No. 21-468

In the
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, ET AL.,
Petitioners,

v.

KAREN ROSS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

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[1] This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

Here, NLC, USCM, ICMA, and IMLA offer their perspective on why the extraterritorial rule sought by Petitioners would harm local governments.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici fully agree with the State Respondents that "Petitioners' arguments for an expansive new extraterritoriality doctrine lack merit." *See* Br. for the State Resps. at 19-36. And amici fully agree with the Intervenor Respondents that "Petitioners would radically expand the dormant Commerce Clause" and "Petitioners' proposed theory of extraterritoriality defies law and logic." *See* Br. for Intervenor Resps. at 11-32.

Amici write separately to describe local ordinances in a variety of areas that have faced dormant Commerce Clause challenges. It is not only the States that are subjected to dormant Commerce Clause litigation. While local governments have withstood many such challenges in the past, the ordinances described below—and many others—could be stricken under the expansive extraterritoriality rule sought by Petitioners.

At the very least, under Petitioners' rule, municipalities would face an increase of costly litigation, something they can ill afford. *See, e.g.*, Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, GOVERNING (Oct. 12, 2016), https://www.governing.com/archive/gov-government-lawsuits-settlements.html ("In large cities across the country, court challenges can be a drain on municipal coffers. . . . It's a big problem, and it's not getting any better.").

ARGUMENT

Municipal governments necessarily have broad police powers. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."). The expansive extraterritoriality doctrine sought by Petitioners would infringe on those powers.

The *Baldwin-Healy* line of cases invoked by Petitioners has been the "most dormant" aspect of dormant Commerce Clause jurisprudence. *Energy & Envtl. Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.); *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010) ("Extraterritoriality has been the dormant branch of the dormant Commerce Clause."), *vacated on other grounds sub nom. IMS Health, Inc. v. Schneider*, 564 U.S. 1051 (2011). The Court should reject Petitioners' attempt to weaponize that line of cases.

I. Petitioners' proposed extraterritorial rule would jeopardize countless types of local laws that protect the public.

The broad extraterritoriality rule sought by Petitioners would threaten commonsense regulations in a wide variety of areas addressed by local governments, such as ammunition, child/forced labor, commercial gambling, fur products, recycled content, renewable energy, stolen property, toxic products, waste disposal, and wildlife trafficking. Amici highlight just a few examples here: laws addressing

affordable rental housing, graffiti, hazardous wastes, and puppy mills.

A. Affordable rental housing

Problems caused by short-term rentals are plaguing many localities. These harms include long-term rent increases, decreased local government tax revenues, negative externalities imposed on neighbors, and declining job quantities and qualities. Josh Bivens, *The Economic Costs and Benefits of Airbnb*, ECONOMIC POLICY INSTITUTE (Jan. 30, 2019), https://files.epi.org/pdf/157766.pdf. The damage from an increasing short-term property rental industry has become so pervasive that Forbes dubbed it the "Airbnb effect"—drawing parallels between "over-tourism" and gentrification. Gary Baker, *The Airbnb Effect on Housing and Rent*, FORBES (Feb. 21, 2020, 6:54 AM), https://www.forbes.com/sites/garybarker/2020/02/21/the-airbnb-effect-on-housing-and-rent/?sh=7a1c521b2226.

In light of these harms, many localities have passed short-term rental regulations. *See, e.g.*, *Airbnb Regulations by City [2022]*, ALLTHEROOMS, https://www.alltherooms.com/analytics/airbnb-regulations (last visited Aug. 11, 2022). The City of Santa Monica, for example, in an attempt to preserve housing availability and encourage "active" residents of the community, passed an ordinance to restrict short-term rentals. *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 443 (9th Cir. 2019). Though 95% of the rental transactions involved an out-of-state party, the ordinance survived a dormant Commerce Clause challenge because it penalized only conduct within the city and thus was not a direct regulation of interstate commerce. *Id.* at 445-46.

Rosenblatt demonstrates that the out-of-state effects of regulating in-state conduct should not, on their own, suffice to invalidate a law under the extraterritoriality doctrine (indeed, these effects are likely unavoidable). Direct regulation of out-of-state conduct does. *See id.* at 445; *Stroman Realty, Inc. v. Allison*, No. 4-15-0501, 2017 WL 2589983 (Ill. App. Ct. 4th Dist. June 13, 2017) (holding that application of Illinois timeshare licensing rules to Texas resident and his business was impermissible extraterritorial application because neither resident's business nor the real estate in question was located within Illinois).

More recently, another disturbing trend—also limiting the availability of affordable rental housing—has emerged. National private equity firms and real estate investment trusts have begun to "swoop in to buy mobile home parks" and then dramatically raise the rent on residents, many of whom have nowhere else to go. *See* Michael Casey & Carolyn Thompson, *Rents Spike as Large Corporate Investors Buy Mobile Home Parks*, PBS (July 25, 2022, 3:25 PM), https://www.pbs.org/newshour/economy/rents-spike-as-large-corporate-investors-buy-mobile-home-parks. Absentee owners provide fewer services, are harder to reach, and frequently increase the rent. *See id.* Local governments need the ability to protect their constituents from such predatory practices by requiring companies doing business in their jurisdictions to comply with reasonable regulations. Petitioners' expansive extraterritorial rule could subject such efforts to curb national landlords to a dormant Commerce Clause challenge.

B. Graffiti

Graffiti has long marred our cities. *See, e.g.*, *Vincenty v. Bloomberg*, 476 F.3d 74, 80 (2d Cir. 2007) (noting "evidence that, nationwide, graffiti is the most common type of property vandalism, constituting 35% of all property crimes . . . and that the annual clean-up costs total $8-15 billion"); *Sherwin-Williams Co. v. City and Cnty. of San Francisco*, 857 F. Supp. 1355, 1357 (N.D. Cal. 1994) ("Graffiti vandalism—the outrageous scarring of real property both public and private with unintelligible markings made by irresponsible persons—plagues San Francisco as it does other cities in the United States and Europe.").

In an effort to curb its growing graffiti problem, the City of Chicago outlawed the sale of spray paint in 1991. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1126 (7th Cir. 1995). The law survived a dormant Commerce Clause challenge—despite its out-of-state effects—in part because it applied to spray paint manufactured anywhere, including within Illinois. *Id.* at 1132. In upholding the Chicago ordinance, the Seventh Circuit emphasized, "Because even 'local' activities displace the movement of goods, services, funds, and people, almost every state and local law—indeed, almost every private transaction—affects interstate commerce." *Id.* at 1130. Petitioners' expansive extraterritoriality rule, in contrast, would threaten such attempts to address this serious local concern.

C. Hazardous materials

It has long been "evident that neither the federal government nor the states can adequately identify and keep pace with the mushrooming hazardous waste problem." George F. Gramling, III & William L.

Earl, *Cleaning Up After Federal and State Pollution Programs: Local Government Hazardous Waste Regulation*, 17 Stetson L. Rev. 639, 641 (1988). Local government programs are necessary "to respond to the problem of hazardous wastes." *Id.* at 642. Accordingly, local governments have regulated hazardous wastes for decades. *See generally* William B. Johnson, Annotation, *Validity of Local Regulation of Hazardous Waste*, 67 A.L.R.4th 822, 824-25 (1989) (collecting and analyzing cases in which "courts have discussed the validity of local regulation of hazardous waste" and noting that "[p]ublic awareness in recent years of the problems resulting from the unregulated disposal of hazardous waste has resulted in a wide variety of federal, state, and local enactments").

Local laws regarding hazardous waste have faced dormant Commerce Clause challenges. For example, a municipal ordinance in Portland, Maine prohibited the "bulk loading of crude oil onto any marine tank vessel" in parts of the city. *Portland Pipe Line Corp. v. City of South Portland*, 332 F. Supp. 3d 264, 282-83 (D. Me. 2018). The ordinance responded to residents' concerns regarding air pollution, tainted drinking water, diminished property values, fumes from pipeline operations, damage to the natural environment, and the health and safety of children in nearby schools. *Id.* at 279-80. The city council found that bulk loading of crude oil would likely release hazardous emissions that are known or anticipated "to be 'acutely or chronically toxic, carcinogenic, mutagenic, teratogenic, or neurotoxic.'" *Id.* at 283. Moreover, the tank facilities at issue were "in close proximity to elementary schools, preschools, the South Portland High School and athletic fields, a community center, a large senior city housing facility,

and numerous residential districts," all of which would experience "air quality impacts associated with the bulk loading of crude oil." *Id.*

The plaintiff pipeline operator alleged that the ordinance was *per se* invalid under the dormant Commerce Clause because, "by plugging one end of a cross border pipeline, the Ordinance stops trade across three states and Quebec." *Id.* at 292. The court rejected that argument, holding that the ordinance did not regulate extraterritorially even though it would affect the pipeline operator's ability to obtain financing for its reversal project if it could not load oil in South Portland. *Id.* at 297. The court reasoned that in this "modern age of highly interconnected commerce, there would be virtually no room for local historic police powers if this sort of extraterritorial effect were enough to invalidate an ordinance under the dormant Commerce Clause." *Id.* The ordinance's "indirect economic effects on out-of-state transactions" were the "natural implication of cross-border projects and local government control, not an indication of unconstitutional extraterritorial regulation." *Id.* at 297-98.

In short, localities need the ability to address hazardous wastes within their borders without facing the threat of dormant Commerce Clause claims based on incidental out-of-state effects. *See also Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944 (N.D. Cal. 2020) (granting motion to dismiss extraterritoriality claim because there was no viable extraterritoriality argument to city ordinance regulating coal storage only within city limits). Petitioners' expansive extraterritorial rule would threaten local governments' ability to do so.

D. Puppy mills

Local laws addressing the scourge of puppy mills have likewise faced dormant Commerce Clause challenges. The City of Chicago addressed the harms to pet owners caused by pet stores that "sourced their animals from large mill-style breeders, which are notorious for deplorable conditions and abusive breeding practices." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 498 (7th Cir. 2017). The city council found that mill-bred pets developed health and behavioral problems, leading to "economic and emotional burdens for pet owners" and "financial costs on the City as owners abandon their physically or emotionally challenged pets." *Id.*; *see also More Puppies More Profits*, ASPCA: BARRED FROM LOVE, https://www.aspca.org/barred-from-love/puppy-mills-101/more-puppies-more-profits (last visited Aug. 9, 2022) (stating that the negative impacts of puppy mills include tiny cages, filthy conditions, poor vet care, no grooming, no socialization, nonstop breeding, sudden separation from their young and littermates, stressful transport, and no retirement programs).

In response to these problems, the city council passed an ordinance "limit[ing] the sources from which pet stores may obtain" animals for resale. *Park Pet Shop*, 872 F.3d at 497. A Missouri dog breeder and two Chicago pet stores joined forces to challenge the ordinance as an unconstitutional regulation of interstate commerce. *Id.* at 498. Despite being a "significant restriction" that affected both out-of-state and in-state pet breeders, the Seventh Circuit concluded the law was a valid exercise of municipal power because "Chicago ha[d] not attempted to regulate beyond its borders." *Id.* at 499, 503. New

York City's pet source ordinance also faced—and survived—a dormant Commerce Clause challenge. *See New York Pet Welfare Ass'n v. City of New York*, 850 F.3d 79, 89-92 (2d Cir. 2017) (holding local ordinance requiring pet shops to sell only animals acquired from breeders holding Class A license under Animal Welfare Act did not violate dormant Commerce Clause).

Puppy mill laws exemplify how innovative local ordinances that protect the public from various harms can inspire similar initiatives throughout the country, a true laboratories of democracy success story. Now, more than 350 American localities and at least three states—Maine, Maryland, and California—"prohibit the sales of puppy mill dogs and kittens in pet stores, despite aggressive attempts by puppy mill interests to defeat them." *More Localities End Puppy Mill Sales in Pet Stores, Taking Total to More Than 350,* THE HUMANE SOCIETY OF THE UNITED STATES: A HUMANE WORLD (Mar. 25, 2020), https://blog.humanesociety.org/2020/03/more-localities-end-puppy-mill-sales-in-pet-stores-taking-total-to-more-than-350.html? Credit =blog_post _033120 _id11312.

Petitioners' expansive extraterritoriality rule, however, would threaten all the sensible local ordinances described above and more. For this reason and the additional reasons addressed by the State Respondents, the Intervenor Respondents, and other amici, the Court should reject Petitioners' "audacious invitation" to expand the *Baldwin-Healy* line of dormant Commerce Clause doctrine. *See Epel*, 793 F.3d at 1175.

CONCLUSION

The judgment below should be affirmed.

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