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 & SECURITIES,

Respondent.

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

REPLY BRIEF IN SUPPORT OF 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

RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

This case presents an undisputed circuit split on an important question—whether the Commerce Clause permits a State to regulate loans made to its residents in other States. As *amici* have explained, the decision below, which allows Pennsylvania to regulate TitleMax's out-of-state loans because those transactions may have effects within Pennsylvania, will have far-reaching consequences for lenders and other businesses that have ongoing relationships with customers in other States. *See* Br. of American Financial Services Association 8–14; Br. of Washington Legal Foundation 18–20.

In response, the Pennsylvania Department of Banking and Securities ("the Department") argues that the Third Circuit addressed only whether the Department may "investigate" TitleMax's loans to Pennsylvania residents. Opp. 8. But that is manifestly wrong. The Third Circuit unambiguously "examine[d] whether *applying* Pennsylvania's usury laws to TitleMax's conduct violates the Commerce Clause" and answered that question in the negative. Pet. App. 12a n.8 (emphasis added). Thus, the question is cleanly presented for this Court's review.

Next, the Department argues that the Third Circuit's acknowledged split with the Seventh Circuit's decision in *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), is unworthy of review because *Midwest Title* predates *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). But *Midwest Title* turned on this Court's extraterritoriality doctrine, not the "physical presence" rule at issue in *Wayfair*. Nor can the split be limited to the Third and Seventh Circuits or to cases involving title loans—the decision below is

also irreconcilable with decisions from the Fourth and Ninth Circuits concerning, among other transactions, out-of-state auto purchases and waste disposal.

And the Department makes no serious effort to justify the Third Circuit's decision under this Court's extraterritoriality precedent. Nor could it—this Court has long held that the Commerce Clause forbids a State from "project[ing] its legislation into other States by regulating" out-of-state commercial transactions, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (alteration and internal quotation marks omitted), which is precisely what Pennsylvania has done here.

To resolve these conflicts, the Court should grant review and hear this case alongside *National Pork Producers Council v. Ross*, No. 21-468, which raises a similar Commerce Clause question. At a minimum, the Court should hold this case for *National Pork Producers*.

ARGUMENT

I. THIS CASE IS AN IDEAL VEHICLE.

The Department's primary argument is a purported vehicle problem. According to the Department, this case is merely about its "ability to investigate TitleMax in order to discover the nature and scope of [TitleMax's] business activities" with Pennsylvanians. Opp. 8. That is demonstrably false—the Third Circuit held that Pennsylvania may *apply* its lending laws to loans that TitleMax made to Pennsylvania residents in other States, not simply that Pennsylvania may investigate those loans.

A. The Third Circuit's decision speaks for itself. The court explained that "[b]y issuing [a] subpoena, the Department is thus asserting that its usury laws

may apply to TitleMax's conduct." Pet. App. 12a n.8. Rather than merely address the subpoena's propriety, the Third Circuit "examine[d] whether *applying* Pennsylvania's usury laws to TitleMax's conduct violates the Commerce Clause." *Id.* (emphasis added). The court then unambiguously held that "*applying* the Pennsylvania statutes to TitleMax does not violate the extraterritoriality principle," Pet. App. 16a (emphasis added), and that "Pennsylvania may therefore investigate *and apply* its usury laws to TitleMax without violating the Commerce Clause," Pet. App. 18a (emphasis added).

The district court similarly recognized that this case is about whether Pennsylvania may apply its lending laws to loans that TitleMax executed in Delaware, Virginia, and Ohio. TitleMax's complaint sought "injunctive relief . . . based on the Commerce Clause prohibition of the Department's application of [Pennsylvania law] to TitleMax." Pet. App. 21a. Similarly, TitleMax sought a declaration "that the Secretary has no authority to enforce against TitleMax the LIPL, CDCA, or any other laws or regulations." Pet. App. 21a–22a. The district court, like the Third Circuit, decided that question, holding that "the Department's attempt to apply its usury laws to the loans issued by TitleMax violate[s] the Commerce Clause." Pet. App. 33a.[1]

Nor could the Department credibly dispute that Pennsylvania seeks to apply its lending laws to regulate loans made to Pennsylvania residents in other

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[1] Tellingly, the Department's primary quotation supporting its assertion (at 9) that this case involves only an investigatory subpoena comes from a *different* case—*Department of Banking & Securities v. TitleMax of Delaware, Inc.*, No. 1:17-cv-2112, 2020 WL 127995, at *3 (M.D. Pa. Jan. 10, 2020).

States. Indeed, the Department touts Pennsylvania's settled practice of "appl[ying] these laws to lenders doing business with Pennsylvania consumers despite having no physical presence in the Commonwealth." Opp. 4; *see id.* at 24 (Pennsylvania has regulated out-of-state lenders "for at least a decade"); *Mayo v. TitleMax of Del.*, No. 2:21-cv-2964, 2022 WL 62533, at *2 (E.D. Pa. Jan. 4, 2022) (applying Pennsylvania's lending laws in lawsuit brought by TitleMax borrower).

B. The Department similarly attempts to avoid the breadth of the Third Circuit's holding that "Pennsylvania may regulate any contracts between a Pennsylvanian and an out-of-stater." Opp. 11–12 (emphasis and internal quotation marks omitted). According to the Department, the Third Circuit's opinion is limited to the supposedly "unique" facts of this case. *Id.* at 12.

Again, the Third Circuit's decision speaks for itself. The court held that "even if TitleMax's transactions were understood to be limited to the 'origination' of the loan, our precedent makes clear that contracts between a Pennsylvanian and an out-of-stater do not occur 'wholly outside' Pennsylvania." Pet. App. 13a n.9. In the Third Circuit, "it does not matter that the consumers would have been physically outside of Pennsylvania when the transaction was initiated." *Id.* The Third Circuit's constitutional holding plainly extends well beyond the particular facts of this case to encompass all out-of-state contracts executed by Pennsylvanians.

The district court's and Third Circuit's opinions therefore make clear that the question presented—whether Pennsylvania may regulate loans that out-of-

state lenders make to Pennsylvania residents in other States—is cleanly presented.[2]

II. THE DECISION BELOW CREATES A SPLIT WITH THE FOURTH, SEVENTH, AND NINTH CIRCUITS.

The Department concedes that the decision below splits from the Seventh Circuit's decision in *Midwest Title*. The decision below is also inconsistent with other decisions from the Fourth, Seventh, and Ninth Circuits. Pet. 17–19. The Department's attempt to minimize that division fails.

A. The Department does not (and cannot) dispute that the Third Circuit's decision departs from the Seventh Circuit's holding on virtually identical facts in *Midwest Title*. Instead, the Department insists that *Midwest Title* is "of questionable continued viability" because it was supposedly premised on the "physical presence" rule from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which this Court overturned in *Wayfair*. Opp. 19.

This argument misreads both *Midwest Title* and *Wayfair*. Although the Seventh Circuit cited *Quill*, the court's analysis relied primarily on a straightforward application of this Court's precedent forbidding the "class of nondiscriminatory local regulations" that, as here, "attempt to regulate activities in other

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[2] The Department did not cross-petition on the ground that the Third Circuit should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971), and therefore forfeited that argument. *Younger* abstention would require "alter[ing] the Court of Appeals' judgment" to a dismissal without prejudice, "which is impermissible in the absence of a cross-petition." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). Moreover, *Younger* abstention does not implicate this Court's jurisdiction, Pet. 7 n.2, and thus poses no obstacle to review.

states." *Midwest Title*, 593 F.3d at 665–66 (citing *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), *Brown-Forman*, 476 U.S. 573, and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)). Indiana's attempt to regulate loans to Indiana residents in Illinois contravened the rule "'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 665 (quoting *Healy*, 491 U.S. at 337).

The *Healy* line of extraterritoriality cases was not at issue in *Wayfair*, which addressed a different question: whether "an out-of-state seller can be required to collect and remit [sales] tax" for indisputably *in-state* transactions between an in-state buyer and an online or mail-order seller. 138 S. Ct. at 2087–88. Indeed, in *Wayfair*, this Court cited an extraterritoriality case, *Brown-Forman*, as an example of the "variations" in the Court's Commerce Clause doctrine, confirming that cases like *Brown-Forman*, *Healy*, and *Midwest Title* remain good law. *Id.* at 2091. Accordingly, the Seventh Circuit continues to apply *Midwest Title*'s holding that a State can assert "legislative and regulatory jurisdiction over only instate activity." *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 812 (7th Cir. 2020).

B. The Third Circuit's decision also departs from other cases in the Fourth, Seventh, and Ninth Circuits rejecting States' efforts to regulate out-of-state transactions involving their residents. Pet. 17–18. The Department insists that these cases are inapposite because they involved "the sale or disposal of goods, rather than lending," and "a long-lasting contractual relationship was critical to the Third Circuit's analysis." Opp. 21. But the fact that a title loan creates an ongoing relationship between the lender and the bor-

rower cannot explain the difference between the decision below and decisions from other circuits involving other kinds of goods and services.

The sale of a truck, for example, can create an ongoing relationship between the seller and the buyer for the provision of "warranty services," but the Fourth Circuit nevertheless held that South Carolina cannot regulate truck sales to South Carolina residents in Georgia. *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491, 494 (4th Cir. 2007). Similarly, the Seventh Circuit held that Wisconsin cannot regulate milk sales in Illinois despite the fact that an Illinois buyer solicited business in Wisconsin, the buyer "enrolled" Wisconsin farmers in a long-term delivery program, and the effects of the buyer's transactions were "felt, perhaps even predominantly, in Wisconsin." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 618–20 (7th Cir. 1999). And the Ninth Circuit rejected California's attempt to regulate the disposal of medical waste in Kentucky, even though the transactions involved a long-term relationship between a transfer station in California and a business in another State, because "[t]he mere fact that some nexus to a state exists will not justify regulation of wholly out-of-state transactions." *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018).

There is no way to reconcile the Third Circuit's reasoning with any of these holdings.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DORMANT COMMERCE CLAUSE PRECEDENT.

The Third Circuit's decision also conflicts with this Court's precedent prohibiting States from regulating commerce extraterritorially. Pet. 19–23. As this Court has held, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy*, 491 U.S. at 336. Rather than attempt to reconcile the decision below with this Court's extraterritoriality precedent, the Department elides it altogether, citing *Healy* only once, Opp. 7, and completely ignoring *Brown-Forman* and *Baldwin*.

According to the Department, the extraterritoriality principle is inapplicable because (1) Pennsylvania only seeks to apply its lending laws to its own residents and (2) TitleMax records liens on Pennsylvania automobiles. Opp. 12–18. Neither argument withstands scrutiny.

Pennsylvania is not simply attempting to apply its laws to its own residents—instead, it seeks to apply its laws to out-of-state lenders that make loans to Pennsylvania residents. Just as Pennsylvania may not forbid Atlantic City casinos from allowing Pennsylvanians to gamble on their premises in compliance with New Jersey law, Pennsylvania may not forbid Delaware lenders from allowing Pennsylvanians to borrow money in transactions that occur in Delaware and that comply with Delaware law. A contrary rule would interfere with "the autonomy of the individual States within their respective spheres," which is the "special concern" of the dormant Commerce Clause's

extraterritoriality principle. *Healy*, 491 U.S. at 335–36.

It is similarly inconsequential that TitleMax secures an interest in a Pennsylvania vehicle and later records that interest with the Pennsylvania Department of Transportation. The Commerce Clause prohibits the extraterritorial application of state law to out-of-state commerce "whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (internal quotation marks omitted); *see Baldwin*, 294 U.S. at 522–23 (invalidating statute setting minimum price for milk sales by out-of-state producers whose milk was sold in New York, despite competitive impact on New York producers). Accordingly, that a loan made in Delaware has the effect of a lender's recording its security interest in a Pennsylvania vehicle does not permit Pennsylvania to regulate *the loan*, even assuming Pennsylvania law could be applied to the lender's recording of the security interest or any subsequent efforts to repossess the car.

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

Finally, the Department argues that the Third Circuit's decision is unimportant because Pennsylvania has purported to "appl[y] Pennsylvania usury laws to out-of-state companies lending to Pennsylvania residents" in several other cases, too. Opp. 24. But Pennsylvania's acknowledged practice of projecting its lending laws into other States "for at least a decade," *id.*, makes the question presented *more* important, not less, especially now that the Third Circuit has given Pennsylvania the green light to continue.

Nor can the Third Circuit's reasoning be cabined to title loans. *See* Br. of American Financial Services Association 6–14; *see also* Pet. 25–26. The decision below also would plainly allow Pennsylvania to regulate auto finance loans made to Pennsylvanians in other jurisdictions. Auto loans, like title loans: (1) create an ongoing contractual relationship between the lender and the buyer, including ongoing payment obligations; (2) allow the lender to take a security interest in the buyer's vehicle; and (3) give the lender the right to repossess the vehicle in the buyer's home State. Under the decision below, therefore, all auto loans made to Pennsylvania residents must comply with Pennsylvania law, even if the loans are made at car dealerships in other States. And, as explained in the petition, the Third Circuit's broad reasoning also extends to all other transactions that involve an ongoing relationship between a Pennsylvania buyer and an out-of-state seller. *See* Pet. 25.

The Department urges that "the sky has not fallen" and "[l]ending remains a robust business." Opp. 25. But that is not the relevant question under the Commerce Clause. In *Healy*, beer was still available in Connecticut, yet this Court intervened to ensure "the autonomy of the individual States within their respective spheres." 491 U.S. at 336. In *Baldwin*, the milk was still flowing in New York, but this Court reaffirmed "the principle that one state in its dealings with another may not place itself in a position of economic isolation." 294 U.S. at 527. Here, too, Pennsylvania seeks to force its policy preferences on other States, and thus, here, too, this Court's intervention is warranted.

In any event, the practical consequences of the Third Circuit's decision are real and far-reaching. As

a result of the Department's actions, TitleMax has stopped making loans to Pennsylvanians in other States, denying Pennsylvanians a lending opportunity that, for many would-be borrowers, may be their only means of accessing short-term financing. Pet. App. 5a. Pennsylvania has therefore "neutralize[d] the economic consequences of free trade among the states"—precisely what this Court's dormant Commerce Clause precedent prohibits. *Baldwin*, 294 U.S. at 525–26.

V. THE COURT SHOULD HEAR THIS CASE ALONGSIDE *NATIONAL PORK PRODUCERS*.

After TitleMax filed its petition, this Court granted certiorari in *National Pork Producers Council v. Ross*, No. 21-468. This case is a mirror image of *National Pork Producers*. There, a California law prohibits the sale of pork *in California* unless out-of-state farmers comply with certain animal-welfare standards; the petitioners argue that the law is impermissibly extraterritorial, because of its effects in other States. Pet. for Cert. at i, *Nat'l Pork Producers*, No. 21-468. Here, Pennsylvania seeks to prohibit loans made *in other States* based on the purported effects of those loans in Pennsylvania.

In light of this narrow but crucial distinction, the Court should grant review in this case and hear it alongside *National Pork Producers*. Both cases involve the question whether a state law impermissibly regulates out-of-state conduct, an issue that this Court has not meaningfully addressed in more than 30 years. And hearing the cases together will assist the Court in elucidating its extraterritoriality precedent by applying the doctrine in two different regulatory contexts—one, a State's direct regulation of out-

of-state conduct (this case); the other, a State's indirect regulation of out-of-state conduct (*National Pork Producers*).

In similar circumstances, the Court has recognized the benefit of hearing distinct but closely related issues together at the merits stage. *See*, *e.g.*, *Axon Enter., Inc. v. FTC*, No. 21-86 (Jan. 24, 2022) (granting certiorari on question whether federal courts have jurisdiction over challenges to ongoing administrative proceedings at the FTC); *SEC v. Cochran*, No. 21-1239 (May 16, 2022) (subsequently granting certiorari on question whether federal courts have jurisdiction over challenges to ongoing administrative proceedings at the SEC); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (Jan. 24, 2022) (granting certiorari on question whether public university may use race as a factor in admissions); *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, No. 20-1199 (Jan. 24, 2022) (same for private university).

At a minimum, the Court should hold this petition pending the outcome in *National Pork Producers*. Even if the Court does not hear this case on the merits, the Court's decision in *National Pork Producers* is likely to require vacatur of the Third Circuit's opinion and a remand in light of this Court's clarification of the scope of the Commerce Clause's prohibition on extraterritorial laws.

CONCLUSION

The Court should grant the petition and hear this case alongside *National Pork Producers Council v. Ross*, No. 21-468, or, in the alternative, should hold this case pending its decision in *National Pork Producers*.

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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