Supreme Court, U.S.
FILED
03 73 JUL 1 1 2003
OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

LOREN DOMKE
LOREN DOMKE, P.C.
2201 North Jordan Avenue
Juneau, Alaska 99801
(907) 790-2844

BETH HEIFETZ
GREGORY A. CASTANIAS
(*Counsel of Record*)
JULIA C. AMBROSE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court erred in holding that only the Privileges and Immunities Clause, and *not* the Commerce Clause, is implicated by Alaska's imposition of fees on nonresident commercial fishermen that are three times greater than those imposed on resident commercial fishermen.

2. Whether the Alaska Supreme Court erred in holding that the constitutional limits on "compensatory" taxes under the Commerce Clause do not apply to allegedly compensating taxes under the Privileges and Immunities Clause, thereby permitting Alaska to impose on nonresident commercial fishermen the general costs of state government.

PARTIES TO THE PROCEEDINGS

Other than the unnamed members of the plaintiff class, all of whom are individual commercial fishermen who are not residents of Alaska, there are no petitioners or respondents in addition to those named in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

1. The Alaskan License and Permit Tax Schemes. 2

2. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION BELOW CONFLICTS WITH COMMERCE CLAUSE DECISIONS OF THIS COURT 11

A. The Commerce Clause Applies Because Nonresident Commercial Fishermen Are Engaged In Interstate Commerce 11

B. The Commerce Clause Applies To Discrimination Based On Residency 14

II. THE DECISION BELOW AUTHORIZES DISCRIMINATION THAT NONE OF THIS COURT'S DECISIONS WOULD COUNTENANCE 17

A. The *Carlson* Formula Authorizes A Compensatory Tax That Would Violate The Commerce Clause 18

TABLE OF CONTENTS
(Continued)

Page

B. The *Carlson* Formula Sanctions A Discriminatory Fee That *Toomer* Does Not Authorize.......23

III. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS WITH NATIONWIDE CONSEQUENCES.......26

CONCLUSION.......30

TABLE OF AUTHORITIES

Page

Case

Alaska v. Arctic Maid, 366 U.S. 199 (1961)........................2
Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).......12
Anderson v. Mullaney, 191 F.2d 123 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952)......................16, 21, 27
Armco Inc. v. Hardesty, 467 U.S. 638 (1984)..............19, 21
Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371 (1978)...13, 15
Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)........14
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)........................8, 9, 11, 12
Carlson v. State of Alaska, 798 P.2d 1269 (Alaska 1990)...1, 4, 5, 22
Carlson v. State of Alaska, 919 P.2d 1337 (Alaska 1996)..*passim*
Carlson v. Alaska Commercial Fisheries Entry Comm'n, 519 U.S. 1101 (1997)..8
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)..13
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)..13, 18
Douglas v. Seacoast Prod., Inc., 431 U.S. 265 (1977)......12
Edwards v. California, 314 U.S. 160 (1941).....................11
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)..........*passim*
Gov't Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992).......................................19
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)...12
Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).......13
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)...19, 21
Hicklin v. Orbeck, 437 U.S. 518 (1978)...........12, 15, 16, 27
Hillside Dairy, Inc. v. Lyons, 123 S. Ct. 2142 (2003)..16

TABLE OF AUTHORITIES
(Continued)

Page

Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) 13
Mullaney v. Anderson, 342 U.S. 415 (1952) 16, 26, 27
Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 13
Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994) .... *passim*
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), *overruled in part on other grounds, United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 17
Pharm. Research & Mfrs. of Am. v. Walsh, 123 S. Ct. 1855 (2003) 14
Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980) 27
Sosna v. Iowa, 419 U.S. 393 (1975) 15
State of Alaska v. Carlson, 65 P.3d 851 (Alaska 2003) .... *passim*
Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 16
Toomer v. Witsell, 334 U.S. 385 (1948) .... *passim*
United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984) 15, 16
Walling v. Michigan, 116 U.S. 446 (1886) 14
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) 15
Zobel v. Williams, 457 U.S. 55 (1982) 28

Statutes

16 U.S.C. § 5102(6) 2
28 U.S.C. § 1257(a) 1
Ala. Code § 9-12-80 28
Alaska Admin. Code tit. 20, § 05.240 4
Alaska Stat. Tit. 16, Art. 43 2
Alaska Stat. § 16.05.480 .... 2, 3, 4
Alaska Stat. § 16.43.140(a) 2

TABLE OF AUTHORITIES
(Continued)

Page

Alaska Stat. § 16.43.020 2
Alaska Stat. § 16.43.100(a) 2
Alaska Stat. § 16.43.160 .... 3, 4. 25
Alaska Stat. § 16.43.160(e) 3, 4
Alaska Stat. § 43.75.015 25
Alaska Stat. § 43.75.130 25
Code Ark. R. 002 00 001 41.13 28
Cal. Fish & Game Code § 7852 28
Conn. Gen. Stat. § 26-142a (c) 28
Del. Code Ann. tit. 7 § 914 28
Fla. Stat. Ann. § 370.06(2) 28
Ga. Code Ann. § 27-2-23 28
Idaho Code § 36-416 28
515 Ill. Comp. Stat. 5/20-45 28
Ind. Code Ann. § 14-22-14-6 28
Iowa Code § 482.4 28
Kan. Admin. Regs. § 115-2-1 28
301 Ky. Admin. Regs. 3:022 29
La. Rev. Stat. Ann. § 56:303 29
Md. Code Ann., Natural Resources § 4-701 29
Me. Rev. Stat. Ann. tit. 12, § 6501 29
Mich. Comp. Laws § 324.47330(2) 29
Minn. Stat. Ann. §§ 97A.461, 475 29
Miss. Code Ann. §§ 49-15-80, 49-15-30 29
Mo. Code Regs. tit. 3, § 10-10.720 29
N.C. Gen. Stat. § 113-168.2 29
N.D. Cent. Code, § 20.1-03-12 29
N.J. Stat. Ann. § 23:5-24.2 29
Neb. Rev. Stat. § 37-4, 104 29
Okla. Stat. Ann. tit. 29, § 4-103 29
Or. Rev. Stat. § 508.285 29
30 Pa. Cons. Stat. § 2903 29
R.I. Gen. Laws §§ 20-2.1-5, 20-2.1-6 29
S.C. Code Ann. §§ 50-5-300, 50-5-310 29

TABLE OF AUTHORITIES
(Continued)

Page

Tenn. Code Ann. § 70-2-205 29
31 Tex. Admin. Code § 53.6 29
4 Va. Admin. Code §§ 20-730-20, 20-920-30 29
Wash. Rev. Code Ann. §§ 77.65.160, 77.65.200 29
Wis. Stat. §§ 29.523-537 30

Miscellaneous

Commercial Fisheries Entry Comm'n, 2001 Annual Report 2, 26, 27
National Oceanic and Atmospheric Administration, *Fisheries of the United States* (2001) 27

PETITION FOR A WRIT OF CERTIORARI

Donald H. Carlson, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, individually and as class representatives on behalf of all persons similarly situated ("Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinions of the Supreme Court of Alaska are reported as follows: *State of Alaska v. Carlson* (*Carlson III*), 65 P.3d 851 (Alaska 2003) (App. 1a-52a); *Carlson v. State of Alaska* (*Carlson II*), 919 P.2d 1337 (Alaska 1996) (App. 56a-82a); and *Carlson v. State of Alaska* (*Carlson I*), 798 P.2d 1269 (Alaska 1990) (App. 88a-112a). The unreported final orders of the Superior Court of the State of Alaska are reproduced in the Appendix to this Petition as follows: "Findings of Fact and Law" (August 8, 2000) (App. 53a-55a); "Decision and Final Order on Reconsideration of the Court's August 12, 1993 Order and Final Decision Granting the State's Motion for Summary Judgment" (July 25, 1994) (App. 83a-87a); "Final Order" (Feb. 21, 1989) (App. 113a).

JURISDICTION

The Supreme Court of Alaska entered its judgment on March 14, 2003. On June 5, 2003, Justice O'Connor granted Petitioners' application to extend the time in which to file the petition for writ of certiorari to and including July 12, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are located in the Appendix to this Petition at App. 114a-126a.

STATEMENT

The case presents important questions as to whether, consistent with the Commerce Clause and the Privileges and

Immunities Clause, Alaska may discriminate against nonresident commercial fishermen by charging them three times the licensing and permitting fees it charges resident commercial fishermen for access to the State's fisheries. The Supreme Court of Alaska analyzed the fee differential under the Privileges and Immunities Clause but concluded that the Commerce Clause has no application to the State's commercial-fishing-license scheme. The Alaska court's analysis led it to endorse under the Privileges and Immunities Clause a facially discriminatory fee that would be invalidated under this Court's long-standing Commerce Clause and compensatory-tax jurisprudence.

1. The Alaskan License and Permit Tax Schemes. Because Alaska controls the waters within three miles of its shore,[1] the state has the power to impose licensing and permitting fees for access to its fisheries. *See Alaska v. Arctic Maid*, 366 U.S. 199, 203 (1961); *Toomer v. Witsell*, 334 U.S. 385, 393 (1948); Alaska Stat. §16.43.100(a)(18). Fishermen seeking to operate fishing gear in the most intensively used Alaska commercial fisheries must purchase a limited entry permit.[2] Alaska Stat. § 16.43.140(a). A crewman working on the vessel of a gear license operator does not need a permit but must purchase a commercial fishing license. Alaska Stat. § 16.05.480 (App. 115a-117a).

---

[1] *See* 16 U.S.C. § 5102(6) (establishing an "Exclusive Economic Zone" (EEZ) in the area running three nautical miles to 200 nautical miles from shore; waters within the EEZ are, in general, regulated by the federal government, while the area from the shore out to three nautical miles is generally regulated by the states).

[2] The limited entry permit program is designed to maintain the "stability" of Alaska's fisheries resources by "regulating and controlling entry" into its commercial fisheries. *See* Title 16, Art. 43, Alaska Stat.; Commercial Fisheries Entry Comm'n, 2001 Annual Report at 1, *available at* http://www.cfec.state.ak.us/annrpts/ar2001.pdf. Respondent Commercial Fisheries Entry Commission ("CFEC") is the regulatory body created to manage that program. Alaska Stat., § 16.43.020.

Until 2001, a nonresident permit holder or nonresident crewman paid three times the fee residents paid. App. 117a, 122a. In actual dollars, residents annually paid between $50 and $250 for limited entry permits; nonresidents paid $150 to $750 for the same permit. App. 122a. Nonresidents therefore were required to pay as much as $500 more than residents for the same permit, year after year. Resident crewmen were charged $30 for a commercial license, while nonresidents paid $90 for the same license. App. 117a. Beginning in 2001, in response to the *Carlson* decisions, Alaska amended its statutes to equalize resident and nonresident permit and license fees, setting a uniform "base fee" but continuing to impose a surcharge on all nonresidents, both permit holders and crewmen, a fee differential based solely on their nonresident status. Alaska Stat. §§ 16.05.480(h), 16.43.160(e) (App. 116a, 118a).[3] This differential is calculated from a formula first advanced in *Carlson II*. Based on Alaska's discovery responses, petitioners estimate that the nonresident surcharge under the *Carlson II* formula will vary between $150 and $200 annually, and could be significantly higher, depending on how the state defines its fisheries costs under the formula.

---

[3] As a result of this case, the state amended Section 16.05.480 to provide that a resident adult will be charged $60 for a crewmember fishing license, while a nonresident must pay "$60 plus an amount, established by the [Commercial Fisheries Entry Commission] by regulation, that is as close as is practicable to the maximum allowed by law." Alaska Stat. §16.05.480(g)-(h) (App. 116a). The "maximum allowed by law" refers to the fee differential formula approved by the Alaska courts in this case, discussed in detail *infra*. Like the commercial fishing license fee statute, the statute governing limited entry permit fees was similarly amended during the *Carlson* litigation. It now provides that the base fee for a limited entry or interim-use permit "may not be less than $10 or more than $300"; the fee for nonresidents "*shall* be higher than the annual base fee by an amount, established by the [CFEC] by regulation, that is as close as is practicable to the maximum allowed by law." Alaska Stat. § 16.43.160(e) (App. 118a) (emphasis added).

The resulting economic disadvantage to nonresident commercial fishermen, and the adverse impact on interstate commerce, is both obvious and significant.

2. The Proceedings Below. Petitioners are a class of nonresident commercial fishermen who have been required to pay at least three times as much as Alaska residents to obtain fishing licenses and permits to fish in Alaska's territorial waters. App. 1a-2a, 88a-89a. In 1984, Petitioners filed suit in Alaska Superior Court, challenging Alaska's discriminatory commercial-fishing-license fee statutes and regulations, specifically Alaska Stat. §§ 16.05.480 and 16.43.160(b), and Alaska Admin. Code tit. 20, § 05.240, as violative of the Interstate Commerce and Privileges and Immunities Clauses of the United States Constitution. App. 2a-3a, 88a-89a. This case has now gone to the Alaska Supreme Court three times.

Carlson I. On cross-motions for summary judgment, the Alaska Superior Court held that both Clauses apply to the discriminatory Alaska license scheme. The court nonetheless found no Commerce Clause violation because the "legitimate local purpose" of "ensuring that nonresidents pay their fair share of [fisheries] management costs . . . justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose." App. 96a. The Superior Court also found no violation of the Privileges and Immunities Clause because the state had demonstrated a "permissible" reason for the discriminatory fee: "to have the non-resident [fishermen] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of the state, which costs are largely borne by the residents through general fund expenditures." App. 95a. The Superior Court ultimately determined that the figures submitted by the state reflected the costs to Alaska of managing its commercial fisheries, and that the fee differential fairly reflected nonresidents' "fair share" of those costs. App. 95a-96a, 97a.

On appeal, the Alaska Supreme Court agreed with the Superior Court that commercial fishing "license fees which discriminate against non-residents are *prima facie* a violation" of the Privileges and Immunities Clause, App. 98a, but remanded for consideration of "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." App. 105a-106a. Only if the "higher fees charged nonresidents are excessive" in comparison to the economic burden borne by state residents to support the state's fisheries would the differential be unconstitutional. App. 106a. Alaska residents pay no state income tax. Instead, the majority of the state's budget was derived from petroleum taxes and state oil royalties. *See* App. 106a (for fiscal year 1986, 86 percent of state revenues derived from oil production). The Alaska Supreme Court treated each resident's share of oil revenues as equivalent to a tax payment, on the theory that revenues allocated to fisheries management that could have been put to other uses reflect "benefits foregone" by each resident. App. 106a.

With respect to the Commerce Clause, the Alaska Supreme Court stated that the analysis, "assuming [the Clause] is implicated," would be similar to the analysis under the Privileges and Immunities Clause. App. 103a. The court noted that early cases from tbis Court "suggested that the Commerce Clause does not come into play until the fish are actually harvested . . . ," although "[d]ictum in more recent cases suggests the contrary." App. 103a n.4. The Alaska Supreme Court reached no firm conclusion about the applicability of the Commerce Clause in *Carlson I.*

Carlson II. On remand, the parties were required to propose a method by which to compare the fees paid by nonresidents with the expenditures of state revenues "to which non-residents make no contribution." App. 59a. The

Superior Court rejected Petitioners' formula, which compared each Alaska resident's per capita contribution toward maintaining Alaska's commercial fisheries with the fee differential, and instead adopted the state's proposed approach, which "in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by non-residents." App. 59a. Applying that analysis, the Superior Court concluded that the discriminatory fees did not violate the Constitution because "[r]esidents pa[id] by way of taxes, or the economic equivalent of taxes, *i.e.*, benefits foregone, substantially more than non-resident fishers pay toward the benefits received. . . ." App. 86a.

On appeal, the supreme court held that the higher license cost for nonresidents did not implicate the Commerce Clause. According to the court in *Carlson II*, harvested fish only become articles of commerce when they cross state lines. Because "the fee differentials at issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits," App. 62a, the court concluded that the Commerce Clause does not apply. App. 62a-63a.

As to the Privileges and Immunities Clause, the Alaska Supreme Court refused to apply this Court's longstanding "compensatory tax" jurisprudence, then most recently articulated in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93 (1994), in which this Court held that the Commerce Clause does not permit states to consider residents' contributions to general tax revenues as compensating for higher fees imposed on out-of-state competitors. App. 65a. Instead, the Alaska Supreme Court held that the Alaska fee differential "merely balances out 'any conservation expenditures from taxes which only residents pay,'" a result the court found permissible under the Privileges and Immunities Clause in light of *Toomer v. Witsell*, 334 U.S. at 399. App. 66a.

The Alaska Supreme Court in *Carlson II* approved Petitioners' proposed *per capita* formula, which had been rejected by the trial court, and rejected the *pro rata* method proposed by the state and adopted by the trial court. App. 67a-69a. The court conceded that the comparison advocated by the state–the total fisheries-related expenditures made by the state verses the total contribution made by nonresident fishermen–would violate the *Oregon Waste* prohibition on compensatory taxes. App. 68a & n.16. The court believed, however, that the *per capita* formula avoided this problem by comparing each Alaska resident's individual contribution toward fisheries management with the fee differential assessed against each individual nonresident fisher. The *Carlson II* court thus remanded the case to the Superior Court for application of the *per capita* formula in order to determine whether any nonresidents were due a partial refund of fees paid. App. 69a.[4]

Justice Rabinowitz dissented. App. 76a-82a. He would have applied the compensatory tax analysis of *Oregon Waste* to the Privileges and Immunities analysis of the Alaska fee differential. App. 78a. Justice Rabinowitz explained that the distinction drawn by the Alaska Supreme Court between the *per capita* and *pro rata* formulae is meaningless and does not save the discriminatory fee from invalidity under the compensatory tax rationale: "The approach authorized by [*Carlson II*] seems to place greater emphasis on the theoretical equality of individual contributions than the

---

[4] Under the *per capita* formula, the state's fisheries budget is divided by the Alaska population. That amount then is multiplied by the percentage of the state's budget derived from oil revenues, to determine each Alaska resident's *per capita* contribution to the management and conservation of the state's fisheries (by virtue of benefits foregone). App. 72a-73a. The resulting figure is compared to the nonresident fee differential to determine whether the differential is constitutionally excessive. App. 69a.

Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their 'entire share' of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste . . . were to be borne by the entire population." App. 79a n.3. And even "[m]ore importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances." *Id.*

This Court denied certiorari. *Carlson v. Alaska Commercial Fisheries Entry Comm'n*, 519 U.S. 1101 (1997).

Carlson III. On remand, the Alaska Superior Court held an evidentiary hearing to determine what state expenditures comprised the components of the formula approved by the *Carlson II* court. The Superior Court adopted virtually wholesale the state's proposed method for computing both its annual fisheries budget and the percentage of the total state budget derived from oil revenues for fiscal year 1996, and accepted without further inquiry the figures supplied by the state in making its calculations. Using the state's figures, the court determined a maximum allowable fee differential that could be charged to nonresidents in 1996 consistent with the *Carlson II* formula, App. 53a-55a, and directed the parties to use the court's methodology to calculate the allowable fee differential for each year going back to 1984. Rather than perform this accounting, both parties appealed.

On appeal, the Alaska Supreme Court in *Carlson III* declined to reconsider its *Carlson II* Commerce Clause holding, despite two then-recent decisions of this Court: *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), and *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997). App. 14a-24a. Reiterating its *Carlson II* reasoning, the court declared *Fulton Corp.* inapplicable "because commercial fishing licenses are not objects of interstate commerce" and because the Alaska fee differentials "relate not to commerce but rather to the

opportunity to utilize Alaska's natural resources." App. 20a-21a. The court likewise distinguished *Camps Newfound* by noting that this Court had likened the charitable camp there at issue to a hotel, which the Alaska Supreme Court viewed as "a sufficient distinction from commercial fishing licenses and permits to allay concerns about the constitutionality of the fee differential." App. 22a. The court offered no further analysis than that. In a footnote, the court declared that, even if Alaska's fee differential implicated the Commerce Clause, it would nevertheless satisfy this Court's rigorous compensatory tax jurisprudence, citing *Fulton Corp.*, 516 U.S. at 331. App. 21a n.78. *But see* App. 68a & n.16.

The Alaska Supreme Court then reviewed the components of the state's fisheries budget approved by the Superior Court and the calculation of the percentage of the state budget derived from oil revenues. App. 27a-37a. The Alaska Supreme Court found no clear error in the Superior Court's determination that the "direct and indirect operating expenditures" calculated by the state should be included in the fisheries budget. App. 29a. The court also agreed with the Superior Court that categories of costs described by the state as "general governmental expenditures" and "foregone revenues" from commercial fishery resources cannot be included. App. 31a-33a, 34a-35a. However, the court reversed the Superior Court's determination that "capital costs" directly supporting the commercial fishing industry and the state's "hatchery loan fund subsidy" should be excluded from the fisheries budget. App. 33a-34a. *Carlson III* left "to the superior court on remand to determine whether proportionality exists [between Alaska residents' per capita contribution as calculated by the *Carlson II* formula and the fee differential imposed for a given year] and whether a refund is due." App. 26a.

REASONS FOR GRANTING THE WRIT

This case presents important and far-reaching questions concerning the application and relationship of the Commerce

Clause and the Privileges and Immunities Clause. At issue here are discriminatory license fees that favor state residents over nonresidents who seek to pursue their trade in the licensing state, and the constitutional limitations on a state's ability to assess such discriminatory fees.

Alaska requires all commercial fishermen to purchase licenses and permits to fish in Alaska's territorial waters. Nonresidents are required to pay at least three times as much as residents. Despite this facially discriminatory surcharge, the Alaska Supreme Court held that higher costs charged to out-of-state residents for *commercial* fishing licenses do not even implicate the Interstate *Commerce* Clause. It concluded that Alaska's discriminatory commercial-fishing-license scheme warrants scrutiny only under the Privileges and Immunities Clause, and that the overcharge of nonresidents is permissible under that Clause so long as it does no more than compensate the state for fisheries-related expenditures made from revenues to which only state residents contribute.

Although it expressly refused to apply the Commerce Clause to Alaska's fee differential, the Alaska Supreme Court selectively borrowed the Commerce Clause's "compensatory tax" doctrine to justify imposing higher fees on nonresidents; even so, it refused to apply the rule of strict equality that is the essence of that doctrine. *See, e.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

The *Carlson III* holding thus invites states to justify, under the rubric of the Privileges and Immunities Clause, patently discriminatory taxes and fees imposed disproportionately on nonresidents. If not reversed, the decision below would sanction, under the auspices of the Privileges and Immunities Clause, a plainly discriminatory tax on a commercial activity that could not possibly survive scrutiny under this Court's Commerce Clause jurisprudence.

I. THE DECISION BELOW CONFLICTS WITH COMMERCE CLAUSE DECISIONS OF THIS COURT

A. The Commerce Clause Applies Because Nonresident Commercial Fishermen Are Engaged In Interstate Commerce

The Alaska Supreme Court refused to analyze the discriminatory license-fee scheme under the Commerce Clause based on its cramped view that the Commerce Clause applies only to "the interstate flow of *articles of commerce.*" *Carlson II*, 919 P.2d at 1340 (emphasis in original). The court distinguished between fee differentials "predicated upon the movement of articles of commerce across state lines" and those based on "the residency status of those applying for permits," believing only the former to be subject to the Commerce Clause. *Id.* That holding cannot be reconciled with precedent, nor with common sense.

Under the Commerce Clause, "commerce" is defined far more broadly than the Alaska Supreme Court acknowledged. In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), this Court held that a charitable camp located in Maine that enrolled campers who resided in "all parts of the Nation" was engaged in interstate commerce: "The attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce.'" *Id.* at 573. This holding was neither novel nor surprising: Over sixty years ago, in *Edwards v. California*, 314 U.S. 160 (1941), this Court declared it "settled beyond question that the transportation of persons is 'commerce,' within the meaning of" the Commerce Clause. *Id.* at 172. The nonresident fishermen who travel to Alaska to fish (and pay a disproportionate price for that privilege) generate the same sort of interstate "commerce" as the campers in *Camp Newfound* and the indigent who traveled to California in *Edwards*.

Indeed, this Court has long recognized that commercial fishing is by its very nature an *interstate, commercial* enterprise:

> The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. . . . A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent.

Douglas v. Seacoast Prod., Inc., 431 U.S. 265, 285-86 (1977) (footnotes omitted) (citing the Commerce Clause decisions in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-39 (1949), and *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974)).

And because that interstate commercial enterprise depends upon access to natural resources, the Commerce Clause applies with particular force. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 533-34 (1978) ("the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."); *Camps Newfound*, 520 U.S. at 578 ("[b]y encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent"). The natural resource at issue here–Alaska's fishing waters and the fish that swim in them–is made available to Alaska residents on a far more favorable basis. And that favoritism impacts not

nonresidents' use and enjoyment of the state's fishing waters for recreation, *cf. Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388 (1978) (higher licensing fees imposed on nonresidents for recreational elk hunting license did not implicate category of rights protected by Privileges and Immunities Clause), but their access to the very resource upon which their commercial interests depend.

The Alaska Supreme Court's original holding to the contrary–that the Commerce Clause has no application to the discriminatory license fee–was apparently premised on the fact that the license and permitting fees are imposed prior to any fish being harvested. *See Carlson II*, 919 P.2d at 1340 n.8. That rationale, however, has been soundly discredited. The *Carlson* court's reasoning was derived from the Commerce Clause holding of *Toomer v. Witsell*, that a non-discriminatory South Carolina tax imposed on the taking of shrimp within the state's territorial waters did not violate the Commerce Clause because the taxable event–the taking of the shrimp–occurred before the shrimp "entered the flow of interstate commerce." 334 U.S. 385, 394-95 (1948). *Toomer*'s Commerce Clause holding, and the cases upon which that holding rested, *id.* at 394-95 n.22, including *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923); and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927), have long since been recognized as unsound. This Court has expressly disapproved "*Heisler* and its progeny" insofar as they suggest that the Commerce Clause has no application until an article of commerce has entered "the stream of interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614, 617 (1981). And the last vestiges of the rule that states could, without Commerce Clause limitation, freely tax certain purely local activities that occurred prior to the commencement of "interstate" commerce were eradicated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

In short, the Alaska court's decision that the Commerce Clause has no application to Alaska's discriminatory fee

ignores the reality of the interstate commercial interests–the "interstate commerce"–directly affected by the state's licensing scheme. The discriminatory fee "impose[s] a disparate burden on any [nonresident] competitors" who travel to Alaska to fish in the state's commercial fisheries. *Pharm. Research & Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855, 1871 (2003). And it is precisely such discriminatory measures protective of local commercial interests at the expense of nonresident competitors that the Commerce Clause forbids.

B. The Commerce Clause Applies To Discrimination Based On Residency

In holding that discrimination based on residency simply is not cognizable under the Commerce Clause, the Alaska Supreme Court boldly announced that this Court has instead "consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses." *Carlson II*, 919 P.2d at 1340-41. While the Privileges and Immunities Clause is of course implicated when states discriminate on the basis of residency, this Court has long recognized that the Commerce Clause also reaches such discrimination where interstate commerce is involved: "The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *see also Walling v. Michigan*, 116 U.S. 446 (1886) (tax imposed only on nonresidents selling liquor in the state violated the Commerce Clause).

The Alaska Supreme Court's error is borne out by the fact that none of the decisions it cited (App. 62a-63a & n.10) even suggest that discrimination against *commercial* interests based on residency is not cognizable under the Commerce Clause. The wholly discredited Commerce Clause holding of *Toomer v. Witsell* did not relate to the higher license fees

imposed on nonresidents that were at issue in that case, but rather to a wholly separate and nondiscriminatory tax on the taking of shrimp. 334 U.S. at 394. In *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 213 (1984), a municipal resident hiring preference was not subject to the Commerce Clause because Camden was acting as a market participant; absent that fact, the Commerce Clause would have applied. In *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), the parties did not raise a Commerce Clause challenge to an Alaska hiring law giving a preference to state residents. *Sosna v. Iowa*, 419 U.S. 393 (1975), concerned residency limitations on a state court's divorce jurisdiction; no commercial interests were advanced. And *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), involved recreational, not commercial, hunting, and the nonresident plaintiffs raised no Commerce Clause challenge.

It is of course true that the Privileges and Immunities Clause protects the right of a citizen of one state to enter another state for the purpose of engaging in lawful commerce. *See, e.g.*, *Hicklin*, at 524 (noting body of "decisions holding violative of the [Privileges and Immunities] Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State."); *Baldwin*, 436 U.S. at 383 (citing *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449 (1871)); *United Bldg. & Const. Trades Council*, 465 U.S. at 219. That principle applies equally where, as here, pursuit of the common calling depends upon access to natural resources found within the state: "[A] State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause." *Baldwin*, 436 U.S. at 386 (citing *Toomer*, 334 U.S. 385).

When a common calling involves *interstate* as opposed to purely intrastate commerce, however, there is no basis for

concluding that the Commerce Clause is not also implicated. While the Privileges and Immunities Clause and the Commerce Clause "have different aims and set different standards for state conduct," *United Bldg. & Constr. Trades Council*, 465 U.S. at 220 ("It is discrimination against out-of-state residents on matters of fundamental concern which triggers the [Privileges and Immunities] Clause, not regulation affecting interstate commerce."), nothing in the Court's jurisprudence precludes the application of both clauses when *both* concerns–a regulation that both affects "matters of fundamental concern" and impacts interstate commerce–are implicated. Indeed, just last Term in *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003), this Court held that claims by nonresidents challenging California's milk pricing and pooling regulations are cognizable under *both* the Commerce Clause and the Privileges and Immunities Clause. This of course is appropriate, given "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause–a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." *Hicklin*, 437 U.S. at 531-32 (footnote omitted); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 & n.8 (1985).[5]

---

[5] As the Alaska Supreme Court noted (App. 63a n.11), the Ninth Circuit struck down an earlier version of Alaska's discriminatory commercial-fishing-license scheme under the Commerce Clause. *Anderson v Mullaney*, 191 F.2d 123 (9th Cir. 1951). This Court affirmed the unconstitutionality of the discriminatory license scheme on Privileges and Immunities Clause grounds without reaching the Ninth Circuit's Commerce Clause holding. *Mullaney v. Anderson*, 342 U.S. 415 (1952). The Ninth Circuit's Commerce Clause holding therefore remains intact and conflicts with the Alaska Supreme Court's holding that the Commerce Clause has no application to such discriminatory license fees.

The flaw in the Alaska Supreme Court's reasoning becomes apparent when it is applied to a slight factual variation: If the applicant for a commercial fishing license were an out-of-state corporation (which employs individual fishermen and pays the Alaska license fees on behalf of its employees) rather than an individual, the Privileges and Immunities Clause, which protects only "citizens," would have no application. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-82 (1868), *overruled in part on other grounds*, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). But the Commerce Clause surely would protect the National marketplace against such patent local favoritism. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). It is unfathomable that the Commerce Clause would not be implicated (and violated) by such obvious favoritism.

II. THE DECISION BELOW AUTHORIZES DISCRIMINATION THAT NONE OF THIS COURT'S DECISIONS WOULD COUNTENANCE

The Alaska Supreme Court, extrapolating from a fragment of a dictum in *Toomer v. Witsell*, endorsed under the Privileges and Immunities Clause a surcharge imposed solely on nonresidents that could not possibly pass Commerce Clause muster. The court justified that surcharge on the ground that it "equalizes" expenditures made from Alaska's general revenues. Even if the decision below were correct that only the Privileges and Immunities Clause applies, which Petitioners dispute, *see* Part I, *supra*, just as this Court has prohibited states under the Commerce Clause from shifting to nonresidents "charges purportedly included in general forms of intrastate taxation . . . anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds," *Oregon Waste*, 511 U.S. at 105 n.8, so too Alaska should be precluded from shifting such general costs of state government to nonresidents under the Privileges and Immunities Clause.

A. The *Carlson* Formula Authorizes A Compensatory Tax That Would Violate The Commerce Clause

Carlson II approved a formula for determining whether the "differential in fees charged residents and nonresidents was sufficiently related" to the state's asserted goal of "equalizing the burden of fisheries management" to justify the disparate treatment. App. 64a. According to *Carlson II*, the nonresident fee differential is allowable under the Privileges and Immunities Clause so long as the amount of the differential does not "substantially exceed" each Alaska resident's per capita contribution (via expenditures from the state's oil revenues, *see* n.4, *supra*) toward the maintenance and operation of Alaska's fisheries, as calculated by the *Carlson II* formula, in any given year. App. 72a-73a. While the description of the formula may seem complicated, it boils down to this: whether nonresidents pay, through license and permit fees, roughly the same amount residents "contribute" through state oil revenues. The fee differential sanctioned by *Carlson II* thus operates in theory as a compensatory tax–that is, a tax "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 516 U.S. at 331 (citation omitted). But a compensatory tax is valid under the Commerce Clause–and, it should follow, under the Privileges and Immunities Clause–only if it satisfies this Court's strict test for substantial equality. The Alaska surcharge plainly does not.

This Court has acknowledged that "interstate commerce may be made to 'pay its way.'" *Oregon Waste*, 511 U.S. at 102 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 281). A state's ability to exact from nonresidents a "fair share" of the state's costs related to a particular transaction or course of commerce is, however, subject to "the strictest scrutiny," *Oregon Waste*. 511 U.S. at 100-01 (citation omitted), because

> permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general

> forms of intrastate taxation "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds."

Id. at 105 n.8 (quoting *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992)); *see also Fulton Corp.*, 516 U.S. at 335 (noting "the danger of treating general revenue measures as relevant intrastate burdens for purposes of the compensatory tax doctrine").

Accordingly, the Court has invalidated state laws imposing higher taxes on out-of-state commercial interests than those imposed on purely in-state commerce unless (1) the state identifies the specific intrastate tax burden for which it is attempting to compensate, (2) the tax on interstate commerce roughly approximates but does not exceed the tax on intrastate commerce, and (3) the in-state and out-of-state levies are imposed on substantially equivalent events. *Fulton Corp.*, 516 U.S. at 332-33 (invalidating state intangibles tax on corporate stock that authorized residents to take deduction equal to percentage of corporation's income subject to North Carolina income tax); *see also Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984) (invalidating gross receipts tax imposed on out-of-state wholesalers from which in-state manufacturers were exempt); *Oregon Waste*, 511 U.S. at 104-05. Under this strict test, "use taxes on products purchased out of state are the only taxes [the Court] ha[s] upheld in recent memory under the compensatory tax doctrine." *Id.* at 105; *see Henneford v. Silas Mason Co.*, 300 U.S. 577 (1987) (upholding tax on use of any article of tangible personal property within the state unless article had already been subject to state sales tax in an equal or greater amount; although tax was facially discriminatory, the combined effect of the sales and use taxes was to impose equivalent burdens on interstate and intrastate commerce).

The surcharge Alaska has imposed on out-of-state commercial fishermen ostensibly to "equalize" expenditures from the state's general oil revenues plainly fails under this Court's compensatory tax jurisprudence.

First, *Oregon Waste* makes clear that costs paid out of a state's general tax revenues cannot support the imposition of allegedly "equivalent" taxes on out-of-state commerce. In *Oregon Waste*, this Court rejected, on Commerce Clause grounds, an Oregon surcharge imposed on the disposal in Oregon of waste generated in another state. The state defended the facial discrimination inherent in the surcharge by categorizing it as a "'compensatory tax' necessary to make shippers of [out-of-state] waste pay their 'fair share' of the costs imposed on Oregon by the disposal of their waste in the State." 511 U.S. at 102. This Court soundly rejected the state's attempted justification, noting that Oregon had not imposed "a specific charge" on the disposal of waste generated in-state for which the surcharge was intended to compensate. Instead, Oregon premised the surcharge on the theory that "intrastate commerce does pay its share of the costs underlying the surcharge through general taxation," *id.* at 104, a theory that the Court rejected as incompatible with the Commerce Clause. Indeed, this Court has repeatedly "decline[d] . . . to open such an expansive loophole in [its] carefully confined compensatory tax jurisprudence." *Oregon Waste*, 511 U.S. at 105 n.8. *Carlson*, however, opens precisely such a loophole, allowing the state to impose a discriminatory fee on out-of-state commercial fishermen to "compensate" for expenditures from the state's general revenues.

Second, this Court's compensatory tax jurisprudence requires that the purportedly compensating taxes "fall on substantially equivalent events." *See Fulton Corp.*, 516 U.S. at 338-39 (citing cases). While refusing to apply this test, the Alaska Supreme Court in *Carlson III* nevertheless claimed that the Alaska fee differential satisfied this rigorous equivalence requirement, because "the event being taxed,

namely the license to use state fisheries, is the same for residents and nonresidents." App. 21a n.78. This superficial analysis contradicts this Court's teachings. In *Oregon Waste*, the Court rejected the Oregon surcharge as a compensatory tax in part because "earning income and disposing of waste at Oregon landfills are even less equivalent than manufacturing and wholesaling," the taxable incidents compared in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). *Oregon Waste*, 511 U.S. at 105. Here, too, "the events being taxed" are not substantially equivalent: The tax on nonresidents falls on the privilege of fishing alone, but the state seeks to justify that higher tax on nonresidents by a *combination* of two "taxable events" for local residents–the lower cost of their fishing license, *plus* the local residents' alleged share of the monies generated by petroleum production. These are not "substantially equivalent events."

Finally, many discriminatory taxing schemes that states attempt to justify as "compensatory taxes," like the surcharge in *Oregon Waste*, fail for lack of proof that the tax is in fact a rough approximation of costs actually borne by state residents. *See, e.g.*, *Fulton Corp.*, 516 U.S. at 336-38. Alaska's discriminatory surcharge is even further afield from the compensatory taxes that this Court rejected in *Oregon Waste* and *Fulton Corp.*, however, given that the "burden" supposedly borne by Alaska residents does not even involve the payment of taxes in the first place.

In evaluating whether a state is free to assess a "compensatory tax" against nonresidents in order to equalize a tax burden unfairly borne by state residents, it is significant that residents face a direct burden as a result of the obligation to contribute to the state's tax fund, from which general expenditures are made. *See, e.g.*, *Henneford*, 300 U.S. at 579-80 (direct tax of two percent imposed on retail sales within the state). An individual (or, as in *Fulton Corp.*, a corporation) obligated to pay a tax on income "spends" personal funds in support of the state. No Alaska resident, however, makes such a contribution to Alaska's general

revenues, and none of the conservation (or other) expenditures cited by the state are made from "taxes which only residents pay," *Toomer*, 334 U.S. at 399, because Alaska does not impose an income tax on state residents. Instead, the expenditures the state seeks to recoup from nonresidents are made from "oil revenues" generated by petroleum production within the state, which has been the primary source of Alaska's revenues. *See, e.g.*, App. 106a (in fiscal year 1986, 86 percent of state revenues derived from oil production). *Carlson I* nevertheless proclaimed the state's oil revenues to be "analytically equivalent" to taxes paid only by state residents, without further analysis. App. 106a. In effect, the Alaska Supreme Court has allowed the state to use its natural oil bounty, the proceeds from which are themselves reserved for the residents of Alaska, as a justification for further, illegal favoritism of its own residents with respect to the state's natural bounty in fish.

In treating expenditures from state oil revenues as tantamount to expenditures from state income tax revenues–because Alaska residents "pay proportionately more by way of foregone benefits then nonresidents for fisheries management," *id.*–the Alaska Supreme Court vastly expanded the reach of, and the justification for, the compensatory tax doctrine. The Alaska Supreme Court's analysis would allow virtually any tax to be imposed disproportionately on nonresidents: Following the *Carlson* reasoning, *any* expenditure from a state's general revenues, whether or not derived from taxes imposed directly on residents, can be offset by imposing a "compensatory" tax or fee on any nonresident who seeks access to any resource or service located in or provided by the state.

In short, although it explicitly disclaimed any intent to authorize the imposition of a "compensatory tax" upon nonresident commercial fishermen, App. 66a, close analysis reveals that the Alaska Supreme Court has done precisely that, but without any of the rigorous limits this Court has imposed on application of the doctrine. The Alaska court

sanctioned under the Privileges and Immunities Clause precisely the sort of generalized tax-shifting that *Oregon Waste* prohibited under the Commerce Clause, on the theory that the fee differential does nothing more than "impos[e] on nonresidents their share of the costs of commercial fisheries," thereby "balanc[ing] out 'any conservation expenditures from taxes which only residents pay.'" App. 66a (quoting *Toomer*, 334 U.S. at 399). Semantics do not disguise the fact that Alaska has done what *Oregon Waste* forbids. If the Alaska license fee system is constitutionally permissible as a "compensatory fee," there are no real limits on surcharges a state may impose on nonresidents in the name of equalizing expenditures from the state's general revenues.

B. The *Carlson* Formula Sanctions A Discriminatory Fee That *Toomer* Does Not Authorize

The *Toomer* dictum can be read to crack an exceedingly narrow window under the Privileges and Immunities Clause for nonresident fee differentials that do no more than "compensate the state for any added enforcement burden [nonresidents] may impose or for any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399. In light of the *Toomer* dictum and similar language with respect to the Commerce Clause in *Oregon Waste, see* 511 U.S. at 102, it is possible that perfect equality of treatment of nonresidents is not mandated by the Constitution, but that states may take into account limited enforcement and conservation expenses when imposing fees on nonresidents. Yet the Alaska Supreme Court's rationale for upholding the state's nonresident fee differential, which was imposed without reference to any such costs (and in the absence of any "taxes" paid by residents), would vastly expand upon *Toomer* and would permit far more discrimination than absolutely necessary to compensate the state for any additional "enforcement burden" generated by nonresidents or "conservation expenditures" from state funds. In fact, Alaska has conceded that nonresident

commercial fishermen do not impose any greater costs on the state than do residents. *See State of Alaska v. Carlson*, No. S-10091/10101, Joint Excerpt of Record on Appeal at 119 (Alaska Supreme Ct., filed Sept. 17, 2001).

Most alarmingly, the Alaska court's approach would allow a state to shift to nonresidents a wide range of generalized costs of state government–a result plainly prohibited by this Court's compensatory tax cases, *see supra* pp. 20-21; *Oregon Waste*, 511 U.S. at 105 n.8, and clearly beyond the extraordinarily limited category of "enforcement" and "conservation" expenditures that the Privileges and Immunities Clause allows to be taken into account, *Toomer*, 334 U.S. at 399. The decision below invites such *post hoc* accounting abuses, as a limitless array of costs can be (and has been) characterized as sufficiently related to a particular state program or service to warrant inclusion in the category of costs shifted to nonresidents. Here, Alaska seeks to pass along to nonresident commercial fishermen far more than the costs of any "added enforcement burden" imposed by the presence of nonresidents in the state's commercial fisheries (Alaska has cited none) or even "conservation expenditures" made from Alaska's revenues. *Toomer*, 334 U.S. at 399. The Alaska Supreme Court reasoned that the appropriate calculation instead derives broadly from "what the State spends from its general funds on its commercial fisheries." App. 27a.

Relying upon that expansive premise, Alaska included in its submission to the court significant components that can only be described as general costs of state government, such as "mechanical inspection[s]" performed by the Department of Labor, occupational safety inspections, and legal costs associated with "statehood defense/federal relations" and "Environmental-Exxon Valdez." App. 127a. Indeed, Alaska's breakdown of its fisheries expenditures includes such all-encompassing categories as "Public Safety-Administration Services" and "Community & Regional Affairs-Community Development Quota Program." App.

127a-128a. The state also included costs of the Department of Fish and Game attributable to "sport fish," App. 128a, a recreational category that by definition should not be charged to *commercial* fishermen. And the state's budget includes "shared fish taxes," *see* Alaska Stat. §§ 43.75.015, 43.75.130, which are business taxes collected by the state from fish processors and then passed through to municipal governments for general uses. App. 128a. In fact, these broad categories of costs are now enumerated in the permit fee statute, which notes that nonresident permit fees may reflect, among other things, "the "direct operating expenditures" of a variety of state agencies and institutions including the Office of the Governor, the Department of Community and Economic Development, the Department of Labor, the Alaska court system, and others, and "capital expenditures to support the commercial fishing industry as measured by annual depreciation of public facilities and infrastructure." Alaska Stat. § 16.43.160(e) (App. 118a-120a).

The state has been given such leeway in calculating its fisheries budget that it can–and perhaps did–include costs directly related to this very litigation (under such broad categories as "Law/Civil" or "CFEC"). The costs to the state of preparing the accounting used to calculate the state's fisheries budget may also be included within the broad categories of fisheries-related legal or administrative costs the state seeks to pass along to nonresidents. In essence, the state could shift a portion of its legal fees to the very class of nonresident fishermen who challenged the discriminatory fee that prompted this case. Such a perverse result cannot be intended by the *Toomer* dictum.

There is no hint in *Toomer* (much less in the Court's compensatory tax cases) that the constitutionality of a facially discriminatory fee turns on this sort of line-item accounting of every conceivable general cost associated with the operation of Alaska's commercial fisheries, much less a *post hoc* accounting prepared by the state and accepted

virtually wholesale by the courts. This Court has made clear that "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations." *Mullaney*, 342 U.S. at 418. The open-ended invitation to Alaska to define and calculate its fisheries budget encouraged the state to inflate its fisheries-related costs (in ways the Alaska legislature never considered) to justify the substantial differential. Indeed, under the *Carlson* formula, Alaska can attempt to impose a fee differential greater than the current three-to-one surcharge, so long as the state can assemble a sufficiently large "fisheries budget" after the fact. The potential for abuse–at the expense of out-of-state commercial interests–is virtually limitless.

The Alaska Supreme Court erred by failing to recognize that, apart from the specific "enforcement" and "conservation" expenditures discussed in *Toomer*, the Privileges and Immunities Clause does not sanction the expansive cost-shifting approved by the court below. When a state defends a facially discriminatory fee on the ground that it compensates for a variety of expenditures from general revenues that otherwise would be borne by state residents alone, this Court's compensatory tax jurisprudence provides the appropriate analytical framework–and requires strict equality of treatment of residents and nonresidents.

III. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS WITH NATIONWIDE CONSEQUENCES

Alaska's commercial fishing industry is vital, both within the state and to the Nation as a whole. "The commercial fishing industry is a major component of [the] statewide economy and the economic backbone of Alaska's fishing communities." Commercial Fisheries Entry Commission, 2001 Annual Rpt. at 1 ("2001 Annual Report"). Beyond the state's borders, fish caught in Alaska's waters account for *more than half* of the Nation's total commercial catch. In 2001, commercial landings–quantities of fish bought and

sold–at Alaskan ports slightly exceeded 5 billion pounds of fish, valued at $869.9 million; total commercial landings at all United States ports in 2001 were 9.5 billion pounds of fish with a value of $3.2 billion.[6] Thus, in 2001, commercial landings at Alaskan ports represented more than half of the total national catch of fish, in pounds, and almost 30 percent of the value of fish caught and landed at United States ports. Given the sheer size of the fish pool in Alaskan waters, it is not surprising that large numbers of nonresident commercial fishermen travel to Alaska to participate in its many fisheries.[7]

Alaska's prominent role in the Nation's commercial fishing industry makes the constitutional issues presented by this case all the more pressing: The state that controls many of the country's most abundant and profitable commercial fisheries has erected barriers to entry that favor local commercial fishermen over nonresidents. And the discriminatory fee challenged here is hardly Alaska's first attempt to favor state residents over nonresidents. *See*, *e.g.*, *Anderson v. Mullaney*, 191 F.2d 123, 125 (9th Cir. 1951), *aff'd*, 342 U.S. 415 (1952) (striking down Alaska's imposition of $5 commercial-fishing-license fee on resident fishermen and $50 license fee on nonresidents); *Hicklin*, 437 U.S. at 533-34 (challenge to hiring preference law requiring the employment of Alaska residents in connection with oil and gas projects within the state); *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980) (striking down Alaska's rule requiring applicant for the Alaska bar to establish domicile in the state at least 30 days before bar examination

---

[6] National Oceanic and Atmospheric Administration, *Fisheries of the United States*, at iv, vii, 6 (2001). The state with the next highest level of commercial landings in 2001 was Louisiana, with 1.2 billion pounds, less than one-fourth of the Alaska landings. *Id*.

[7] As of 2001, nonresidents held 4,910 of 23,339 permits issued by the State, a total of 21 percent. 2001 Annual Report, at 17.

under Privileges and Immunities Clause); *cf. Zobel v. Williams*, 457 U.S. 55 (1982) (Equal Protection challenge to Alaska Permanent Fund dividend distribution plan, which calculated amount of dividend based on length of time an individual resided in Alaska).

Although the Alaska legislature has been historically aggressive in acting to protect the state's residents against competition from outsiders, it is not alone: At present, 34 states (aside from Alaska) discriminate against nonresidents by imposing additional fees on them or by banning their access to commercial fishing altogether.[8] Allowing the

---

[8] *See* Ala. Code § 9-12-80 (non-residents charged at least as much as their state charges non-residents but not less than twice as much as Alabama residents, unless the non-resident's state has entered into a reciprocity agreement with Alabama); Ark. Code Ann. § 002 00 001 41.13 (excluding nonresidents from commercial fishing activities, with exceptions for residents of Mississippi, Missouri and Tennessee, according to reciprocal agreements); Cal. Fish & Game Code § 7852 (non-resident crew members charged three times as much as residents; non-resident vessel operators charged sixty-six percent more than residents); Conn. Gen. Stat. § 26-142a (c) (non-residents charged fees ranging from thirty-three percent more to five times more than residents, depending on devices used); Del. Code Ann. tit. 7 § 914 (non-residents charged ten times more than residents, with exceptions for New Jersey residents fishing certain portions of Delaware River); Fla. Stat. Ann. § 370.06(2) (non-residents charged four times as much as residents for standard license and five times as much for special activity license); Ga. Code Ann. § 27-2-23 (non-residents charged more than ten times as much as residents); Idaho Code § 36-416 (non-residents charged twice as much as residents); 515 Ill. Comp. Stat. 5/20-45, 5/20-55 (non-residents charged more than four times as much as residents for licenses and twice as much as residents for each 100 yards of seine and each line, trap, or net device); Ind. Code Ann. § 14-22-14-6 (excluding non-resident individuals and corporations with non-resident shareholders); Iowa Code § 482.4 (non-residents charged twice as much as residents for licenses and each unit of gear; non-resident mussel fishers and mussel helpers charged twenty-five times and four times more, respectively, than residents); Kan. Admin. Regs. § 115-2-1 (non-residents charged more than twelve times as much as residents for commercial mussel fishing

---

licenses); 301 Ky. Admin. Regs. 3:022 (non-residents charged nearly five times as much as residents); La. Rev. Stat. Ann. § 56:303 (non-residents charged more than eight times as much as residents); Me. Rev. Stat. Ann. tit. 12, § 6501 (non-residents charged ten times as much as residents); Md. Code Ann., Natural Resources § 4-701 (non-residents charged twice as much as residents as well as surcharge of either $350 or the difference between total fees charged Maryland residents for like activities in applicant's domicile state and total fees charged applicant in Maryland, whichever is greater); Mich. Comp. Laws § 324.47330(2) (non-residents charged five times as much as residents); Minn. Stat. Ann. §§ 97A.461, 475 (nonresidents excluded from commercial fishing); Miss. Code Ann. §§ 49-15-80, 49-15-30 (non-residents charged four times as much as residents, except that residents of other states bordering on Gulf of Mexico charged same fees as their domicile states charge Mississippi residents in order to promote reciprocal arrangements); Mo. Code Regs. tit. 3, § 10-10.720 (non-residents charged eight times as much as residents); Neb. Rev. Stat. § 37-4, 104 (non-residents charged two times as much as residents); N.J. Stat. Ann. § 23:5-24.2 (non-residents charged ten times as much as residents, unless their domicile state charges New Jersey residents the same amount as residents for a similar license); N.Y. Comp. Codes R. & Regs tit. 6, § 35.1 (d) (non-residents charged ten times as much as residents); N.C. Gen. Stat. § 113-168.2 (non-residents charged four times as much as residents or amount equal to the non-resident fee charged by non-resident's state, whichever is less, but in no event less than North Carolina resident's fee); N.D. Cent. Code, § 20.1-03-12 (non-residents charged four times more than residents for commercial frog licenses and ten times more for commercial clam licenses); Okla. Stat. Ann. tit. 29, § 4-103 (non-residents charged more than twice as much as residents); Or. Rev. Stat. § 508.285 (non-residents charged twice as much as residents); 30 Pa. Cons. Stat. § 2903 (b) (5) (non-residents charged two times as much as residents); R.I. Gen. Laws §§ 20-2.1-5, 20-2.1-6 (non-residents charged four times as much as residents); S.C. Code Ann. §§ 50-5-300, 50-5-310 (non-residents charged twelve times as much as residents); Tenn. Code Ann. § 70-2-205 (non-residents charged four times as much as residents for fishing only and six times as much for mussels only); 31 Tex. Admin. Code § 53.6 (non-residents charged four times as much as residents); 4 Va. Admin. Code §§ 20-730-20, 20-920-30 (non-residents charged additional $350 per vessel); Wash. Rev. Code Ann. §§ 77.65.160, 77.65.200 (non-residents charged eighty percent more than residents for limited entry salmon

decision below to stand will only encourage states to engage in impermissible economic protectionism.

* * * * *

"In its negative aspect, the Commerce Clause prohibits economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp.*, 516 U.S. at 330. Alaska's discriminatory nonresident commercial-fishing fee does just that: It ensures that state residents who make their living as commercial fishermen need not face the degree of competition from nonresidents engaged in the same commercial endeavors that would prevail in a completely free market. That Alaska expressly bases its surcharge on residency makes undeniable the state's intent to protect its residents from out-of-state competition. Such a facially discriminatory law should be held unconstitutional under *both* the Commerce and the Privileges and Immunities Clauses.

CONCLUSION

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

---

licenses and fifty to sixty percent more for other species, gear, or area licenses); Wis. Stat. §§ 29.523-537 (nonresidents excluded from commercial fishing).

Respectfully submitted,

LOREN DOMKE
LOREN DOMKE, P.C.
2201 North Jordan Avenue
Juneau, Alaska 99801
(907) 790-2844

BETH HEIFETZ
GREGORY A. CASTANIAS
(*Counsel of Record*)
JULIA C. AMBROSE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioners

July 11, 2003