No. 21-1262

In the Supreme Court of the United States

TITLEMAX OF DELAWARE, INC., *ET AL.*
Petitioners

v.

RICHARD VAGUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it permissible under the dormant Commerce Clause for a Pennsylvania regulatory agency to issue an investigative subpoena to an out-of-state car title lender that markets itself to Pennsylvanians, records liens against them in Pennsylvania, and enforces those liens in Pennsylvania?

PARTIES TO THE PROCEEDING

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 (collectively TitleMax).

Respondent Richard Vague, in his official capacity as the Secretary of the Pennsylvania Department of Banking and Securities, was the defendant and appellant (the Department of Banking).[1]

[1] When Petitioners filed their complaint in 2017, the Secretary of the Pennsylvania Department of Banking and Securities was Robin L. Weissmann. She was succeeded by Richard Vague in early 2020.

RELATED PROCEEDINGS

This case arises directly from the decision of the Third Circuit in *TitleMax of Delaware, Inc. v. Weissmann*, No. 21-1020 (3d Cir.) (judgment entered Jan. 24, 2022), which reversed the district court's decision in *TitleMax of Delaware, Inc. v. Weissmann*, No. 1:17-cv-1325-MPT (D. Del.) (judgment entered Dec. 7, 2020).

This case is also related to *Dep't of Banking & Securities v. TitleMax of Delaware, Inc.*, No. 1:17-cv-2112 (M.D. Pa.) (judgment entered Jan. 10, 2020), and to a still-pending state court proceeding in *Dep't of Banking & Securities v. TitleMax of Delaware, Inc.*, No. 417 M.D. 2017 (Pa. Cmwlth. Ct.).

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INTRODUCTION

The public policy concerns associated with car title lenders like TitleMax are well documented. "[L]enders advance a few hundred to a few thousand dollars based on the titles to paid-for vehicles * * * usually for a fraction of the vehicle's value[.]" And the loans "are made without consideration of ability to repay, resulting in many loans being renewed month after month to avoid repossession. Like payday loans, title loans charge triple digit interest rates, threaten a valuable asset, and trap borrowers in a cycle of debt." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 662 (7th Cir. 2010) (quoting Jean Ann Fox & Elizabeth Guy, Consumer Federation of America, "Driven into Debt: CFA Car Title Loan Store and Online Survey," p. 1 (Nov. 2005)).

For "well over 100 years[,]" Pennsylvania has had a public policy prohibiting usurious lending. *Pennsylvania Dep't of Banking v. NCAS of Delaware, LLC*, 948 A.2d 752, 759 (Pa. 2008). When the Department of Banking discovered that TitleMax had been offering car title loans with triple-digit interest rates to Pennsylvanians, and recording thousands of vehicle liens with the Pennsylvania Department of Transportation, the Department of Banking sent TitleMax an investigatory subpoena asking about the nature and scope of its business with Pennsylvania consumers.

In an effort to prevent any investigation into their transactions with Commonwealth residents, TitleMax fought the Department's subpoena for five years. The Court of Appeals determined that investigating an out-of-state company doing business with Pennsylvania consumers did not violate the dormant Commerce

Clause. TitleMax seeks review of that unremarkable ruling.

OPINIONS BELOW

The District of Delaware's opinion (Pet. App. 20a–33a) granting TitleMax's motion for summary judgment and denying the Department of Banking's motion for summary judgment is reported at 505 F. Supp. 3d 353 (D. Del. 2020). The Court of Appeals' opinion (Pet. App. 1a–19a) reversing that decision is published at 24 F.4th 230 (3d Cir. 2022).

STATEMENT OF THE CASE

This case involves an investigatory subpoena issued by the Department of Banking, seeking information from TitleMax about their business dealings with thousands of Pennsylvania consumers.

1. TitleMax is a collection of related companies, registered outside of Pennsylvania, that offer high-interest car title loans. Pet. App. 3a. TitleMax charges triple digit interest rates for its loans—as high as 180%—and takes a security interest in the borrower's vehicle. *Ibid.*

TitleMax does not have offices or stores in Pennsylvania, but did business with Pennsylvania consumers. *Id.* at 4a. Therefore, when a Pennsylvanian sought a loan from TitleMax, that individual would travel to one of TitleMax's brick-and-mortar locations to sign the loan agreement and receive a check. Pet. App. 3a. After the loan was signed, TitleMax would record the lien on the vehicle with the Pennsylvania Department of

Transportation (PennDOT). *Ibid.* Between October 2013 and October 2019, TitleMax filed 2,011 vehicle liens with PennDOT. C.A. Dkt. 16, App. at A.529 (declaration). When the borrower defaulted, TitleMax repossessed the borrower's likely only vehicle from Pennsylvania and charged the borrower an assortment of additional fees and costs. *Id.* at 568 (contract terms).

In addition to perfecting the lien in Pennsylvania, TitleMax also serviced loan agreements with Pennsylvania borrowers in the Keystone State, including collecting payments, sending phone call or text messages to the borrower, and repossessing the vehicle. Pet. App. 3a. Borrowers also made payments on their loans while physically present in Pennsylvania "in a variety of ways, including mailing, calling TitleMax to use a debit card, or visiting a 'local money transmitter . . . to have fees transmitted to a TitleMax location.'" *Id.* at 3a-4a (quoting the record). Finally, TitleMax advertised its services inside Pennsylvania, Pet. App. 15a n.11, and TitleMax employees actively encouraged Pennsylvania consumers to "come into the store to further discuss anything as far as the loan products," *ibid.* (quoting deposition testimony).

The full scope and volume of TitleMax's loans to Pennsylvanians is unknown because TitleMax claims that it lacks the "technological capability" to identify the number of loans or credit services that have been provided to borrowers who reside in Pennsylvania. Pet. App. 5a n.1; C.A. Dkt. 16, App. at A.205-06 (TitleMax deposition). TitleMax also claims to be unaware of the number of Pennsylvanians who have defaulted on its high interest loans, C.A. Dkt. 16, App. at A.206 (Title-

Max deposition). The Department of Banking was attempting to ascertain this information through the investigatory subpoena.

2. Under the Pennsylvania Loan Interest and Protection Law (LIPL), the maximum amount of interest that can be charged on a consumer loan of $50,000 or less is 6%. 41 P.S. § 201(a). Under the Consumer Discount Company Act (CDCA), a lender licensed by the Department may charge an annual interest rate up to 24% for loans of $25,000 or less. 7 P.S. §§ 6203(a), 6213. "[T]he effect of these two statutes is that if a lender is licensed by the Department in accord with the CDCA, it can charge between 6-24% on loans under $25,000. If it is not licensed, it is bound by the 6% cap imposed by the LIPL." *Cash America Net of Nev. LLC v. Commonwealth Dep't of Banking*, 8 A.3d 282, 285-86 (Pa. 2010). The option to apply for a license under the CDCA is equally available to both in-state and out-of-state lenders. *Id.* at 295.

If a lender subjects a borrower to an interest rate that violates the LIPL or CDCA, the violation "renders the [loan] not void, but only voidable as to the interest specified beyond the lawful rate." *Mulcahy v. Loftus*, 267 A.2d 872, 873 (Pa. 1970). For over a decade, Pennsylvania courts have applied these laws to lenders doing business with Pennsylvania consumers despite having no physical presence in the Commonwealth. *See Cash Am. Net of Nevada, LLC v. Commonwealth*, 978 A.2d 1028, 1030 (Pa. Cmwlth. 2009), *aff'd sub nom. Cash Am. Net of Nevada, LLC v. Com., Dep't of Banking*, 8 A.3d 282 (Pa. 2010). And Pennsylvania borrowers have successfully challenged usurious loans signed out-of-state as violative of these laws. *See e.g.*, *Mayo v.*

TitleMax of Delaware, No. 21-2964, 2022 WL 62533, *2 (E.D. Pa. Jan. 4, 2022); *Auto Equity Loans of Delaware, LLC v. Baird*, 232 A.3d 1293 (Del. 2020) (table).

The Department of Banking possesses broad subpoena power under the CDCA, 7 P.S. § 6212, and LIPL, 41 P.S. § 506(b). It also possesses the power to issue subpoenas under the Department of Banking and Securities Code, 71 P.S. § 733-401(F). Under each of these statutes, the Department of Banking must "invoke the aid of the courts" to enforce its subpoenas. *See* 7 P.S. § 6212; 41 P.S. § 506(b); 71 P.S. § 733-401(F).

3. In August 2017, the Department of Banking issued an investigative subpoena to TitleMax, asking for documents relating to TitleMax's commercial interactions with Pennsylvania consumers. C.A. Dkt. 16, App. at A.29-34 (subpoena).

Upon receiving the subpoena, TitleMax brought suit in the United States District Court for the District of Delaware, seeking to enjoin the investigation as violative of the dormant Commerce Clause and due process.[2] Pet. App. 5a. Before the Department of Banking was served with a copy of the federal complaint, it filed an action in state court to enforce its subpoena. *Ibid.* Although TitleMax attempted to remove the state action to federal court, the Middle District of Pennsylvania, recognizing TitleMax's gamesmanship for what it was, remanded the action back to state court in January 2020. *Dep't of Banking and Securities. v. TitleMax of Delaware, Inc.*, 1:17-CV-02112, 2020 WL 127995, *1 (M.D. Pa.) (*TitleMax*).

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[2] TitleMax abandoned its due process claim. Pet. App. 7a n.5.

The Delaware district court granted TitleMax's motion for summary judgment. Relying almost exclusively on the Seventh Circuit case of *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), the district court held, in pertinent part, that "the Department's attempt to apply its usury laws to the loans issued by TitleMax violate[d] the Commerce Clause." Pet. App. 33a. The Department of Banking timely appealed.

4. The Third Circuit Court of Appeals reversed the judgment of the district court. Pet. App. 19a. That court began its analysis by articulating a two-step approach to TitleMax's Commerce Clause challenge: First it would identify the territorial scope of the transactions that Pennsylvania was attempting to regulate to determine whether they occurred "wholly outside" of the Commonwealth. *Id.* at 12a. If the transaction did not occur wholly outside of Pennsylvania, then the court would examine the Department of Banking's investigation under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Pet. App. 12a.

As to the first step, the Court of Appeals recognized that "TitleMax's transactions with Pennsylvania involve both loans and collection, and these activities do *not* occur 'wholly outside' of Pennsylvania." *Id.* at 13a (emphasis added). Borrowers made payments to TitleMax while physically in Pennsylvania; the loan agreements gave TitleMax a security interest in property within Pennsylvania; and to protect those interests, TitleMax recorded liens with PennDOT. Pet. App. 13a-14a. Thus, by extending loans to Pennsylvanians, "TitleMax [took] an interest in property located and operated in Pennsylvania." *Id.* at 14a. The Court of Appeals concluded that "[t]hese aspects of loan servicing make

TitleMax's conduct different from that in the [*Healy v. Beer Inst.*, 491 U.S. 324 (1989)] line of cases, which largely involved transactions in goods that ended at the point of sale." *Ibid.*

The Court of Appeals then examined the Department of Banking's investigation using the *Pike* balancing test. Under that test, when a law "effectuate[s] a legitimate local public interest, and its effects on interstate commerce are only incidental," the court must determine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. The Court of Appeals correctly determined that "Pennsylvania has a strong interest in prohibiting usury[,]" the Department of Banking's actions furthers that interest, and "any burden on interest commerce from doing so is, at most, incidental." Pet. App. at 18a. That court also correctly recognized that "application of Pennsylvania's usury laws to transactions with Pennsylvanians puts TitleMax in no different position than an in-state lender." Pet. App. at 17a.[3]

The Court of Appeals, therefore, held that "Pennsylvania may * * * investigate and apply its usury laws to TitleMax without violating the Commerce Clause." *Ibid.*

REASONS FOR DENYING THE WRIT

This Court grants a petition for writ of certiorari "only for compelling reasons." S.Ct. Rule 10. This case involves the unremarkable occurrence of a state agency

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[3] TitleMax presents no complaints about this *Pike* analysis.

seeking information from out-of-state businesses engaging in commerce with its residents. Neither this Court nor any Courts of Appeals have held that issuing an investigatory subpoena discriminates against interstate commerce.

In order to make its petition appear compelling, and thus worthy of review, TitleMax ignores the inconvenient fact that the only regulatory action taken by the Department of Banking was to issue an investigatory subpoena. TitleMax also mischaracterizes the holding of the Court of Appeals, exaggerates that holding's effect, and attempts to inflate the narrow split between a Seventh Circuit decision and Third Circuit precedent, a split that rested upon now overturned caselaw.

I. BECAUSE THIS CASE ONLY CONCERNS AN INVESTIGATORY SUBPOENA, IT IS A POOR VEHICLE TO EXAMINE DORMANT COMMERCE CLAUSE PRINCIPLES.

This case is about the Department of Banking's ability to investigate TitleMax in order to discover the nature and scope of its business activities with thousands of Pennsylvanians. As this Court has explained, the "very purpose" of an investigation "is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if * * * the facts thus discovered should justify doing so." *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946). And as the district court for the Middle District of Pennsylvania correctly understood in the companion case, the subpoena at issue here is necessary because "the Department is completely in the dark regarding the extent of [TitleMax's] business activities in Pennsylvania

* * *. The Department is seeking to obtain information so that it can make an informed determination regarding what, if any, steps may be necessary to ensure that [TitleMax is] not violating Pennsylvania law." *TitleMax*, 2020 WL 127995, at *3.

Pennsylvania clearly has the authority to investigate TitleMax's transactions with Pennsylvania consumers. It is settled law that a business need not have a physical presence in a State to fall under the laws of that State. *See South Dakota v. Wayfair, Inc.*, __ U.S.__, 138 S.Ct. 2080, 2093 (2018). And any challenge to a Pennsylvania court's authority to enforce a Department of Banking subpoena, *see supra* at 5, would be more properly addressed under due process principles, a claim TitleMax wisely abandoned below given its abundant contacts with Pennsylvania. Pet. App. 7a n.5.

TitleMax cites no cases either below or in its petition holding that the dormant Commerce Clause prohibits a state from even *investigating* an out-of-state company doing business with its residents. The unremarkable act of a state agency issuing an investigatory subpoena does not discriminate against or otherwise burden interstate commerce. "Holding otherwise would require the Attorney General to simply assume the truth of [any out-of-state company's] averments that it has no relevant contacts with Pennsylvania and defer to [the company's] legal position regarding the type of conduct that may be regulated in conformance with the dormant Commerce Clause." *Auto Equity Loans of Delaware, LLC v. Shapiro*, 1:19-CV-1590, 2021 WL 2681972, at *2 (M.D. Pa. June 30, 2021).

Instead of seeking to have the Court address the question actually presented—an uncontroversial question, easily answered—TitleMax asks this Court to examine an academic question: Whether the Department of Banking can, should it choose to do so in the future, prosecute TitleMax for violating Pennsylvania law. But "[i]t is the law as applied that [this Court] review[s], not the abstract, academic questions which it might raise in some more doubtful case." *Saia v. New York*, 334 U.S. 558, 571 (1948) (Jackson, J., dissenting). And the only "law as applied" here is the Department of Banking's authority to investigate.

Further, it is axiomatic that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The Department of Banking argued before the district court and the Court of Appeals that, although TitleMax's challenge to the subpoena power of the Department was ripe, any challenge to possible future prosecutions that may or may not occur would not be ripe. C.A. Dkt. 16-1, App. at A.614-616 (reply brief in district court); Dkt. 15 at 52-53 (appellant's opening brief); Dkt. 30 at 26-27 (appellant's reply brief). In response, TitleMax cabined its challenge to "the constitutionality of the Department's *investigation* into the interest rates of loans made and executed by TitleMax outside of Pennsylvania * * *," C.A. Dkt. 26 at 50 (appellees' response brief) (emphasis added).

Given this concession, the Court of Appeals found that "[t]he parties agree[d] that TitleMax's challenge to an *investigation* into a violation of Pennsylvania law

[was] ripe." Pet. App. at 7a (emphasis added). By attempting to broaden this case to challenge Pennsylvania's ability to apply *any* of its usury laws, not just its authority to investigate, Pet. at i (question presented), TitleMax attempts to resurrect an unripe issue.

The issues TitleMax seeks to have this Court review are not properly before it. Given the fact pattern actually presented, this case is a particularly poor vehicle to examine dormant Commerce Clause questions.

II. TITLEMAX MISCHARACTERIZES THE HOLDING OF THE COURT OF APPEALS.

TitleMax mischaracterizes the Court of Appeals' holding as "categorical," Pet. at 25, when, in fact, it is TitleMax that seeks a categorical rule from this Court. Cherry-picking language from a footnote in the decision, TitleMax describes the Court of Appeals' holding as "Pennsylvania may regulate *any* 'contracts between a Pennsylvanian and an out-of-stater'—no matter the location where the contract is executed[.]" Pet. at 18 (quoting Pet. App. 13a n.9) (emphasis in original). The Court of Appeals' holding, however, is not nearly so broad.

In the footnote TitleMax quotes, the Court of Appeals describes how "conceptions of the territorial scope of contracts have evolved over time." Pet. at 13a n.9. "Under the 'traditional' approach, a contract is 'made' in the state where the offer is accepted." *Ibid.* But under the modern approach, "contracts formed between citizens in different states 'implicate the regulatory interest of both states.'" *Ibid.* (quoting *A.S. Goldman & Co., Inc. v. New Jersey Bureau of Sec.*, 163 F.3d 780,

787 (3d Cir. 1999)). Contrary to TitleMax's assertions, this academic aside did not create a categorical rule. Rather, the Court of Appeals' ruling arises from an examination of the facts unique to this case. Pet. App. 13a-16a.

A. As this Court has made clear, "Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" *Wayfair, Inc.*, 138 S.Ct. at 2094 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)). Following this guidance, the Court of Appeals examined the "territorial scope of the transaction that Pennsylvania has attempted to regulate and whether such transactions occur wholly outside the state." Pet. App. 12a (cleaned up). The Court of Appeals' holding is based upon the particular facts of this case; that court created no categorical rule.

Given how TitleMax chose to structure its business, the Court of Appeals correctly determined that its transactions with Pennsylvania consumers were not wholly outside of Pennsylvania. Pet. App. 14a-15a. "Unlike the sale of a good," which ends at the point of sale, "a TitleMax loan has a longer lifespan: it involves payments and permits a physical taking (repossession) from inside another state." *Ibid.* Because of these particular facts, "applying the Pennsylvania statues to TitleMax does not violate the extraterritoriality principle." Pet. App. 16a. *See also*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008) (holding that a loan transaction is not 'wholly extraterritorial' and thus not problematic under the dormant Commerce Clause).

Critical to the Third Circuit's analysis was the fact that TitleMax took a security interest in property located in Pennsylvania, using a Pennsylvania agency—PennDOT—to record liens on the property. Pet. App. 13a-15a. There certainly would be no question that Pennsylvania could regulate loans using Pennsylvania land as collateral. *Accord*, *Williams v. First Gov't Mortg. Inv'rs Corp.*, 176 F.3d 497, 499 (D.C. Cir. 1999) ("by issuing a loan to a D.C. resident and taking his D.C. home as collateral," a Maryland lender "availed itself of, and subjected itself to, the consumer protection laws of the District of Columbia") (internal quotation and brackets omitted). So too here. TitleMax recorded liens in the Commonwealth and executed those liens in the Commonwealth. But for the beneficence of the Pennsylvania government, TitleMax could do neither. This fact alone establishes that TitleMax's "conduct is not 'wholly outside' of Pennsylvania" for dormant Commerce Clause purposes. Pet. App. 15a.

B. In contrast with the Court of Appeals' fact specific analysis, TitleMax seeks a formalistic, categorical rule that finds no support in this Court's precedent. TitleMax attempts to cabin the commerce involved in its loan agreements to only the signing of the document, dismissing the actual execution of the terms of the contracts as mere "effects" of the commerce. Pet. at 22. Under TitleMax's per se rule, the dormant Commerce Clause bars a State from interfering in *any* contract signed outside of its borders, even if the terms of that contract directly apply to persons, property, and interests within the State. Such a rule runs counter to this Court's precedent and longstanding notions of the territorial scope of contracts between citizens of different

states, including well-established conflict of laws jurisprudence.[4]

1. This Court has often remarked in its dormant Commerce Clause cases that 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) (cleaned up). This is because, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *S. Pac. Co. v. State of Arizona, ex rel. Sullivan*, 325 U.S. 761, 766-67 (1945). Unlike the sale of goods, "contracts formed between citizens in different states implicate the regulatory interests of both states." *A.S. Goldmen & Co., Inc. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999), *cert. denied*, 538 U.S. 868 (1999).

The dormant Commerce Clause does not require Pennsylvania to stand silently by while a lender crosses its border to extract "a pound of flesh, to be by him cut off nearest the [Pennsylvania borrower's] heart" merely because another state allows such an

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[4] In the amicus brief filed by the American Financial Services Association, the association complains at length about how difficult it is for lenders to navigate different state laws regulating vehicle sales and financing. AFSA br. at 8-14. This case does not involve financing of new or used vehicles; it involves title loans. And the constitutionality of laws from other states is not before this Court. Both TitleMax and amici seek a per se rule that eliminates a case-by-case analysis of dormant Commerce Clause claims and makes a company's physical location dispositive.

agreement. Shakespeare, "The Merchant of Venice," act IV. sc. I, lns. 240-241. "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). And because consumer protection is a field traditionally subject to state regulation, courts "should be particularly hesitant to interfere with the [State's] efforts under the guise of the Commerce Clause * * *." *Id.* at 344.

Far from Pennsylvania projecting its laws into its neighbors, TitleMax seeks constitutional protection to force neighboring laissez faire laws into Pennsylvania. The Commerce Clause requires no such surrender of state sovereignty and traditional police powers. *See id.*, 550 U.S. at 345 (when "the very people who voted for the laws" bear the costs attributable to those laws, the costs of the regulation do not fall outside the state).[5]

2. As noted by the Court of Appeals, "courts routinely decide choice-of-law questions for contracts that cover multiple states, and there is 'nothing untoward about applying one state's law' to 'activities outside [that] state." Pet. App. 12a n.7 (quoting *Instructional*

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[5] This is why the policy arguments raised by the Washington Legal Foundation and Online Lenders Alliance in their amici brief are so wrongheaded. WLF Br. at 18-20. Whether car title lending at triple digit interest rates is good or ill for society is a policy decision best left to the people's representatives. Here, Pennsylvanians' choice to limit *their* own access to high-interest loans only affects them; Pennsylvania laws do not prevent residents in other states from accessing high interest loans.

Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813, 825 (3d Cir. 1994)). Even where the parties choose the law of a different state to govern their contracts, the chosen law does not apply if "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue * * *." Restatement (Second) of Conflict of Laws § 187 (1971).

Using this well-established principle, Delaware has applied Pennsylvania law to high-interest loans made in Delaware. *See Auto Equity Loans of Delaware, LLC*, 232 A.3d 1293, *2-4. And Pennsylvania has permitted the Department of Banking to institute an action under the CDCA and LIPL against a Delaware lender despite a Delaware choice-of-law provision. *Pennsylvania Dep't of Banking v. NCAS of Delaware, LLC*, 948 A.2d 752, 759 (2008). Such conflict-of-law analyses occur regularly in courts throughout the Nation without disrupting interstate commerce. *See*, *e.g.*, *Ohayon v. Safeco Ins. Co. of Illinois*, 747 N.E.2d 206 (Ohio 2001) (applying its laws to an automobile policy issued by an Illinois company covering an accident in Pennsylvania).

C. TitleMax argues that Pennsylvania is attempting to regulate the price of loans in other states. Pet. at 21. Not so. *First*, the Department of Banking has not attempted to prosecute TitleMax; it has simply sought information about TitleMax's activities. *Second*, as determined by the district court for the Eastern District of Pennsylvania in a case brought by a Pennsylvania borrower against TitleMax, "Pennsylvania's usury laws do not directly regulate TitleMax's sales of loans to residents of other states, do not force TitleMax to

conform its out-of-state practices to less favorable in-state conditions, or do anything to prevent other states from regulating consumer loan products differently * * *." *Mayo*, 2022 WL 62533 at *4 (cleaned up). The extra-territoriality principle is simply not applicable here. Pet. App. 14a (citing *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

Despite TitleMax's attempt to diminish their importance, the particular facts of its transactions with Pennsylvania consumers matter. TitleMax's loans to Pennsylvania borrowers involve an interest in property within Pennsylvania and liens on that property recorded with PennDOT, a Pennsylvania agency. Those transactions obviously did not occur wholly outside of Pennsylvania.

Additionally, TitleMax's argument that the Court of Appeals' reasoning would "allow Pennsylvania to regulate out-of-state loans made to borrowers who move to Pennsylvania after they borrow money in another State" is also incorrect. Pet. at 11. If a borrower attempted to forum shop by moving into Pennsylvania after obtaining a loan with TitleMax, the connections with Pennsylvania would be less and TitleMax would not have registered a security lien on the vehicle with PennDOT. Pennsylvania would likely not have the same state interests in regulating loans under that fact pattern.

Determining whether a state action violates the dormant Commerce Clause is a fact intensive analysis to be performed on a case-by-case basis. *See Wayfair*, 138 S.Ct. at 2094. And again, under the actual fact pattern of this case, the Department of Banking only

sought information about TitleMax's business with Pennsylvanians. TitleMax does not allege, because it cannot allege, that the Department of Banking attempted to apply Pennsylvania usury laws to loans made to individuals who moved to Pennsylvania during the pendency of the agreements. The Department of Banking remains in the dark as to TitleMax's business with Pennsylvanians, which is precisely why it issued an investigatory subpoena.

Finally, TitleMax attempts to bolster its request for review by improperly injecting an argument that was not raised below. On page 21 of the petition, TitleMax argues that Pennsylvania law discriminates against out-of-state lenders by allowing lenders who register with the Department of State, or maintain a place of business in the Commonwealth, to lend at a higher interest rate. Pet. at 21. This law, TitleMax argues, violates the dormant Commerce Clause because it "disfavors out-of-state lenders." *Ibid.*

Not only did TitleMax not make this argument below, it renounced any discrimination analysis as irrelevant to its claim: "Where the extraterritoriality doctrine has been invoked, * * * discrimination does not matter and is not an element of the claim." C.A. Dkt. 26, Appellees' br. at 38 n.14. It is inappropriate for TitleMax to attempt to raise this argument for the first time before this Court. *See, e.g.*, *Monks v. New Jersey*, 398 U.S. 71 (1970) (dismissing writ as improvidently granted, in part, because petitioner raised a claim for the first time upon the writ).

III. THE PRIMARY CASE TITLEMAX USES TO ARGUE A CIRCUIT SPLIT IS OF QUESTIONABLE CONTINUED VIABILITY.

The circuit split identified by TitleMax is both extremely narrow and premised upon a single Seventh Circuit decision of questionable continued viability.

A. In 2010, the Seventh Circuit took a broad view of the extraterritoriality principle and a strict view of the territorial scope of loan agreements when it decided *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010). That court held that Indiana could not enforce the provisions of its consumer credit code—including interest rate restrictions—on title loans executed in Illinois by an Illinois loan company to Indiana consumers. *Id.* at 669.

Unlike here, that case involved the enforcement of Indiana's consumer credit code, not a State investigating an out-of-state company's commercial transactions with its residents. *Id.* at 662. Unlike Pennsylvania law, the Indiana code voided unauthorized loans "[a]nd a borrower who ha[d] paid finance charges in excess of those permitted by the code [was] entitled to a refund." *Id.* at 662. Also unlike here, the lending company required borrowers to provide copies of the keys to the vehicles "so that it wouldn't have to go to court to enforce its lien should the borrower default." *Id.* at 662-663.

As noted by the Third Circuit, the *Midwest Title Loans* decision relied on the "physical presence" rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which "is no longer good law." Pet. App. 15a n.11. In *South*

Dakota v. Wayfair, Inc., 138 S.Ct. 2080 (2018), issued after the *Midwest Title Loan* decision, this Court repudiated the importance of physical presence to the dormant Commerce Clause analysis. *Id.* at 2099. This Court determined that a physical presence rule, "when the day-to-day functions of marketing and distribution in the modern economy are considered, * * * is artificial in its entirety." 138 S.Ct. at 2095. The rule "treat[ed] economically identical actors differently, and for arbitrary reasons." *Id.* at 2094. And "[w]hat may have seemed like a 'clear,' 'bright-line test[ ]' when *Quill* was written now threatens to compound the arbitrary consequences that should have been apparent from the outset." *Ibid.* (cleaned up). Accordingly, this Court concluded that "there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection." *Id.* at 2096.

The Seventh Circuit relied on *Quill* as "an example of extraterritorial regulation held to violate the commerce clause even though the entity sought to be regulated received substantial benefits from the regulating state." 593 F.3d at 666. In overturning *Quill*, the *Wayfair* decision directly undercut the Seventh Circuit's conclusion that an out-of-state company's receipt of "substantial benefits from the regulating state" plays no part in the dormant Commerce Clause analysis. *Ibid.* The Seventh Circuit has not yet had an opportunity to grapple with the effect of *Wayfair* on its reasoning in *Midwest Title Loans*.[6]

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[6] Since *Wayfair*, the Seventh Circuit has cited *Midwest* only once. In *Gunn v. Continental Casualty Co.*, the Seventh Circuit cited *Midwest* in passing for a principle that neither party dis-

Additionally, the Seventh Circuit in *Midwest Title Loans* explicitly rejected the reasoning of the First Circuit in *Pharm. Rsch. & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001). The Seventh Circuit failed to recognize, however, that *Pharmaceutical Research* had been affirmed by this Court. *See Pharm. Rsch. & Mfrs. of Am.*, 538 U.S. at 670 (2003).

As recently recognized by Judge McHugh of the Eastern District of Pennsylvania, the last twelve years have not been kind to *Midwest Title Loans*. *See Mayo*, 2022 WL 62533 at *3 (The Seventh Circuit's reasoning "does not appear to enjoy broad support"). Not only does the decision now rest upon overturned precedent, but since its issuance, no other circuit has favorably cited the decision. The alleged split proffered by TitleMax between the Seventh and Third Circuits—if it even still exists at all—is neither deep nor urgent. This is no reason to grant review.

B. TitleMax also incorrectly argues that the Third Circuit's decision is contrary to inapposite cases from other circuits, each of which concerns the sale or disposal of goods, rather than lending. The distinction between a sale of a good and a long-lasting contractual relationship was critical to the Third Circuit's analysis. *See* Pet. App. at 14a-15a.

For example, in *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), *Carolina Trucks &*

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puted. 968 F.3d 802, 812 (7th Cir. 2020) (noting simply that Washington State only asserts regulatory jurisdiction over instate activities). That passing reference did not address whether *Midwest Title Loans* remains viable in light of this Court's decision in *Wayfair*.

Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 493 (4th Cir. 2007), and *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), states sought to regulate sales of goods occurring wholly outside of their borders. In *Ass'n for Accessible Medicines*, Maryland tried to regulate the sale of prescription drugs "that did not result in a single pill being shipped to Maryland." 887 F.3d at 671. In *Carolina Trucks & Equip.*, South Carolina attempted to regulate the sale of trucks anywhere in the country so long as the manufacturer engaged in advertising within the state. 492 F.3d at 493. And in *Dean Foods*, Wisconsin attempted to regulate the sale of milk in Illinois. 187 F.3d 609, 617.

As explained by the Third Circuit, however, loan agreements are not equivalent to the sale of goods when examining territorial scope. TitleMax's loan agreements "have a longer lifespan" than transactions in goods, which "end[] at the point of sale[,]" and, under the facts of this case, those agreements crossed into Pennsylvania. Pet. App. 14a. The Third Circuit's ruling is in no way inconsistent with the above decisions by sister circuits.

Similarly, in *Sam Francis Found v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (*en banc*) and *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018), California attempted to regulate the sale of artwork and disposal of medical waste, respectively, anywhere in the country. In both cases, the Ninth Circuit found that California was attempting to regulate commercial transactions that occurred wholly outside the Golden State's borders. In contrast, the Third Circuit found the exact opposite here: that Pennsylvania

was only attempting to investigate agreements that crossed into its borders. Pet. App. 14a-15a.

Contrary to TitleMax's assertion, Pet. 18, the Ninth Circuit would not have decided this case differently. Recently in *Ward v. United Airlines, Inc.*, that court explained that Ninth Circuit precedent "casts doubt on the continued viability of the broad extraterritoriality principle * * *." 986 F.3d 1234, 1240 (9th Cir. 2021). And in reviewing whether California could regulate the terms of employment of pilots and flight attendants, that court concluded that "the analysis required under the dormant Commerce Clause largely tracks the analysis that would be required under the Fourteenth Amendment's Due Process Clause." *Ibid.* (citing *Wayfair, Inc.*, 138 S. Ct. at 2093).[7] "The salient question, then, is whether California's ties to the employment relationship are sufficiently strong to justify its assertion of regulatory authority over the contents of an employee's wage statements." *Ibid.* Likewise here, the Third Circuit correctly concluded that Pennsylvania possessed a "strong interest" in protecting its residents from high interest loans secured by property both located in the state and registered with the state government. Pet. App. 18a. The Ninth Circuit would not have decided the facts of this case differently.

No split exists between the Third Circuit and the Fourth or Ninth Circuits on the issue presented here.

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[7] Any comparison between the dormant Commerce Clause and due process principles was explicitly rejected by the Seventh Circuit in *Midwest Title Loans*, 593 F.3d at 668, again based on the now-overturned *Quill* decision.

As for *Midwest Title Loans*, that decision is an outlier of questionable continued viability.

IV. TITLEMAX EXAGGERATES THE MARKET IMPACT OF THE THIRD CIRCUIT'S DECISION.

In a transparent effort to portray this controversy as particularly urgent, thus warranting immediate review, TitleMax exaggerates the impact of the Court of Appeals' decision. TitleMax breathlessly argues that, absent review, "lenders making loans to customers who reside in the Third Circuit, Tenth Circuit, or Minnesota * * * 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 * * *. Pet. at 24. But this has been true for many years.

As discussed above, *supra* at II.B.2, well-established conflict-of-law principles permit courts, in certain circumstances, to override the express agreed upon terms of the contracting parties and apply the laws of a State with "materially greater interest" in an issue. Restatement (Second) of Conflict of Laws § 187 (1971). And for at least a decade, Pennsylvania courts have applied Pennsylvania usury laws to out-of-state companies lending to Pennsylvania residents despite the lender having no physical presence in the Commonwealth. *See e.g., Cash Am. Net of Nevada, LLC*, 978 A.2d at 1031 (Pa. Cmwlth. 2009); *Pennsylvania Dep't of Banking*, 948 A.2d at 759.

Likewise, for over a decade, the Third Circuit has permitted consumers to apply Pennsylvania laws to title-loan agreements executed out-of-state. *See Kaneff v.*

Delaware Title Loans, Inc., 587 F.3d 616 (3d Cir. 2009).[8] And even the Supreme Court of Delaware applied Pennsylvania usury law to loan agreements executed in its state, affirming an arbitrator's declaration that high-interest loans signed in Delaware by three Pennsylvania residents were usurious under Pennsylvania law. *See Auto Equity Loans of Delaware, LLC*, 232 A.3d 1293 *2-4.

Yet, the sky has not fallen. Lending remains a robust business. And in choosing to engage in the business of lending, companies like TitleMax take the risk that borrowers may go bankrupt, that they may destroy the collateral for their loans, or that courts may not enforce the high interest rates contained in the loan agreements. The Court of Appeals' holding here stands for the unremarkable principle that a State agency may investigate companies doing business with its citizenry. Even if multi-state corporations, like TitleMax, express shock that their activities may be subject to scrutiny by an administrative agency in a state where their customers live, that hardly presents an issue worthy of this Court's review.

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[8] In *Kaneff*, a borrower drove 30 miles across the Pennsylvania border to obtain a $550 loan at a 300.01% annual interest rate in Delaware. *Id.* at 618. When she learned that after making her payments for six months, her loan had nevertheless ballooned to $842.50, the borrower sued the lender in federal court arguing that the contract was unconscionable under the LIPL. *Ibid.* In determining which law—Pennsylvania or Delaware—should control the agreement, the Third Circuit correctly concluded that "Pennsylvania ha[d] a materially greater interest than Delaware" in whether certain terms of the contract were "unconscionable" under Pennsylvania law. *Id.* at 624. This was despite the fact that the contract was entered into and signed in Delaware, required repayment in Delaware, and the lender only had offices in Delaware. *Id.* at 623.

V. THE COURT SHOULD NOT HOLD THE PETITION WHILE IT CONSIDERS *Nat'l PORK PRODUCERS COUNCIL v. ROSS*.

At the end of its Petition, TitleMax briefly makes an alternative request—that the Court hold its petition in abeyance pending *Nat'l Pork Producers Council v. Ross*, No. 21-468. Pet. at 28-29. After TitleMax filed its petition, this Court granted certiorari in that case.

While both cases involve claims under the dormant Commerce Clause, as even amicus American Financial Services Association concedes, the two cases raise "distinctly different" issues. AFSA br. at 19. *Nat'l Pork Producers Council* involves a state law that bans the sale of pork products in California unless the pigs those products came from were born to sows housed with 24 square feet of space. *Nat'l Pork Producers Council* pet. at 2. Petitioners in that case argue that, because of the unique nature of pork production in this country, this law effectively regulates the sale of pork products raised and sold wholly outside California. *Nat'l Pork Producers Council* pet. at 2. The issue in that case is not whether the raising and selling of Georgia pigs takes place wholly outside California—which they clearly do—but whether the extraterritoriality principle applies when a state law has the effect of indirectly regulating such wholly external transactions.

Here, the only action taken by the Department of Banking was an investigative subpoena seeking information about the nature and scope of TitleMax's interactions with Pennsylvanians. The instant case is highly fact specific and focuses on the actions taken by TitleMax within the Pennsylvania market. Pet. App. at

14a-15a. Resolving the issues in *Nat'l Pork Producers Council* will not answer whether the specific actions taken by TitleMax in this case were "wholly outside" of Pennsylvania.

As detailed above, the Third Circuit's fact specific analysis upholding the Department of Banking's authority to investigate TitleMax's conduct in Pennsylvania follows this Court's precedent and does not present an important unsettled question of federal law. The Department of Banking issued the investigatory subpoena on TitleMax in 2017. TitleMax has successfully delayed this investigation for five years. Further delay is neither warranted nor just.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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