No.

IN THE

Supreme Court of the United States

TITLEMAX OF DELAWARE, INC., ET AL.,

Petitioners,

v.

ROBIN L. WEISSMANN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF BANKING & SECURITIES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD J. ZACK
TROUTMAN PEPPER HAMILTON SANDERS LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

THEODORE B. OLSON
EUGENE SCALIA
Counsel of Record
AMIR C. TAYRANI
MATT GREGORY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Counsel for Petitioners
[Additional counsel listed on inside cover]

DOUGLAS D. HERMANN
TROUTMAN PEPPER HAMILTON
SANDERS LLP
Hercules Plaza, Suite 5100
1313 N. Market Street
P.O. Box 1709
Wilmington, DE 19899
(302) 777-6560

Counsel for Petitioners

QUESTION PRESENTED

Whether the dormant Commerce Clause prohibits Pennsylvania from extending its lending laws beyond its borders to loans that out-of-state lenders make to Pennsylvania residents at brick-and-mortar stores in Delaware, Virginia, and Ohio.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In the proceedings below, petitioners TitleMax of Delaware, Inc., d/b/a TitleMax, TitleMax of Ohio, Inc., d/b/a TitleMax, TitleMax of Virginia, Inc., d/b/a TitleMax, and TMX Finance of Virginia, Inc., were the plaintiffs and appellees. Respondent Robin L. Weissmann, in her official capacity as the Secretary of the Pennsylvania Department of Banking and Securities, was the defendant and appellant.

Pursuant to this Court's Rule 29.6, undersigned counsel state as follows:

TitleMax of Delaware, Inc., TitleMax of Ohio, Inc., TitleMax of Virginia, Inc., and TMX Finance of Virginia, Inc. are each wholly owned by TMX Finance LLC.

TMX Finance LLC is wholly owned by TMX Finance Holdings, Inc.

TMX Finance Holdings, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

TitleMax of Delaware, Inc. v. Weissmann, No. 1:17-cv-1325-MPT (D. Del.) (judgment entered Dec. 7, 2020);

TitleMax of Delaware, Inc. v. Weissmann, No. 21-1020 (3d Cir.) (judgment entered Jan. 24, 2022);

Department of Banking & Securities v. TitleMax of Delaware, Inc., No. 1:17-cv-2112 (M.D. Pa.) (judgment entered Jan. 10, 2020); and

Department of Banking & Securities v. TitleMax of Delaware, Inc., No. 417 M.D. 2017 (Pa. Commw. Ct.) (pending).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners (collectively, "TitleMax") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion (Pet. App. 1a–19a) is published at 24 F.4th 230 (3d Cir. 2022). The District of Delaware's opinion (Pet. App. 20a–33a) is published at 505 F. Supp. 3d 353 (D. Del. 2020).

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The relevant provisions of the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 201, and the Consumer Discount Company Act, 7 P.S. §§ 6203, 6213, are reproduced at Pet. App. 34a–43a.

INTRODUCTION

The dormant Commerce Clause protects "the autonomy of the individual States within their respective spheres" by prohibiting States from enacting commercial regulations that "control conduct beyond the boundaries of the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). In the decision below, however,

the Third Circuit held that this constitutional prohibition on extraterritorial regulation does not prevent Pennsylvania from extending its laws to loans that out-of-state lenders make to Pennsylvania residents in brick-and-mortar stores in other States. In so ruling, the Third Circuit expressly departed from a decision of the Seventh Circuit that, on indistinguishable facts, found a dormant Commerce Clause violation. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 669 (7th Cir. 2010). The Third Circuit's opinion is also at odds with decisions from several other circuits that, in cases arising outside of the lending setting, have rejected States' efforts to project their laws extraterritorially onto their residents' commercial transactions in other States.

Nor can the Third Circuit's decision be reconciled with this Court's dormant Commerce Clause jurisprudence. Under this Court's precedent, a state law that regulates commercial conduct "wholly outside of the State's borders" by "establishing a scale of prices for use in other [S]tates" is unconstitutional even if the commercial conduct "has effects within the State." *Healy*, 491 U.S. at 336 (internal quotation marks omitted). Yet, in the decision below, the Third Circuit held that Pennsylvania may regulate interest rates and other features of loans made to Pennsylvania residents in other States precisely because those loans generate effects in Pennsylvania, such as the recording of a security interest in vehicles registered in the State. The Third Circuit's reasoning is a clear transgression of this Court's extraterritoriality precedent

and exemplifies the lower courts' deep confusion concerning States' power to extend their laws to commerce beyond their borders.

The Third Circuit's decision also creates significant practical problems that amplify the importance of this Court's review. For example, lenders across the country now must comply with both the laws of the State in which they are located and the laws of Pennsylvania when making a loan to a Pennsylvania resident who travels out of State to execute a loan. In addition, the Third Circuit's open split with the Seventh Circuit means that Pennsylvania can extraterritorially apply its laws to loans that its residents execute in Illinois, Indiana, or Wisconsin, but those three States cannot apply their laws to loans that their residents enter into in Pennsylvania, Delaware, or New Jersey because the Seventh Circuit's decision in *Midwest Title* forbids them from applying their lending laws to loans made in other States. Moreover, even for loans made to Pennsylvania residents in Illinois, Indiana, or Wisconsin, the legality of the loans will turn on the forum of the litigation: if a lender sues first in the Seventh Circuit, Pennsylvania law cannot apply to the loan, but if the borrower sues first in the Third Circuit, it can.

Moreover, the inconsistency and confusion are not limited to lenders: The Third Circuit's decision creates uncertainty for all manner of businesses that sell products and services to out-of-state customers by raising the specter that those transactions are subject not only to the laws of the States in which they occur but also the laws of the customers' home States.

To alleviate this uncertainty and eliminate these impediments to interstate commerce, this Court

should grant review and hold that the dormant Commerce Clause prohibits Pennsylvania from applying its laws to loans made in other States. At a minimum, the Court should hold this petition pending the disposition of the petition for a writ of certiorari in *National Pork Producers Council v. Ross*, No. 21-468, which involves the question of when a state law's impact on out-of-state conduct violates the dormant Commerce Clause.

STATEMENT

1. TitleMax provides short-term loans to borrowers who visit its brick-and-mortar stores in Delaware or, formerly, Virginia and Ohio.[1] Pet. App. 20a–23a. In return, borrowers grant TitleMax a lien on their vehicles as security and agree to pay the loan back with interest. Pet. App. 3a.

The "entire loan process—from the application to the disbursement of funds—takes place at one of TitleMax's brick-and-mortar locations." Pet. App. 3a (alterations and internal quotation marks omitted). The transaction culminates in the issuance to the borrower of a check drawn on a bank outside of Pennsylvania. *Id.*

TitleMax is fully licensed in the States in which it operates and complies with all applicable laws of the State in which a loan agreement is executed. Pet. App. 22a. TitleMax does not make any loans in Pennsylvania and does not have offices, employees, agents,

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[1] Petitioner TitleMax of Ohio, Inc. was not the lender itself but instead facilitated loans for consumers who borrowed money from third-party lenders. But for purposes of this case, the material facts as to TitleMax of Ohio, Inc. are the same as for the other petitioners.

or stores in Pennsylvania. Pet. App. 4a, 32a. But TitleMax has made loans in Delaware, Virginia, and Ohio to residents of Pennsylvania who traveled to TitleMax's stores in those States. Pet. App. 32a–33a.

2. Even though TitleMax does not make loans in Pennsylvania, the Pennsylvania Department of Banking and Securities takes the position that TitleMax must comply with Pennsylvania's lending laws when making loans to Pennsylvania residents who travel to TitleMax stores in other States and return to Pennsylvania with the borrowed funds. Pet. App. 4a–5a. Specifically, Pennsylvania purports to apply provisions of the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 201, and the Consumer Discount Company Act, 7 P.S. §§ 6203, 6213, to out-of-state loans made to Pennsylvania residents that have subsequent effects in the State, such as through loan servicing—even where a Pennsylvania resident applies for a loan, executes the loan agreement, and receives the loan proceeds in another State. Pet. App. 4a–5a.

The Pennsylvania Loan Interest and Protection Law caps the interest rate for loans of less than $50,000 at 6%. 41 P.S. § 201(a). The Consumer Discount Company Act allows lenders to charge up to 24%, but only if they obtain a license from the Pennsylvania Department of Banking and Securities. 7 P.S. §§ 6203(A), 6213. Pennsylvania permits out-of-state lenders to obtain a license only if they "become domesticated in accord with the Business Corporation Law by filing articles of domestication with the Department of State," *Cash Am. Net of Nev., LLC v. Commonwealth of Pa. Dep't of Banking*, 8 A.3d 282, 295 (Pa. 2010), or seek a license for "a branch office in another state provided the licensee maintains a place of business in th[e] Commonwealth," 7 P.S. § 6203(C).

Accordingly, Pennsylvania law expressly discriminates against out-of-state lenders with no presence in Pennsylvania by precluding them from obtaining the license necessary to provide short-term, higher-interest-rate loans to Pennsylvania residents, unless they "become domesticated" in Pennsylvania. *Cash Am.*, 8 A.3d at 295.

Because TitleMax does not have a place of business in Pennsylvania and has not become domesticated in the State, it is ineligible for a license under the Consumer Discount Company Act. The interest rates on the loans that TitleMax has made to Pennsylvania residents at its stores in Delaware, Virginia, and Ohio comply with the laws of those States but can exceed the maximum rates established by Pennsylvania law. Pet. App. 3a.

3. In 2017, the Pennsylvania Department of Banking and Securities issued a subpoena to TitleMax, pursuant to the Department's authority to enforce the State's lending laws, requesting documents regarding TitleMax's out-of-state loans to Pennsylvania residents. Pet. App. 4a–5a. After receiving the subpoena, TitleMax stopped making loans to Pennsylvania residents at all of its locations. Pet. App. 5a.

TitleMax also brought this action for declaratory and injunctive relief against the Department's Secretary in the U.S. District Court for the District of Delaware. Pet. App. 22a–23a. TitleMax sought an injunction prohibiting the Department from taking any further action to enforce Pennsylvania's lending laws against TitleMax and a declaration that extraterritorial enforcement of Pennsylvania law against TitleMax based on its out-of-state loans to Pennsylvania residents violates the dormant Commerce Clause. C.A. App. Vol. II at 25–27, ECF 16-2.

The district court granted summary judgment to TitleMax, holding that the dormant Commerce Clause prohibits the extraterritorial application of Pennsylvania's laws to loans made in other States. Pet. App. 32a–33a.[2]

As the district court recognized, this Court has long held that "the Commerce Clause 'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects in the state.'" Pet. App. 31a (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). Moreover, "[i]n a case almost factually identical to the present matter, *Midwest Title [Loans,*

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[2] The Department did not move to dismiss for lack of personal jurisdiction or argue that Pennsylvania officials may not be sued in the District of Delaware. In fact, the Department specifically consented to jurisdiction by a District of Delaware magistrate judge. C.A. App. Vol. II at 63, ECF 16-2. The Department did argue that the district court should abstain from adjudicating the case under *Younger v. Harris*, 401 U.S. 37 (1971)—a nonjurisdictional defense, *see New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358–59 (1989)—in light of a pending state-court proceeding that the Department had filed against TitleMax to enforce its subpoena. Pet. App. 25a–31a. The district court rejected that argument, reasoning that none of the "three exceptional circumstances" for *Younger* abstention applied because TitleMax's federal suit did not: (1) "intrude on an ongoing state criminal prosecution"; (2) "involve[ ] a state civil enforcement proceeding 'akin to a criminal prosecution in important respects'"; or (3) interfere with "'pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.'" Pet. App. 29a (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 70 (2013)) (alteration omitted).

Inc. v. Mills, 593 F.3d 660 (7th Cir. 2010)], the Seventh Circuit held the extraterritoriality principle should focus on where the transaction the state seeks to regulate takes place." Pet. App. 32a.

Applying the Seventh Circuit's reasoning from *Midwest Title*, the district court ruled that TitleMax was entitled to summary judgment because "the loans by TitleMax to Pennsylvania residents are completely made and executed outside Pennsylvania and inside TitleMax locations in Delaware, Ohio, or Virginia." Pet. App. 32a. Pennsylvania's attempt "to regulate transactions that occur completely outside its jurisdiction," the court concluded, "violate[s] the Commerce Clause." Pet. App. 32a–33a.

4. The Third Circuit agreed with the district court's rejection of the Department's request for *Younger* abstention, Pet. App. 7a–10a, but reversed on the merits, Pet. App. 10a–18a.

The Third Circuit acknowledged that "[a] state law that directly controls commerce wholly outside its borders violates the dormant Commerce Clause." Pet. App. 11a (citing *Healy*, 491 U.S. at 336). But the court believed this principle to be inapplicable here because "TitleMax's transactions with Pennsylvanians involve both loans and collection, and these activities do not occur 'wholly outside' of Pennsylvania." Pet. App. 13a.

To support its view that loans made in Delaware, Virginia, and Ohio actually are made in Pennsylvania, the court emphasized that Pennsylvanians repaying TitleMax loans "made payments to TitleMax while physically present in the [S]tate," Pet. App. 13a; that TitleMax's loans were secured by vehicles that the borrowers had registered in Pennsylvania and TitleMax recorded those liens in Pennsylvania, Pet. App.

13a–14a; and that TitleMax "may" take borrowers' vehicles in Pennsylvania if they default on their loans, Pet. App. 14a. According to the Third Circuit, these features "make TitleMax's conduct different from that in the *Healy* line of cases, which largely involved transactions in goods that ended at the point of sale." *Id.*

On these grounds, the Third Circuit attempted to distinguish its reasoning from that of decisions from the Fourth, Seventh, and Ninth Circuits rejecting States' attempts to extend their laws to transactions that the States' residents entered into in other States. Pet. App. 14a n.10 (citing *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484 (4th Cir. 2007); *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017); *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (en banc)). But elsewhere in the Third Circuit's opinion, it held that "even if TitleMax's transactions were understood to be limited to the 'origination' of the loan"—which takes place at a brick-and-mortar store outside of Pennsylvania—"our precedent makes clear that contracts between a Pennsylvanian and an out-of-stater do not occur 'wholly outside' Pennsylvania" under *any* circumstances. Pet. App. 13a n.9 (citing *A.S. Goldmen & Co. v. N.J. Bureau of Sec.*, 163 F.3d 780, 786 (3d Cir. 1999)).

The Third Circuit acknowledged that nothing can reconcile its decision with the Seventh Circuit's contrary holding on substantially identical facts in *Midwest Title*. Pet. App. 15a–16a n.11. Instead, the court declared the Seventh Circuit's reasoning to be "unpersuasive," explaining that "*Midwest* took a narrower

view of the loan transaction than our Circuit has taken." *Id.* As an additional basis for discounting the Seventh Circuit's reasoning, the Third Circuit noted that *Midwest Title* had relied "in part" on the "'physical presence' rule" in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which this Court later overturned in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). Pet. App. 15a–16a n.11. And, the Third Circuit reasoned, the Seventh Circuit's other "primary authority was *Healy*," which the Third Circuit deemed inapposite because it "involved a price affirmation statute, not a statute regulating loans and continuing obligations to pay." *Id.* (citation omitted). Accordingly, in the Third Circuit's view, the Seventh Circuit's "analysis" did "not govern" this case. *Id.*

REASONS FOR GRANTING THE PETITION

This Court's review is warranted for at least three reasons.

First, as exemplified by the direct and acknowledged circuit split between the decision below and the Seventh Circuit's decision in *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), the lower courts are sharply divided regarding the extent to which the dormant Commerce Clause prohibits States from regulating transactions that their residents enter into in other States. Indeed, that division and uncertainty extend well beyond the Third Circuit's explicit rejection of *Midwest Title*. At least two other appellate courts have endorsed reasoning similar to the Third Circuit's constricted view of the dormant Commerce Clause's extraterritoriality prohibition, *see*, *e.g.*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008), while a number of other courts have unequivocally rejected States' attempts to extend their laws to their residents' out-of-state transactions, *see*, *e.g.*,

Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 615 (9th Cir. 2018).

Second, the Third Circuit's decision is impossible to reconcile with this Court's longstanding precedent holding that the dormant Commerce Clause "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders,'" even if "'the commerce has effects within the State.'" *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality op.)). Because TitleMax's loans to Pennsylvania residents are executed "wholly outside" of Pennsylvania—whether or not they have post-execution effects in Pennsylvania—Pennsylvania's attempt to apply its interest-rate restrictions and other lending laws to those out-of-state transactions directly contravenes this Court's prohibition on state laws that have "the practical effect of . . . control[ling] conduct beyond the boundaries of the State" by "establishing 'a scale of prices for use in other [S]tates.'" *Id.* (quoting *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 528 (1935)).

Finally, the question presented has far-reaching practical and legal implications. As long as the Third Circuit's decision stands, businesses outside of Pennsylvania that offer or sell goods and services to Pennsylvania residents will be required to ensure that they comply both with the laws of the State in which they are located and the laws of Pennsylvania—chilling interstate commerce through the imposition of duplicative, and potentially conflicting, regulations. The Third Circuit's reasoning would even allow Pennsylvania to regulate out-of-state loans made to borrowers who move to Pennsylvania *after* they borrow money in another State. And, in the absence of authoritative

guidance from this Court, businesses throughout the country will be left to wonder whether, by doing business with out-of-state residents, they are inadvertently running afoul of restrictions imposed by States that seek to police their residents' out-of-state transactions.

It has been more than thirty years since this Court's decision in *Healy*, and lower courts have repeatedly asked for more guidance on the proper application of the extraterritoriality doctrine. *See*, *e.g.*, *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). This Court should answer those requests by granting certiorari and providing lower courts, businesses, and consumers with much-needed clarity regarding the territorial limits that the dormant Commerce Clause imposes on States' commercial regulations.

I. THE LOWER COURTS ARE DIVIDED REGARDING THE SCOPE OF THE DORMANT COMMERCE CLAUSE'S PROHIBITION ON EXTRA-TERRITORIAL REGULATION.

Although the Third Circuit's explicit rejection of the Seventh Circuit's decision in *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), is sufficient reason, standing alone, to grant review, the lower courts' disagreement regarding the application of the dormant Commerce Clause's extraterritoriality prohibition to out-of-state loans, and other types of out-of-state transactions, is far deeper and broader.

A. The Third Circuit expressly acknowledged that its decision splits from the Seventh Circuit's holding in *Midwest Title*, which the Third Circuit deemed "unpersuasive." Pet. App. 15a n.11.

Like Pennsylvania's effort to apply its lending laws to loans that TitleMax made to Pennsylvania residents in Delaware, Virginia, and Ohio, in *Midwest Title*, Indiana sought to apply its lending laws to a car-title lender that made loans to Indiana residents in Illinois. *See* 593 F.3d at 662. There, as here, the lender made loans "only in person, at Midwest's offices in Illinois," and it "had no offices in Indiana." *Id.* There, as here, the lender "had made title loans" to Indiana residents who traveled to Illinois. *Id.* And there, as here, the loans were secured by an interest in the borrower's Indiana-registered vehicle that was recorded with Indiana's Bureau of Motor Vehicles. *Id.* at 663.

Unlike here, however, the Seventh Circuit held in *Midwest Title* that the dormant Commerce Clause prohibited Indiana's attempt to "'project[ ] [its] state regulatory regime into the jurisdiction of another State.'" 593 F.3d at 667 (quoting *Healy*, 491 U.S. at 336–37). The court reasoned that, under *Healy*, "'no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.'" *Id.* at 665–66 (quoting *Healy*, 491 U.S. at 337); *see also Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam) ("No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders."). And it made no "difference" that the borrowers' "collateral" was located "in Indiana," which merely "illustrates that a transaction made in one state can have repercussions in another." *Midwest Title*, 593 F.3d at 669. The loan was "made and executed in Illinois," which was "enough to show" that the application of Indiana law to the transaction "violate[d] the commerce clause." *Id.*

The Seventh Circuit noted the policy arguments for and against allowing consumers who lack other credit options to seek title loans and other short-term, high-interest financing. *Midwest Title*, 593 F.3d at 663–64. But, the court emphasized, one State's policy objections do not permit it to "apply its law against title loans when its residents transact in a different state that has a different law," because that would "exalt the public policy of one state over another" and violate the Constitution's prohibition on extraterritorial regulation. *Id.* at 667–68.[3]

In so holding, the Seventh Circuit acknowledged disagreement between its precedent and a "couple of cases in other circuits"—including the Third Circuit—that have limited the application of this Court's extraterritoriality decisions to laws that "plac[e] a firm under 'inconsistent obligations.'" *Midwest Title*, 593 F.3d at 667 (quoting *Pharm. Research & Mfg. of Am. v. Concannon*, 249 F.3d 66, 82–83 (1st Cir. 2001), and citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994)). The Seventh

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[3] The Seventh Circuit also cited *Quill*'s physical-presence rule for the collection of state sales taxes—which this Court later overturned in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)—as "an example of extraterritorial regulation held to violate the commerce clause." *Midwest Title*, 593 F.3d at 666; *see also id.* at 668–69. But the Seventh Circuit relied primarily on the *Healy* line of cases, which remain good law. *See id.* at 665–69 (citing, among other decisions, *Healy*, 491 U.S. at 337; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–84 (1986); *Baldwin*, 294 U.S. at 521). Accordingly, *Midwest Title* remains controlling precedent in the Seventh Circuit post-*Wayfair*. *See Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 812 (7th Cir. 2020) (citing *Midwest Title* for the proposition that a State may assert "legislative and regulatory jurisdiction over only instate activity").

Circuit, however, had taken "a broader view of inconsistent state policies" than these other circuits in an earlier case and was therefore required to "do so in this one," as well. *Id.* (citing *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 378–80 (7th Cir. 1998)).

B. The split between the Seventh Circuit's holding that the dormant Commerce Clause prohibits Indiana from regulating loans made to Indiana residents in Illinois, and the Third Circuit's holding that there is no constitutional prohibition on Pennsylvania's regulation of loans made to Pennsylvania residents in Delaware, Virginia, and Ohio, is clear and unavoidable. Indeed, not only did the Third Circuit itself expressly acknowledge the split, *see* Pet. App. 15a n.11, but the Department conceded that, even before the decision below, the Third Circuit's extraterritoriality jurisprudence was "irreconcilable with the Seventh Circuit's holding in *Midwest Title*." C.A. Reply Br. 25 (discussing the Third Circuit's decision in *Instructional Systems*, 35 F.3d at 828, which held that the dormant Commerce Clause did not prohibit application of the New Jersey Franchise Practices Act to a franchisee's activities outside of New Jersey).

The split is not limited, however, to the Third and Seventh Circuits. Siding with the Third Circuit, the Tenth Circuit and the Minnesota Supreme Court have indicated that States' application of their lending laws to out-of-state transactions may be compatible with the dormant Commerce Clause. *See Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008); *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 95 (Minn. 2015). In those cases, unlike here and in *Midwest Title*, the States conceded that, as written, their laws did *not* regulate loans that their residents

entered into in other States, and they instead sought to apply their laws only to online lending to consumers who borrowed money on the Internet from within the State. *See Quik Payday*, 549 F.3d at 1308; *Swanson*, 870 N.W.2d at 95. But, in rejecting dormant Commerce Clause challenges to those applications of the statutes, both courts employed reasoning that, like the Third Circuit's reasoning here, could permit States to extend their laws to loan transactions that their residents executed in other States.

In *Quik Payday*, which involved a Kansas lending law, the Tenth Circuit reasoned that even if a Kansas resident applied for a loan in Missouri from a Missouri lender, "other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas." 549 F.3d at 1308. According to the Tenth Circuit, that meant "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Id.* And in *Swanson*, the Minnesota Supreme Court reasoned that "the site of contract formation is only one factor among many in determining the 'location' of commerce," 870 N.W.2d at 95, opening the door to the regulation of out-of-state loans as long as they have effects in Minnesota.

Neither court's reasoning can be reconciled with the extraterritoriality standard adopted in *Midwest Title*—which looks exclusively to the place at which a loan is executed to determine whether a State is attempting to regulate extraterritorially, 593 F.3d at 669—or with the Seventh Circuit's reasoning that the mere fact that "a transaction made in one state can

have repercussions in another" is insufficient to justify the application of one State's law to a loan transaction that was consummated in another State. *Id.*

C. The division in the lower courts also extends beyond States' regulation of loan transactions. The Third Circuit's narrow conception of the dormant Commerce Clause's extraterritoriality prohibition is inconsistent with decisions from the Fourth, Seventh, and Ninth Circuits rejecting States' attempts to regulate out-of-state transactions based on the residence of one of the parties or an expansive view of where the relevant "commerce" occurred. *See Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 672 (4th Cir. 2018); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491 (4th Cir. 2007); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 617 (7th Cir. 1999); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc); *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018).

In the Ninth Circuit, for example, "[t]he mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Daniels Sharpsmart*, 889 F.3d at 615. Thus, the Ninth Circuit held that the dormant Commerce Clause forbids California from regulating the disposal of waste in Kentucky and Indiana even where the waste originates from "a medical waste treatment facility in California," *id.* at 612–13, 615, or "sales of artworks outside of California simply because the seller resided in California," *id.* at 615 (citing *Sam Francis*, 784 F.3d at 1322).

Similarly, the Fourth Circuit rejected the argument that South Carolina could regulate truck sales in Georgia to residents of South Carolina based on the

seller's advertising in South Carolina, holding that "the rule against extraterritorial application of state law is not a technicality to be so readily evaded." *Carolina Trucks*, 492 F.3d at 491; *see also Ass'n for Accessible Meds.*, 887 F.3d at 666 (holding that a Maryland prescription-drug price-gouging statute "violate[d] the dormant commerce clause because it directly regulate[d] the price of transactions that occur[red] outside Maryland"). And, consistent with the approach in *Midwest Title*, the Seventh Circuit has also focused, outside of the loan setting, on the location of "sales alone," rejecting Wisconsin's attempt to regulate milk contracts made in Illinois based on "numerous contacts between [the buyer] and Wisconsin farmers." *Dean Foods*, 187 F.3d at 617.

Each of these cases would have come out the other way in the Third Circuit, which held in the decision below that Pennsylvania may regulate *any* "contracts between a Pennsylvanian and an out-of-stater"—no matter the location where the contract is executed—and that "it does not matter that the consumers would have been physically outside of Pennsylvania when the transaction was initiated." Pet. App. 13a n.9.

* * *

In sum, the Third Circuit's decision creates a direct and acknowledged split with the Seventh Circuit in the specific context of a State's authority to regulate loans made to the State's residents in brick-and-mortar stores in other States. Although that split is reason enough to grant review, the conflict is both deeper and wider than the disagreement between the Third and Seventh Circuits regarding lending regulation. The Tenth Circuit and the Minnesota Supreme Court have employed reasoning that is similar to the Third

Circuit's and that is equally irreconcilable with the Seventh Circuit's application of the dormant Commerce Clause to out-of-state loans. Meanwhile, outside of the loan context, the Fourth, Seventh, and Ninth Circuits have rejected States' attempts to justify the extraterritorial application of their laws based solely on a purchaser's or seller's State of residence.

This Court's review is urgently needed to establish uniformity and ensure that the dormant Commerce Clause is applied consistently in jurisdictions across the country.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DORMANT COMMERCE CLAUSE PRECEDENT.

The Third Circuit's decision also contravenes this Court's precedent defining the restrictions that the dormant Commerce Clause imposes on States' authority to regulate commerce outside of their borders.

This Court has repeatedly emphasized that a State "may not 'project its legislation into other States by regulating the price to be paid' . . . in those States." *Brown-Forman*, 476 U.S. at 582–83 (quoting *Baldwin*, 294 U.S. at 521) (brackets omitted). The dormant Commerce Clause's prohibition on the extraterritorial application of state commercial regulations "reflect[s] 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." *Healy*, 491 U.S. 335–36 (footnotes omitted). In *Healy*, this Court reviewed its "cases concerning the extraterritorial effects of state economic regulation" and explained that they establish three propositions. *Id.* at 336.

"First, the 'Commerce Clause . . . precludes the 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,'" *Healy*, 491 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642), including a state statute that "has the practical effect of establishing 'a scale of prices for use in other [S]tates,'" *id.* (quoting *Baldwin*, 294 U.S. at 528). "Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Id.* The "critical inquiry" for these purposes, the Court stated, "is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown-Forman*, 476 U.S. at 579). And, third, "the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 337; *see also Brown-Forman*, 476 U.S. at 578–79, 582 (explaining that "[w]hen a state statute directly regulates . . . interstate commerce," this Court has "generally struck down the statute without further inquiry" and that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce").

The Third Circuit's decision upholding the application of Pennsylvania's lending laws to loans that TitleMax made in Delaware, Virginia, and Ohio to Pennsylvania residents transgresses each of these principles. Because "the entire loan process—from the application to the disbursement of funds—takes place at one of TitleMax's brick-and-mortar locations" outside of Pennsylvania, Pet. App. 3a (alterations and internal quotation marks omitted), Pennsylvania is unquestionably attempting to regulate commerce that

"takes place wholly outside of the State's borders" and "to control conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336 (internal quotation marks omitted). Specifically, Pennsylvania seeks to control the interest rates or charges that TitleMax asks Pennsylvania borrowers to pay in exchange for loans made in Delaware, Virginia, and Ohio. In other words, Pennsylvania is seeking to establish a "scale of prices for use in other states," *id.* (internal quotation marks omitted)—*i.e.*, maximum interest rates that lenders in other States may charge Pennsylvania residents for loans they execute outside of Pennsylvania's borders.

Pennsylvania is also attempting to require out-of-state lenders to seek its "regulatory approval"—by applying for a license from the Pennsylvania Department of Banking and Securities—before they may lend money to Pennsylvania residents at rates higher than 6%, regardless of where the transaction is consummated. *Healy*, 491 U.S. at 337. This undermines licensing requirements and similar regulatory regimes in the States in which TitleMax and other out-of-state lenders operate and that authorize loans that Pennsylvania prohibits. Moreover, Pennsylvania denies those licenses to any out-of-state lender that does not "become domesticated" by registering with the Pennsylvania Department of State, *Cash Am. Net of Nev., LLC v. Commonwealth of Pa. Dep't of Banking*, 8 A.3d 282, 295 (Pa. 2010), or maintain "a place of business in th[e] Commonwealth," 7 P.S. § 6203(C). Thus, extraterritorial application of Pennsylvania's licensing requirement disfavors out-of-state lenders. This is precisely the sort of "barrier to traffic between one state and another" that the extraterritoriality doctrine prohibits. *Baldwin*, 294 U.S. at 521.

The Third Circuit attempted to justify the application of Pennsylvania law to loans made in other States based on the effects of those loans in Pennsylvania—for example, payments made from Pennsylvania and the potential repossession of cars in Pennsylvania. *See* Pet. App. 14a–15a. But that reasoning squarely contradicts *Healy*'s admonition that a State may not apply its law "to commerce that takes place wholly outside of the State's borders, *whether or not* the commerce has effects within the State." 491 U.S. at 336 (emphasis added; internal quotation marks omitted).

The Third Circuit's reasoning also conflicts with this Court's consistent refusal to allow in-state connections to justify a State's regulation of out-of-state conduct. In fact, this Court has struck down state laws triggered by in-state activity far more significant than the strained connections on which the Third Circuit relied. In *Healy*, for example, Connecticut's price-affirmation statute—which required out-of-state beer shippers to affirm that their posted prices for products sold to Connecticut wholesalers were no higher than the prices they charged in neighboring States—applied only to beer "sold in Connecticut" but was still unconstitutional in light of the practical effect on out-of-state conduct by shippers that also sold beer in other States. 491 U.S. at 327, 329, 337–40. And, in *Brown-Forman*, the Court struck down a similar law that was "triggered only by sales of liquor within the State of New York," explaining that in-state sales "do[ ] not validate [a] law if it regulates the out-of-state transactions" of businesses that operate in other States, too. 476 U.S. at 580; *see also W. Union Tel. Co. v. Pendleton*, 122 U.S. 347, 358 (1887) (rejecting Indiana's attempt to regulate the out-of-state delivery of telegrams sent from Indiana).

Similarly, in *Baldwin*, this Court struck down a New York statute establishing "the minimum [price] payable to producers" of milk sold in New York. 294 U.S. at 520–22. The statute did not apply to milk purchased from a producer in another State, brought to New York, and consumed there, but instead was triggered only by a resale of the milk *within New York's borders*. *Id.* at 518–20. But the law was still unconstitutional because "one state in its dealing with another may not place itself in a position of economic isolation," "neutraliz[ing] the economic consequences of free trade among the states." *Id.* at 526–27.

Here, Pennsylvania's extraterritorial application of its lending laws is even more problematic. It seeks to place its *citizens* in "economic isolation" by preventing them from accessing loans that citizens of other States may obtain by traveling to a TitleMax location in Delaware or, formerly, Virginia or Ohio. Under a straightforward application of this Court's extraterritoriality precedent, Pennsylvania's attempt to impose its lending laws on other States—and thereby establish a "scale of prices" that overrides those States' own judgments about the appropriate regulation of title loans, *Baldwin*, 294 U.S. at 528—is demonstrably impermissible. Only Congress may enact legislation that "directly regulates . . . interstate commerce." *Brown-Forman*, 476 U.S. at 579; *see also Baldwin*, 294 U.S. at 521.[4]

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[4] The Third Circuit was mistaken in pointing to *Wayfair* as support for its holding. *See* Pet. App. 15a n.11. In *Wayfair*, this Court overturned the requirement that an out-of-state merchant have a "physical presence" in a State before it could be required to collect sales taxes for sales made to the State's consumers. 138 S. Ct. at 2099. But in *Wayfair*, the retailers sold products directly to South Dakota residents in transactions "consummated" in

III. THE QUESTION PRESENTED HAS FAR-REACHING PRACTICAL AND LEGAL IMPLICATIONS.

The question presented has profound significance for a range of interested parties—businesses selling goods or services to out-of-state residents, customers seeking to access various credit opportunities such as title loans and other goods and services outside their State of residence, States seeking to safeguard their sovereign prerogatives against intrusions by other States, and judges seeking authoritative guidance regarding the scope of the dormant Commerce Clause's extraterritoriality restrictions.

A. The question presented—whether one State may regulate loans that its residents enter into in other States—is critically important to businesses and consumers across the country and in a range of industries.

Unless this Court grants review and reverses, lenders making loans to customers who reside in the Third Circuit, Tenth Circuit, or Minnesota (as well as in other jurisdictions that have not yet addressed the issue) will need to assume that their loans may be subject not only to the laws of the State in which the lender is located but also to the laws of the State in which the borrower resides (or may one day reside). The result will be the imposition of overlapping and potentially conflicting requirements on lenders, which

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South Dakota itself. *Id.* at 2092. Nothing in this Court's opinion suggests that a State may require out-of-state businesses to collect taxes on—or may regulate—in-person transactions beyond the State's borders. To the contrary, the Court's overview of dormant Commerce Clause doctrine cited *Brown-Forman*'s extraterritoriality holding as one of the established "variations" of the doctrine. *Id.* at 2091.

will generate a host of difficult practical questions regarding the terms and conditions of loans made to out-of-state customers. For example, the Third Circuit's reasoning would apply to loans made to Delaware residents who subsequently move to Pennsylvania and "ma[k]e payments to TitleMax while physically present in the State." Pet. App. 13a. Thus, under the decision below, lenders cannot even rely on a borrower's residence at the time the loan is made to determine which State's (or States') laws will apply. Absent intervention by this Court, the most prudent course for many lenders—especially small lenders—will be to make loans only to their own States' residents. That is exactly the sort of "economic Balkanization" that the extraterritoriality doctrine is intended to prevent. *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 548 (2015).

Other types of commerce will also be harmed by this uncertainty. Although the Third Circuit purported to distinguish "transactions in goods that ended at the point of sale," Pet. App. 14a & n.10, the court's reasoning applies to any transaction that creates an ongoing relationship between a buyer and a seller. For example, the decision below would apply to the purchase of a car that comes with a warranty, the purchase of a refrigerator on an installment plan, or any transaction where a seller delivers a product purchased in one State to the consumer's home in another State. Pet. App. 13a–16a & nn.9–11. In fact, the Third Circuit went even further by holding, as a categorical matter, that "contracts between a Pennsylvanian and an out-of-stater do *not* occur 'wholly outside' Pennsylvania," Pet. App. 13a n.9 (emphasis added), which necessarily means that every type of contractual relationship with a Pennsylvania resident—including transactions that are negotiated and

executed entirely in other States—can be subjected to Pennsylvania law.

Moreover, the uncertainty created by the direct and acknowledged split between the Third Circuit and the Seventh Circuit generates additional practical problems for lenders. An Illinois lender that makes loans to Pennsylvania residents who travel to Illinois will be immune from Pennsylvania law in litigation in the Seventh Circuit (for example, in a suit by the borrower challenging the validity of the interest rate) but will be subject to Pennsylvania law in the Third Circuit (for example, in a declaratory-judgment action by the lender seeking to prevent a Pennsylvania enforcement action). The lawfulness of the same loan made to the same consumer will turn on the fortuity of venue, not a generally applicable rule of constitutional law.

In addition, the division in the lower courts means that States in different circuits are subject to different constraints on their regulatory authority. Pennsylvania may regulate loans and other transactions its residents enter into in other States. But Wisconsin, for example, cannot regulate loans made to its residents in Pennsylvania (or any other State)—the Seventh Circuit's controlling decision in *Midwest Title* ensures that Wisconsin's lending laws stop at its borders. 593 F.3d at 669. Nor may South Carolina regulate auto sales to its residents in Georgia—the Fourth Circuit's controlling decision in *Carolina Trucks* prohibits South Carolina from extending its laws that far. 492 F.3d at 491–93. This imbalance violates the "fundamental principle of equal sovereignty among the States," *Shelby Cnty. v. Holder*, 570 U.S. 529, 544

(2013) (internal quotation marks omitted), and can be remedied only by this Court.

B. The need for this Court to resolve the question presented is also clear from the steady chorus of requests for further guidance voiced by the lower courts, which continue to struggle with applying this Court's extraterritoriality precedent.

"From early in its history, a central function of this Court has been to adjudicate disputes that require interpretation of the Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce." *Wayfair*, 138 S. Ct. at 2090. The rule against extraterritorial regulation is a crucial component of this Court's dormant Commerce Clause jurisprudence, protecting basic principles of federalism and preserving "the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 336.

Yet, it has been nearly twenty years since this Court last addressed the dormant Commerce Clause's extraterritoriality restrictions in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 668–70 (2003). And there, the primary issue before the Court was a question of statutory interpretation under Medicaid, *id.* at 661–68 (plurality op.); the Court's Commerce Clause holding was little more than an afterthought, *see id.* at 668–70.

Healy therefore remains this Court's last meaningful engagement with the extraterritoriality doctrine. In the more than thirty years since that decision, the lower courts have sharply fractured regarding the fundamental contours of the doctrine, *see supra* Part I, and numerous lower-court judges have urged the Court to provide additional guidance.

For example, then-Judge Gorsuch suggested that the "extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence." *Energy & Env't Legal Inst.*, 793 F.3d at 1172. Judge Sutton asked: "What divides impermissible 'direct' extraterritorial laws from permissible 'indirect' ones? I cannot tell, and I do not think *Healy*'s suggestion to look to the 'practical effect' of the regulation offers any meaningful guidance." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring). A different Sixth Circuit panel also noted "ambiguity in the Court's articulations of the extraterritoriality doctrine." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 559 (6th Cir. 2021). And Judge Wynn noted that lower courts have "questioned the extraterritoriality doctrine's continuing vitality." *Ass'n for Accessible Meds.*, 887 F.3d at 681 (Wynn, J., dissenting).

This Court should heed these calls for clarity by granting certiorari and preventing further erosion of the Constitution's prohibition on extraterritorial commercial regulations—"a powerful but precise instrument" that serves a critical role in the constitutional structure, *Online Merchants*, 995 F.3d at 559, through "maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," *Healy*, 491 U.S. at 335–36.

IV. AT A MINIMUM, THE COURT SHOULD HOLD THIS PETITION FOR *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*.

At a minimum, the Court should hold this case pending its decision on the pending petition for a writ of certiorari in *National Pork Producers Council v. Ross*, No. 21-468. The question presented in that case, like this one, asks the Court to decide whether a State

has violated the dormant Commerce Clause by regulating conduct in other States. Pet. for Cert. at i (Question Presented), *Nat'l Pork Producers Council*, No. 21-468 (Sept. 27, 2021). If the Court grants certiorari in *National Pork Producers Council*, it will expound upon the extraterritoriality doctrine for the first time in almost two decades, providing guidance that could bear directly upon the resolution of this case.

Thus, if the Court does not immediately grant this petition, TitleMax respectfully requests that the Court hold the case pending *National Pork Producers Council*.

CONCLUSION

The Third Circuit's decision permits Pennsylvania to override the policy judgments of other States by projecting its lending laws beyond its borders and imposing them on transactions that take place wholly outside of Pennsylvania. In so doing, the Third Circuit expressly departed from the Seventh Circuit's decision in a factually indistinguishable case, contravened this Court's longstanding extraterritoriality precedent, and impaired the sovereign right and autonomy of States to regulate commerce transacted within their own territory without interference from other States.

For all of these reasons, the Court should grant the petition for a writ of certiorari or, in the alternative, hold the petition pending disposition of the petition for a writ of certiorari in *National Pork Producers Council v. Ross*, No. 21-468.

Respectfully submitted.

RICHARD J. ZACK
TROUTMAN PEPPER HAMILTON
SANDERS LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

DOUGLAS D. HERMANN
TROUTMAN PEPPER HAMILTON
SANDERS LLP
Hercules Plaza, Suite 5100
1313 N. Market Street
P.O. Box 1709
Wilmington, DE 19899
(302) 777-6560

THEODORE B. OLSON
EUGENE SCALIA
Counsel of Record
AMIR C. TAYRANI
MATT GREGORY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

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