No. _____

15-1538

In The
Supreme Court of the United States

MERSCORP HOLDINGS, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Petitioners,

v.

DANNEL P. MALLOY, GOVERNOR, STATE OF CONNECTICUT; GEORGE C. JEPSEN, ATTORNEY GENERAL, STATE OF CONNECTICUT; DENISE L. NAPPIER, TREASURER, STATE OF CONNECTICUT; KENDALL F. WIGGIN, STATE LIBRARIAN, STATE OF CONNECTICUT; LEANN R. POWER, PUBLIC RECORDS ADMINISTRATOR, STATE OF CONNECTICUT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Connecticut Supreme Court created a conflict with this Court's cases by holding that a state law does not discriminate against interstate commerce on its face (and thereby violate the dormant Commerce Clause *per se*) even though the law expressly targets a "national" business for unfavorable treatment to "level the playing field" inside the State.

2. Whether, in the alternative, the Connecticut Supreme Court departed from this Court's precedent by holding that the State's singling out of a "national" business for unfavorable treatment does not impermissibly burden commerce among the States under this Court's balancing test in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

MERSCORP Holdings, Inc. does not have any stock-owning parent corporations. Fannie Mae and Freddie Mac each owns more than 10 percent of MERSCORP Holdings, Inc. Mortgage Electronic Registration Systems, Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners MERSCORP Holdings, Inc. (MERSCORP) and Mortgage Electronic Registration Systems, Inc. (MERS) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

OPINIONS AND ORDERS BELOW

The Connecticut Supreme Court's opinion (App., *infra* 1-41) is reported at 131 A.3d 220 (Conn. 2016). The opinion of the Superior Court of Connecticut, Judicial District of Hartford (App., *infra* 42-93) is unreported and available at 2014 WL 2854013.

STATEMENT OF JURISDICTION

The judgment of the Connecticut Supreme Court was entered on February 23, 2016. Justice Ginsburg extended the filing date for this petition to June 22, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution of the United States, U.S. CONST., art. I, § 8, cl. 3, provides:

[Congress shall have Power:] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

Section 7-34a of the Connecticut General Statutes provides:

> (A) * * * [T]own clerks shall receive from a nominee of a mortgagee for the recording of any document * * * as follows: For the first page * * * , one hundred sixteen dollars; for each additional page of such deed or assignment, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars.
>
> * * *
>
> (C) For purposes of this subdivision, "nominee of a mortgagee" means any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note.

CONN. GEN. STAT. § 7-34a(a)(2) (2013).

The full provisions of the relevant Connecticut General Statutes are set forth at App., *infra* 94-98.

STATEMENT

The Commerce Clause gives Congress the power "[t]o regulate Commerce * * * among the several States." U.S. CONST., art I, § 8, cl. 3. This grant of authority was drafted specifically "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). Thus the Commerce Clause was seen at the Founding as a barrier against parochialism, which would impede economic relations across the internal borders of the young Nation.

To safeguard that positive grant of power, this Court has consistently interpreted congressional authority over interstate commerce "to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state [economic regulation] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). The dormant Commerce Clause prevents States from enacting legislation that would discriminate against—and thus regulate—commerce on the basis of an interstate element. *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977). Nor may a State "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984). Similarly, a State cannot "discriminat[e] between two kinds of interstate transactions." *Boston Stock Exchange*, 429 U.S. at 333.

Here, the Connecticut Supreme Court has explicitly acknowledged that the State's legislature "*create*[*d*] *a two tiered system* in which a mortgage nominee operating a *national* electronic database * * * must pay recording fees approximately three times higher than do other mortgagees." App. 2 (emphases added). The second tier of mortgagees—on which Connecticut has imposed higher recording fees—comprises only MERS, a national company. Although the recording services provided by Connecticut's clerks do not depend on or relate to the mortgagee's identity, Connecticut has attempted to subsidize its local residents and businesses by imposing additional fees on MERS as a mortgagee simply because it has loans that are registered on a "national electronic database." This blatant discrimination against interstate commerce is an affront to the dormant Commerce Clause and this Court's precedents enforcing that provision.

Because the Connecticut law charges more for recording merely because a mortgagee has loans registered on a "national electronic database"—and here, petitioners do business nationally, in all 50 States—the legislation is facially discriminatory and should be struck down. Beyond that, Connecticut admitted that its law was designed to recover more in fees from companies that engage in interstate commerce. *Id.* at 34. Without a legitimate rationale to justify its higher fees on interstate companies, the law is an undue burden unable to survive any sort of balancing test to measure its constitutionality.

This Court's review in this type of case is vital. The dormant Commerce Clause violation is blatant, and the potential for further mischief is significant. After all, if a State can now charge additional fees on companies engaged in interstate commerce simply because—as here—the State wants more money, there is no end to the fees and other burdens on interstate commerce that can be imposed.

Modern technology heightens the importance of this Court's enforcement of the dormant Commerce Clause. Today's interconnected world permits interstate commerce to occur more easily than ever before. Indeed, technology enabled and made possible petitioners' business model, which relies on the speed, efficiency and ease of access afforded by the use of a national electronic database. Electronic sales (e.g., sales through websites) and services (such as those provided by petitioners) readily cross state lines. Thus permitting state discrimination against national companies also threatens electronic commerce, an area of concern to Congress. Cf. Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, §§ 1100-1104, 112 Stat. 2681-719 to 2681-726 (1998) (banning multiple taxation of electronic commerce). Certiorari should be granted now, before other States give in to the temptation of charging higher fees to disfavored national companies.

The economic protectionism embodied by the Connecticut statute is precisely what the Founders sought to guard against. This Court alone can prevent States from enacting legislation that contravenes federal law.

The Court should grant the petition, resolve the conflict, and reinforce the Court's precedents holding that the Commerce Clause does not permit discrimination against interstate commerce—especially where the discrimination is as blatant as it is here, and where the discrimination threatens companies that engage in innovative means of electronic interstate commerce.

1. When buying a home, most people borrow money and secure repayment of their loan by a mortgage, pledging the property purchased as collateral. App. 3-4. In Connecticut, when a borrower obtains a home loan, the borrower typically executes two documents in favor of the lender: (1) a promissory note that creates the borrower's legal obligation to repay the lender; and (2) a mortgage that grants the lender a lien on the property as security for repayment of the debt. *Id.* at 4. To give notice to the world, including subsequent purchasers and creditors, the mortgage may be recorded in the public land records where the property is located. *Ibid.* In Connecticut, as elsewhere, the recording of a mortgage is optional, and not mandated by law. *Ibid.*

2. Petitioner MERSCORP operates and maintains a national electronic database known as the MERS® System that tracks the transfer of beneficial ownership interests and servicing rights in loans for which MERS is designated as the mortgagee on the mortgage. Members of the MERS® System include residential mortgage lenders, servicers of residential mortgage loans, and investors in such loans. Members

are typically national companies engaged in interstate commerce, such as Freddie Mac and Fannie Mae.[1]

When a borrower obtains a home loan from a MERS® System member-lender, the lender may designate MERS as the mortgagee on the security instrument (as the nominee for the lender). The mortgage is recorded in public land records where the real property (i.e., the secured collateral) is situated. Because MERS is the mortgagee, it will often be indexed by the county clerk in the public land-records index as a "grantee." App. 7. The member then registers the loan on the national electronic database known as the MERS® System.

As the mortgagee, MERS is the nominee or agent of the original lender and any of the lenders' successors or assigns. Thus, MERS serves as a common agent or nominee for the members of the MERS® System. As long as a MERS® System member is involved with the mortgage loan, MERS typically will remain the mortgagee and no assignment of the mortgage is necessary. If there is no MERS® System member involved with the mortgage loan, then MERS executes an assignment of the mortgage to the non-MERS® System member, and that assignment is recorded

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[1] The Connecticut Supreme Court's opinion struggled to differentiate between MERS and MERSCORP, and resorted to referring to them collectively as MERS. App. 6 n.3. MERS is designated on mortgages as the mortgagee (as the nominee for the lender and its successors and assigns). MERSCORP maintains and operates a national electronic database that tracks those loans around the country for which MERS has been designated as the mortgagee.

in the public land records—and, of course, the applicable recording fees must be and are paid.

For example, if the lender transfers the promissory note associated with the loan to another MERS® System member, that member agrees that MERS will remain as the mortgagee (now as the nominee for the lender to whom the note was transferred). So when the debt is transferred between MERS® System members, the mortgagee MERS does not change and MERS remains the holder of the mortgage in the land records—an assignment of the mortgage is unnecessary, as there is no change in the mortgagee.

The MERS® System thus effectively streamlines successive sales of mortgage loans, making the sales much more efficient. This innovative process results in fewer assignments of mortgages being executed and recorded.

3. Like most States, Connecticut charges a fee for the recording of mortgages and mortgage assignments in its public land records. Before July 2013, Connecticut charged all filers a base recording fee of $53 per filing. CONN. GEN. STAT. § 7-34a(a)(1). But thereafter, Connecticut chose to impose special, additional recording fees on companies engaged in interstate commerce by registering loans on a national electronic database: The revised statute imposes an additional $116—for precisely the same recording services—on a "nominee of a mortgagee," which the statute defines as one who "serves as mortgagee in the land records for a mortgage loan registered on a *national electronic database* that tracks changes in

mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members." *Id.* § 7-34a(a)(2)(A), (C) (emphasis added).

Counsel for Connecticut admitted at oral argument below that the legislature crafted this language to impose the additional fee for recording where MERS, and MERS alone, is the designated mortgagee. See App. 34; Oral Argument Transcript at 18. Thus, MERS, and MERS alone, must pay three times the fees as everyone else to have Connecticut clerks record mortgages, mortgage assignments, and mortgage satisfactions, solely because the mortgage loan is registered on a national electronic database.

4. MERS and MERSCORP challenged Section 7-34a on numerous grounds in state court. After the parties filed cross-motions for summary judgment, the trial court granted summary judgment in favor of Connecticut. App. 42. The companies appealed to the Appellate Court and the Connecticut Supreme Court transferred the appeal directly to that court pursuant to state law. *Id.* at 3 n.2.

5. On appeal, the Connecticut Supreme Court affirmed each of the trial court's rulings. App. 2-3. As relevant here, the court bifurcated its dormant Commerce Clause analysis into two parts. First, it rejected the argument that the statute facially discriminated against interstate commerce. *Id.* at 31-37. Second, the

court held that the new law did not impose an "undue burden" on interstate commerce. *Id.* at 37-41.

The Connecticut Supreme Court offered four rationales for its holding that Section 7-34a did not facially discriminate against interstate commerce. First, the court determined that the statute did not discriminate against interstate commerce because there was no in-state analogue to MERS and the MERS® System, and because MERS would pass the additional fees on to borrowers, Connecticut residents. *Id.* at 31-34.

Second, the court determined that Connecticut did not truly intend to discriminate against companies operating "national electronic databases," but meant only to impose charges on MERS and other future, similar businesses. *Id.* at 34-35. Notwithstanding the plain language of the statute, the discrimination against "national" companies was just an accident according to the court.

Third, the court concluded that MERS and MERSCORP were not similar to other entities recording mortgages in Connecticut, *despite receiving identical recording services from the State*. *Id.* at 35-36.

Fourth, the court concluded that even if the statute did discriminate against interstate commerce, its "legitimate local purpose" would outweigh this discrimination. *Id.* at 36-37.

Moving on to the determination whether, even if not facially discriminatory, the statute nonetheless violates the dormant Commerce Clause by burdening interstate commerce, the court articulated two different tests. *Id.* at 37-41. The court stated that a facially neutral statute does not violate the dormant Commerce Clause unless it either: (a) imposes burdens that clearly outweigh the benefits of the legislation; or (b) would unduly burden interstate commerce if every State adopted an identical policy. The court determined that Section 7-34a did not do the former, *id.* at 37-39, and would not do the latter. *Id.* at 39-41.

REASONS FOR GRANTING THE PETITION

The dormant Commerce Clause forbids a State to exercise its police powers to commercially disfavor out-of-state residents relative to in-state ones. *Granholm* v. *Heald*, 544 U.S. 460, 474 (2005). This Court first asks whether the challenged law facially discriminates against interstate commerce—i.e., whether the law necessarily subjects interstate commerce to unfavorable treatment. *Oregon Waste Sys.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 94 (1994). Laws that facially discriminate against interstate commerce are almost always found to violate the dormant Commerce Clause. At the same time, even those laws that do not facially discriminate will be held unconstitutional when they impose burdens on interstate commerce clearly greater than the in-state benefits that the laws

provide. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Proper application of these tests has proven difficult for States—and unsurprisingly, the States tend to err in their favor. This tendency is exemplified by this case, where the Connecticut Supreme Court interpreted this Court's precedents to justify a facially discriminatory statute with nothing more than an economic protectionist rationale. For the Connecticut Supreme Court to hold that a "legitimate local purpose" of generating revenues from out-of-state companies can salvage a facially discriminatory statute shows a level of confusion that is intolerable and warrants this Court's review. Indeed, given how patent the facial violation is in this case, the Court may wish to consider summarily reversing the Connecticut Supreme Court without the need for merits briefing and argument. See, e.g., *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam) (summarily reversing in case involving pleading standards for breach of fiduciary duty claims against ERISA fiduciaries after initial decision was GVR'd and Ninth Circuit reached same conclusion on remand); *Nitro-lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam) (summarily reversing in arbitration case); *Am. Tradition P'ship* v. *Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (same in First Amendment case).

Throughout the Nation's history, this Court has ensured the fair treatment of individuals across state lines and prevented state legislatures from transgressing constitutional boundaries. If this Court's cases

teach anything, it is that the dormant Commerce Clause keeps States from "discriminat[ing] between transactions on the basis of some interstate element." *Boston Stock Exchange*, 429 U.S. at 332 n.12. Were the Connecticut Supreme Court's decision here to stand, it would establish a dangerous roadmap for other desperate, cash-strapped States to follow in enacting similar legislation—with virtually no limits on the industries, products, and services that could be targeted for discriminatory treatment. This Court should resolve the conflict, restore the proper boundaries, and remind States that while the police power is broad, it is not unlimited and may not be used to transgress constitutional commands.

I. The Connecticut Supreme Court's Refusal To Invalidate A Facially Discriminatory Statute Irreconcilably Conflicts With This Court's Precedent.

"[T]he dormant Commerce Clause precludes States from 'discriminat[ing] between transactions on the basis of some interstate element.'" *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (alteration in original) (quoting *Boston Stock Exchange*, 429 U.S. at 332 n.12). Under this Court's precedent, a court analyzes a statute challenged on dormant Commerce Clause grounds by first asking "whether it discriminates on its face against interstate commerce." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *Am. Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429,

433 (2005)). "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 338 (quoting *Oregon Waste*, 511 U.S. at 99).

On its face, the Connecticut statute at issue discriminates against a person who serves as a mortgagee for loans registered on a "*national electronic database*" by requiring payment of higher recording fees than other designated mortgagees. CONN. GEN. STAT. § 7-34a(a)(2)(C) (emphasis added). Just because MERSCORP operates a MERS® System *national* electronic database (rather than an in-state database), a person who serves as a mortgagee for a loan registered on that national database must now pay higher recording fees to record in Connecticut's land records its mortgages, mortgage assignments, and mortgage satisfactions. This is as blatant an instance of facial discrimination as one could imagine.

Connecticut imposes higher fees *only* on a mortgagee engaging in interstate commerce by registering loans on a "national electronic database." CONN. GEN. STAT. § 7-34a(a)(2)(C). The MERS® System is a national registry with national member-lenders—indeed, it is the national aspect and size of the MERS® System's membership that allows the system to work—and nationally, it is the only business that operates in the manner described by the Connecticut legislature. The statute's "two tiered system" thus expressly "discriminate[s] between transactions on the basis of

some interstate element." *Boston Stock Exchange*, 429 U.S. at 332 n.12.

On its face, the Connecticut law engages in differential treatment of in-state and out-of-state (i.e., "national") economic interests. Yet the Connecticut Supreme Court refused to invalidate it—and in the process created a serious conflict with this Court's precedent.

A. This Court Has Routinely Invalidated Similarly Discriminatory Laws.

This Court has routinely concluded that similar laws discriminate against interstate commerce. See, e.g., *Oregon Waste*, 511 U.S. at 99 (holding that Oregon discriminated against interstate commerce by "subject[ing] waste from other States to a fee almost three times greater than the [fee] imposed on solid in-state waste"); *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992) (holding that Alabama discriminated against interstate commerce by imposing a higher fee on the disposal of out-of-state waste than on the disposal of in-state waste); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 274 (1988) (holding that Ohio discriminated against interstate commerce by depriving products made in other States of beneficial tax treatment). Like the laws in these cases, the Connecticut law discriminates against interstate commerce on its face and is thus "virtually per se invalid." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste*, 511 U.S. at 99).

Even apart from the law's differential treatment of "national" electronic databases, Connecticut admits that it enacted the law to target MERS and MERSCORP, out-of-state parties engaging in interstate commerce. App. 34. Indeed, MERS is the only entity that "serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members." CONN. GEN. STAT. § 7-34a(a)(2)(C)(i). And as the only "nominee of a mortgagee" in the country (as defined by § 7-34a), only mortgages, mortgage assignments, and lien releases involving MERS must pay the higher recording fees. But this Court's precedent recognizes that a law does "not need to be drafted explicitly along state lines in order to demonstrate its discriminatory design." *Amerada Hess Corp.* v. *Director, Div. of Taxation, N.J. Dept. of Treasury*, 490 U.S. 66, 76 (1989).

For example, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii statute that established an exemption to the state liquor tax for "okolehao," a brandy distilled from the root of an indigenous shrub of Hawaii. *Id.* at 265. Even though this exemption did not contain an express interstate element, this Court readily concluded that the exemption "seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao." *Id.* at 268.

Just as Hawaii could not discriminate against interstate commerce by enacting a "neutral" law that evenhandedly favored all producers of a particular type of liquor (who all happened to be located in-state), Connecticut cannot enact a "neutral" law that evenhandedly disfavors MERS and MERSCORP (which happen to be located out-of-state). Even if Connecticut's law were not drafted explicitly along state lines to disfavor "national" products, the State's admitted intent to target MERS would still reveal a discriminatory design.

Like other targets of discrimination against interstate commerce, MERS has no "remedy at the polls." *Wynne*, 135 S. Ct. at 1798. Because MERS is an out-of-state corporation, schemes that impose discriminatory fees on MERS "may be attractive to legislators and a majority of their constituents for precisely this reason." *Ibid.* Protecting out-of-state corporations, like MERS, from discriminatory taxation and fees is the heart of the dormant Commerce Clause. Even apart from the statute's discrimination against companies providing "national" products, the State's admitted targeting of MERS constitutes discrimination against interstate commerce.

Under this Court's precedent, such a law must be invalidated unless it survives strict scrutiny—i.e., unless the State can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste*, 511 U.S. at 101 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278). Connecticut has not even

attempted to carry this heavy burden. The opinion below states, in passing, that discrimination against interstate commerce "advances a legitimate local purpose." App. 36. The purported "legitimate local purpose" is raising revenue by charging MERS, as a "nominee of a mortgagee," three times what others pay for identical services provided by recording clerks—a rationale this Court has firmly rejected. See *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994). And the court below wholly failed to consider reasonable nondiscriminatory alternatives. As a result, the court's refusal to invalidate a patently discriminatory statute cannot be squared with this Court's precedent.

B. The Connecticut Supreme Court's Rationales For Upholding The Law Only Confirm The Conflict.

If the Connecticut law does not amount to facial discrimination against interstate commerce under this Court's precedents, it is difficult to imagine what would. That is likely why the decision below rests on the rather remarkable holding that the Connecticut statute does not, despite its plain text, facially discriminate against interstate commerce at all. Not surprisingly, the court's scattershot justifications for this conclusion are unavailing.

Several—such as the theory that companies are not harmed by fees that can be passed on to their customers—have been expressly rejected by this Court.

Others—such as the theory that MERS would be a "free rider" if it paid the same fees as other filers for the same services—rest on shoddy and confused economics and legal principles. In the end, the Connecticut Supreme Court's strained attempts to demonstrate that the statute does not facially discriminate at all only underscore why the statute cannot stand—and why this Court's guidance is needed to re-set the proper metes and bounds of facial discrimination for dormant Commerce Clause purposes.

First, the Connecticut Supreme Court suggested that in the absence of higher fees, members of the MERS® System would "free ride on the public recording system." App. 24. As the term is used in economics, a "free ride" (or the "free rider problem") refers to "taking the fruits while contributing nothing to the labor." *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1550 (2013). When MERS opts to record a mortgage, it of course pays the fees in return for the clerk's services in recording the mortgage. What MERS resists is having to pay grossly disproportionate fees for exactly the same recording services received by other mortgagees whose loans are not registered on a national electronic database. Far from attempting to "free ride on the public recording system," MERS seeks only to pay the same fees for the same services provided to other mortgagees.

The opinion further suggests that town clerks are entitled to fees when a mortgage is assigned, and that members of the MERS® System somehow evade paying amounts that would otherwise be due. App. 24.

But recording of a mortgage or an assignment is entirely optional, and is not mandated by Connecticut law. *Id.* at 3. If a mortgage assignment is not recorded (whether because MERS remains the mortgagee and thus there is no mortgage assignment created to record, or because the assignee chooses not to record the assignment of the mortgage), then no recording services are provided by the town clerks, and thus no recording fees are owed for a service not performed.

Second, the court below held that the statute does not facially discriminate because it "levels the playing field" between in-state and national players. *Id.* at 36. But far from justifying the law, this purported justification only underscores its impropriety. The statute requires that MERS pay a higher fee for the same services for the sole reason that it engages in interstate commerce. Recording a mortgage for MERS is no more burdensome or costly to the State than recording a mortgage for anyone else—and the State has never argued otherwise. See *Chemical Waste*, 504 U.S. at 343-44 (noting, in holding that Alabama's disposal fee for waste generated outside the State violated the dormant Commerce Clause, that "there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama").

To the extent that fewer mortgage assignments are recorded resulting in the State realizing less in recording fees, this is only because mortgages and other instruments involving MERS result in fewer mortgage assignments being created and executed, and thus

there is less of the permissive recording of these assignments in the land records. The fact that fewer mortgage assignments involving MERS are not being recorded in Connecticut's land records is not because these MERS mortgages and other instruments are being recorded elsewhere such as on the MERS® System. The reason that fewer mortgage assignments are recorded is that with MERS as the common agent of the MERS® System members, loan transactions between those members do not necessitate the mortgage being assigned. MERS® System members agree that MERS may remain as the mortgagee and therefore the MERS® System members do not need the identity of the mortgagee to be changed in the land records. This, in turn, results in fewer assignments being created and then recorded in the public land records.

The Connecticut Supreme Court's response to this argument is revealing—it notes that a reduction in the demand for the county clerk's services will not reduce the overhead expenses—i.e., the fixed costs of running a recording clerk's office. App. 23. But that should not be a single private national company's burden. Connecticut is merely subsidizing its operations by assessing higher fees on an innovative out-of-state company. Rather than providing a reason to uphold the statute, the Connecticut Supreme Court's analysis only confirms its invalidity.

MERS's and MERSCORP's innovative and nationwide electronic system has resulted in less demand for the recording services of clerks. But in response to the reduced demand, Connecticut chose to penalize those associated with MERS and MERSCORP's electronic

national database to fund the state and its local municipalities. Instead of distributing overhead costs evenhandedly among all users of recording services, the Connecticut legislature decided to impose a disproportionate share of these overhead costs on MERS—thereby subsidizing local Connecticut residents at the expense of a company engaged in interstate commerce, not to mention creating a profit center that also funds various programs that benefit in-state residents.

This Court's precedent confirms that such a scheme violates the dormant Commerce Clause: "[R]evenue generation is not a local interest that can justify discrimination against interstate commerce." *C & A Carbone*, 511 U.S. at 393. An interstate firm "expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike." *Am. Trucking Ass'ns*, 545 U.S. at 438. The dormant Commerce Clause forbids Connecticut to impose additional fees on disfavored, interstate firms.

Third, the court below held that the statute did not discriminate on its face since imposing higher recording fees on MERS does not actually harm MERS because, according to the court, "the likely result will be that Connecticut homeowners, who, the parties agree, typically absorb the higher upfront fees for MERS-listed loans, will subsidize out-of-state banks."

App. 32-33.[2] But this Court rejected a materially indistinguishable argument in *Bacchus Imports*, where Hawaii argued that "the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax" that they pass along to their customers. 468 U.S. at 267.

This Court noted that the wholesalers were "liable for the tax" and that "[a]lthough they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Ibid.* And "even if the tax is completely and successfully passed on," the tax "increases the price of [the wholesalers'] products as compared to the exempted beverages." *Ibid.* Thus, "[t]he wholesalers plainly have standing to challenge the tax in this Court." *Ibid.* There is no serious argument that MERS cannot challenge the discriminatory fees imposed on it by Connecticut's statute.

Fourth, the court below held there could be no facial discrimination as long as there is no in-state competitor. See App. 35-36; see also *id.* at 33 (characterizing a mortgage nominee "that operates a Connecticut only electronic database" as "a chimera"). This argument is without merit. Indeed, this Court has already considered—and rejected—a similar argument, explaining that "where discrimination is patent, as it is here, neither a widespread advantage to in-state

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[2] The meaning of the Connecticut Supreme Court's reference to "subsidize" is unclear. Throughout the opinion below, economic terms are used imprecisely or incorrectly.

interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co.*, 486 U.S. at 276.

This Court noted that in earlier cases, it did not "consider the size or number of the in-state businesses favored or the out-of-state businesses disfavored relevant to our determination"—and there is certainly no *de minimis* exception for discrimination. *Ibid.* "Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field." *Id.* at 276-77.

The same analysis applies here to compel the conclusion that the "number of the in-state businesses favored" is simply not relevant to the dormant Commerce Clause determination. To be sure, considering the practical effect on interstate commerce and competition may be necessary when a neutral statute is challenged as burdening interstate commerce under the *Pike* balancing test. But where, as here, discrimination is patent on the face of the statute, there is no need to look further.

Finally, the court below held that despite the statute's reference to "national electronic databases," it is not "a facial attack on interstate commerce" because according to the court, the "legislature's apparent intent" was to target all "virtual recording systems," not merely national ones. App. 34. That is, although the Connecticut legislature enacted a statute that

discriminates against interstate commerce, it did so by accident. Not surprisingly, this theory of "accidental" discrimination does not make the statute any less facially discriminatory and cannot save it.

On its face, the statute targets a company that is a mortgagee that has loans registered on a "national electronic database"—the MERS® System—and charges that company treble fees. Such facial discrimination does not become permissible merely because a court concludes that the legislature did not really mean to discriminate. Cf. *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2528-29 (2013) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words." (quoting *Gardner* v. *Collins*, 27 U.S. 58, 93 (1829))). Speculation about the legislature's motives cannot save a facially discriminatory statute.

II. The Connecticut Supreme Court's Decision Conflicts With This Court's Precedent Because The Statute Lacks A Legitimate Justification For Burdening Interstate Commerce.

Even if a statute does not facially discriminate against interstate commerce (unlike the Connecticut statute at issue in this case), "nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Dep't of Revenue* v. *Davis*, 553

U.S. 328, 353 (2008). In this case, the burdens on interstate commerce plainly outweigh the benefits of the state statute under the balancing test of *Pike* v. *Bruce Church, Inc.* The Connecticut Supreme Court's contrary holding conflicts with this Court's precedent for that reason, too.

Connecticut simply has no legitimate justification for the burden its statute places on interstate commerce. The Connecticut Supreme Court concluded that the statute was justified because MERS would only pay a recording fee once, rather than every time that a loan is transferred. App. 38. But as already discussed, that is irrelevant. See *supra* pp. 19-22. If MERS pays fewer recording fees, that is because it uses fewer services. There is no rational reason that MERS should pay higher recording fees than other filers for the same services—particularly given that MERS uses those services less and should not have to pay for services it did not receive.

The Connecticut Supreme Court's conclusion that the statute "level[s] the playing field" between MERS® System members and non-members, App. 36, not only misunderstands the statute's operation, but also underscores why the statute is impermissible. Far from leveling the playing field, the statute treats parties who use the same state resources radically differently, depending solely on whether they are engaged in interstate commerce.

Because Connecticut offers no legitimate justification for burdening interstate commerce with the

additional recording fees, its burden on interstate commerce would violate the dormant Commerce Clause even if the statute were not discriminatory on its face—and the Connecticut Supreme Court sharply departed from this Court's precedent in holding otherwise.

III. The Petition Presents Constitutional Questions Of Substantial Importance That Can Only Be Resolved By This Court.

The Court's review is warranted to safeguard "[t]he 'negative' aspect of the Commerce Clause" that was "considered the more important [one] by the 'father of the Constitution,' James Madison." *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 192, 193 n.9 (1994). Indeed, by "prohibiting States from discriminating against * * * interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution" in the first place. *Wynne*, 135 S. Ct. at 1794. Yet without this Court's intervention from time to time, state courts could nullify the dormant Commerce Clause, undermine the intent of the Founders, and interfere with the free flow of goods and services across state lines. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (Max Farrand ed., Yale University Press) (1911) ("[The Commerce Clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather

than as a power to be used for the positive purposes of the General Government.").

The Connecticut Supreme Court's decision in this case approves what is essentially a naked wealth transfer as the cost of doing business in the State. It does so by singling out—on its face—"national" businesses and "has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause." *Wynne*, 135 S. Ct. at 1792. Some dormant Commerce Clause cases may present difficult line-drawing problems, but this is not one of them. Under the Connecticut Supreme Court's decision, it is difficult to imagine a statute that could *not* pass muster, given the patent facial discrimination and the lack of any legitimate justification for the statute.

As a result, if the Connecticut Supreme Court's decision is allowed to stand, it will provide a road map for other cash-strapped States, counties, and cities to similarly target any "national" business for what amounts to an impermissible state tariff—under the guise of simply "leveling the playing field." This case thus implicates precisely the concern motivating the dormant Commerce Clause—that States will favor their own interests over those of the Nation as a whole. This Court should grant the petition, remedy the constitutional violation, and restore the proper metes and bounds of the Commerce Clause.

IV. The Connecticut Supreme Court's Decision Is An Excellent Vehicle For Resolving The Conflict And Reaffirming This Court's Dormant Commerce Clause Jurisprudence.

This case provides an ideal vehicle for restoring the proper bounds of the dormant Commerce Clause. The Connecticut Supreme Court's decision is final, its opinion is published, and its discriminatory effect is immediate.

There is no need for further percolation, and no possibility that the conflict can resolve itself. No antecedent questions of fact or law would prevent this Court from deciding the issue. Indeed, the discrimination is plain on the face of the statute—and the lack of any legitimate justification makes application of the *Pike* balancing test particularly straightforward.

Under the Connecticut Supreme Court's logic, there is no reason that other States could not adopt similar protectionist regulations of their own. As explained above, if the decision below is permitted to stand, it can only embolden other States to pass laws blatantly discriminating against other "national" businesses.

The effect is magnified by the fact that the statute here targets the "national electronic database." Congress has made clear that it does not want States impeding the flow of Internet commerce, which is inherently interstate. Cf. Internet Tax Freedom Act §§ 1100-1104 (prohibiting multiple taxation). Here, it is precisely *because* of the substantial efficiencies

achieved by MERS and MERSCORP's innovative approach, enabled by modern technology, that have made it a target for Connecticut's protectionist legislation.

In today's Internet-age and e-business environment, permitting this dormant Commerce Clause violation would open the floodgates to fee enhancements against all manner of on-line businesses. And at least according to the Connecticut Supreme Court, those States will have legitimate purposes, such as seeking additional revenue to pay for the overhead at the state comptroller's office. The potential for this case to spawn significant litigation later is more than enough reason for this Court to review it now before even more damage is done to interstate (and electronic) commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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