

MORRISON FOERSTER

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Eric George (00:00:02):

Thank you, Chief Judge Thomas. And may it please the court. My name's Eric George. And I'm here on behalf of the plaintiffs and appellants. I would like to take 15 minutes and then have 10 minutes go to the deputy solicitor general, who's here, Aimee Feinberg, and then say five minutes for rebuttal. And to begin, Your Honors, if I can add a little perspective on the law that's at issue here, there are two fundamental points that I'd like to make. Number one, although the very purpose of Dormant Commerce Clause jurisprudence is to stem protectionism to address in instances where in-staters are made to benefit at the expense of out-of-staters. Number one, there is zero discrimination of any sort imposed by the Resale Royalty Act here. There's no penalization against out-of-state interests. There's no in-state favoritism. And the second point I'd like to make is that at no time, since its 1976 enactment, has this act purported to or in any way had the effect of regulating price, the terms of a sale, or the conditions of a sale. All that this enactment has done is require that a California resident either directly or through his agent or her agent pay a certain levee, uncertain, profitable art sales.

Eric George (00:01:35):

That's it. We know that, in the context of Dormant Commerce Clause, labels don't matter. Complete Auto tells us we look past the labeling nomenclature, but if we look at this as a regulation or as a tax, the act readily passes muster. Let me focus on why that's so for regulation. Any regulation that's non-discriminatory and does not involve price controls or tie in-state and out-of-state prices is not reached by Healy. The Supreme Court told us that in Walsh in 2003. This court has told us that same thing. I'm not going to give the French pronunciation, but in the flaw draw case, that has been a constant.

Judge Berzon (00:02:25):

Isn't—my understanding is that [inaudible]—that there is—there are various strains of Dormant Commerce Clause jurisprudence, and some of them are sort of black letter and some of them are fuzzier and balancing and so on. But from Healy—before Healy, in terms of this court's jurisprudence, actually and directly regulating an out-of-state transaction. And you can argue about whether that's what's happened here, but it is a Dormant Commerce Clause violation, regardless of whether it favors or disfavors the in-state or the out-of-state people that you just can't enact a law that regulates an out-of-state transaction, is that wrong?

Eric George (00:03:08):

That is wrong, Your Honor, with all due respect.

Judge Berzon (00:03:09):

Why?

Eric George (00:03:09):

It takes more than that. It takes either discriminatory law or it has to involve actual prices. For example, each of—

Judge Berzon (00:03:19):

So I could pass a law that says that in New York anybody who sells X in New York has to do Y.

Eric George (00:03:29):

Yes. And—

Judge Berzon (00:03:29):

And California can pass such a law, and that would not be a Dormant Commerce Clause problem.

Eric George (00:03:33):

Ah, no to be sure. I appreciate the clarification. The language of Healy has a very important ad verbum. The regulation has to be wholly outside of the state in order for it to be extraterritorial and impermissible.

Judge Graber (00:03:48):

So if someone buys and sells in New York, to use Judge Berzon's example, even if one party is from Paris and the other party is from another state, it's your view that the other state, whichever that may be California, Ohio, whatever, can regulate that sale that takes place in New York?

Eric George (00:04:17):

The answer for that would be Complete Auto, and there'd be a four part—

Judge Graber (00:04:21):

It's a yes or no. It's a—Complete Auto's maybe a reason, but can the state regulate the New York transaction merely because either the buyer or the seller is from the state that seeks to regulate?

Eric George (00:04:38):

No. For a tax, there has to be more. And that's why I mentioned Complete Auto, but it would certainly be indispensable in order to get to the next step that the tax—

Judge (00:04:48):

So I want to stay with that point. Let's assume we view this as a tax, because in terms of its incidents on interstate commerce, it appears to me to be exactly the same as a sales tax posed on gross receipts. Is there any case you can cite for the proposition that California can consummate a sale of goods made in a— can tax the consummation of a sale of goods in another state?

Eric George (00:05:13):

I think the closest we have is Quill and National Geo—

Judge (00:05:16):

Quill is a use tax.

Eric George (00:05:17):

Yes.

Judge (00:05:18):

Is there—I'm talking about a sales tax. We're talking about sale of goods, so you're not tax—this is not a use tax. You're not taxing the enjoyment of the art in California, because as Judge Graber points out, you reach a transaction where the art's never even been in California. So is there any case that you can cite

where a sales tax on a sale consummated in a different state than the state imposing the tax has been upheld?

Eric George (00:05:42):

I don't know the answer to that, Your Honor.

Judge (00:05:43):

Didn't the Supreme Court say in the Oklahoma case that only Oklahoma could tax the sale of the ticket?

Eric George (00:05:53):

Well, I don't know. And I think that in the context of current tax law, we'd have to look at Complete Auto and that any case that follows that regime.

Judge (00:06:03):

So under Complete Auto, do you think that it would be legal for California to tax the sale of goods made by a California resident to a New York resident if the sale of goods occurred in California—in New York, sorry?

Eric George (00:06:15):

In this case, yes, and I will elaborate why, because you don't just have a Californian who is the seller of the art. You also have an agent who happens to be a California resident. And let's recall, we've got three defendants here. One is a California domiciliary; the other two have a substantial presence in California. So I believe that yes, under that circumstance, tax would be appropriate.

Judge (00:06:39):

You do agree that the statute reaches circumstances where not—where those facts not necessary?

Eric George (00:06:44):

Where those facts are not—

Judge (00:06:45):

Are not necessary. The statute on its face reaches a circumstance where a California resident, as Judge Graber suggests, owns an apartment in New York, has a piece of art in it, sells it to a New York buyer. Statute imposes the royalty under those circumstances, too. Does it not?

Eric George (00:07:02):

It does. And if I can elaborate Your Honor, because I think this is a very important distinction. First of all, the three auction house defendants here are not able to raise constitutional or tax arguments outside of, let's say a first amendment context on behalf of others. So, really what we're looking at, for purposes of this challenge, are three defendants, three defendants, only each of which would be deemed a California resident. And under that context, Californian, who is the seller; a Californian, who is the auction house; the auction house, being an agent by contract with the particular seller, there ought not to be a problem. Whether, we look at it as a tax or a regulation.

Judge (00:07:44):

And what case can you cite for the proposition that California can impose a sales tax under those circumstances?

Eric George (00:07:50):

But, Your Honor, I can't. And the part of my problem is that this is not a sales tax, of course, because sales tax is paid by the purchaser, and this is a tax or a levee or royalty, whatever we call it, that's imposed by the seller.

Judge (00:08:03):

Counsel, you seem to be assuming that this is a tax. Does your case turn entirely on whether or not we agree with you that this is a tax?

Eric George (00:08:12):

Not at all, Your Honor. And I think, first and foremost, I do look at it as a regulation, albeit one that requires the payment of some monies. As a regulation, the point that I want to emphasize is that Healy does not reach non-discriminatory regulations unless they involve price tying price controls of some sort unquestionably. This does not.

Judge Berzon (00:08:36):

But that's why I began where I began. And that can't be right. I mean—what—even though Haley isn't—Healey has broader statements than that, but it can't be that if, even if it doesn't affect price. I can pass a statute saying what two people can do in a transaction in New York, even including a California resident.

Eric George (00:08:58):

Yes, Your Honor. And I—

Judge Berzon (00:08:59):

You keep overstating that and therefore misleading us. I mean, whatever Healy, whether Healy certainly has sentences that seem that broad, the facts were not that broad, but there can't be any doubt that that's the case.

Eric George (00:09:10):

Judge Berzon, I certainly don't want to mislead or do anything could be construed as misleading, but the language of Healy requires that the transaction be wholly out of state in order to be extra territorial.

Judge Berzon (00:09:24):

Well, the transaction is wholly out of state.

Eric George (00:09:26):

It is—

Judge Berzon (00:09:26):

There's a person involved who is a California resident, but the transaction is how out of state.

Judge Graber (00:09:31):

Mr. George?

Eric George (00:09:33):

Yes.

Judge Graber (00:09:33):

Go ahead. Finish with Judge Berzon, and then I'll—

Eric George (00:09:36):

Your Honor, I would take issue with that, Your Honor, for the reason as follows. Every single time that this act is applied, it involves a California resident seller that makes this case no different from no fewer than four of this court's cases.

Judge (00:09:51):

But counsel, suppose there's a non-California auction house, purely local auctioneer in New York, no California connections, that you would assert, I assume, that the statute would apply even to that sale.

Eric George (00:10:05):

Not necessarily, that's a much more tricky situation, Your Honor, because they're the tax laws. For example, the cases of Quill, excuse me, Quill and National Geographic wouldn't provide the necessary nexus. On the other hand, if this is still looked at as a regulation, and we know that the selling party is a Californian, then there may be a sufficient nexus. But I want to emphasize that is not our case here. We're dealing with three auction houses, all of which are California residents.

Judge Graber (00:10:36):

I'm trying to, to figure out Mr. George, what the court would have to find in order for your position to prevail. And I'm seeing two avenues that you're going, and one would be confining the bar on extra territorially state legislation, to price fixing statutes. And the other is to designate this as the tax, is—are those or two avenues, or am I making it narrower than your position?

Eric George (00:11:01):

Your Honor, it can be either or truly, and I'm going to state it right this time. If we take the language of Healy and we recognize that this is a non-discriminatory statute that does not apply wholly outside of California, because of it doesn't involve price tying or price controls. It is appropriate.

Judge (00:11:21):

Can I ask you about that first part? You say it doesn't apply wholly outside of California. I take it that's because the auction houses are California residency, even though they do nothing in California in a particular case?

Eric George (00:11:36):

Well, we don't know if they do or don't.

Judge (00:11:37):

Right, but you do contend it would apply to them had they done nothing in California. In other words, the California resident who had an apartment in New York sought out Christie's or eBay and said, would you conduct an auction for me in New York, you would contend the statute applied. Would you not?

Eric George (00:11:53):

I would, Your Honor, because that would be the resident of California saying, I want to engage you as my agent to perform the sale for me.

Judge (00:12:03):

But let's assume that this all occurs extra territorially the person lives in New York, goes to Christie's and

says, will sign a contract. I have the art right here. It's never left the city. You nonetheless contend that this statute is not being applied extra territorially in that circumstance.

Eric George (00:12:18):

I do. As long as that, person's a California resident.

Judge Graber (00:12:22):

Counsel.

Eric George (00:12:22):

Yes.

Judge Graber (00:12:23):

I'm sorry. I'd like to ask you a question outside the sort of tax or quasi-tax area. Could California pass a statute that says every seller of hotdogs to a California resident, wherever the seller is located, has to follow certain health regulations because we want to keep Californians healthy and could they do that and then go and try to control, you know, what's in hotdogs in Nebraska?

Eric George (00:12:55):

I was going to make a joke about a Nebraska hotdog versus a New York one. But no, it, that would not be appropriate Your Honor, because you would have conflicting regulations. And that is per se problematic.

Judge Berzon (00:13:07):

Well, you have conflicting regulations. If California would apply in all the different states, but what's the conflicting regulation, because Nebraska might have a different rule about hotdogs?

Eric George (00:13:17):

Sure. Presumably there are food and health codes that would apply in Nebraska.

Judge Berzon (00:13:22):

Oh, New York might have a different rule about this, too. It happens. They don't, but they could.

Eric George (00:13:25):

For sure. And this is why one of the hypotheticals it's raised by the other side, doesn't wash and it's not an appropriate comparison. The only type of regulation that exists here is taking a small piece of the proceeds that come out of a successful sale. It's not attempting to impose any type of regulatory measure on any other person out of state.

Judge (00:13:47):

What's the purpose of the statute?

Eric George (00:13:48):

To benefit the arts, Your Honor, to benefit the arts in California, by making the state richer for artists and by having nationwide artists benefited.

Judge Callahan (00:14:01):

If—

Eric George (00:14:02):

And Your Honor, I'm sorry.

Judge Callahan (00:14:03):

I was just going to just quickly, because I know you want to turn this over to Ms. Feinberg, but the—if you assume in a hypothetical that the CRRRA violates the dormant commerce clause, I just assume, and that the CRRRA is severable and that the CRRRA is preempted by the copyright act of 1976. Is it your position that a remand is still required because you also challenge art sales made within California before the copyright act of 1976 went into effect?

Eric George (00:14:32):

That is true in part. And it also, because a would still be a piece that would apply for sales within California. I'd like to add to that, Judge Callahan, the following, let us not forget. This is a facial challenge. This is 12B6. If there's any conceivable set of circumstances under which this act can be constitutionally applied, we must be given the opportunity to do that. There is not a single case of any dormant commerce clause area that was struck down at a pleading stage. They all had summary judgment or a factual record or a trial. So, I think the rule about facial invalidity is particularly important here. It takes us back to S.D. Meyers. One of this circuit's cases in which that rule was emphasized and where the court stated as each of the panel members here is well familiar that by choosing to attack an ordinance on its face, the party has the burden of showing. It will have the practical effect of directly regulating interstate commerce under all circumstances. And there are plenty of circumstances.

Judge (00:15:45):

Counsel, does that affect the severability issue as well? Assuming you have not persuaded us on the extra territoriality issue. What about severability?

Eric George (00:15:54):

Well, most certainly we would still have the opportunity to go back and to respect what the legislature said, which is that if there were any piece of this that were unconstitutional, that the whole of it ought to go back. I'm sorry that the piece that was not unconstitutional ought to go back and that ought to happen.

Judge Berzon (00:16:12):

But, what we have reached the copyright preemption argument, then with respect to the other piece of it, i.e., the in-state transactions?

Eric George (00:16:19):

Of course, as I—

Judge Berzon (00:16:22):

I understand that you disagree with it, but I wonder—just want to know structurally would we have to reach it?

Eric George (00:16:26):

Certainly. No, I think that that would be appropriate for remand. I think it would also be appropriate for this court to take up. As the court knows, Judge Sneed back in 1980 upheld the constitutionality of this very act under a due process challenge and also as not being preempted as a matter of copyright law, but that of course is not an unbanked decision.

Judge (00:16:48):

Thank you, counsel.

Eric George (00:16:49):

Thank you.

Aimee Feinberg (00:17:02):

Thank you, Your Honor. And may I please the court. Aimee Feinberg appearing on behalf of the state of California. Your Honor, the resale royalty act raises no dormant commerce clause concern because it doesn't regulate sales transactions at all. It doesn't prescribe the terms or conditions of a sale. It doesn't purport to determine the terms under which or whether or under what circumstances a sale may or must go forward.

Judge (00:17:27):

Is it a tax?

Judge (00:17:29):

Ms. Feinberg, may I ask you doesn't that impose some rather extensive administrative duties on the auction houses? They have to find out, first of all, if the owner is indeed a resident of California. Secondly, they have to find out if the painter is a United States citizen. And if he's not, they have to find out if he lived in California for two years. It's not clear to me whether the last two years or two years at any point in his life. And isn't that a condition of the civil code section?

Aimee Feinberg (00:18:10):

Yes, it is. Your Honor, under Section A4 auction houses or other sellers' agents do have the administrative duty to withhold—

Judge (00:18:18):

So that's a regulation of the sale. You can't do a sale without making these administrative duties, which may be somewhat onerous.

Aimee Feinberg (00:18:25):

Your Honor, those administrative duties don't regulate the sales transaction itself. And that conclusion follows from this court's decision in Gerling, where the court held that certain information disclosure requirements don't regulate an underlying transaction.

Judge (00:18:40):

Well, information disclosure may be information that the seller or the agent has. This puts an affirmative duty of investigation a seller doesn't it not?

Aimee Feinberg (00:18:51):

It does Your Honor, but none of those conditions purport to regulate the sale of art itself. Those conditions when imposed on a seller's agent to define the relationship between the seller and her agent, and don't define any relationship or transaction between the seller and the buyer that who might consummate the transaction of the sale of art. So while there are regulatory obligations, as Your Honor pointed out, those do not regulate a sales transaction at all. They regulate the relationship between the seller and her agent, and that's a very different part of the statutory scheme at issue here.

Judge (00:19:32):

Is it a tax?

Aimee Feinberg (00:19:33):

No, Your Honor, it's not a tax. It does impose a financial obligation, but it doesn't bear any of the [inaudible] that we commonly think of as being associated with the tax and that the U.S. Supreme Court considered in the Affordable Care Act case. The payments under the statute are made to a private party, not to the government, at least in the first instance. And when the payments, the royalty payments must be paid to the California arts council. They're not used for general revenue purposes, but rather for a specific purpose of funding art in public buildings.

Judge (00:20:06):

Does that make any difference? Doesn't, hasn't the Supreme Court told us that how money gets spent doesn't have—doesn't define it as a tax?

Aimee Feinberg (00:20:13):

Your Honor, there are other indicia as well that make it clear that this isn't a tax that the government has no collection authority under the statute. Rather if a seller or her agent failed to pay the required royalty, the remedy is to a private right of action by the artist. And the last thing I would say that distinguishes this from a tax is that it appears in the civil code and not in the revenue and tax code. And those things taken together demonstrate that it is not a tax.

Judge (00:20:43):

Now, let me ask it this way. You didn't try to do this—I'm not accusing the state of California, anything, but if it—if you designed something that was in all other respects, like taxes and you decided not to call it a tax, would we not look at it under the Supreme Court's tax jurisprudence?

Aimee Feinberg (00:20:59):

Your Honor, there might be circumstances under which it might be a closer case, but I don't think that's true here. Because for the reasons that I set out that while the label formally may not be dispositive, the other characteristics of the operation of this statute reveal that it isn't a tax.

Judge Berzon (00:21:20):

And what is the consequence of that conclusion for this case? I mean, I gather that your co-counsel or your account and the council for the auction houses is of the view that he sort of wants it to be like a tax and you don't want it to be like a tax. Why is that?

Aimee Feinberg (00:21:36):

Your Honor, I think the primary consequence of that goes back to the benches questions about whether this is analogous to a sales tax and in the sales tax context, the U.S. Supreme Court has drawn very clear, And in some cases, somewhat artificial lines to define the incidence of a tax as occurring—

Judge Berzon (00:21:57):

By not being a tax, there is more room for California to make these financial requirements than if it were a tax?

Aimee Feinberg (00:22:08):

That's correct, Your Honor, because in the tax context, the court has defined a taxable event, typically speaking as occurring in only one location. And that is the analysis we saw in the Jefferson Lines case. But

outside of the tax context, courts have recognized that more than one state may have regulatory authority and a regulatory interest in a multi-state transaction. And that principle is seen in many of the cases cited in our brief. And so with in the sales tax context, one might conclude that a transaction only occurs in one particular place to avoid the possibility of multiple tax burdens being imposed on a particular taxable event. Although there could be successive taxation in the life of a product but those taxes would be directed to different discreet events that drive toward defining an event as a single, as occurring in a single location is not the analysis that courts typically apply outside of the tax context.

Judge (00:23:13):

Counsel, you mentioned that in this is enforceable by a private right of action. Does the state participate in any way in the enforcement of this statute to the, do you survey, do you do any kind of investigation? Are you following sales?

Aimee Feinberg (00:23:32):

Your Honor, the role that's assigned to the state under this under the statute is if after 90 days the seller or the seller's agent are unable to locate the artist, they must make the required royalty payment to the California arts council. Then the responsibility lies with the California arts council to locate the artist and pay him or her. And if after, I believe it's seven years—

Judge (00:23:58):

But let's suppose the—that information is never communicated to the state? The—happens then is the state in the position to follow up on its own?

Aimee Feinberg (00:24:09):

Your Honor, I don't know if outside of this particular statute, there's some sort of general enforcement power that a state official might have to enforce laws. Generally speaking, I'm afraid I don't know the answer to that question, but with regard to this particular statute, there is no enforcement mechanism or enforcement power parti—especially assigned to the state in the context of this particular statute.

Judge (00:24:36):

Would you speak to the question of severability?

Aimee Feinberg (00:24:38):

Yes, Your Honor, the California Supreme Court and the California Redevelopment Agency case said that when there is a statutory provision providing for severability, as there is here, there is a presumption in favor of severability. So the burden lies with defendants to show that the legislature would not have enacted the law absent the potentially invalid applications.

Judge (00:25:07):

So did the district court refuse to sever the statute because it found that the legislature would not have intended to drive art sales out of California. So, I mean, in other words, the district court believed that the severed statute would be a bad idea as a matter of policy. Does the state disagree?

Aimee Feinberg (00:25:22):

Yes, Your Honor, we do. There's no evidence in the legislative history that would suggest the legislature would've preferred no law to one that was confined only to any applications that the court would consider unconstitutional. Now, of course, our position is that all applications of the statute are constitutional, but were this court to disagree, there's nothing in the legislative history that suggests that the legislature would've preferred no statute over one, in which any unconstitutional applications were disallowed. Here—

Judge (00:25:54):

In fact, wasn't the, wasn't the severance provision added to this legislation after people raised questions about whether the legislation might affect it might run—effect the file with the dormant commerce clause?

Aimee Feinberg (00:26:05):

Yes, it was Your Honor.

Judge (00:26:06):

So that suggests the legislature at you knew there might be a problem, but still wanted the severability.

Aimee Feinberg (00:26:10):

That's exactly right, Your Honor. And the only evidence that the auction houses have pointed to in the legislative history in support of their position against severability is a letter from a single professor that was author—that was mailed to, or addressed to three members of the legislature. And under California law, that letter can't even be considered because it does not events the intent or doesn't reveal the intent of the legislature as a whole. But even if we were to consider it, the most we can say about it is that three legislators were apprised of the concerns of a third party. That doesn't say anything about what the legislature had in mind when it added the California resident language and the sources of legislative history that are relevant here. Those show that what the later had in mind, when it added the California resident language, was to expand the scope of the law to cover not only the auction houses, galleries, and museums that were subject to the law in the assembly passed version of the bill, but to make sure that the law covered private sales as well. So the suggestion that the California resident language was intended to as the auction houses suggest prevent the art market from fleeing California finds no support in the legislative history.

Judge (00:27:31):

Could New York enact a similar royalty statute involved in the hypotheticals we gave you before with the sale took place in New York?

Aimee Feinberg (00:27:43):

Yes, Your Honor. Or it could.

Judge (00:27:44):

And if there were 20 sellers or if the resident—if people resided in 20 states, could each state enact a 5% royalty?

Aimee Feinberg (00:27:53):

Your Honor. Yes. Each state could enact a similar royalty law. As we know here in the 40 plus years that the law has been on the books, no such no state, it hasn't enacted a similar law—

Judge Berzon (00:28:06):

But that's sort of a circular thing for perhaps the reason they haven't done it just because of these problem, constitutional problems.

Aimee Feinberg (00:28:11):

Your Honor, I don't know the reason that they haven't, but that doesn't undermine the policy judgment made by the California legislature—

Judge Graber (00:28:19):

But would you address what Healy references in this regard in that is a concern that you would have the potential for inconsistent legislation? So what happens for example, if instead of New York enact the 5% law in New York says, well, in honor of the—for sale doctrine, we prohibit any additional deduction from the terms of sale, with respect to fine arts. Isn't that precisely what the Supreme Court was concerned about in Healy is that you would get multiple, you have the potential, you don't have to have potential for inconsistent results in this kind of a situation.

Aimee Feinberg (00:29:00):

Your Honor, the language in Healy does speak of the possibility of inconsistent regulations applying to a particular entity. But as this court said in S.D. Meyers, no case that I'm aware of, and that the court was aware of in S.D. Meyer, there is no U.S. Supreme Court decision striking down a law as per se, invalid under the extra territoriality principle based on the possibility of a hypothetical conflict go in the future. And were other states to enact laws that were inconsistent with this or duplicative with California's enactment, auction houses or others regulated that by the law would be free to bring—

Judge Berzon (00:29:45):

Is the—go ahead—

Aimee Feinberg (00:29:45):

A challenge based on Pike. And that would be one of the things that the court would consider in that context, in which the U.S. Supreme Court has repeatedly considered in cases involving, for example, transportation regulation, where train companies or trucking companies have said you, this particular state law is subjecting me to the possibility of inconsistent regulation and the U.S. Supreme Court and this court and the Union Pacific case have analyzed that under the Pike balancing test and an auction house or other into visual or entity subjected to the law here would be free to do that here as well, if such inconsistency arose.

Judge (00:30:29):

Thank you, counsel.

Aimee Feinberg (00:30:30):

Thank you, Your Honor.

Judge (00:30:32):

I'll give you some time for rebuttal.

Deanne Maynard (00:30:45):

May it please the court. Deanne Maynard, and joined by Howard Comet for Sotheby's and also Jason Russell who represents Christie's and John Dwyer who represents eBay. Christie's and eBay have seated their time to me. The district court correctly held that the resale royalty act is a per se violation of the commerce clause on its face, by its very terms, it purports to regulate transactions wholly outside California, where the only hook is that the seller is a resident of California. The act requires that anytime the seller is a resident of California, either the seller or the seller's agent must withhold 5% of the gross proceeds of the sale, track down the artist and pay the withheld amounts to the artist.

Judge (00:31:42):

Counsel does it matter that the defendants in this particular case all have a California connection?

Deanne Maynard (00:31:48):

No, it doesn't Judge [inaudible] because the nexus only matters once you've established a valid obligation. Here there is no valid obligation. So the—if the agents weren't involved here at all right, if this were a sale by a California resident in New York, California can't regulate that sale.

Judge (00:32:10):

Whether you want—

Judge (00:32:11):

Well there could be a valid obligation. If the extraterritorial part were severed, you're not contending that the statute is in violation of some provision, to the extent that it deals with sales within California. Are you?

Deanne Maynard (00:32:29):

Oh, I'm sorry. Judges [inaudible] if I misunderstood your question. So if the extraterritorial part were stricken and the court severed, which we don't think the court should sever, and I would like to address that, but if, if the in state, if it remained an in state-only issue, then there are other claims we have, including the copyright preemption issue and a taking claim that is not on appeal—

Judge (00:32:53):

But only if it's severable?

Deanne Maynard (00:32:56):

No, Your Honor. Thank you. So to take this claim, which we raised in the court would have an appeal, the copyright preemption claim, which we have appealed. Those would alleviate the need to reach the severability issue. Those would strike down the statute in total for different reasons.

Judge (00:33:11):

Well, would your dormant clause analysis be different in this case, if the CRA imposed a sales tax on a California resident sale of his or her artwork at auctions held outside of the state? I mean, wouldn't striking down a tax like that seriously undermine a state's ability to impose sale taxes in this era of ecommerce.

Deanne Maynard (00:33:34):

If it were a sales tax, Your Honor, that would be a violation of the commerce clause. The Supreme Court has been quite clear in Jefferson Lines, the Oklahoma tax commission case and others, EVCO that sales tax McCloud is a sales tax case. EVCO is a gross proceeds tax case, but they both are similar. They're both taxes upon the total of the sale. When those occur outside of a state, the California would have no ability under the commerce clause to tax those sales. So, the plaintiffs want to make a tax analogy. The state in its brief to this court, it's only defense of the statute was to make a tax analogy. It's somewhat running from that here. But if this is analogized to attacks, it is that just confirms that it's unconstitutional.

Judge (00:34:27):

So why do you resist the tax analogy?

Deanne Maynard (00:34:30):

We embrace the tax analogy.

Judge (00:34:32):

And your brief sort of resisted it. You're embracing it now <laughs>.

Deanne Maynard (00:34:35):

Well, I think that either way, whether one applies the dormant cut commerce clause cases that apply to regulation of commerce outside of state, this is—this fails because you look at the transaction and where it occurs and auctions in New York occur in wholly and New York, or whether you look at it as a tax, then it fails. I mean, I think the, in some ways, the tax analogy more than confirms, it's unconstitutionality, if that's possible, because the state couldn't even do this to take revenue for its own purposes. It certainly can't do it to require us to pay search and pay third-party artists. Some who may have no connection to California.

Judge Graber (00:35:19):

Counsel, that makes it seem less like a tax and more like a regulation because it requires the seller or the seller's agent to undertake a lot of activities that Judge [inaudible] was describing. And the money is ordinarily not paid into the coffers of the state, which is also would be unusual for tax. What is your response to opposing counsel's argument that the key in Healy is the word wholly that once you have a California resident on one side of the transaction or the other that makes it not a wholly in another state?

Deanne Maynard (00:35:59):

That the fact that someone is a resident of a particular state is not the right inquiry. The question for extraterritoriality is where does the regulated transaction take place? And here by its terms, this is not to take issue with the state's argument. This is not a statute that regulates any relation between the auction houses and the seller. This is a statute that on its face, by its terms regulates only the sale and Judge when correctly—sorry, Judge Berzon.

Judge Berzon (00:36:32):

Well do you—are you looking at the Healy? In Healy, I mean, in one view of Healy is that it wasn't directly regulating an out-of-state transaction and there's a sort of a second problem, which is this practical effect pro, so do we have to get into this whole dispute about whether Healy applies to prices or more than prices, or are we sort of one step even before Healy?

Deanne Maynard (00:36:54):

I think, we think, Your Honor, that you're one step before Healy here. I agree with you that Healy is a practical effects case. This is not that this is an easier case. This is a case, and this is a very rare statute where a state is purporting to regulate a transaction that occurs wholly outside the state. Just to step back. This is an auction transaction where the bid is the offer and the fall of the hammer is the acceptance. The entire transaction occurs outside the state. That's what the Supreme Court looks at involved when the transaction. So to answer your question, Judge Berzon, we think there are two reasons why you don't have to resolve the Healy pricing issue here. One is, this is not a practical effects case. This is a on its face, this purports, the regulated transaction wholly outside the state. And two, it links reality to think that imposing a 5% levy on the gross sales price will not affect the price. So—

Judge Berzon (00:37:52):

So what does that tell us anything about that our Harris opinion seems to, at some point, I say, limit Healy to price, perhaps does that it would not be inconsistent with that statement in that context, which was a practical effects context to just skip that here. We wouldn't have to do anything to Harris to do that. Right?

Deanne Maynard (00:38:19):

I agree with that, Your Honor, to rule for us, you would not have to deal with that statement in Harris one way or the other for the two reasons that I said, which is, this is an easier case than that. We're not a practical effects case. We're an actual explicit regulation of outstate transactions. And two, this is really a regulation of price by requiring 5% of the gross proceeds to be paid. If I may—

Judge (00:38:47):

Well, do you think, do we, is there a problem with Harris and Corey, two ninth circuit cases?

Deanne Maynard (00:38:57):

We have no view on the bottom-line answers in those cases, Your Honor, it, the question that the court posed in its order regarding whether or not this case should be held on bunk pointed out two statements in those cases, for the reasons I was just discussing with Judge Berzon, I don't think the court has to resolve the tension there to rule for us here. If the court does reach that issue or feels like it needs to reach that issue to rule for us here. I do not think this is a correct statement to limit the dormant commerce clause to pricing only. The commerce clause, I mean, the commerce clause itself applies beyond price and therefore states can violate its strictures by doing things that regulate things other than price. The court's parasites, the Supreme Court's decision in Walsh. I think the best reading of that paragraph in Walsh is that the court is addressing the rebate program there. The Supreme Court is addressing the rebate program there and saying the rebate program at issue, at least on the record, the court had on preliminary junction appeal, did not have the kind of outside the state effects that the court had found problematic. And he—

Judge (00:40:22):

So, are you asking us though—I understood previously that you were saying that we didn't have to deal with severability because you would win by preemption of the copyright act. Did you say that?

Deanne Maynard (00:40:33):

I did say that, Your Honor. You know, to pick up on the question that you asked the opposing counsel, we believe so there's I would like to address—

Judge (00:40:41):

Well, I guess I gave him that maybe I give you the same hypothetical that the CRRA violates the dormant CRRA clause, that the CRRA is severable, and that the CRRA is preempted by the copyright act of 1976. Isn't a remand still because the plaintiffs challenged some art sales between Maden California after the enactment of the CRRA on January 1st, 1977. But before the enactment of the copyright act of 1976 on January 1st, 1978. So you have a year in there.

Deanne Maynard (00:41:13):

I think there are two possible ways to deal with that, Your Honor. We believe that this act is preempted by the copyright act of 1976, for two separate reasons. Both conflict preemption and express preemption. Morrisburg this court's previous panel decision dealt only with the 1909 act and dealt only with conflict preemption, the not the express preemption provision. I think that the Morrisburg holding has been passed by, by subsequent Supreme Court precedent that establi—

Judge (00:41:48):

Well, if we're following your line of reasoning, then would you be encouraging us to not affirm *Morrisburg v. Bailon*?

Deanne Maynard (00:41:59):

I do think that *Morrisburg v. Bailon* would, does not withstand current Supreme Court reasoning on the first sale doctrine.

Judge Berzon (00:42:06):

But what—why isn't this an added or extra element as they put it in the copyright law that would save it from preemption? And is this a legal issue for this court to decide if we need to get there? Or is there some

additional evidence that would be needed to force whether it is this additional element?

Deanne Maynard (00:42:29):

There is no additional, I think it is a legal question. I don't think that the CRA any additional legal element of the kind meant by this court's test for preemption, the CRA simply creates additional exclusive distribution rights. Those are rights equivalent to those covered by the federal copyright statute. And therefore under the express preemption provision should fall. You know, the fact that you, one can point to different elements as the other side does, is not dispositive. The question is whether the right that's given is similar to the, is equivalent to the rights given by the copyright statute. And they clearly are. The rights given by the copyright federal copyright statute are, you know, the exclusive rights to the distribution and the amount to the ability to control that and receive funding for it. And this gives the same exact kind of right.

Judge (00:43:20):

Did the district court deal with the copyright issue, Ms. Maynard?

Deanne Maynard (00:43:23):

The district court did not reach the copyright issue, Your Honor, because she resolved the case on the commerce clause grounds, but she also held the statute had to be struck down and its entirety as applied to us. And so therefore it did not reach the copyright act. I understood the basis of Judge Callan's questions to be perhaps she was inclined to hold the statute severable.

Judge Callan (00:43:42):

In my hypothetical, I said that it was severable.

Deanne Maynard (00:43:45):

Yes, Your Honor. Thank you.

Judge (00:43:46):

So, you did understand my hypothetical?

Deanne Maynard (00:43:47):

I, it was I'm sorry. I didn't mean to accuse you of stating a position.

Judge (00:43:51):

If we agree with that, that it is severable shouldn't we let the district court take the first crack at the copyright issue?

Deanne Maynard (00:43:55):

Well, one, obviously that's within the discretion of the court. We fully briefed that issue on appeal. It's particularly well-suited to on bunk resolution. Now that you're here, given that there is this previous panel decision that I think has been passed by Supreme Court precedent. And this court would be particularly well-suited to reach it as an on bunk panel.

Judge Berzon (00:44:16):

Could you then why, I won't call it an added element, why this resale royalty arrangement, why it's 10 amount to the distribution provisions of the, I think it's 106 of the copyright law?

Deanne Maynard (00:44:31):

Because the 106 grants, the original owner of the copyright, the right to distribute the work, the right to get remuneration for that distribution.

Judge Graber (00:44:41):

But counsel here, you have an exemption from the law for the initial sale by the artist, right?

Deanne Maynard (00:44:49):

That's true, Your Honor.

Judge Graber (00:44:52):

So, let's take a sculpture that is a one off sculpture. The artist has a copyright in that and sells it to you. What distribution right does the artist retain in the sense of allowing you resell it? Don't you have the unfettered right to resell it without violating the copyright law?

Deanne Maynard (00:45:18):

It's not the unfettered, right that the first sale doctrine of federal copyright law should give me. So under the first sale doctrine of federal copy law, I should be able to sell it with no strings attached, with no obligations to anyone. But this act would require me upon the resale if I sold it for more than I purchased it for to pay 5% of the gross proceeds to the artist. Under the federal copyright law, the artist is supposed to get all they get, can get for it on the first sale. That's the balance that the federal government has chosen.

Judge (00:45:55):

But to whom we it's hard to say when we say you, because it's hard to know, are we saying you the lawyer personally, or are we saying the election house? So if a work is sold to an individual and then the individual sells it and, the individual then has a right of you know, the first sale doctrine individual can sell to whomever, correct? No restrictions.

Deanne Maynard (00:46:18):

That's right.

Judge (00:46:18):

So the individual says, well, I think I'll sell to this little gallery in New York. No restriction on the sale to that gallery. Correct?

Deanne Maynard (00:46:28):

Well, if the, are you, you trying to, are you setting up hypothetical where the law, the law's not triggered because—

Judge (00:46:35):

If the law, the sale, the sale is triggered, I mean, the action is triggered by the gallery, not by the seller, the individual seller, correct?

Deanne Maynard (00:46:43):

So let me just clarify when I was speaking before, I understood the hypothetical to be me as a person, I owned that art. So, I was talking about me personally.

Judge (00:46:52):

And okay, now you sell it to a little gallery in New York.

Deanne Maynard (00:46:54):

Now, if the person sells it to a gallery and in such a way that the Resale Royalty Act obligations are triggered and that they must find the artist and pay 5% to the artist.

Judge (00:47:06):

Who's they?

Deanne Maynard (00:47:07):

Sorry, the gallery.

Judge (00:47:09):

Oh.

Deanne Maynard (00:47:09):

No. Under the Resale Royalty Act, the seller

Judge (00:47:13):

Oh, the seller.

Deanne Maynard (00:47:13):

Who had bought it free and clear from the artist and under the federal copyright laws should therefore be able to sell it with no restrictions on alienation to anyone they want with no strings attached. The California Resale Royalty Act attaches strings to it.

Judge Berzon (00:47:30):

What's strange about it, suppose the regulation was a regulation—a monetary regulation on the first sale. That's is. Anybody who sells a painting in California has to pay at least \$10 for it. Is that a copyright violation?

Deanne Maynard (00:47:51):

On the—it's the original sale.

Judge (00:47:52):

The original sale.

Deanne Maynard (00:47:53):

Adding additional royalties to the original copy.

Judge Berzon (00:47:56):

Well, yeah, I mean, in other words, I don't—is the price of a sale of a work covered by a copyright regulated by the copyright act?

Deanne Maynard (00:48:07):

The original sale, that—may or may not, Judge Berzon, but it is different than the problem here because what's well—

Judge Berzon (00:48:13):

But, all you're doing essentially is so that if you projected the future price at the time of the original sale, it wouldn't be a problem. So what's the difference if you do it later?

Deanne Maynard (00:48:25):

Well, it may. I'm sorry. I didn't mean to concede it wouldn't be a problem. It may well be problem for California to set a minimum original sale price, but it's still—it would be a different analysis than the one here. So what the Supreme Court has made clear since this court's decision in *Morrisburg*, in both *Keurig* and *Quality King*, that the first—that the copyright, the federal copyright statute has created balance between the works of the—

Judge Berzon (00:48:50):

Right, but they don't deal with price setting of sales. And there's no distribution restriction here. Go ahead and distribute to whomever you want, sell to whomever you want. So the question is a copyright act cover price regulation.

Deanne Maynard (00:49:05):

I think it's passing strange to conclude that requiring someone to pay 5% of their gross sales price upon their resale is not a restriction on the first sale.

Judge Graber (00:49:18):

Well earlier, you said it was a matter of raising the price. You said the only point of this is going to be to change the pricing structure that was earlier in your argument. So it sounds like you're kind of switching gears between the argument under the dormant commerce clause and the argument under the copyright act. In the one hand, you're saying it's all about price, but under copyright, you're saying, well, it's not really all about price because price isn't copyright. So which is it?

Deanne Maynard (00:49:48):

I think I am being inconsistent, Your Honor. In both cases, it's a regulation on the resale. So in both cases, it's a forbidden regulation. So in the one case, it's a forbidden regulation on the sale, outside the state of California, that California lacks the authority under the commerce clause to do. And in the second case, it is a regulation on the resale after federal copyright law has given the purchaser the right to sell that without any restrictions on alienation. So to—

Judge (00:50:21):

But why—it's not a restriction on alienation. Why isn't it then similar what a New York can impose tax. Can't they oppose a New York sales tax on it?

Deanne Maynard (00:50:33):

They could impose, you know, assuming all the necessary—

Judge (00:50:36):

What would be the difference then, of that kind of regulation imposed on the resale, along with there may be a city tax as well, and the royalty?

Deanne Maynard (00:50:47):

There's a difference between a generally applicable tax that's lawful that applies to a sale, and California passing a statute that undermines the federal for sale doctrine by requiring terms of the resale—

Judge (00:51:03):

Okay. I understand that you say there's a difference and I'm trying to understand it. I understand there's a—what a tax is in general, but I'm asking you, in the context of the copyright act, what is the difference between that kind of regulation that is imposed on a resale and the royalty imposed on a resale?

Deanne Maynard (00:51:22):

And I think one way to think about it is under the federal copyright law, once the artist has sold it once the artist—that exhausts the artist copyright rights in the article and the owner owns it. California is now trying to come in and tag the art with a restriction that flows with the art, such that if the person chooses to sell it, they have to find the artist, pay the artist 5% of their gross proceeds if the acts triggered.

Judge (00:51:55):

Okay. But even so, that's a preemption argument.

Deanne Maynard (00:51:58):

That's oh, yes. That's—we're still discussing pre—that's preemption, yes—

Judge (00:52:02):

But you still got that one year where the—where the first sale doctrine was not in effect here.

Deanne Maynard (00:52:08):

Yes, Your Honor. And so, but I—but I think that the—there we have two preemption arguments that we've made in our briefs. One is an express preemption under the 1976 act. And one is conflict preemption. Conflict preemption is what this court addressed in *Morrisburg*, and I respectfully suggest that time has passed *Morrisburg* by, and that is incorrect. And so if one were to reverse *Morrisburg* on, on VA, has this courts free to do, then there wouldn't be that period. And that's what we would ask this court to do.

Judge (00:52:36):

Can I ask you about severability?

Deanne Maynard (00:52:38):

Yes please, thank you, judge.

Judge (00:52:39):

Because all this turn, and I know you wanted to get to it. So I wanted to give you a segway into it. Let me pose the difficulty for you that the severability argument gives me. There's a severability provision in the statute. It's possible, mechanically, to sever provisions here. And the California cases tell us we presume severability. The district court said, well, I don't think the legislature would've wanted to do this had it only affected California transactions, but at least in the chronological history, they were aware of a dormant commerce clause issue and then added a favorability provision. Why doesn't that lead me to think that this ought to be severable?

Deanne Maynard (00:53:20):

Because, Your Honor, one thing about the record, the legislative counsel's memo stating that this would be a dormant commerce clause problem, and the addition of the boilerplate severance provision, occurred on the same day. So it wasn't that one was after the other. And if I can grab—

Judge (00:53:38):

Well, and I take your point. They occurred on the same day, but I attribute knowledge to legislatures,

maybe that's a wrong thing to do, but I attribute—I attribute knowledge to them that they were acting—they were acting simultaneously with knowledge of what their counsel had recommended to them.

Deanne Maynard (00:53:55):

Well, I would suggest that there's nothing in the record to indicate that they did know. And given that they were on the same date, it seems likely to me that they didn't know, especially since when the severability provision was added, was added to several other things that sort of said this is kind of a housekeeping measure. So there's nothing to suggest that they added it because of legislative counsel's memo. Second—

Judge (00:54:10):

But nonetheless, the legislation proceeded thereafter with a severability measure on it. And at least the people who voted on it after that are presumed to have knowledge of what the counsel did.

Deanne Maynard (00:54:22):

It did, Your Honor. But you know, as this court recognizes recently as yesterday, the severability provision is not alone enough. The California courts still go through the analysis about whether or not it's foolishly separable—severable, and here it isn't. Here the—when you look at the history of the legislation, the assembly passed a bill that was a California-only bill that made its way to the Senate. And in the interim, the legislature was warned by Professor Merriman that this would drive—this California-only bill would drive the art market out of the state. And then they added the provision that we're challenging here.

Judge (00:55:05):

So why do we—how do we conclude that they acted on his advice as opposed to for any number of other policy reasons, for example, much greater protection for artists to make this nationwide.

Deanne Maynard (00:55:22):

It's the only explanation in the record for the change between the assembly bill and this—and what ultimately passed was this warning that it would drive our market out of California. So the standard that this court is to apply for severability, even when there's a severability clause, is, is this court—can this court say with confidence that the legislature would've passed a California-only-bill—

Judge (00:55:47):

What would Justice Scalia say about your argument on this legislative history?

Deanne Maynard (00:55:53):

Well, Justice Scalia does consider legislative history as it passes, you know, the—as it passes through. He doesn't—he doesn't take—he might not look at the Professor Merriman letter, I'll that keep talking, but he would—

Judge (00:56:10):

But I think he—

Judge (00:56:10):

He'd be interested in your whole dorm commerce clause.

Judge (00:56:12):

Yeah, that's right.

Judges (00:56:15):

<Laughs>.

Judge (00:56:15):

That's if you had him, you wouldn't have to make the argument <laughs>.

Deanne Maynard (00:56:20):

Justice Scalia actually applies the court's current precedent on the dormant commerce clause and the— and so he does write separately often to say that's what he's doing. But I believe that under the current precedence, this is a violation of the commerce clause. And in fact, this is a striking violation of the commerce clause. And so I would hope that Justice Scalia would agree.

Judge Graber (00:56:41):

But let me ask you a little bit like of a follow-up question to these other questions on severability. When we look at the legislative intent or try to determine whether the legislature would have passed this as a California sale statute, doesn't that still end up protecting a lot of artists, in fact, and wouldn't the legislature still have wanted to do that? And otherwise, why did they include a severability provision?

Deanne Maynard (00:57:19):

Well, I think that goes back to the same line of questioning. I think the severability provision was included as a housekeeping amendment on the same day that they were warned this was unconstitutional. It isn't, I think—I don't think this court can say with confidence, which is the relevant standard that they would've passed a California-only bill. It isn't at all clear that a California-only bill would protect more artists if it drove the art market out of California, which is what—

Judge Berzon (00:57:44):

Whether they believed it was going to try through the art market at California. That there's—that's obviously a debatable question. If, being a debatable question, they might well have said, well, you know, well, if one—if we can't have one, we'll have the other one. We'll see what happens. So we're—

Deanne Maynard (00:58:00):

Well, I think—

Judge Berzon (00:58:03):

My real question is how was a court supposed to decide this?

Deanne Maynard (00:58:05):

I think given that the standard is this court has to conclude with confidence.

Judge (00:58:11):

Does the with confidence standard apply when there is an express severance clause?

Deanne Maynard (00:58:15):

Yes, it does, Your Honor. And so I would—

Judge (00:58:17):

I thought there was a presumption that the legislature wanted severance when there was an express presumption clause. The express severance clause, sorry.

Deanne Maynard (00:58:25):

The California Supreme Court does state that when there's a severability provision, but then it goes on to apply the volitional test in the same way. And I would—I would point the court to the hotel employee's case that we signed in our brief Cal per Supreme Court case. Indeed, this court just yesterday, and vivid entertainment stated—

Judge (00:58:40):

So that would—that would mean that the clause meant the clause was irrelevant, right? If we had the same test with or without the clause and it's California law, so perhaps that's what it is, but if we'd have the, we'd have the same test with or without the clause under your view, wouldn't we?

Deanne Maynard (00:58:54):

You know, perhaps it provides more teeth to other pieces of it, but the California courts, as I read them—they apply the same test and they ask can the court conclude with confidence? And I think a—Judge Berzon, back to your question, and if it could go either way, it's hard to see how you can conclude with confidence that they would've wanted a California-only law.

Judge (00:59:12):

Counsel, I have a question about eBay. Is eBay identically situated with your other two clients with respect to this appeal? We made a slightly different argument as I recall earlier.

Deanne Maynard (00:59:25):

Mr. Dwyer is here and can address any specific questions you have with respect to eBay. But I think on the dormant commerce clause issues here in the cop rate preemptions, we are equally situated in the sense that there are sales that occur outside California, on eBay, every day.

Judge (00:59:41):

Very well. Any further questions? Thank you for your argument.

Deanne Maynard (00:59:45):

Thank you. We request that you affirm.

Judge (00:59:47):

We'll give you five minutes.

John Dwyer (00:59:49):

Thank you, Your honor. Your Honors, there is no regulation of a transaction. There is no regulation that deals with the point of sale. What this does is it takes a part of the revenue received with a profitable art sale, and in that respect, it's like a tax. But it is fundamentally, and this has fundamentally been our argument from the first, a regulation, and as such, when we apply Healy, and we ask ourselves, is this a transaction there's wholly outside of California? The answer has to be no. Ms. Maynard—

Judge Berzon (01:00:37):

What about my question about whether we're not even pre-Healy here? I.e., that Healy is a practical effects case, and this one is a direct regulation of an out-of-state transaction?

John Dwyer (01:00:48):

By my account, Your Honor, there have been only three U.S. Supreme Court—

Judge Berzon (01:00:51):

That may be true, but nonetheless the—because they're all in the second category, probably because the first category is so obvious. And as to the first category, i.e. when you're directly regulating a—out of state transaction, the case law does speak in the alternative direct or practical effect. And all the cases are practical effect cases. But this one seems to be before that. It's a direct regulation.

John Dwyer (01:01:21):

I'm not sure that I'm with Your Honor on that. I think, fundamentally, Healy really is a discrimination case, but when we get beyond that, and we look at the language directly regulating.

Judge Berzon (01:01:32):

Well it didn't report to be doing that. It said it was regulating the sales in state, but in a way that was likely to lead to, or could lead to, changes because there were two ways to respond to it: either to change the in-state price or to change the out-of-state price.

John Dwyer (01:01:52):

Yes.

Judge Berzon (01:01:52):

But it wasn't purporting to change the out-of-state price.

John Dwyer (01:01:56):

Your Honor, I think it's an expansion. I think it takes dormant commerce clause cases beyond where the Supreme Court has been to the point about where Justice Scalia would be on this. There's no question that this is beyond where the Supreme Court has been, and it's well beyond where this circuit has been.

Judge (01:02:12):

Can you—could you explain, Mr. George, why you say it is not a direct regulation?

John Dwyer (01:02:15):

It's not a direct regulation because it doesn't change any aspect of the art sale. All it does is take 5% of the proceeds received by a California resident at the end of the day. It doesn't affect price, conditions, location, anything at all about—

Judge Graber (01:02:32):

But it affects the allocation of the proceeds of a sale.

John Dwyer (01:02:35):

Yes.

Judge Graber (01:02:35):

So it—it you're—would seem to me that if California had a whole lot of favorite charitable causes, then you could say, well, 5% of the artist and 5% to against cruelty for animals or whatever. And pretty soon the seller would get 50% of the proceeds of the sale. Why isn't that a direct regulation of the transaction?

John Dwyer (01:03:00):

I think that at best, Your Honor, maybe that gets us to a takings-clause type of issue, but that for purposes of dormant commerce clause, there have been situations where there have been businesses regulated

where they've had to pay monies, most recently in the pharmaceutical research case, where there were monies that were required to be paid for purposes of complying with an Alameda ordinance with regard to the disposal of pharmaceutical products. That was held to be constitutional. And, Your Honors, all of the recent cases by this circuit have made clear with respect to many pieces of California legislation ranging from the California equipment dealers act, to animal rights issues, to carbon credits, that these have not been improper, direct regulations. And I think that the art statute at issue here is even less so. I really would like to conclude on the point about this being a facial challenge. The law seems so crystal clear that if there is any set of circumstances under which this law can be constitutionally applied, that there should be no question but that we have a remand for purposes of assessing the burden. Does this satisfy the pipe balancing test? We submit, Your Honors, that it does. We can even conjure situations where there are in-state sales, private sales, not auctions, maybe online sales, where the nexus to Californians even more than having a California seller and a California buyer. Thank you, Your Honor.

Judge (01:04:30):

Thank you, counsel. The case is heard and will be submitted for decision. Thank you all for your arguments, and we'll be in recess.