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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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STATEMENT OF INTEREST

Amici curiae are distinguished law professors from several leading law schools across the country. Amici have lectured and written extensively on issues of energy, trade, and constitutional law in general and state sovereignty in particular. They believe that the Court should grant certiorari to resolve a circuit split regarding whether the Constitution still prohibits state regulation of businesses in other states, or whether, as the Ninth Circuit and Tenth Circuit have held, this Court's cases on extraterritorial regulation should be confined to their facts. A list of Amici is set forth in the appendix hereto.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

One central aim of the Constitution was to erase state tariffs that burdened interstate commerce. THE FEDERALIST NO. 11 (Alexander Hamilton); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). The Court's members have disagreed over what provision of the Constitution accomplishes this ban—the dormant Commerce Clause, the Import-Export clause, or wider

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[1] In accordance with Supreme Court Rule 37.6, counsel for Amici certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief. American Energy Alliance contributed to the printing costs for the brief. No other person other than Amici, its members, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, Amici state that Petitioners and Respondents, upon timely receipt of notice of Amici's intent to file this brief, have consented to its filing.

principles of horizontal federalism. But they have always agreed that a state may not simply impose a tariff on goods entering from other states.

But may a state impose a carbon tariff? This question has divided the Circuit Courts of Appeals. A carbon tariff, such as the one imposed on importers by the Oregon Fuels Program, charges importers for greenhouse gases that were emitted elsewhere to make an imported product. It is used by jurisdictions that impose carbon emission limits on their own industry to protect themselves against competition from jurisdictions without these limits.

Carbon tariffs are the subject of widespread national and international controversy. They are controversial because, unlike normal regulations, they have nothing to do with the safety or quality of the actual product regulated. For example, the Oregon Fuels Program regulates ethanol by debiting midwestern companies that rely on local electricity or dry their waste products.[2] Oregon wants Iowa companies to avoid Iowa power, which might have been produced by coal, and wants these companies to save energy by leaving their waste products wet. But these goals have nothing to do with the ethanol that Oregon is importing—every gallon of ethanol is chemically identical. Oregon's regulation is solely aimed at other things the company did in

[2] See Pet. App. 88a (showing producers that leave their waste product, DGS [distillers grains with solubles] wet are assessed a carbon intensity of just 60.10, ETHC008, while identical ethanol producers that dry their waste are assessed a carbon intensity of 68.40, ETHC004); *id*. at 89a-94a (showing requirement not to use electricity from the Midwestern power grid).

Iowa—namely, emitting greenhouse gases or purchasing from companies who have emitted these gases.

On the other hand, carbon tariffs are politically attractive because they insulate states from the competitive impact of their greenhouse gas regulation. They allow a state to regulate out-of-state emissions as effectively as in-state emissions. Could Europe apply a tariff to all U.S. goods to account for the greenhouse gases emitted in their production? Thus far, none of the many countries that have imposed limits on greenhouse gas emissions have dared to impose a comprehensive carbon tariff on imports.

Oregon, however, has not been so circumspect. The Ninth Circuit has authorized carbon tariffs, not as an exception but as part of a general rule that any state may discourage or ban out-of-state products that are made by methods that the state disapproves. Thus, even if international law would prevent a nation from imposing carbon tariffs on other nations, this decision allows U.S. states to impose these controversial tariffs on other U.S. states and on other countries.

More broadly, the categorical rule adopted by the Ninth Circuit—that states may forbid sale of goods that are produced elsewhere by a method it disapproves—is a recipe for balkanizing interstate trade. States regularly experiment with new regulations controlling company behavior, such as Wisconsin's right-to-work law, Wis. Stat. § 111.04(3)(a), or California's corporate director gender requirement, Cal. Corp. Code § 301.3. Under the Ninth Circuit's decision, these states could dramatically expand the impact of their new rules by simply forbidding sale of any product made by companies that do not comply

with the new rules.[3] So California could forbid sale of products made by companies with gender-imbalanced boards and Wisconsin could forbid sale of products made by companies with a union security agreement. This would give California and Wisconsin's rules a much wider scope and it would protect these states' companies from competition from states that did not impose similar rules.

These extraterritorial regulations would bring interstate trade to a standstill because of variation in state-to-state labor, environmental, and corporate laws. It is unlikely that any company outside of California complies with every single California law. Thus, if California banned sale of any goods that were not produced in compliance with its standards, that would amount to a *de facto* ban on all imports. If a state may forbid sale of products from all companies that do not follow its regulations, even when the company made the product in a different state with different laws, interstate trade will quickly become impossible. This reality is the reason why one minimum requirement for any kind of free trade agreement is a prohibition on extraterritorial regulation.[4]

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[3] The Oregon Fuel Standard is a tax on fuel made by out-of-state processes that Oregon disapproves, not a ban. But the Constitution wisely does not distinguish between a ban and an disincentive placed on imports. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988). Such a distinction would force courts to answer the difficult economic question about when a disincentive becomes strong enough to operate as a ban.

[4] All federations and all free-trade areas have a version of this prohibition. *See*, *e.g.*, General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (nations may not

Historically, the dormant Commerce Clause forbade extraterritorial regulations, but the Circuits are now split on whether that doctrine still applies. The Ninth Circuit has abrogated the doctrine by confining this Court's decisions to the narrow context of "price affirmation statutes." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2876 (2014). So has the Tenth Circuit. *Energy & Envtl. Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). In the Seventh Circuit, the doctrine still applies. *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 831 (7th Cir. 2017).

If the Constitution no longer limits extraterritorial regulation, the Court should say so. The circuit split has left interstate trade in the worst of all possible worlds: Congress may well assume that this Court's precedents still protect interstate trade but that protection has been removed in fifteen Western states that are just beginning to flex their regulatory muscles. California, like Oregon, now regulates how companies produce fuels in other states. *Rocky Mountain Farmers Union*, 730 F.3d 1070. But it also has begun regulating how they produce eggs and goose liver. *Missouri v.*

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condition domestic sales based on "process and production methods" of their trading partners); *Interprovincial Cooperatives Ltd v R* (1976) 1 S.C.R. 477 (one Canadian province may not punish pollution emitted in another province). WESTMAN-CLÉMENT & BLANCHET, THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA (EEA): A GUIDE TO THE FREE MOVEMENT OF GOODS AND COMPETITION RULES (1994) 75 ("any product imported from another EEA country must in principle be admitted to the territory of the EEA country if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country").

California, Motion for Leave to File a Bill of Complaint, No. 148; *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013). The Court should step in before these extraterritorial regulations become ubiquitous or step-aside and clarify that Congress alone must pass new laws to protect interstate trade.

This Court should grant certiorari to resolve this circuit split and clarify whether the Constitution—whether through the dormant Commerce Clause, the Export-Import Clause, or broader principles of horizontal federalism—forbids extraterritorial regulations such as Oregon's carbon tariff for fuels.

ARGUMENT

I. THE OREGON FUEL STANDARD IS A CARBON TARIFF FOR FUEL, AN ARCHETYPAL EXTRATERRITORIAL REGULATION

Nearly every state regulation has effects beyond state borders because we live in an interconnected national marketplace. Producers in one state want to be able to sell to producers in many other states. If Oregon banned gasoline-powered lawnmowers, it would undoubtedly affect lawnmower producers in other states. If it banned trampolines, it would harm out-of-state trampoline manufacturers. This is a normal and uncontroversial consequence of free-trade and does not offend the Constitution.

Extraterritorial regulations are quite different from these mine-run regulations. Extra-territorial regulations target out-of-state actions rather than in-state harm; they are not aimed at dirty lawnmowers or

dangerous trampolines. Instead, they regulate how companies do their business in other states. For example, California could say that it would only allow sale of lawnmowers made by workers paid more than $11 per hour. Or it could say that it would only allow sale of trampolines produced by companies with gender-balanced boards.

Oregon's Fuel Standard is an archetypal extraterritorial regulation. Ethanol is ethanol. Just as there is no difference between a lawnmower made by someone paid $10 an hour or $12 an hour, there is no difference between ethanol made with coal-fired electricity and ethanol made with natural-gas fired electricity—all ethanol is chemically identical. Pet. App. 125a.

So Oregon is not regulating a product in Oregon commerce, instead it is regulating the actions of the companies that produced that product. Specifically, it is regulating what it calls the "lifecycle greenhouse gas emissions" of ethanol, which it defines to include "all stages of fuel production, from feedstock generation or extraction, production, distribution, and combustion of fuel by the consumer." Id. at 124a-25a (quoting Or. Admin. R. 340-253-0040(9),(37)).

Oregon's requirement applies to two types of parties, "Producers and importers," and to everyone that those companies contract with throughout their global supply chain. Pet. App. 68a. Oregon's regulations of its own producers is not extraterritorial—it just forces Oregon producers to pay for their greenhouse gas emissions within the state. Oregon's regulation of importers and the companies they contract with, however, is extraterritorial: Oregon

is forcing out-of-state companies to pay for their greenhouse gas emissions elsewhere.

What this means in practice is that Oregon is asking out-of-state ethanol companies to change their production method in myriad ways, most prominently: 1) leaving waste products wet to conserve energy, 2) burning natural gas or biomass rather than coal for heat, and 3) avoiding electricity from the power grid, which could be powered by Midwestern coal power plants.[5] Naturally, none of this has anything to do with the product that is sold in Oregon. By the time that a refiner disposes of its waste products, whether wet and dry, the ethanol has already been shipped off to Oregon.

Oregon's regulation of importers is a carbon tariff for fuels. Sometimes called a "border carbon adjustment", a carbon tariff forces importers to pay for the greenhouse gases they emit in other countries. Michael Moore, *Implementing Carbon Tariffs: A Fool's Errand?*, The World Bank, Working Paper 5359. Of course, these tariffs need not be applied at a border. Oregon simply requires that before a company sells fuel, it must pay for the greenhouse gas emissions from all the companies, around the United States and around the world, that participated in the fuel lifecycle. Id. at 125a.

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[5] See Pet. App. 88a (showing the higher carbon emissions assigned to companies that dry their waste product, DGS [distillers grains with solubles] and that use coal for heating), 89a-94a (showing requirement not to use electricity from the Midwestern power grid).

Oregon or California could expand their fuels carbon tariff to cover all products in the same manner: they would simply ask all product retailers to pay for the greenhouse gases emitted to make a product no matter where it was produced. This would function as a carbon tax on in-state producers plus a carbon tariff on out-of-state producers. Oregon and California have started with fuels because there are many studies of greenhouse gases emitted in fuel production around the world, so companies are able to estimate the emissions of their entire supply chain. James W. Coleman, *Importing Energy, Exporting Regulation*, 83 FORDHAM L. REV. 1357, 1373-74 (2014). In time, there will be similar studies for nearly all consumer goods, so states will be able to extend these tariffs accordingly.

The validity of carbon tariffs is one of the most controversial issues in international environmental law. David A. Weisbach & Gilbert E. Metcalf, *The Design of a Carbon Tax*, 33 HARV. ENVTL. L. REV. 499, 546-49 (2009) (summarizing the debate). International trade law generally forbids extraterritorial regulation, prohibiting countries from conditioning domestic sales on foreign manufacturers following particular "process and production methods." *See, e.g.* , General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. But some argue that carbon tariffs should be allowed under special rules for environmental legislation. Weisbach & Metcalf at 548-49.

The United States, which unlike many of its trading partners does not have federal carbon regulations, has vigorously resisted all efforts to impose a carbon tariff on its exports. Most prominently, the European Union

attempted to extend its limits on airline emissions to include emissions from flights coming to the E.U. from overseas. Barbara Lewis & Valerie Volcovici, *Insight: U.S., China Turned EU Powers Against Airline Pollution Law*, REUTERS, Dec. 10, 2012. U.S. lawmakers reacted with outrage, almost unanimously enacting a law to forbid U.S. airlines from complying with this law. European Union Emissions Trading Scheme Prohibition Act of 2011, Public Law 112–200, 126 Stat. 1477. The E.U. quickly backed down. Lewis & Valerie Volcovici.

In the past, extraterritorial regulations like these carbon tariffs were far more difficult to enforce because even large commodity companies might not be able to account for every step in the supply chain that resulted in a final product, so past extraterritorial regulations were relatively blunt. Thus in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), New York simply required New York milk retailers to pay producers a minimum price for milk. Like Oregon's fuel standard, the law applied to New York in-state retailers that purchased their milk in-state as well as those that purchased their milk out-of-state. *Id*. This Court struck down the law because it effectively set a minimum price for Vermont dairies if they wanted to sell to New York retailers. *Id*. at 524. If New York could tell its retailers how much to pay Vermont dairies for milk, the Court worried that the State's next step could be a law demanding that retailers only buy from dairies that paid a "satisfactory wage scale"—i.e. the absurd idea that New York would soon be, in effect, prescribing a wage for the various employees in Vermont dairies. *Id*.

Little did the *Baldwin* court know that revolutions in supply chain management would enable far more intrusive extraterritorial regulations than a simple wage scale. Nowadays companies have begun to track all links in their supply chains more carefully for marketing reasons. Substantial number of consumers now reward companies that can make claims about their supply chain, such as that all the companies in this supply chain are "fair-trade", "organic," "forest-safe," or "cruelty-free." There are now hundreds of these supply-chain standards. Jay S. Golden, *An Overview of Ecolabels and Sustainability Certifications in the Global Marketplace*, Duke University (2010) App.C (listing over 300 currently active supply chain ecolabels).

Consumers, of course, are free to reward these supply-chain practices. Oregon, however, has concluded that it can mandate these global supply chain practices for any company that wants to sell goods in Oregon. It is now requiring supply chain practices that are far more intrusive than a wage scale. As this case demonstrates, Oregon is now micro-managing ethanol and oil production around the country, asking Iowa producers to save energy by taking steps like disconnecting from the grid and leaving their waste products wet.

And these states are just getting started. Oregon's fuel standard is modeled on one developed by California. After promulgating that fuel standard, California began regulating goose-feeding around the world. *Ass'n des Eleveurs*, 729 F.3d 937 (9th Cir. 2013). In 2015, California began regulating the size of chicken cages in egg producing states. *Missouri v. California*,

Motion for Leave to File a Bill of Complaint, No. 148. ¶ 63. Thus, California has gone beyond setting wages for Vermont dairy workers, it is actually setting working conditions for Vermont's chickens. With the Ninth Circuit's authorization, California, Oregon, and other western states can expand to other areas: ensuring that every product sold within their state was made by a company following the rules they prescribe for their own companies. This will give these states far greater reach to impose their legislative will around the country, pursuing environmental, social, and equitable goals—and will thus diminish other states' ability to choose how their own companies operate.

For example, Oregon recently enacted a first-in-the-nation law requiring some companies to give workers notice of their work schedules seven days in advance. Or. Rev. Stat. §653.428. It could easily extend the impact of this law to other states by simply forbidding in-state sale of products produced by companies who did not provide this notice to their workers. Given each state's different environmental, labor, and social standards, these extraterritorial regulation could soon bring interstate trade to a standstill.

II. THE CIRCUITS ARE SPLIT REGARDING WHETHER THE CONSTITUTION FORBIDS EXTRATERRITORIAL REGULATION

The Circuit Courts are split on whether the Constitution still forbids extraterritorial regulation. The Ninth Circuit and the Tenth Circuit have held that this Court's cases on extraterritorial regulation should be confined to their facts. So in the fifteen western states of these two circuits, this Court's limits on

extraterritorial regulation have been abolished. The Seventh Circuit, by contrast, has continued to apply the constitutional limits prescribed by this Court to extraterritorial regulation.

The Tenth Circuit described the case against this Court's extraterritorial cases most succinctly: "*Baldwin*'s extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause" and "[i]t is certainly the most dormant." *Energy & Envtl. Legal Inst.*, 793 F.3d at 1172 (10th Cir. 2015). But "whatever doctrinal pigeonhole you choose to place" these cases in, they should only apply in a case with "three essential characteristics": "(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 1174. The Ninth Circuit adopted nearly identical reasoning, explaining that "In the modern era" this Court has only applied the extraterritoriality doctrine against "price-affirmation statutes." *Rocky Mountain Farmers Union*, 730 F.3d at 1101 (9th Cir. 2013).

Price-affirmation statutes are, of course, just a tiny drop in the bucket of extraterritorial regulation. This is because states can regulate many company actions apart from pricing. Oregon undisputedly has police power to ask Oregon companies to burn less coal, use gender-balanced boards, and give employees their schedules ahead of time. But allowing Oregon to prohibit sale of products made by any companies that do not comply with such laws would radically expand the state's power—and accordingly diminish the power of the other states to choose how their own companies

are regulated. Even more so if, like the Oregon Fuel Standard, these prohibitions applied not just to the importing company, but to every other company in the product "lifecycle." Imagine an Iowa company trying to sell lawnmowers in Oregon and having to certify that each of its many part suppliers gave their employees work schedules more than seven days in advance.

The Seventh Circuit has repeatedly explained the problem with such archetypal extraterritorial regulations. *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer,* 63 F.3d 652 (7th Cir. 1995). Most recently, in *Legato Vapors*, the Court considered Indiana regulation of e-cigarettes. 847 F.3d 825 (7th Cir. 2017). The Seventh Circuit noted that regulating e-cigarettes by regulating formulas, labeling, and packaging was "unremarkable and uncontroversial." *Id*. at 827-28. But, like Oregon, Indiana went further: it forbid in-state sale of e-cigarettes unless they were manufactured in accordance with security and manufacturing standards that Indiana prescribed. *Id*. at 828.

Like many extraterritorial regulations, including the regulation in *Baldwin*, the Indiana law was not facially discriminatory: it "applie[d] equally to in-state and out-of-state manufacturers." *Id*. at 830. The problem is that rather than simply demanding higher purity or regulating what kind of e-cigarette could be sold in Indiana, the law required companies to produce that product in a certain way, "tell[ing] out-of-state companies how to operate their businesses." *Id*. at 834. These extraterritorial regulations are an existential threat to interstate trade because there are "countless

possible variations" of state laws telling companies how to operate—as varied state corporate, labor, and environmental laws make clear. *Id*. at 835. It is very unlikely that any manufacturer outside Indiana complies with every single Indiana statute, so if Indiana prohibited sale of goods that were not made in accordance with its own collection of laws, that would operate as a *de facto* ban on all imports.

III. THE COURT SHOULD TAKE THIS CASE TO CLARIFY WHETHER THE CONSTITUTION FORBIDS EXTRATERRITORIAL REGULATION

The Court should grant certiorari to resolve this circuit split. The Court should hold that the Constitution still prohibits extraterritorial regulation. On the other hand, if the Court believes that the Constitution does not prohibit extraterritorial regulation, it should say so; Congress could then enact free trade rules to stem the rising tide of extraterritorial regulations and put states in every circuit on an even playing field. The current split, characterized by inconsistent rules for state regulators, rising protectionism, and disrespect for this Court's precedents, is the worst of all possible worlds.

The Constitution was adopted to create "an unconstrained intercourse between the states… advanc[ing] the trade of each by an interchange of their respective productions." THE FEDERALIST NO. 11, (Alexander Hamilton). Otherwise, interstate trade would be "fettered, interrupted, and narrowed by a multiplicity of causes." *Id*. Over time, this Court's members have, at times, disagreed, about which

provision of the Constitution accomplishes this central purpose.

This Court has, of course, held that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Institute*, 491 U.S. 324, 337 (1986). But it has also held that both "commerce clauses," including the Import/Export Clause, forbid extraterritorial regulation, noting that "a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" *Baldwin,* 294 U.S. at 522 (quoting 2 Records of the Federal Convention of 1787, 308 (Max Farrand, ed. 1911)); *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610, 639-40 (1997) (Thomas, J., dissenting)(arguing that the Import-Export clause forbids "duties"—i.e. taxes on import of goods not assessed at the border).

The Court has also derived this principle from broader principles of horizontal federalism. In *Bonaparte v. Tax Court*, this Court noted that it could use the full faith and credit clause to ensure that "[n]o state can legislate except with reference to its own jurisdiction" 104 U.S. 592, 594 (1881). As the Court stated in *Brown v. Fletcher's Estate*, "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." 210 U.S. 82, 89 (1908) (citation omitted). After all, extraterritorial regulations such as Oregon's are most destructive not to the federal government but to the other states that can no longer

choose what regulations should apply to their own companies.

This position has found substantial support among legal scholars. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987). By securing to each state the power over its internal affairs, the prohibition on extraterritorial regulation derives "from the structure of the Constitution as a whole." Id. at 1885; Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law & Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (the extraterritoriality principle is "better understood as a prohibition rooted in general structural principles of horizontal federalism"). The right of each state to choose how to regulate its own citizens is fundamental to our federalism and is established by the structure of our Constitution. Cf. *Printz v. United States*, 521 U.S. 898 (1997).

The Court should take this case to clarify that the Constitution accomplishes the dual aim of its authors, protecting interstate trade and state sovereignty. Oregon's extraterritorial fuel standard infringes other states' regulatory authority over their own companies and threatens to break down interstate trade in fuels.

If, however, the Court has decided that there are no longer any limits on extraterritorial regulation, it should take this case to make that plain. Every free-trade agreement, whether within a federation or between nations, requires a prohibition on extra-territorial regulation. *See, e.g.*, General Agreement on

Tariffs and Trade art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (nations may not condition domestic sales based on "process and production methods" of their trading partners); *Interprovincial Cooperatives Ltd v R* (1976) 1 S.C.R. 477 (one Canadian province may not punish pollution emitted in another province). WESTMAN-CLÉMENT & BLANCHET, THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA (EEA): A GUIDE TO THE FREE MOVEMENT OF GOODS AND COMPETITION RULES (1994) 75 ("any product imported from another EEA country must in principle be admitted to the territory of the EEA country if it has been lawfully produced, that is, conforms to rules and processes of manufacture that are customarily and traditionally accepted in the exporting country"). Congress has not enacted such a law because the Constitution was thought to provide this prohibition. If the Court intends to abandon its past practice, it should make that plain so that Congress can step in. *See United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 349, (2007) (Thomas, J., concurring in judgment) (arguing that Congress can protect free trade by circumscribing state regulation).

When multiple lower courts confine decisions of this Court to their facts, it is time for this Court to step in. These courts have signaled that they will no longer abide by the reasoning of this Court's decisions. The Court should either step-in and reaffirm its long-standing rule against extraterritoriality or formally abandon this rule so that Congress can begin repairing the damage that its demise has begun to inflict.

CONCLUSION

The Court should grant certiorari to resolve a circuit split regarding the continued validity of its cases on extraterritoriality. It should confirm that those cases still protect state sovereignty and interstate trade.

Respectfully submitted,

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List of Amici Curiae

The signatories listed below appear on their own behalf. Institutional affiliations are listed for identification purposes only.

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Donald Kochan. Parker S. Kennedy Professor in Law at Chapman University Dale E. Fowler School of Law.

Michael I. Krauss. Professor of Law at George Mason University Antonin Scalia Law School.

Ronald J. Rychlak. Butler Snow Professor of Law at University of Mississippi.