nonresidents *any* amount more, so long as it does not drive them from the market or make a profit (collect more than its total investment in the fishery). Finally, it need not even show that the "investment" the nonresident fees reimburse came from residents to begin with—*i.e.*, California can double-charge nonresidents, making them repay the state for expenditures that they already contributed to through other fees.

The panel rejected these arguments: although California has an interest in ensuring nonresidents do not unfairly benefit from residents' tax expenditures, here Defendant failed to show a relationship between that objective and the thousands

of dollars in additional fees charged. Defendant fails to raise grounds for rehearing:

- Every court to consider the issue has held that commercial fishing falls within the purview of the Privileges and Immunities Clause. The panel unanimously held the same here. Slip Op. at 10, 14. No decision requires Plaintiffs to prove the nonresident license fees prevented them from fishing, as Defendant argues. Pet. at 20-21.
- The panel decision does not conflict with *Toomer v. Witsell*, 334 U.S. 385 (1948). See Pet. at 5-12. Defendant selectively edits a quotation from *Toomer* to create the supposed “*Toomer Rule*”—that a state may charge any differential that merely compensates itself for expenditures. See Pet. at 1. Instead, *Toomer* holds that a state may “charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.” *Id.* at 399. The panel correctly held that Defendant did not make any showing under this standard. Slip. Op. at 13.
- Defendant misdescribes the panel decision as holding that the Privileges and Immunities Clause’s guarantee of substantial equality between residents and nonresidents means a state may never charge

differential fees. Pet. at 13. It does not. It holds only that Defendant failed to show the fee differentials challenged in this case closely relate to achievement of a substantial state interest. Slip. Op. at 13.

The panel considered Defendant's arguments and the authorities invoked in the rehearing petition: Defendant's petition merely reargues the appeal. Cf. Fed. R. App. P. 40. The panel's decision also faithfully follows Supreme Court and Ninth Circuit precedent, creates no inter-circuit split, and does not address a question of exceptional importance. See Fed. R. App. P. 35. Accordingly, there are no grounds for either panel rehearing or rehearing en banc, and the Court should deny the petition.

ARGUMENT

“[T]he Privileges and Immunities Clause bars ‘discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.’” *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (quoting *Toomer*, 334 U.S. at 396). Courts evaluate the permissibility of residency classifications under the Privileges and Immunities Clause according to a two-step inquiry:

- (1) The plaintiff must show the activity affected by the discrimination implicates a privilege or immunity protected by the Clause; and

(2) Once the plaintiff makes such a showing, the State must prove that discriminating against nonresidents in the challenged way is closely related to the achievement of a substantial state interest.

See Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 64-65 (1988); *see also Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 934 (9th Cir. 2008).

Defendant seeks rehearing of the panel's determinations at both steps of this inquiry.

I. THE PANEL'S FIRST-STEP ANALYSIS DOES NOT CONFLICT WITH PRECEDENT OR WARRANT REHEARING.

The panel unanimously held that the activity affected by the discrimination, commercial fishing, implicates a privilege protected by the Clause. Slip Op. at 10, 14. Every other court that has considered the issue has held similarly. *See, e.g., Mullaney v. Anderson*, 342 U.S. 415, 417 (1952); *Toomer*, 334 U.S. at 403 (“commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause”); *Blumenthal v. Crotty*, 346 F.3d 84, 96 (2d. Cir. 2003) (“the []law] discriminates against nonresidents with respect to the privileges and immunities New York accords to its own citizens to engage in commercial lobstering”); *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 266 (4th Cir. 1993); *Carlson v. Alaska*, 798 P.2d 1269, 1274 (Alaska

1990) (“Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause . . .”).

Defendant contends that the first step requires Plaintiffs to prove additionally that the challenged fees “excluded” them from commercial fishing in California. Pet. at 20-21. The Supreme Court has specifically rejected such a requirement. *See Sup. Ct. of Va.*, 487 U.S. at 66. As the panel recognized, Defendant’s exclusion requirement would upset decades of precedent. Slip. Op. at 8. It would also “undermine the purpose of the Clause, because permitting a State to freely discriminate against non-residents up to the point they are driven out would not ‘place the citizens of each State upon the same footing with citizens of other States.’” *Id.*, citing *Lunding*, 522 U.S. at 296.

As the panel opinion discusses at length, Defendant’s cited cases do not require a plaintiff to prove exclusion. Slip Op. at 7-10. Instead, they make clear that the Privileges and Immunities Clause generally prohibits “giving [one’s] own citizens a competitive advantage in business or employment.” *McBurney v. Young*, 133 S. Ct. 1709, 1716 (2013); *see also Molasky-Arman*, 522 F.3d at 934 (holding there could be “no doubt” that the insurance trade falls within the purview of the Clause). The panel’s holding at the first step is correct and creates no conflict with precedent, and therefore does not warrant rehearing.

II. THE PANEL’S SECOND-STEP ANALYSIS DOES NOT CONFLICT WITH PRECEDENT OR WARRANT REHEARING.

At the second step, the panel held that Defendant failed to show the fees closely related to a substantial state interest. Slip Op. at 11-14. It held that a state may “charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay.” *Id.* at 11, quoting *Toomer*, 334 U.S. at 398-99. However, Defendant failed to show the fees—which often amounted to thousands of dollars in additional expense for nonresidents—bore a close relationship to this objective. *Id.* at 5, 13. Indeed, Defendant made no attempt to show what portion of its investment in the fisheries came from residents.¹

Repeating his arguments before the panel, Defendant seeks rehearing of this holding on two grounds. First, he argues that under *Toomer*, California may charge any fee differential that merely compensates itself for expenditures. As noted above, *Toomer* instead permits the state to compensate itself for expenditures “from taxes which only residents pay.” 334 U.S. at 399. Defendant’s only response is to argue that those words do not mean what they say. Pet. at 10-13.

¹ The record discloses that California’s expenditures come primarily from the Fish and Game Preservation Fund. This fund consists of fees, landing taxes, and penalties paid by both residents and nonresidents. See SER at 1:55-61 at ¶¶ 148-178; see also ER at 1:174, 177, 181, 182-183.

That response makes no sense in the context of the Privileges and Immunities inquiry, which requires that discrimination against nonresidents closely relate to achievement of the state's claimed interest. *Friedman*, 487 U.S. at 64-65. It also means the state could double-charge nonresidents without scrutiny, making them repay the state for expenditures that they already contributed to through other fees.

Second, Defendant argues that the panel misapplied the Clause's requirement that states allow residents and nonresidents to compete on terms of substantial equality. Pet. at 13-19. Defendant argues that the Clause requires substantial equality of treatment for nonresidents only in "tax" cases, and not "common calling" cases. *Id.* at 16-19. As the panel noted, the Supreme Court draws no such distinction between the cases and applies the same test in both.² Slip Op. at 11 n.4.

Defendant contends that by requiring substantial equality of treatment, the panel precludes any differential fees. Pet. at 13. Not so. The panel expressly recognized that ensuring nonresidents do not unfairly benefit from resident tax expenditures is a substantial state interest that may justify differential fees. Slip Op. at 11-12. It held only that Defendant failed to show the fee differentials

² Indeed, many cases fall in both of Defendant's proposed categories. *See, e.g., Lunding*, 522 U.S. at 302 (tax at issue implicated "the right of nonresidents to pursue their livelihood on terms of substantial equality with residents"); *Austin v. New Hampshire*, 420 U.S. 656, 659 (1975) (same).

challenged *in this case* closely relate to that interest. *Id.* at 13. *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208 (1984) is not to the contrary. It held that only that it could not determine from the record whether Camden closely tailored its local hiring preference to a claimed interest in nonresidents free-riding off public expenditures. *Id.* at 222-23.

Defendant also contends the panel's ruling prohibits differential fees as a practical matter, based on calculations using the entire California population. Pet. at 7. That result does not indicate the panel decided incorrectly, given the relatively modest expenditures at issue. More importantly, however, the panel did not purport to hold that a state must prove its allocation of costs between residents and nonresidents using this or any other particular calculation. Instead, it limited its holding to the case before it, and preserved to states flexibility in demonstrating substantially equal treatment of nonresidents. *See Slip Op.* 12-13 (requiring only that state show individual nonresidents contribute an amount substantially equal to residents across related fees and taxes); *see also Carlson*, 798 P.2d at 1278.

Defendant did not contend that this case requires rehearing because it presents a question of exceptional importance.³ *See Fed. R. App. P.* 35. However,

³ Defendant does state that Congress has declared differential fishing fees to be in the public interest. Pet. at 1. However, Congress cannot circumvent Privileges and Immunities Clause requirements. Further, its declaration does not specify that the public's interest relates to commercial fishing, as opposed to *recreational* fishing, which does not implicate the Clause.

the discussion above shows why it does not. Defendant made no showing regarding what portion of its expenditures come from taxes which only residents pay. Defendant bore this burden on summary judgment and had the necessary facts in its possession. *See* Slip Op. at 13. Because of this failure of proof, this case does not present the issue of *how* a state must go about proving its nonresident fee differential merely compensates for resident tax expenditures. It only presents the issue of whether, as Defendant contended, the state may charge nonresidents discriminatory fees so long as it does not profit off them in the aggregate or drive them from the market. As the panel recognized, longstanding Supreme Court precedent already resolves this issue: discriminatory fees cannot be justified on that basis. *See, e.g., Toomer*, 334 U.S. at 396.

Finally, as an additional consideration that weighs against granting rehearing, the position Defendant advances would create a circuit split if adopted. In *Tangier Sound*, Virginia argued that it subsidized its fisheries and could seek to recoup those subsidies directly from nonresidents through discriminatory fees. The court held identically to the panel here:

The rationale of *Toomer* permits a state to make judgments resulting in discrimination against nonresidents where the state establishes an “advancement of a substantial state interest” as a reason for the disparate treatment, and . . . evenly or approximately evenly distributes the costs imposed on residents and nonresidents to support those programs benefiting both groups. Thus, such a higher tax or fee

CERTIFICATE OF COMPLIANCE

I certify, that, pursuant to Ninth Circuit Rule 40-1, the attached Plaintiffs-Appellees' Response to Petition for Panel Rehearing/Rehearing En Banc, is proportionately spaced, has a type-face of 14 points or more, and contains 2,221 words (based on the word processing system used to prepare the brief).

Dated: December 7, 2015

FENWICK & WEST LLP

By: /s/Todd R. Gregorian

Todd R. Gregorian

Attorneys for Plaintiffs-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 13-17358

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the following:
**PLAINTIFFS-APPELLEES' RESPONSE TO PETITION FOR PANEL
REHEARING/REHEARING EN BANC** with the Clerk of the Court for
the United States Court of Appeals for the Ninth Circuit by using the
appellate CM/ECF system on December 7, 2015.

I certify that all participants in the case are registered CM/ECF users
and that service will be accomplished by the appellate CM/ECF system.

Dated: December 7, 2015

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