No. 18-881

IN THE
Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,
Petitioners,

v.

JANE O'KEEFFE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INDIANA, ALABAMA, LOUISIANA, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Oregon Fuel Program—which restricts transportation fuel imports based upon a "lifecycle analysis" that regulates the manner in which the fuels are produced and transported in interstate and foreign commerce—is an impermissible extraterritorial regulation that violates the United States Constitution.

2. Whether the Oregon Fuel Program—which is designed to require and has the effect of requiring out-of-state competitors to subsidize in-state producers—violates the Commerce Clause.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Louisiana, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah respectfully submit this brief as *amici curiae* in support of Petitioners and urge the Court to grant certiorari to consider Question 1 of the petition.

The decision below implicates an intractable circuit conflict concerning States' power under Commerce Clause doctrine to enact and enforce laws that regulate extraterritorially, *i.e.*, that regulate commercial transactions occurring wholly in other states. Petitioners argue that the Oregon Clean Fuel Plan violates the bar against extraterritorial legislation because it requires out-of-state transportation-fuel producers to modify their extraction, production, and transportation methods to satisfy Oregon's standards for lifecycle greenhouse gas emissions. App. 2a–6a. The Ninth Circuit rejected Petitioners' challenge on the ground that the Constitution's extraterritoriality principle applies only to price-affirmation laws. App. 20a–21a; *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1102–03 (9th Cir. 2013). That decision squarely conflicts with decisions from the First, Fourth, Seventh, and Eighth Circuits. *See* Part B, *infra.*

The *Amici* States have a vital interest in urging the Court to resolve the conflict and adopt a uniform rule. All States ought to be subject to the same territorial limits on their sovereign law-making authority.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *Amici* States' intention to file this brief at least 10 days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

The Court has long recognized that by granting Congress the power to regulate commerce "among the several States," U.S. Const. art. I, § 8, cl. 3, the Constitution also imposes limits on state authority to regulate interstate commerce. While Congress and the States are not on equal footing when it comes to regulating interstate commerce, however, the structure of the Constitution presupposes that States are on equal footing *with one another* when it comes to the constitutional limits on their authority. The Constitution does not give preference to one or a few States over others.

This case further calcifies an established circuit split concerning the limits on States' authority to enact laws that affect out-of-state commerce. During the 25 years since the Court last addressed the extraterritoriality principle of Commerce Clause doctrine, the circuit courts have struggled to identify a uniform rule marking the boundaries of States' authority to regulate out-of-state conduct.

The Ninth and Tenth Circuits have read the Court's cases narrowly, allowing Western States considerable leeway to enact laws affecting out-of-state production and commerce. Here, the Ninth Circuit upheld Oregon's Clean Fuel Program even though it effectively requires out-of-state transportation-fuel producers to change their out-of-state conduct—namely, how they produce transportation fuel—if they wish to have access to Oregon's market for transportation fuel.

In contrast, the First, Fourth, Seventh, and Eighth Circuits have read the Court's cases to establish a robust prohibition on extraterritorial regulation, significantly circumscribing States' authority to enact regulations that have extraterritorial effects. These circuits' decisions limit the affected States' ability to implement policies that require out-of-state market players to modify their conduct, even if the end product ultimately makes its way into the regulating State.

Regardless of which circuit cluster is correct, the conflict between them creates a grossly uneven playing field among the States and effectively creates a third tier in the constitutional hierarchy: Congress, "super" States that can freely regulate conduct occurring in other States, and "normal" States whose ability to regulate out-of-state conduct is sharply limited. The Court should grant the petition to clarify the scope of all States' authority to enact laws regulating out-of-state conduct and restore the even playing field envisioned by the Constitution.

REASONS TO GRANT THE PETITION

The Court Should Clarify State Authority to Regulate Extraterritorially

Under the Articles of Confederation, each State legislated "according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (internal quotation omitted). To address the resulting "drift toward anarchy and commercial warfare" among the States, *id.*, the framers called the Constitutional Convention and ultimately adopted the Commerce Clause, based on their firm "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Indeed, the delegates to the Convention framed the entire Constitution "upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 n.12 (1989) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

Consequently, the Court has understood the Commerce Clause not only "as a grant of regulatory power to Congress," but also as a negative restraint "that denies the States the power unjustifiably to discriminate against or burden the flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994).

The "dormant" Commerce Clause doctrine "rest[s] upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090–91 (2018). The Court accordingly has adopted a two-tiered approach under which facially discriminatory laws are "virtually *per se* invalid," *Oregon Waste Sys.*, 511 U.S. at 99–101, while other laws are subject to judicial balancing of the local benefits and the burden imposed on interstate commerce, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A. The extraterritoriality branch of Commerce Clause doctrine lacks clarity

As the Court recently acknowledged, there are "exceptions and variations" to the two-tiered rubric for evaluating challenges under the Commerce Clause. *Wayfair*, 138 S. Ct. at 2091 (citing as an example *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986)). One such "variation" is the extraterritoriality principle, which the Court has employed to invalidate state laws that regulate out-of-state conduct, even if those laws do not discriminate against out-of-staters and do not fail the *Pike* balancing test. *See, e.g.*, *Brown-Forman*, 476 U.S. at 582–83; *Baldwin*, 294 U.S. at 522–28.

The extraterritoriality principle "precludes application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion). Under this principle, a law regulating commerce outside the State's borders is invalid even if the state legislature did not intend the law's extraterritorial reach, for "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. The extraterritoriality principle also "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State," so the law's practical effects "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States." *Id.* at 336–37. This facet of Commerce Clause doctrine stems from "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Id.* at 335–36.

Accordingly, the Court has invalidated efforts by one State to project its policies into other States. In *Baldwin*, the Court invalidated a New York law precluding resale of milk purchased from dairies (no matter where located) at prices higher than those dictated by New York Law, concluding that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." 294 U.S. at 521. The law effectively neutralized price advantages of nearby Vermont dairies, which had no state minimum price of their own. *See id.* at 520. Such barriers against competition with the labor of another State's residents, the Court said, improperly nullify competitive advantages and "are an unreasonable clog upon the mobility of commerce." *Id.* at 527. Indeed, the New York Law would "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. While New York could restrict sale of Vermont milk if it were contaminated, it could no more set a minimum price for Vermont milk than "condition importation upon proof of a satisfactory wage scale." *Id.* at 524.

Similarly, in *Edgar*, the Court invalidated an Illinois statute that required companies with ties to the State to register all corporate-takeover offers with the Illinois Secretary of State, even if the offer came from a foreign company and was made only to out-of-state shareholders. 457 U.S. at 642–43. The plurality concluded that the Illinois statute violated the Commerce Clause owing to its "sweeping extraterritorial effect," which threatened to stifle "interstate commerce in securities transactions generated by tender offers" should other States adopt conflicting regulations. *Id.* at 642. The Court also held that the statute unduly burdened interstate commerce. *Id.* at 643.

In *Brown-Forman* and then *Healy*, the Court struck down price-affirmation laws as impermissible extraterritorial regulations. The law in *Brown-Forman* required distillers selling liquor to wholesalers within New York "to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States." 476 U.S. at 575. The law thus prohibited a distiller from changing its prices anywhere else once it had posted its prices for the month in New York, thereby impermissibly "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 582. Even though New York could "regulate the sale of liquor within its borders," it could "not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States." *Id.* at 582–83 (quoting *Baldwin*, 294 U.S. at 521).

The Connecticut law in *Healy* similarly required "out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were] . . . no higher than the prices at which those products [were] sold in the bordering States of Massachusetts, New York, and Rhode Island." 491 U.S. at 326. Unlike the New York law in *Brown-Forman*, the Connecticut law "require[d] only that out-of-state shippers affirm that their prices are no higher than the prices being charged in the border States as of the moment of affirmation." *Id.* at 335. But like the New York law, the Connecticut price-affirmation law had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id.* at 337. And when considered "in conjunction with the many other beer-pricing and affirmation laws that ha[d] been or might be enacted throughout the country," the law practically "create[d] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Id.*

Most recently, in *C & A Carbone, Inc. v. Town of Clarkstown*, the Court invalidated a solid-waste ordinance granting exclusive sorting rights to a local franchisee. 511 U.S. 383, 394 (1994). Among other objections, the Court observed that "Clarkstown [may not] justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds." *Id.* at 393. Critically, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *Id.*; *cf. BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) ("We think it follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

The Court's cases thus clearly establish that a state law can run afoul of the Commerce Clause doctrine because it regulates out-of-state conduct, even if the law does not discriminate against interstate commerce or fail *Pike* balancing. But the Court's cases do not provide clarity as to how this extraterritorial principle applies in practice. It is unlikely that the bar on extraterritorial regulation invalidates *all* state laws that regulate out-of-state conduct—otherwise, innumerable state regulations that are triggered by the manner of production would be in jeopardy. Yet it is also difficult to discern the relevant factors that courts should consider in the extraterritoriality analysis (*e.g.*, the purpose of the state law, the degree to which the law "directly" regulates out-of-state conduct, etc.).

B. The circuit courts have been unable to identify and apply a uniform extraterritoriality standard

It is therefore perhaps unsurprising that the Court's extraterritoriality cases have sowed confusion in the lower courts resulting in a circuit conflict over whether the Commerce Clause permits States to regulate the conditions of out-of-state production of goods coming into the State. *See, e.g.*, *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.) ("*Baldwin*'s extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence.");

Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001) (describing the extraterritoriality principle as "unsettled and poorly understood").

Some courts have even questioned whether the doctrine exists at all. *See Epel*, 793 F.3d at 1172 (noting that the extraterritoriality principle "is certainly the most dormant [of the Court's three strands of Commerce Clause jurisprudence] for, though the Supreme Court has cited *Baldwin* in passing a number of times, a majority has used its extraterritoriality principle to strike down state laws only three times" (internal citations omitted)); *id.* at 1173 (questioning whether extraterritoriality is really a separate strand of Commerce Clause doctrine as opposed to an application of the antidiscrimination rule); *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) ("Is it possible that the extraterritoriality doctrine, at least as a freestanding branch of the dormant Commerce Clause, is a relic of the old world with no useful role to play in the new? I am inclined to think so."); *see also Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring in the judgment) ("[T]he negative Commerce Clause, having no foundation in the text of the Constitution and not lending itself to judicial application except in the invalidation of facially discriminatory action, should not be extended beyond such action and nondiscriminatory action of the precise sort hitherto invalidated."); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the

Constitution, makes little sense, and has proved virtually unworkable in application.").

So too have scholars struggled to make sense of the scope and vitality of the extraterritoriality principle. *Compare* Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979 (2013), *with* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 Marquette L. Rev. 497 (2016).

1. On one side of the circuit divide, the Ninth and the Tenth Circuits have held that the extraterritoriality principle applies only to state price-affirmation statutes, thereby giving States in those circuits wide latitude to dictate production conditions of commodities in other States by controlling access to state markets.

In this case, for example, the Ninth Circuit rejected an extraterritoriality challenge to the Oregon Clean Fuel Program. App. 20a–21a. The Oregon law requires regulated parties to "keep the average carbon intensity of all transportation fuels used in Oregon below an annual limit," with the annual limit becoming "more stringent annually through 2025." App. 3a (citations omitted). "Carbon intensity" constitutes "the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in carbon dioxide equivalent per megajoule (gCOse/MJ)." App. 3a n.2 (quoting Or. Admin. R. 340-253-0040(20)). A transportation fuel with a carbon intensity below the annual limit generates a credit, while a fuel with a carbon intensity above the limit generates a deficit. App.

3a. Regulated parties annually must have carbon-intensity credits that are greater than or equal to their deficits. *Id.* A party may achieve this either by producing and importing fuels that in the aggregate satisfy the carbon-intensity standard or by purchasing credits from other regulated parties. *Id.* at 3a–4a.

By basing the "carbon intensity" metric on lifecycle greenhouse gas emissions, the Oregon law effectively regulates the extraction, production, transportation, and distribution of petroleum-based transportation fuels—all of which (because Oregon does not refine petroleum) occurs wholly in other States. App. 125a, 131a. The Clean Fuel Program seeks to change the conduct of producers in other States by forcing them to cut the amount of greenhouse gas emissions that occur during the extractions and production of transportation fuels.

The Ninth Circuit rejected the argument that the Clean Fuel Program violates the extraterritorial principle, reasoning that the argument was barred by the court's prior decision in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013). App. 20a–21a. The Ninth Circuit explained that, just like the program in *Rocky Mountain*, Oregon's Clean Fuel Program "expressly applies only to fuels sold in, imported to, or exported from Oregon" and so did not violate the extraterritoriality principle. App. 21a.

Rocky Mountain itself involved California's Low Carbon Fuel Standard, which like the Oregon Clean Fuel Program barred sale of fuel based *not* on the carbon in the fuel itself, but instead on the aggregate amount of greenhouse gases emitted in the *supply chain* through which the fuel reached California. 730

F.3d at 1078–86. The Ninth Circuit upheld the law because, while in practice it regulated out-of-state production, the law itself *facially* regulated only the sale of fuel in California, such that the regulatory impact on of out-of-state commerce was merely "incidental." *Id.* at 1078, 1106. In the Ninth Circuit's view, moreover, the *Baldwin/Brown-Forman/Healy* per se invalidity standard is limited to price-affirmation laws. *Id.* at 1102–03. And, while "States may not mandate compliance with their preferred policies in *wholly* out-of-state transactions, . . . they are free to regulate commerce and contracts within their boundaries *with the goal of influencing the out-of-state choices of market participants*." *Id.* at 1103 (emphasis added) (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

The Ninth Circuit's cases thus suggest that a State may regulate extraterritorially as long as there is *some* in-state transaction—such as the sale of transportation fuels—to which the State can tie regulations of related out-of-state conduct.

The Ninth Circuit applied its narrow view of the extraterritoriality principle outside the energy context in *Ass'n des Eleveurs de Canards et D'Oies du Quebec v. Harris*, rejecting an extraterritoriality challenge to California's ban on the sale of foie gras from force-fed ducks. 729 F.3d 937, 948–51 (9th Cir. 2013). Just as in *Rocky Mountain*, the court construed the *Baldwin/Brown-Forman/Healy* rule as applying only to price-control or price-affirmation statutes, concluding that the rule did not apply because the foie gras law "[did] not impose any prices for duck liver products and [did] not tie prices for California liver products to out-of-state prices." *Id.* at 951. The court also rejected as speculative the challengers' concerns about Balkanization caused by competing regulations on the ground that no other State or locality had *yet* adopted conflicting legislation. *Id.*

The Tenth Circuit adopted a similar rule in *Epel*, where the court held that Colorado could prohibit importation of electricity that was not generated using a minimum percentage of renewable sources. 793 F.3d at 1172–75. In reaching that conclusion, the court observed that in *Baldwin*, *Brown-Forman*, and *Healy* the Court "faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses." *Id.* at 1173. Because the Colorado law did not "share any of the[se] three essential characteristics," the "near-automatic condemnation" rule under *Baldwin* did not apply. *Id.* Like the Ninth Circuit, then, the Tenth Circuit considers the extraterritoriality doctrine to be limited to direct price-control statutes.

2. On the other side of the circuit divide, the First, Fourth, Seventh, and Eighth Circuits have rejected the narrow extraterritoriality principle adopted by the Ninth and Tenth Circuits and have applied the doctrine to strike down a variety of state laws that cannot be classed as price-affirmation laws. *See Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 667–74 (4th Cir. 2018), *petition for cert. filed*, No. 18-546 (U.S. Oct. 19, 2018); *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833–34 (7th Cir. 2017); *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016); *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665–69 (7th

Cir. 2010), *cert. denied*, 562 U.S. 829 (2010); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Nat'l Solid Waste Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657–58 (7th Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996).

In *Heydinger*, the Eighth Circuit invalidated state regulations prohibiting the supply of electricity that had been generated by a "new large energy facility." 825 F.3d at 922. The law practically controlled "activities taking place *wholly* outside Minnesota," *id.*, but those activities had no impact on the quality of electricity being supplied. Just like the Colorado law at issue in *Epel*, Minnesota's law sought to regulate out-of-state conduct by energy producers who sold their products in Minnesota. A majority of the panel held that Minnesota's law was preempted by federal law, *id.* at 926 (Murphy, J., concurring in the judgment); *id.* at 927 (Colloton, J., concurring in the judgment), and Judge Loken went on to hold that Minnesota's law also violated the extraterritoriality principle, *id.* at 921. In contrast to the Tenth Circuit's decision in *Epel*, Judge Loken concluded that Minnesota's law violated the extraterritoriality principle by erecting a trade barrier that forced regulated parties "to seek regulatory approval in one State before undertaking a transaction in another." *Id.* (quoting *Brown-Forman*, 476 U.S. at 582).

In *Natsios*, the First Circuit held that a Massachusetts law aimed at curbing human rights abuses in Burma violated the Foreign Commerce Clause because the law tried "to regulate conduct beyond [the

State's] borders and beyond the borders of this country." 181 F.3d at 69. The statute generally prohibited Massachusetts and its agencies from purchasing goods or services from companies that conducted business with Burma, the goal being to exert financial pressure on the Burmese government to reform and alleviate its human rights abuses. *Id.* at 45–47. The court, analogizing to domestic Commerce Clause doctrine, reasoned that "by conditioning state procurement decisions on conduct that occurs in Burma," Massachusetts had sought to "regulate conduct wholly beyond its borders." *Id.* at 69. And because the law effectively regulated conduct beyond the State's borders, the court held, it violated the Foreign Commerce Clause, even though a company could pay a bidding penalty or simply forgo the Massachusetts market without altering its conduct. *Id.* at 69–70.

In *Meyer*, the Seventh Circuit invalidated a Wisconsin statute prohibiting solid waste generators—including those located in other States—from dumping waste in Wisconsin landfills unless they resided in communities with effective recycling programs. 63 F.3d at 657–58. The Wisconsin law erected this trade barrier "not because [out-of-state waste was] more noxious than waste produced the Wisconsin way, but simply because it [came] from a community whose ways [were] not Wisconsin's ways." *Id.* at 662. In striking down the law as incompatible with the extraterritoriality principle, the court explicitly rejected the Ninth and Tenth Circuits' subsequent narrowing of this Court's precedents, explaining that "[a]lthough cases like *Healy* and *Brown-Forman* . . . involved price affirmation statutes, the principles set forth in these decisions *are not limited to that context*." *Id.* at 659 (emphasis added).

The Seventh Circuit has also utilized the extraterritoriality principle to strike down laws regulating out-of-state production or commerce to ensure product safety or to avoid predatory lending practices directed at a State's citizens. In *Legato Vapors*, the court invalidated regulations specifying the design and operation of facilities for manufacturing vaping liquid to be sold in Indiana (no matter where the plant was located), which the State justified on grounds of consumer safety. 847 F.3d at 833–34. And in *Midwest Title Loans*, the court struck down an Indiana law regulating title loans and capping title-loan interest rates for all title loans made with Indiana residents, so long as the title-loan company had advertised its services within Indiana. 593 F.3d at 665–69. The court deemed it irrelevant that the Illinois title-loan company could comply with Indiana law without violating any other State's law, stating that allowing Indiana to apply its law when an Indiana resident transacts for a title loan in another State "would be arbitrarily to exalt the public policy of one state over that of another." *Id.* at 667–68.

Most recently, in *Frosh*, the Fourth Circuit invalidated a Maryland law prohibiting drug manufacturers or wholesalers from engaging in upstream price gouging of certain generic drugs sold in Maryland. 887 F.3d at 667–74. The court rejected the narrower view of the extraterritoriality principle embraced by the Ninth and Tenth Circuits, concluding that the extraterritoriality rule applies to more than price-control or price-affirmation statutes. *Id.* at 669–70. And because the regulated upstream sales occurred outside of Maryland, the court held that the law violated the extraterritoriality principle by "effectively seek[ing] to compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland." *Id.* at 672; *see also id.* at 672–73 ("The Act instructs prescription drug manufacturers that they are prohibited from charging an 'unconscionable' price in the initial sale of a drug, which occurs outside Maryland's borders. Maryland cannot, even in an effort to protect its consumers from skyrocketing prescription drug costs, impose its preferences in this manner.").

C. The circuit conflict has effectively conferred preferential status on the laws and policy choices of States in the Ninth and Tenth Circuits

1. The upshot of this circuit conflict is that in the Ninth and Tenth Circuits the *Baldwin/Brown-Forman/Healy* rule of per se invalidity for extraterritorial regulations applies *only* to direct price-control or price-affirmation laws. Those courts subject all other regulations only to *Pike* balancing. Consequently, States in those circuits have far greater leeway to implement their preferred policies even if doing so requires out-of-state entities to modify their behavior to comply with those States' policy choices—and even if the States in which those entities operate have *different* policies. Those States thus may dictate how commodities are produced in other States, effectively overriding other States' policy choices.

In contrast, the States in the First, Fourth, Seventh, and Eighth Circuits cannot enforce laws that effectively force out-of-state market participants to modify their conduct, even if the law has nothing to do with capping the price of goods sold outside the respective State. Unlike California and Oregon, North Dakota and Wisconsin may not enforce their preferred energy and environmental policies if they require market players to modify their out-of-state conduct. Nor may Indiana protect its citizens from the dangers inherent in vaping or the predatory practices of the title-loan industry. And although California may compel the foie gras industry to adapt to California's preferred policies, States in the First, Fourth, Seventh, and Eighth Circuits may not use in-state sales as an excuse to impose their policy preferences on out-of-state producers.

The mere existence of a conflict on a question as fundamental as a State's authority under its police power to enact laws with extraterritorial effects is itself squarely at odds with the Commerce Clause's purpose and with the Constitution's structure. The Commerce Clause, and the constitutional structure more generally, is supposed to ensure that States operate on the same playing field. But the current circuit split makes that impossible.

2. There is no need for the Court to wait for this circuit conflict to percolate any longer. Over the past five years parties have repeatedly asked to the Court to clarify the extraterritoriality principle. *See Indiana v. Massachusetts*, No. 22O149 (U.S. Jan. 7, 2019); *Missouri v. California*, No. 22O148 (U.S. Jan. 7, 2019); *Epel*, 793 F.3d 1169, *cert. denied*, 136 S. Ct. 595 (2015); *Ass'n des Eleveurs de Canards et D'Oies du Quebec*, 729 F.3d 937, *cert. denied*, 135 S. Ct. 398 (2014); *Rocky Mountain*, 730 F.3d 1070, *cert. denied*,

134 S. Ct. 2875 (2014). And in addition to the petition in this case, the Court is currently considering a petition for writ of certiorari in *Frosh v. Ass'n for Accessible Medicines*, No. 18-546 (distributed for Conference of February 15, 2019).

Until this Court steps in and clarifies one of the least understood aspects of Commerce Clause doctrine, the States will remain unequal in their authority to enact under their police powers laws that have extraterritorial effects. That inequality is worse than the "drift toward anarchy and commercial warfare" among the States that the Constitution sought to curb, *H. P. Hood & Sons, Inc.*, 336 U.S. at 533, because it allows certain States to unilaterally impose production standards on States that cannot reciprocate, effectively creating a cluster of "super" States to set commercial standards nationwide unless and until Congress acts.

CONCLUSION

The Court should grant the Petition to consider Question 1.

Respectfully submitted,

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