NO. 21-468

In the

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL AND
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, et al.,

Respondents.

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

**BRIEF FOR *AMICUS CURIAE*
ASSOCIATION FOR ACCESSIBLE
MEDICINES IN SUPPORT OF PETITIONERS**

MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
matthew.rowen@kirkland.com

JAY P. LEFKOWITZ
Counsel of Record
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

The Association for Accessible Medicines is a nonprofit, voluntary association. It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

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STATEMENT OF INTEREST[1]

The Association for Accessible Medicines ("AAM") is a nonprofit, voluntary association representing manufacturers of generic and biosimilar medicines, which provide patients access to safe and effective medicines at affordable prices. AAM's core mission is to improve the lives of patients by providing timely access to safe, effective, and affordable prescription medicines. Generic drugs constitute more than 90% of all prescriptions dispensed in the United States, yet account for less than 20% of total drug spending. AAM regularly participates in litigation as *amicus curiae*.

AAM and its members have a significant interest in the questions presented in this case. Although generic drugs play a major role in bringing down the cost of prescription drugs, generic manufacturers are a frequent target of state legislation, in part because federal law preempts most state regulation of the sale of patented drugs. Yet rather than regulate *in*-state conduct (such as the price of generic drugs sold at in-state retail pharmacies), states of late have passed a number of laws that directly regulate generic manufacturers' wholly out-of-state transactions, apparently on the theory that those out-of-state transactions have effects in the regulating state.

AAM has successfully challenged a number of these laws on Commerce Clause extraterritoriality

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties consented to this filing.

grounds. *See, e.g.*, *Ass'n for Accessible Meds. v. Bonta*, 562 F.Supp.3d 973 (E.D. Cal. 2021) (preliminarily enjoining California law that regulates patent-litigation settlements anywhere in the country); *Health Distrib. All. v. Zucker*, 353 F.Supp.3d 235 (S.D.N.Y. 2018) (invalidating a New York law that prohibited opioids manufacturers from passing on the cost of a New York opioid program to anyone, anywhere in the country), *rev'd in part*, *Ass'n for Accessible Meds. v. James*, 974 F.3d 216 (2d Cir. 2020); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018) (invalidating a Maryland law that prohibited "price gouging" in the sale of generic drugs and applied to wholesale transactions that occur anywhere in the country). Despite these successes, though, states continue to pass laws that directly regulate generic manufacturers' wholly out-of-state transactions. The vitality of the extraterritoriality doctrine that protects against such state overreach—a doctrine the decision below prematurely eulogized, if not interred—is therefore of critical importance to AAM and its members.

ARGUMENT

AAM fully supports petitioners' arguments in support of reversing the decision below, which upheld a California law notwithstanding that law's "dramatic economic effects largely outside of the state." Pet.i. But whatever the right result is vis-à-vis state laws that have significant extraterritorial effects but that do not actually impose state-law liability based on out-of-state commerce, the case for reaffirming the longstanding Commerce Clause prohibition against state regulation of the latter sort is unassailable.

AAM respectfully asks this Court to reverse and, in doing so, to make clear at the very least that a state violates the Constitution when it imposes legal consequences on private parties based on transactions conducted beyond the state's borders, even if those out-of-state transactions have effects in the state.

I. The Prohibition On State Regulation Of Out-Of-State Commerce Is Fundamental To Our Federal System And Safeguarding Liberty.

"The principle that states are territorially bound … permeates the Constitution," Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1520 (2007); *see, e.g.*, U.S. Const. art. IV, §3, cl. 1 (New State Clause), and is reflected in this Court's interpretation of several provisions. One of the central purposes of the Privileges or Immunities Clause, U.S. Const. amend XIV, §1, cl. 2, for instance, is to guard against states' exploitation of nonresidents' lack of political representation to pass laws that specifically disadvantage them. *See Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); *see also Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (Privileges or Immunities Clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism"). The Due Process Clause likewise territorially constrains states' regulatory power. While it is often discussed in terms of the power of state courts to hear cases involving nonresidents, *see, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), due process is not

concerned solely with the exercise of state judicial authority. "The limits on a State's power to enact substantive legislation" that applies beyond its borders "are similar to the limits on the jurisdiction of state courts." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality op.); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (the Due Process Clause prevents states from punishing out-of-state conduct that was lawful where it occurred).

These territorial constraints on states' regulatory powers are critical in protecting liberty. *See, e.g.*, *Shutts*, 472 U.S. at 807 ("[T]he requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest."). Just as efforts by the federal government to evade the limits on its constitutionally enumerated powers inevitably threaten the liberty of the people, *see Bond v. United States*, 564 U.S. 211, 222 (2011), any attempt by one state to enlarge its regulatory ambit is anathema to the freedoms our Constitution is designed to protect.

But the territorial constraints imposed by the New State Clause, Privileges or Immunities Clause, and Due Process Clause, among others, cannot do the job by themselves. Thankfully, the Framers saw to it that they would not be alone. The Constitution assigns Congress the exclusive authority "[t]o regulate Commerce … among the several States." U.S. Const. art. I, §8, cl. 3. The Framers did so to avert the "drift toward anarchy and commercial warfare" that had plagued the Articles of Confederation. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). That is why, although the Commerce Clause is "framed as

a positive grant of power to Congress," this Court has "'consistently held'" that it "prohibit[s] States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 548-49 (2015) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)).

In addition, and consistent with the Framers' "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," this Court has also long held that "the Commerce Clause protects against … the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-37 (1989) (footnote omitted); *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (no state has "power to project its legislation" into another state); *Bonaparte v. Appeal Tax Court of Balt.*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."). 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. "[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 regardless of whether the statute's extraterritorial reach was intended by the legislature" and regardless of its effect on interstate commerce. *Id.*

This limit ensures that state autonomy over "local needs" does not inhibit "the overriding requirement of freedom for the national commerce." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976). To be sure, each state possesses broad authority to regulate conduct in its sphere. And a state law that "has only indirect effects on interstate commerce," but does not actually *regulate* commerce conducted out of state, will typically be upheld unless "the burden" it imposes on interstate commerce "clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). But laws that impose state-law liability (and state-law penalties) on out-of-state actors based on out-of-state transactions are categorically different. Such laws defy the bedrock principle that each state's authority "is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States," *BMW*, 517 U.S. at 571 (citation omitted), which under our federal system are free to regulate commerce conducted in their borders unimpeded by the conflicting policy preferences of a sister state.

Such laws also pose a grave threat to individual liberty. The constitutional prohibition on each state's authority to regulate beyond its respective borders "is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 564 U.S. at 221. It also "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). Indeed, the constraint against extraterritorial state regulation "makes [each state]

government more responsive," *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), by helping ensure that citizens can correctly attribute government actions to their proper source. If the voting public does not know whom to blame (or thank) for public policy decisions, then the governed—"the ultimate authority" in our constitutional system, *The Federalist* No. 46, at 315 (James Madison) (Jacob E. Cooke ed., 1961)—cease to be the masters of the governors. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them." (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876))). Confining a state's regulatory authority to commerce that actually takes place within its own borders thus ensures that the state's power is constrained by the will of the governed. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 202 (1905). Loosening those critical Commerce Clause constraints would make government less accountable, and the people less free.

An example helps illustrate the point. Imagine that Pennsylvania and New Jersey each pass laws prohibiting manufacturers from price gouging in the sale of a certain good. Imagine further that both laws define "price gouging" as an unjustifiable price. And, finally, imagine that (notwithstanding *Healy* and *Baldwin*) each law applies to out-of-state transactions, at least if they are upstream of in-state transactions. It does not take a doctorate in political economy to see the problem. If Pennsylvania's view of what makes a price increase unjustifiable differs from New Jersey's, then a manufacturer could find itself in violation of Pennsylvania law based on a wholesale transaction *that took place in New Jersey* even if that transaction

is perfectly lawful under New Jersey law. And if more than just two states adopted such laws, "[t]he resulting conflict could stop all traffic at state borders." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam); *see also Healy*, 491 U.S. at 336 (courts must "evaluate" an extraterritorial state law "not only by considering the consequences of the statute itself, but also by considering how [it] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945) (invalidating a state law in part because, if multiple states enacted their own versions of it, there would be a "serious impediment to the free flow of commerce").

That state of affairs would be anathema to the Framers, who sought to end state-level incursion on the national economy and the liberties our system protects. Yet as long as a manufacturer did business in the two states, no constitutional provision other than the Commerce Clause could do much about it. *See Wynne*, 575 U.S. at 556 (reaffirming that the Commerce Clause and the Due Process Clause embody distinct limits on state authority). That is one reason among many why, however the Court resolves the questions presented, the *Healy-Baldwin* line of cases protecting against state laws that regulate out-of-state commerce must be preserved. *See also generally Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("antiquity of the precedent," reliance interests, and workability favor preserving precedent).

II. Notwithstanding *Healy* And *Baldwin*, States Continue To Enact Laws That Regulate Transactions Conducted Out Of State.

The hypothetical Pennsylvania-New Jersey situation just described may "sound[] absurd," and surely "it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013). But it is not at all far-fetched. Companies that are not constituents make inviting targets for onerous regulation. As a result, state legislatures have aggressively sought to regulate transactions wholly outside their states' borders, and particularly so of late. AAM's experience illustrates the point: Even this one industry (generic pharmaceuticals) has repeatedly had to sue to invalidate extraterritorial legislation under the Commerce Clause.

1. Consider Maryland House Bill 631, enacted in 2016, which was an audacious attempt to regulate upstream prices without even pretending to regulate any transaction in Maryland. HB 631 regulated the prices charged by "manufacturer[s]" and "wholesale distributor[s]"—but not retailers, which actually sell to Marylanders. The statute declared that those businesses were forbidden from engaging in any practice that Maryland would consider "price gouging" in the sale of off-patent and generic prescription drugs. Md. Code., Health-Gen. §2-802(a). It vaguely defined "price gouging" as making "an unconscionable increase in the price of a prescription drug," *id.* §2-801(c), and "unconscionable increase" as any "increase in the price of prescription drug" that is "excessive," is "not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug," and leaves consumers with "no meaningful choice" but

to buy the drug "at an excessive price," *id.* §2-801(f). The penalty for noncompliance with this vague prohibition was severe: The Maryland Attorney General could sue in Maryland court to demand that companies disgorge (as consumer restitution) "any money acquired as a result of a price increase that violates" the statute, and "[i]mpos[e] a civil penalty of up to $10,000 for each violation." *Id.* §2-803(d).

Yet those sweeping penalties applied not just to the (rare) wholesale transaction conducted in-state, but to wholly out-of-state transactions that were "upstream" of retail sales in Maryland. By its terms, HB 631—which, as noted, did not apply to retailers at all—applied even when manufacturers "did not deal directly with a consumer residing in the State." *Id.* §2-803(g). That was no small detail. Prescription drug manufacturers rarely sell their products direct-to-consumer; most of their transactions are wholesale sales to national pharmaceutical distributors; and those national distributors rarely warehouse drugs in Maryland. As a result, nearly every sale a generic manufacturer makes *takes place outside of Maryland*. HB 631 thus on its face regulated "transaction[s] that occur[] out of state" and authorized the imposition of severe penalties based on the terms of those out-of-state transactions, as the Maryland Attorney General candidly admitted. Oral Arg. at 20:45-55, *Ass'n for Accessible Meds. v. Frosh*, No. 17-2166 (4th Cir. Jan. 24, 2018) (Attorney General admitting as much).

Maryland nonetheless took the view that there was nothing improper about Maryland penalizing manufacturers based on the prices they charged their wholesale buyers *in other states*, as long as the drugs

at issue in those out-of-state wholesale transactions later found their way into Maryland. *See, e.g.*, Pet. for a Writ of Certiorari 4, 8, 14, *Frosh v. Ass'n for Accessible Medicines*, No. 18-546 (U.S. Oct. 19, 2018) (HB 631 "impos[es] requirements" even upon out-of-state "transactions" between "out-of-state actors dealing with out-of-state intermediaries" if they "lead[] to in-state sales"). The Fourth Circuit correctly rejected that breathtakingly broad view of Maryland's regulatory authority, and invalidated HB 631. *Frosh*, 887 F.3d 664. As that court explained, by "compel[ling] manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland," HB 631 did "precisely" what "'the rule … applied in … *Healy*' aims to prevent." *Id.* at 672 (quoting *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

That was not HB 631's only infirmity. Because the statute "target[ed] wholesale rather than retail pricing," manufacturers could find themselves subject "to conflicting state requirements" if another state enacted its own version of the statute. *Id.* at 673. And if *multiple* other states "enacted this type of legislation," then it would not be long before a manufacturer would find itself in the intolerable situation discussed above with the New Jersey-Pennsylvania hypothetical: "subject to an enforcement action in another state (such as Maryland)" based on a wholesale transaction it made "in a state [such as Ohio] *where the transaction* [*was*] *fully permissible*." *Id.* (emphasis added). "The potential for 'the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude' [was] therefore both real and significant," and it

compelled the court of appeals "to invalidate the Act." *Id.* at 674 (quoting *Healy*, 491 U.S. at 337).

2. HB 631 is not unique in regulating out-of-state transactions involving generic drug manufacturers. In 2018, New York enacted a law called the Opioid Stewardship Act, or OSA. N.Y. Pub. Health Law §3323. The OSA established a $600-million "opioid stewardship fund" to be financed not by the state, but by the handful of manufacturers and distributors licensed to sell opioids in New York (referred to in the law as "licensees"). Besides raising revenue for opioid-abuse-related public health and education efforts, one of the OSA's "twin pillars" was forcing manufacturers and distributors to bear the costs of the opioid crisis, which the state believed they caused at least in part. *Zucker*, 353 F.Supp.3d at 265. To that end, the OSA provided that "[n]o licensee shall pass the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid, or such licensee shall be subject to penalties pursuant to subdivision ten of this section." N.Y. Pub. Health Law §3323(2). Those "penalties" were extreme. A licensee that "passed on to a purchaser" its "ratable share, *or any portion thereof*," could be subjected to "a penalty" of up to "*one million dollars per incident*." *Id.* §3323(10)(c) (emphases added).

The OSA's anti-pass-through provisions applied to *all* purchasers, "including" (but not limited to) "the ultimate user of the opioid," *id.* §3323(2), not just to "incident[s]" of passing on the cost of the surcharge to purchasers in New York, *id.* §3323(10)(c). The OSA lacked any geographic or other categorical qualifier on the scope of the anti-pass-through provisions. *All*

price increases undertaken in response to the cost of financing the statewide fund triggered million-dollar-per-incident penalties, even if those price increases were limited to non-opioid products and even if they were limited to sales to distributors outside New York.

A district court judge held that the OSA's pass-through prohibition violates the Commerce Clause. Under "the most natural reading" of the statute, "[a]n opioid manufacturer based in Maine that wished to pass on the surcharge it paid on New York transactions by selling opioids at a markup to a pharmacy in New Mexico could face a million-dollar penalty from New York State." *Zucker*, 353 F.Supp.3d at 261. Such a direct regulation of transactions conducted out of state "violates the Commerce Clause's prohibition on extraterritorial state legislation." *Id.* And because such direct regulation was authorized by the plain text of the law, it made no difference "that [New York] d[id] not intend to apply the OSA to penalize wholly out-of-state transactions": "[T]he text of the OSA places no such limitation on the pass-through prohibition" and, "[a]s AAM points out, New York nowhere concedes that it will never charge the penalty for out-of-state sales, only that it has displayed no current intention to do so." *Id.*

Although it appealed other aspects of the district court's decision, "the State … elected not to seek reversal of the District Court's invalidation of the pass-through prohibition," *Ass'n for Accessible Meds. v. James*, 974 F.3d 216, 218 (2d Cir. 2020), perhaps recognizing that the pass-through prohibition could not survive under the *Healy-Baldwin* line of cases. Nevertheless, other states have recently proposed

laws with similar provisions that are no less unconstitutional. *See, e.g.*, H.B. 1780, 102nd Gen. Assemb. §55(c) (Ill. 2022).

III. Neither Precedent Nor Sense Supports Limiting The Doctrine Applied In The *Healy* Line Of Cases To Price-Control Statutes.

Perhaps the panel that decided petitioners' case below would agree that laws like Maryland HB 631 and the New York Opioid Stewardship Act are verboten, on the theory that they "dictate[] the price of a product" (even though they do not "link[] prices paid in-state with those paid out-of-state"). Pet.App.8a (quoting *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013)). But limiting the doctrine in the way the Ninth Circuit imagined would require eliding a number of this Court's cases, and would result in turning basic principles of the Constitution upside-down.

Start with this Court's cases. The Ninth Circuit claimed below that this Court's decision in *Walsh* "indicated that the extraterritoriality principle in *Baldwin*, *Brown-Forman*, and *Healy* should be interpreted narrowly as applying only to state laws that are 'price control or price affirmation statutes,'" and it relied on *Walsh* for that statement. Pet.App.8a (quoting *Walsh*, 538 U.S. at 669). That is simply wrong. Here is the relevant passage from *Walsh*:

> [U]nlike price control or price affirmation statutes, "the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price.

> Similarly, Maine is not tying the price of its in-state products to out-of-state prices." [*Pharm. Rsch. & Mfrs. of Am. v. Concannon*,]249 F.3d [66,] 81-82[(1st Cir. 2001)]. The rule that was applied in *Baldwin* and *Healy* accordingly is not applicable to this case.

538 U.S. at 669.

The reason *Walsh* talked about price regulation and not something else is that the only law at issue regulated prices. The Maine law there established a mechanism through which manufacturers that sold prescription drugs in Maine could negotiate a rebate for Maine's elderly low-cost-drug program; if a manufacturer refused to agree to a rebate, Maine would impose prior-authorization requirements on certain in-state sales of the manufacturer's medicines. 538 U.S. at 654-55. (Notably, the Maine statute *also* contained an "anti-profiteering provision," which—just like Maryland HB 631, discussed above—declared it unlawful "for a manufacturer to 'exact[] or demand[] an unconscionable price'" in the sale of a prescription drug, but the district court invalidated that provision and the state did not bother to appeal. *Concannon*, 249 F.3d at 72 n.2, 82 n.10 (alterations in original) (quoting Me. Rev. Stat. Ann. tit. 22, §2697(2)).)

Nothing in *Walsh* suggests that the prohibition on extraterritorial state regulation is price-specific, or that Maine could have enacted a law that directly regulated manufacturing processes or any other commercial conduct outside of the state. More to the point, nothing in *Walsh* suggested that it meant to overrule cases like *Sullivan*, in which the Court invalidated an Arizona law that made "it unlawful …

to operate within the state a railroad train of more than fourteen passenger or seventy freight cars," because the "practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it." 325 U.S. at 763, 775; *see also Edgar*, 457 U.S. at 642-43 (plurality op.) (citing *Sullivan* for the proposition 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 within the State"). Nothing in *Walsh* suggests the Court was restricting the application of decades of Commerce Clause cases to only price-control laws. *Cf. C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (rejecting town's attempt to justify a waste-disposal ordinance on environmental concerns with "out-of-town disposal sites," because regulating such sites would "extend the town's police power beyond its jurisdictional bounds"); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (Missouri could not regulate loans entered into in New York).

Nor would it make sense to limit the *Healy* doctrine to price laws. For one thing, price control laws are regulatory measures. *See generally In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968). Indeed, price controls are often among the most efficacious forms of regulation. If the doctrine really were as narrow as the Ninth Circuit imagined, this Court would be hard-pressed to distinguish for constitutional purposes between "true" price control laws and other types of state regulation.

For another thing, the economic and political consequences of the Ninth Circuit's miserly view of the

extraterritoriality doctrine would be dire. California could impose traffic regulations on drivers in Nevada, just because an accident on the eastern side of Lake Tahoe may result in a trip to a California hospital. Or it could impose its health and safety regulations on a New York restaurant, just because the diners there might come back to California. And every other state could do the same in return. The result would be a Union in which individuals are far less free, and interstate commerce far more encumbered. For if a state may "'project[]' its legislation into other states and directly regulate[] commerce therein," then a not-insignificant number of individuals and business will be forced "to abandon commerce in other states," and "other states" will be forced "to alter their regulations to conform with the conflicting legislation" enacted by larger, more economically influential jurisdictions. *Old Bridge Chems., Inc. v. New Jersey Dep't of Env't Prot.*, 965 F.2d 1287, 1293 (3d Cir. 1992). That is not the federalist system our Framers designed.

The interstate market could not function if every state were allowed to impose its own rules on commerce that applied coast to coast. On the contrary, "the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several states." *Minnesota v. Barber*, 136 U.S. 313, 321 (1890). The consequences would not stop at commercial reprisals either. That is why this Court has long held that state laws that regulate transactions in other states are "virtually *per se* invalid" whether they do so *in haec verba* or in practical effect, *Brown-Forman*, 476 U.S. at 579, why it has never cast doubt on the vitality of

that principle, and why it should explicitly reaffirm the vitality of that core principle again here.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and reaffirm the vitality of the *Healy-Baldwin* line of cases.

Respectfully submitted,

MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
matthew.rowen@kirkland.com

JAY P. LEFKOWITZ
Counsel of Record
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com

Counsel for Amicus Curiae

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