No. 21-468

In the Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, et al.,
Petitioners,
v.

KAREN ROSS, et al.,
Respondents.

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

BRIEF OF ILLINOIS, MICHIGAN, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, MAINE, MARYLAND, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANA NESSEL
Michigan Attorney General
FADWA A. HAMMOUD
Michigan Solicitor General
ANN M. SHERMAN
Deputy Solicitor General
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628
HammoudF1@michigan.gov

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
CHRISTINA HANSEN
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

*Counsel of Record

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INTERESTS OF AMICI CURIAE

Amici Illinois, Michigan, Colorado, Connecticut, the District of Columbia, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington ("States") submit this brief in support of respondents.

The States have a powerful sovereign interest in exercising their police powers to enact laws promoting the health, safety, and welfare of their residents, including by regulating the goods and services sold within their borders. Indeed, it is well established that "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted). The States thus have a substantial interest in ensuring that these powers remain unhindered by an overly broad view of the dormant Commerce Clause, which has long served the limited purpose of safeguarding against "economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), brought about by discriminatory and protectionist state laws.

The States' interest is implicated by this case, because petitioners' challenge to California's Proposition 12—a law regulating the sale of pork products in California—proceeds from an unduly expansive view of the dormant Commerce Clause, which has long been understood as imposing only a narrow limitation on the States' robust sovereign authority. Petitioners argue that if "the practical effect of [a State's] regulation is to control conduct beyond the boundaries of the

State," Pet. Br. 21 (cleaned up)—for example, by subjecting businesses "to inconsistent regulations" across States or "impermissibly intrud[ing] into the operations of out-of-state businesses," *id.* at 29, 30—then it is *per se* invalid, *id.* at 20.

But this proposed "extraterritoriality" rule differs significantly from the approach established by nearly a century of this Court's cases, and, if accepted, threatens to greatly constrain the States' sovereign authority to enact even-handed, nondiscriminatory regulations of activities within their respective jurisdictions. Furthermore, limiting state authority in this manner could upset the balance between state and federal power and, in effect, cede to the federal government the sole authority to enact laws in a host of areas traditionally governed by state regulation, such as those furthering the States' long recognized "responsibility of protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

Thus, although the States have taken different approaches to the regulation of pork sold within their borders, all agree that petitioners' view of the dormant Commerce Clause would significantly impair their ability to protect the health, safety, and welfare of their residents across a wide range of regulatory regimes. In fact, some of the States joining this brief, such as Illinois and Michigan, produce pork for sale throughout the United States. Nevertheless, they support respondents because they agree with them on the proper legal framework for assessing dormant Commerce Clause challenges and because of the

broader implications of the questions presented by this case.

Accordingly, the States urge the Court to reject petitioners' request to expand the scope of the dormant Commerce Clause and to affirm the decision of the lower court.

SUMMARY OF ARGUMENT

At issue in this case is whether the dormant Commerce Clause precludes States from exercising their sovereign authority to regulate conduct within their borders, even where such regulations do not discriminate against interstate interests, simply because those regulations can incidentally affect out-of-state conduct. Petitioners' view is that it should: as explained, they assert that a state law should be deemed *per se* unconstitutional where it has the practical effect of controlling conduct beyond the enacting State, irrespective of any evidence of discrimination or protectionism by the enacting State. Pet. Br. 21. But such a rule, if accepted, would constitute a dramatic break from decades of precedent and significantly expand a limited doctrine that has long been grounded in shielding interstate markets from discriminatory and protectionist regulations, not precluding even-handed in-state statutes that may indirectly affect out-of-state conduct or subject businesses to distinct statutory schemes in different States.

Furthermore, petitioners fail to grapple with the sweep of their proposed rule, since countless nondiscriminatory laws that govern in-state activities—including in areas where States are exercising their core sovereign authority—nevertheless can have incidental effects on conduct, operations, and markets

outside of a state's borders. *E.g.*, *Online Merchants Guild v. Cameron*, 995 F.3d 540, 559 (6th Cir. 2021); *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1175 (10th Cir. 2015) (Gorsuch, J.); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 378-379 (6th Cir. 2013) (Sutton, J., concurring). Additionally, the particulars of these regulatory regimes often necessarily and rightly reflect the interests and needs of each State's residents, and thus can vary in ways large and small. *E.g.*, *Online Merchants Guild*, 995 F.3d at 557.

Petitioners' proposed rule, however, does not account for these important considerations, and thus could call into question the States' sovereign authority to enact laws protecting the welfare of their residents, including setting consumer product safety standards, price-gouging prohibitions, energy programs, and restrictions on predatory lending and other financial regulations, to name a few. Constraining the States' traditional regulatory role in this manner would also harm the States' residents, who have come to rely on these important protections when they purchase goods, procure professional services, and engage in financial transactions. The States thus urge this Court to reject petitioners' proposed extraterritoriality doctrine, for these reasons and those explained below.

ARGUMENT

I. Petitioners' Proposed Rule Would Work A Significant Expansion Of The Dormant Commerce Clause, Divorcing It From Its Historical Purpose.

Petitioners and their amici acknowledge that the dormant Commerce Clause has long been understood

to foster a fair and free interstate marketplace by preventing state-level economic protectionism and discriminatory regulation. Pet. Br. 23; U.S. Br. 13-14; Ind. Br. 9-10. Yet petitioners omit these foundational principles from their proposed extraterritoriality rule, by looking only to whether the regulation at issue has practical impacts on out-of-state conduct, "regardless of the purpose with which it was enacted," Pet. Br. 26, or regardless of whether it has discriminatory or protectionist effects, *id.* at 21. This theory not only runs counter to the historical underpinnings of the Commerce Clause, as now explained, but is also fundamentally incompatible with the States' sovereign authority to enact nondiscriminatory regulations of activity within their own borders pursuant to their police powers, *see infra* Section II.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Framers viewed this power as necessary both to promote national security and to curb the "tendencies toward economic Balkanization that had plagued relations" among the States. *Hughes*, 441 U.S. at 325; *see also* The Federalist No. 22 (Alexander Hamilton) (identifying "dissatisfaction between the States" as counseling in favor of federal commerce power).

Of particular concern, the States under the Articles of Confederation had imposed trade barriers against out-of-state products that were "destructive to the general harmony." James Madison, *Vices of the Political System of the United States, April 1787*, No. 4; *see also* The Federalist No. 42 (James Madison) ("A very material object" of the federal commerce power "was the relief of the States which import and export

through other States, from the improper contributions levied on them by the latter."); *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 545 (2015) (identifying state tariffs as "quintessential evil targeted by the dormant Commerce Clause"). As James Madison cautioned, these and other protectionist policies adopted by certain States were "adverse to the spirit of the Union," and would "beget retaliating regulations." Madison, *Vices*, No. 4; *see also* The Federalist No. 22 (Alexander Hamilton) (recognizing risk that "interfering and unneighborly regulations" would harm the Union).

In addition to its affirmative grant of authority to the federal government to regulate commerce among the States, the Commerce Clause has "long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994). But this "dormant" Commerce Clause "is by no means absolute." *Taylor*, 477 U.S. at 138 (internal quotations omitted). Unless Congress has regulated to the exclusion of States in a particular arena, States retain authority to "regulat[e] their own purely internal affairs," including by enacting "laws for regulating the internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203, 209 (1824); *see also, e.g.*, *New York v. Miln*, 36 U.S. 102, 142-143 (1837) (upholding state law requiring commercial ships entering state waters to submit passenger registries); *Wilson v. Blackbird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (upholding state

law authorizing construction of dam obstructing interstate waterway).

And the States may exercise this power to regulate their internal affairs "even by use of measures which bear adversely upon interstate commerce." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532 (1949). Indeed, the focus of the "negative aspect" of the Commerce Clause is not to preclude the States from enacting laws that may have incidental impacts beyond their borders, but to ensure that States do not engage in discriminatory and protectionist practices. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) ("The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 186 (1938) ("It was to end these [discriminatory] practices that the commerce clause was adopted.").

Consistent with these principles, application of the dormant Commerce Clause has been "driven by concern about economic protectionism" and "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337-338 (2008) (internal quotation marks omitted). Accordingly, state laws that expressly discriminate against interstate commerce are almost always invalid. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (invalidating a New Jersey law that prohibited importation of waste into New Jersey landfills). But when a "statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such

commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Within this framework is a line of cases that petitioners view as creating an "extraterritoriality" doctrine. Pet. Br. 21. But this is incorrect: the Court has considered extraterritoriality principles sparingly, to date having cited those principles just three times to strike down state statutes. *See Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989); *Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935). In each instance, the statute was: "(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." *Epel*, 793 F.3d at 1173. In other words, the holdings in these three cases are consistent with the overarching purpose of the dormant Commerce Clause, in that each "suggests a concern with preventing discrimination against out-of-state rivals or consumers." *Ibid.*

First, in *Baldwin,* the Court invalidated a New York statute that prohibited milk dealers from offering out-of-state milk at a lower price than in-state milk. 294 U.S. at 519. By creating a minimum price for out-of-state milk, the Court reasoned, the statute impermissibly "project[ed] its legislation" into other States, depriving them of their natural competitive advantage in the industry. *Id.* at 521. Critical to the Court's analysis was its understanding that the Commerce Clause operated to prohibit States from regulating "with the aim and effect of establishing an economic barrier against competition with the products

of another state or the labor of its residents." *Id.* at 527.

Next, in *Brown-Foreman*, the Court invalidated a New York law requiring liquor distillers to certify that the prices of beverages sold in-state would be no higher than the price certified for out-of-state sales during the same 30-day period, thus precluding a distiller from offering rebates to its out-of-state customers. 476 U.S. at 576-577. Although the law was directed only at New York sales, the Court found that it had the effect of setting out-of-state prices. *Id.* at 582-583. Recognizing that a State may regulate sales within its borders and indeed "may seek lower prices for its consumers," the Court drew the line at allowing New York to effectively set the price that the producers could charge outside of New York through a protectionist "insist[ence] that producers or consumers in other States surrender whatever competitive advantages they may possess." *Id.* at 580.

Finally, the Court struck down a similar Connecticut law, which required out-of-state beer producers to certify that their Connecticut prices were no higher than the price they charged in bordering States. *See Healy*, 491 U.S. at 326-327. Like in *Brown-Forman*, the Court held that the statute violated principles of extraterritoriality because it had the effect of setting the maximum price that out-of-state producers could charge in wholly out-of-state transactions. *Id.* at 339. The Court also found the Connecticut law to be discriminatory on its face because it regulated only those sellers doing business in Connecticut's neighboring

States. *Id.* at 340-341; *see also id.* at 344 (Scalia, J. concurring).

Thus, in each of the only three times this Court has invalidated a discriminatory state law citing its extraterritorial effects, it did so because the law imposed a price control or price affirmation requirement that had "the effect of raising costs for out-of-state consumers or rival businesses." *Epel*, 793 F.3d at 1173. And the Court subsequently confirmed this limited reach of this extraterritoriality principle in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), when it rejected the challengers' argument that a Maine statutory scheme regulating prescription drugs impermissibly affected the drugs' market shares and impacted "the terms of transactions that occur elsewhere." *Id.* at 669. The program at issue subjected drug manufacturers' Medicaid sales to prior authorization procedures if the manufacturers refused to negotiate a rebate agreement with the State for the benefit of all Maine residents. *Id.* at 649-650. But because the Maine program, unlike the price affirmation statutes in *Healy* and *Brown-Foreman*, did not "regulate the price of out-of-state transactions," *id.* at 645, or "impose a disparate burden on any competitors," the Court declined to invalidate it or extrapolate a broader prohibition from those cases, *id.* at 645, 670.

In addition to cases that squarely present challenges based on extraterritoriality, this Court has issued a number of decisions upholding nondiscriminatory state laws that regulate the in-state provision of goods and services, but that also have incidental effects on out-of-state conduct. *E.g.*, *United Haulers*

Ass'n, Inc., 550 U.S. at 334, 342 (upholding law restricting the flow of solid waste, even though the law affected the amount of waste destined for out-of-state processing facilities); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 281-282, 285 (1997) (upholding a tax exemption for natural gas purchased from certain local entities, even though it affected the revenue of out-of-state gas providers); *CTS Corp.*, 481 U.S. at 88 (upholding a statute regulating tender offers, even though, "as a practical matter," the regulation would "apply most often to out-of-state entities"); *Taylor*, 477 U.S. at 132, 152 (upholding prohibition of "importation of live baitfish," even though the prohibition affected out-of-state baitfish suppliers); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (upholding a restriction on in-state gasoline sales, even though the restriction required some refineries to divest their ownership of certain retail service stations, affecting those refineries' out-of-state operations); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557-558 (1917) (upholding state securities law, even though it had "incidental[ ]" effects beyond the State's borders).

By way of a recent example, this Court in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), upheld a South Dakota law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." *Id.* at 2089 (internal quotations omitted). Consistent with the historical principles just discussed, the Court doubted that future Commerce Clause challenges would prove fruitful, since "South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce."

Id. at 2099. Yet petitioners' proposed rule would suggest that the incidental interstate effects caused by a state law like that challenged in *Wayfair*, should be dispositive. *E.g.*, *Am. Beverage Ass'n*, 735 F.3d at 379 (Sutton, J., concurring) (discussing States that tax businesses operating across state lines). This Court's decision to uphold the South Dakota law and others—notwithstanding the evident, incidental effects on interstate commerce—provides further confirmation that petitioners' view of extraterritoriality contravenes settled precedent.

In sum, the Court's Commerce Clause precedent safeguards interstate markets against discriminatory and protectionist state laws, but does not preclude evenhanded in-state regulation that has incidental effects on out-of-state conduct, as petitioners suggest. The Court should decline to depart from its settled precedent.

II. Petitioners' Proposed Expansion Of The Dormant Commerce Clause Could Impair State Sovereign Authority And Jeopardize A Wide Range Of State Laws That Protect Local Health, Safety, And Welfare.

Not only does petitioners' approach fail to take into account the historic and doctrinal understanding of the dormant Commerce Clause, but it is also untenable as a practical matter. Among other flaws, petitioners' proposed rule—which focuses on whether the challenged law has practical effects on out-of-state conduct rather than whether it is impermissibly protectionist—could call into question a host of important state laws that have long been understood to be well within the States' sovereign authority to protect the

health and safety of their residents. *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 269-270 (2006) (States have always possessed "great latitude" to exercise their police powers to protect "the lives, limbs, health, comfort, and quiet of all persons") (cleaned up). In other words, petitioners' proposed standard could "risk serious problems of overinclusion." *Epel*, 793 F.3d at 1175.

Indeed, the "modern reality is that the States frequently regulate activities that occur entirely within one state but that have effects in many." *Am. Beverage Ass'n*, 735 F.3d at 379 (Sutton, J., concurring); *see also, e.g.*, *Epel*, 793 F.3d at 1175. The lower courts have thus recognized a wide range of nondiscriminatory state laws that fall well within the States' traditional regulatory authority but that nevertheless could run afoul of an extraterritoriality standard like the one espoused by petitioners, from state taxation regimes to professional licensure and permitting requirements. *E.g.*, *Online Merchants Guild*, 995 F.3d at 557 (consumer protection laws); *Am. Beverage Ass'n*, 735 F.3d at 379 (Sutton, J., concurring) (taxation, labelling, and product safety laws); *Epel*, 793 F.3d at 1175 (state health and safety laws).

The following discussion highlights just a few of the countless state laws that could be affected by petitioners' overbroad view of the dormant Commerce Clause. These include the States' food safety protections, prohibitions on the sale of dangerous goods, price-gouging statutes, energy programs, and regulations curtailing predatory lending and other financial abuses.

1. To start, as part of their responsibility to protect the health and welfare of their residents, the States routinely regulate the sale of goods within their

borders to ensure that their residents are not exposed to unsafe food and other products. Such laws are typically applied to all who do business within the State, regardless of where the product is manufactured or distributed. Relevant here, States regularly establish standards governing the food supply within their borders, including food products that are produced or manufactured either in-state or in other States.[1] And in certain circumstances, States also require manufacturers or producers to participate in food safety programs—which set standards and require inspections, among other things—to sell their products in the State.[2] This Court has long upheld these types of evenhanded food safety regulations, as well as others, as valid exercises of state sovereign authority—even though they had some incidental effects on business

[1] *E.g.*, Ohio Admin. Code § 3717-1-03.1 (fish must be "commercially and legally caught or harvested," and wild mushrooms may not be sold unless they are either "grown, harvested, and processed" in a regulated operation or the product of a regulated food processing plant); W. Va. Code § 19-11A-3 (dairy distributors must obtain a permit to distribute dairy products in the State, "even if there is no permanent location maintained in the State," and submit to West Virginia's labelling, packaging, and distribution standards).

[2] *E.g.*, 510 Ill. Comp. Stat. 85/2.1 (requiring participation in "the National Poultry and Turkey Improvement Plans for the eradication of pullorum and fowl typhoid"); Ohio Admin. Code 3717-1-03.1(G) (requiring sellers of game animals to participate in regulatory inspection programs); W. Va. Admin. Code § 61-4C-9.1 (requiring milk products for sale to be derived from herds "located in a Modified Tuberculosis Area, Modified Accredited Advanced Tuberculosis Area or a Tuberculosis Free Area").

decisions and operations outside of the regulating State.[3]

2. Another way in which States protect their residents is by prohibiting the sale of dangerous goods within their borders. These prohibitions can vary depending on the interests and needs of the State, but they range from wholesale prohibitions of dangerous products to regulations imposing safety standards on toys, health care products, and household goods.[4] For instance, some States prohibit toys and other children's products containing toxic substances like lead

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[3] *E.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981) (upholding a state law "banning the retail sale of milk in plastic . . . containers," while "permitting such sale in . . . paperboard milk cartons," against Commerce Clause challenge); *Sligh v. Kirkwood*, 237 U.S. 52, 57, 60 (1915) (rejecting Commerce Clause challenge to Florida law prohibiting the delivery of citrus fruits that are "immature and unfit for consumption"); *Plumley v. Massachusetts*, 155 U.S. 461, 479-480 (1894) (rejecting Commerce Clause challenge and upholding conviction for fraudulently selling margarine manufactured in Illinois as butter in Massachusetts); *Empacadora de Carnes de Fresnillo, S.A. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007) (rejecting Commerce Clause challenge to Texas law prohibiting processing, sale, or transfer of horsemeat for human consumption).

[4] *E.g.*, D.C. Code § 8-522 (disposable wipes); 415 Ill. Comp. Stat. 60/1 (fertilizers); 415 Ill. Comp. Stat. 92/5 (phosphorous detergents); 815 Ill. Comp. Stat. 385/3 (requiring specific disclosures by eyewear sellers in their advertisements); Mich. Code § 324.8512b (fertilizers); Minn. Stat. Ann. § 325E.40 (petroleum-based sweeping compounds); Nev. Rev. Stat. § 701.260 (incandescent lamps); Tenn. Comp. R. & Regs. § 0080-04-08 (antifreeze).

or cadmium.[5] In fact, the States were the lone regulators of these products for many years prior to 2008, when the federal government adopted similar standards.[6] These laws protect children in those States from toys that pose unique dangers to them, and have allowed States to pursue actions against manufacturers that produce, sell, or otherwise introduce these products into the stream of commerce. But because toys are not always manufactured and distributed within the States that impose such requirements, the implementation and enforcement of these standards can affect conduct occurring out-of-state, just like the state laws described above that this and other courts have upheld in the face of dormant Commerce Clause challenges.

In 2007, for example, the Illinois Attorney General used her authority under the Illinois Lead Poisoning Prevention Act to investigate reports of high lead con-

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[5] *E.g.*, Ariz. Rev. Stat. § 36-1674(A)(3) (toys with lead-based paint); Cal. Health & Safety Code § 108555(a) (toys "contaminated with any toxic substance"); *id.* § 110552 (lead in candy); 410 Ill. Comp. Stat. 45/4 (children's products that contain a lead-bearing substance); 430 Ill. Comp. Stat. 140/1 (children's jewelry containing certain levels of cadmium); Ky. Rev. Stat. Ann. § 217.801 (lead paint on toys and children's furniture); Me. Rev. Stat. tit. 22 § 13-16A ("lead-containing children's product"); 9 Vt. Stat. Ann. § 2470f (children's product containing lead); Wash. Rev. Code § 70A.430.020 (children's products containing lead, cadmium, or phthalates).

[6] *See* Consumer Product Safety Improvement Act, Public Law 110-314 (Aug. 14, 2008); *see also e.g.*, National Conference of State Legislatures, *State Statutes on Chemical Safety* (Jan. 5, 2017), https://bit.ly/3bzUi6h (describing history of state statutes regulating toxic substances).

tent in toy medical kits sold in Illinois but manufactured elsewhere.[7] As a result of that investigation—which concluded that the toy kits contained lead in excess of the state limit—the out-of-state manufacturer agreed to remove the kits from stores in Illinois, inform online sellers to stop selling the kits to Illinois consumers, and provide replacements to families that had already purchased the kits.[8] In another similar action, 39 state attorneys general investigated a different manufacturer for its use of excessive lead paint in several popular toy lines.[9] The attorneys general secured a settlement that required the manufacturer to pay civil penalties, submit to lead monitoring, and implement more stringent lead standards for toys manufactured in the future.[10]

3. Price-gouging regulations—which protect consumers from paying excessive prices for goods and services—are another critical consumer-protection tool that States use to safeguard their residents' welfare. Although the federal government recognizes the importance of preventing price gouging, regulation has largely been left to the States, the vast majority of

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[7] Press Release, Illinois Attorney General, *Attorney General Warns Consumers of New Potential Lead Poisoning Hazard in Fisher Price Toy Kits* (Dec. 14, 2007), https://bit.ly/3Nz0OYy.

[8] *Ibid.*; Consumer Reports News, *Fisher-Price Pulls Lead-Tainted Toy In Illinois But Not Other States* (Dec. 4, 2007), https://bit.ly/3JLlTP7.

[9] Scott Malone, *States Settle With Mattel On Lead Toys*, Reuters (Dec. 15, 2008), https://reut.rs/3ysjBQR.

[10] MetroWest Daily News, *Coakley, 38 Other AGs Reach Settlement On Lead Paint In Toys*, (Dec. 14, 2008), https://bit.ly/3ORqgcH.

which have implemented such statutes or regulations.[11] These laws, which provide critical protections when people are at their most vulnerable, could affect out-of-state sellers choosing to do business within the State and thus might fall within the scope of petitioners' proposed extraterritoriality standard. Pet. Br. 21, 29, 31. Moreover, while price-gouging laws typically prohibit the sale of goods for "unconscionable" or "excessive" prices, those terms are not defined in the same manner in each State. For example, some States apply a rebuttable presumption that a price increase of 15 percent is unlawful, whereas others set the threshold at 20 or 25 percent.[12]

A trade association representing online merchants recently challenged Kentucky's price-gouging laws on extraterritoriality grounds, arguing that these regulations improperly subjected sellers to varying standards and affected pricing in the interstate marketplace. *See Online Merchants Guild*, 995 F.3d at 555-558. The Sixth Circuit rejected that challenge and concluded that Kentucky's decision to apply its price-gouging laws to online merchants did not violate the Commerce Clause, notwithstanding the impact that the laws would have on out-of-state pricing. *Ibid.* The court also rejected the association's broad view of extraterritoriality, because "in a modern economy just about every state law will have some 'practical effect'

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[11] *See, e.g.*, Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), https://bit.ly/3Qzmaa4. A list of state price gouging laws can be found at https://bit.ly/3AfrCJX.

[12] *See, e.g.,* Ala. Code § 8-31-4 (25 percent); 73 Pa. Stat. § 232.4 (20 percent); Me. Rev. Stat. Ann. tit. 10 § 1105(1)(D) (15 percent).

on extraterritorial commerce." *Id.* at 559. And if such a standard were applied, the court explained, it would draw into question not just "price-gouging laws, but a bevy of heretofore uncontroversial state consumer protection laws that might apply in the context of eCommerce." *Ibid.*

Furthermore, the Sixth Circuit continued, an expansive view of the Commerce Clause would unduly favor businesses that engage in interstate commerce—for example, by selling their products in an online marketplace—over local businesses that produce, market, and sell their products within a single State. *Id.* at 558-559. Indeed, while a broad view of the dormant Commerce Clause, such as the one espoused by petitioners, could exempt businesses engaging in the interstate marketplace from consumer protection statutes, it would not have the same effect on local businesses. In other words, the mere "choice to sell in the virtual economy [w]ould afford a business *added* protection." *Ibid.* (emphasis in original).

4. Next, petitioners' proposed standard could affect the States' longstanding authority to regulate the generation, distribution, and sale of electricity within their borders, such as through the implementation of Renewable Portfolio Standards ("RPSs"). RPSs—which have been adopted by the majority of States—require electric suppliers to source a portion of their

annual electricity sales from solar, wind, and other renewable energy resources.[13] These standards are critical for States that want to diversify their energy mix, reduce pollution, and promote economic development.[14] But state-level regulations can indirectly influence energy companies and markets beyond state borders.

Notwithstanding their incidental effects on interstate commerce, federal courts have appropriately upheld RPSs and other similar programs under the dormant Commerce Clause, since they neither discriminate against interstate interests nor control prices in other States.[15] In *Epel*, for example, the court upheld Colorado's RPS, which required utilities to ensure that 20% of the electricity sold to Colorado consumers comes from renewable sources. 793 F.3d

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[13] *See, e.g.*, DSIRE, NC Clean Energy Technology Center, https://bit.ly/3dpOjlJ (collecting state RPSs); National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (Aug. 13, 2021), https://bit.ly/3SIWZ6P (detailing RPSs and target programs).

[14] *Ibid.*

[15] *E.g.*, *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (upholding Illinois's "zero emission credits" against Commerce Clause challenge and noting that the "Commerce Clause does not cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, just because the legislation might indirectly affect the commerce of the country") (cleaned up); *Allco Finance LTD v. Klee*, 861 F.3d 82, 107 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018) (upholding Connecticut's RPS against Commerce Clause challenge to the program's geographic and other restrictions for renewable energy credits).

at 1170. The challengers claimed that this law violated the dormant Commerce Clause, alleging it would result in a loss of business for some out-of-state coal producers. *Id.* at 1170-1171. But consistent with this Court's limited understanding of the dormant Commerce Clause, the Tenth Circuit held that Colorado's RPS was constitutional because it "isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters." *Id.* at 1173.

The court extrapolated on the final point, noting that it could not conclude that Colorado's RPS would harm interstate commerce "when, if anything, Colorado's mandate seems most obviously calculated to raise prices for *in-state* consumers." *Id.* at 1174 (emphasis in original). Out-of-state consumers, by contrast, would likely see a price reduction for electricity generated using fossil fuels because of the reduced demand for it in Colorado. *Ibid.* And if the court were to disregard this fact, and instead apply a *per se* extraterritoriality rule, it "might lead to the decidedly awkward result of striking down as an improper burden on interstate commerce a law that may not disadvantage out-of-state businesses and that may actually reduce price for out-of-state consumers." *Ibid.*; *see also, e.g.*, *Am. Beverage Ass'n*, 735 F.3d at 378 (Sutton, J., concurring) ("Even a hypothetical state law that *facilitated* interstate commerce—say, an Ohio law that gave tax credits to automobile companies that keep open the production lines of their factories in Michigan and elsewhere—would be invalid if it had extraterritorial practical effects.") (cleaned up) (emphasis in original).

5. As final examples, petitioners' expansive view of extraterritoriality could also call into question the States' longstanding regulations that protect consumers from predatory lending practices and other financial abuses. As with other consumer protection statutes, these financial regulations are often tailored to each State's individual needs. And although these laws are only applied to transactions with an in-state nexus, it can be the case that entities involved in the transaction operate in multiple States. Yet these laws governing in-state activity have largely been upheld against dormant Commerce Clause challenges in recent years, despite the fact that they may indirectly affect out-of-state conduct or subject a business to differing regulations.[16] Any other result would be far-reaching, given the number and variety of state-level

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[16] *E.g.*, *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230, 238-239 (3d Cir. 2022), *cert. denied sub nom. TitleMax of Delaware v. Vague*, No. 21-1262, 2022 WL 2295563 (U.S. June 27, 2022) (upholding Pennsylvania loan collection statute against dormant Commerce Clause challenge by lender in context of loans made against Pennsylvania-registered vehicles but at TitleMax facilities located outside of Pennsylvania); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308-1309 (10th Cir. 2008) (rejecting dormant Commerce Clause challenge to Kansas payday lending statute by lender arguing it would need to adapt operations to comply with Kansas statute because of impossibility of discerning location where customer accesses website); *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 95 (Minn. 2015) (upholding Minnesota payday lending law against dormant Commerce Clause challenge by Delaware company, citing fact that law applies only to "transactions involving Minnesota residents who complete the transaction while physically located in the state of Minnesota") (cleaned up).

regulations protecting state residents from predatory financial transactions.

Lenders and other financial firms choosing to do business in a State must, for example, comply with statutes in every State establishing a maximum legal interest rate "for transactions to which no other statutory or regulatory exception applies."[17] These rates are not uniform.[18] For instance, in Alabama, Maine, Maryland, Massachusetts, Minnesota, Nebraska, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and the District of Columbia, the maximum rate is set at 6%, whereas Arizona, Hawaii, Kansas, Montana, New Hampshire, Tennessee, and Utah allow rates up to 10%, and New Jersey and New York up to 16%.[19]

In addition to these broadly applicable caps, States impose different limitations on maximum interest rates for specific types of loans. These include caps on interest rates and loan fees for installment loans,

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[17] National Consumer Law Center Digital Library, Table B.2 (Summary of State Usury Statutes), https://bit.ly/3JLhdJb.

[18] Mitchell Edwards & Matthew McDonnell, *What Litigators Should Know About Usury Laws*, American Bar Association (Apr. 19, 2022), https://bit.ly/3OVLINV.

[19] Ala. Code § 8-8-1; Ariz. Rev. Stat. § 44-1201; D.C. Code § 28-3302(a); Haw. Rev. Stat. § 478-2; Kan. Stat. Ann. § 16-201; Mass. Gen. Laws ch. 107, § 3; Md. Code, Com. § 12-102; Me. Rev. Stat. Ann. tit. 9-B § 432; Minn. Stat. Ann. § 334.01; Mont. Code Ann. § 31-1-106; N.D. Cent. Code § 47-14-05; Neb. Rev. Stat. § 45-102; N.H. Rev. Stat. Ann. § 336:1; N.J. Stat. Ann. § 31-1-1; N.Y. Banking Law § 14-a; 41 Pa. Stat. Ann. § 201; S.C. Code Ann. § 37-10-106; Tenn. Code Ann. § 47-14-103; Tex. Fin. Code Ann. § 302.002; Utah Code Ann. § 15-1-1; Va. Code Ann. § 6.2-301; W. Va. Code § 47-6-5.

which at least 45 States and the District of Columbia have enacted.[20] In fact, voters directly approved several of these caps in recent years: Since 2008, "overwhelming majorities in five states"—Arizona, Colorado, Montana, Ohio, and South Dakota—have imposed rate caps on installment loans.[21] States also cap interest rates in the context of payday lending, auto title loans, and subprime loans, to name a few.[22] Lenders that choose to do business in multiple States thus must set up their operations to comply with each State's laws.

And there are many other ways that States regulate lenders beyond interest rate caps. For instance, States frequently impose licensure or permitting requirements on lenders doing business in their State or with their residents.[23] One area where such licensure

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[20] National Consumer Law Center, *Predatory Installment Lending In The States 2022* (June 2022), https://bit.ly/3R0EeLd.

[21] National Consumer Law Center, *State Annual Percentage Rate (APR) Caps For $500, $2,000 and $10,000 Installment Loans* (2019), https://bit.ly/3ufSQwr.

[22] *E.g.*, 815 Ill. Comp. Stat. 123/15-5-5 (36% cap on installment loans, payday loans, auto title loans, and open-end lines of credit); National Conference of State Legislatures, *Mortgage Lending Practices*, https://bit.ly/3nVAgpN (summarizing subprime and predatory mortgage lending laws); National Conference of State Legislatures, *Payday Lending State Statutes* (Nov. 12, 2020), https://bit.ly/3z07GtX (summarizing state payday lending laws).

[23] States require licenses or permits for myriad professions, and some of these statutes have been challenged under the dormant Commerce Clause in recent years. *E.g.*, *Brown v. Hovatter*, 561 F.3d 357, 364-365 (4th Cir. 2009) (mortuary services); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1293-1294 (N.D. Fla. 2010) (interior

regulations are commonplace—and of critical importance—is in the student loan industry.[24] These regulatory regimes allow States to "revoke a servicer's license—and thereby preclude the servicer from servicing loans within the state—if the servicer engages in specified acts of misconduct."[25] For example, in the District of Columbia, a loan servicer can have its license revoked if the licensee has "demonstrated incompetency or untrustworthiness to act as a licensee" or "committed any fraudulent acts, engaged in any dishonest activities, or made any misrepresentation in any business transaction."[26] And States also impose licensure requirements in other areas of the lending industry, such as licenses to service payday and installment loans.[27]

Enforcement of these and other state laws protecting against predatory lending roots out misconduct and secures restitution for harmed borrowers. In January 2022, for instance, a coalition of 39 state attorneys general announced a $1.85 billion settlement with Navient to resolve allegations of widespread

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design); *McLemore v. Gumucio*, No. 3:19-cv-00530, 2022 WL 875616, at *5-6 (M.D. Tenn. Mar. 23, 2022) (auctioneering); *American Bus Ass'n, Inc. v. District of Columbia*, 2 A.3d 203, 221 (D.C. Ct. App. 2010) (charter bus operators).

[24] Congressional Research Service, *Federal and State Regulation of Student Loan Servicers*, at 14 (Sept. 17, 2019), https://bit.ly/3SNCO7F (collecting statutes).

[25] *Ibid.*

[26] *Ibid.* (citing 3 D.C. Code § 31-106.02(h)(1)) (cleaned up).

[27] *E.g.*, 205 Ill. Comp. Stat. 660/1 *et seq.* (sales finance agency); 205 Ill. Comp. Stat. 670/1 (consumer installment loans); 815 Ill. Comp. Stat. 122/3-3 (payday lending).

abuses, including illegally steering borrowers into costly forbearance programs and originating subprime loans with borrowers attending for-profit colleges with low graduation rates.[28] Petitioners' proposed rule could place these efforts at risk, a result that would leave borrowers vulnerable to unscrupulous conduct by lenders across the country.

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As these examples demonstrate, petitioners' expansive view of the dormant Commerce Clause would distort the States' traditional regulatory role and undermine their sovereign authority to regulate matters of importance within their borders. This Court should decline petitioners' invitation to take such a drastic departure from its precedent, which rightly construes the dormant Commerce Clause to invalidate only those state laws that discriminate against or excessively burden interstate interests.

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[28] Press Release, Illinois Attorney General, Attorney General Raoul Announces $1.85 Billion Settlement with Student Loan Servicer Navient (Jan. 13, 2022), https://bit.ly/3v2RZQ9.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

KWAME RAOUL
Illinois Attorney General
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
CHRISTINA HANSEN
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
Jane.Notz@ilag.gov

DANA NESSEL
Michigan Attorney General
FADWA A. HAMMOUD
Michigan Solicitor General
ANN M. SHERMAN
Deputy Solicitor General
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628
HammoudF1@michigan.gov

* *Counsel of Record*

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PHILIP J. WEISER
Attorney General of Colorado

WILLIAM TONG
Attorney General of Connecticut

KARL A. RACINE
Attorney General of the District of Columbia

AARON M. FREY
Attorney General of Maine

BRIAN E. FROSH
Attorney General of Maryland

MAURA HEALEY
Attorney General of Massachusetts

AARON D. FORD
Attorney General of Nevada

MATTHEW J. PLATKIN
Acting Attorney General of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico

LETITIA JAMES
Attorney General of New York

ELLEN F. ROSENBLUM
Attorney General of Oregon

PETER F. NERONHA
Attorney General of Rhode Island

ROBERT W. FERGUSON
Attorney General of Washington