No. 18-546

In The
Supreme Court of the United States

BRIAN E. FROSH,
ATTORNEY GENERAL OF MARYLAND, et al.,

Petitioners,

v.

ASSOCIATION FOR ACCESSIBLE MEDICINES,

Respondent.

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

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Commerce Clause prohibit a state from protecting consumer access to essential off-patent and generic prescription drugs by requiring manufacturers to refrain from unconscionably raising the price of those drugs sold in the state?

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INTERESTS OF *AMICI CURIAE*[1]

Amici are legal scholars who possess strong interests in the sound development and consistent application of legal principles.

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[1] No counsel for a party authored this brief in whole or in part. Neither counsel nor a party made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* or its counsel made such a monetary contribution. Counsel for *amici* discloses that he has provided pro bono legal services to Petitioner on an unrelated matter. Counsel of record for the parties received timely notice of *amici's* intent to file this brief. Both parties provided blanket consent for the filing of *amicus* briefs.

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SUMMARY OF ARGUMENT

The open disagreement among at least three federal courts of appeals as to the scope of the extraterritoriality doctrine of the Dormant Commerce Clause, *see* Pet. at 25-27, is a sufficient reason for the Court to grant the instant petition, *see* S. Ct. Rule 10(a). *Amici* support the underlying Petition, as the resolution of this circuit court conflict will add a measure of clarity to an area of law marked by significant incoherence.

Amici seek to situate this split within the broader context of judicial and academic concerns with the extraterritoriality doctrine as a whole. In particular,

courts and scholars alike are expressing doubt as to (1) whether the extraterritoriality doctrine is truly distinct from the core protectionism, discrimination, and balancing concepts of the Dormant Commerce Clause; (2) whether, even if the doctrine is a free-standing branch of the Clause, it is no longer needed in light of the remaining branches, *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018), and modern economic realities; and (3) whether the extraterritoriality doctrine is capable of precise definition or reasoned application.

These questions warrant the Court's attention. They strike at the very hallmarks of a sound and stable legal system, including principled and predictable decisionmaking. State authority and the public good, other virtues in our constitutional system, may be additional casualties in extraterritoriality cases. Indeed, the Fourth Circuit below deployed the doctrine—whose existence, vitality, and meaning are uncertain—to thwart Maryland's ability to exercise its police power and shield its most vulnerable residents from runaway prices for life-saving drugs. Given the precarious state of the extraterritoriality doctrine and very real human costs of its usage, there is no reason to postpone this first-order reconsideration of the doctrine.

Placing the Petition against this critical backdrop, *amici* respectfully submit that the Court should review the Fourth Circuit opinion and address the critical concerns summarized herein.

ARGUMENT

I. Is the Extraterritoriality Doctrine an Independent Branch of the Dormant Commerce Clause?

A. The Traditional Strands of the Dormant Commerce Clause.

The Framers contemplated a national economic model in which "the peoples of the several states must sink or swim together." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Dormant Commerce Clause is said to promote this vision by making it impermissible for a State to "place itself in a position of economic isolation." *Id*. at 527.

The primary form of economic isolation, and therefore the chief evil targeted by the Clause, is economic protectionism. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) ("the dormant Commerce Clause is driven by concern about economic protectionism") (internal quotes and citation omitted); Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1537 (1997) ("the guiding principle behind its dormant commerce clause jurisprudence is the prevention of economic protectionism"). Under this Court's framework for processing Dormant Commerce Clause challenges, such protectionist laws are *per se* unlawful. *See Bacchus Imports v. Dias*, 468 U.S. 263 (1984). Relatedly, laws that discriminate against out-of-state persons or entities are presumptively outlawed, though this presumption may be overcome if the governmental ends are

legitimate, the problem giving rise to the statute is situated out-of-state, and there is no viable alternative to the discriminatory approach. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). On the other hand, even-handed laws are presumptively valid, subject to a balancing of the law's burden on interstate commerce and the law's local benefits. *See Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).

This Court has repeatedly employed this general two-tiered analytical structure in Dormant Commerce Clause litigation. *See*, *e.g.*, *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981); *Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994). To be sure, the exact line between discriminatory and non-discriminatory laws may not always be straightforward, *see Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997), but there is no doubt that the concepts and governing standards are distinct, *see* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause*, 50 WM. & MARY L. REV. 417, 421-22 (2008) ("Black-letter law . . . could not be more clear," reciting the twin discriminatory and non-discriminatory prongs).

B. A Possible Extraterritoriality Strand.

The extraterritoriality doctrine is predicated on the general proposition that a State's authority extends to its borders, but no further. *See* JOSEPH STORY, COMMENTARY ON THE CONFLICT OF LAWS § 20 (1834)

("no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein."). Put differently, a state "has no power to project its legislation into" another state. *Baldwin*, 294 U.S. at 521. A finding that a statute is extraterritorial is all but fatal; an exacting, virtual *per se* standard applies to such statutes, similar to that which is applied to protectionist and discriminatory laws. *See Int'l Dairy Foods Ass'n v. Boggs,* 622 F.3d 628, 646 (1st Cir. 2010).

On the ground, there is serious doubt as to whether a separate extraterritoriality prong truly exists. Courts have observed that the extraterritoriality doctrine may not represent "a distinct line of dormant commerce clause jurisprudence at all." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015) (Gorsuch, J.); *see also IMS Health, Inc. v. Mills*, 616 F.3d 7, 30 (1st Cir. 2010) ("Those state statutes [invalidated by this Court] raised independent concerns about protectionism under established strands of the dormant Commerce Clause.").

This is a well-founded point. The cases from this Court seemingly providing the most critical support for a stand-alone extraterritoriality doctrine may be examples of the traditional anti-protectionism, anti-discrimination, and balancing principles.

In *Baldwin*, this Court struck down a New York statute because the State conceded that the purpose of the statute was "[t]o keep the [in-state] system [of milk production] unimpaired by competition from afar." 294

U.S. at 519. In other words, the problem with the statute was its root in economic protectionism, and not its extraterritorial reach. *See* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1905-06 (1987) ("The statute in *Baldwin* was struck down, not because it operated extraterritorially (although some people have read the case that way), but because of the statute's clear purpose to protect in-state milk producers[.]"). Likewise, in *H. P. Hood & Sons, Inc. v. Du Mond*, this Court invalidated a Massachusetts statute that permitted a public commissioner to deny a license to a milk distributor if the license would not "tend to a destructive competition" in the State. 336 U.S. 525, 538 (1949). Again, the statute was based on an impermissible protectionist purpose. *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1245-52 (1986) (showing why *Baldwin* and *Hood* are cases tied to economic protectionism).

Similarly, in *Healy v. Beer Institute, Inc.*, this Court invalidated a Connecticut statute that sought to boost the in-state market for beer, as residents were traveling out-of-state to purchase cheaper beer, by requiring brewers to affirm that out-of-state prices were no lower than in-state prices. 491 U.S. 324, 328 (1989). The Court wrote that if a brewer opted into the Connecticut market, the brewer would be locked into the price that it can charge in border States. *Id.* at 337-38. In doing so, the Court invoked language indicative of the

extraterritoriality doctrine. But the Court also determined that the statute discriminated against "interstate brewers or shippers of beer," "essentially penalizing Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State." *Id*. at 341. In other words, *Healy* falls within in the anti-discrimination prong of the Dormant Commerce Clause, and thereby cuts against the existence of or need for a freestanding extraterritoriality strand. The same may be said of *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986), which involved an almost identical price-affirming statute.

In *Edgar v. MITE Corporation*, Illinois required any company seeking to take over an Illinois corporation to register a tender offer with the Illinois Secretary of State, who could check the offer for substantive fairness. 457 U.S. 624, 626-27 (1982). A Delaware corporation sought to issue a tender offer for an Illinois corporation. *Id.* at 627. A majority of the Court invalidated the statute, enlisting a *Pike* balancing analysis. *Id*. at 644. Only a plurality would have held that, because a single shareholder need not be in Illinois for the registration requirement to take effect, the statute regulated wholly out-of-state conduct. *Id.* at 641 (plurality). *See* Regan, 85 MICH. L. REV. at 1868 n.18 (the *Pike* analysis "received five votes and thereby became technically the opinion of the Court."); *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 547-48 (7th Cir. 2003) (applying *Pike* despite the argument that *Edgar* calls

for a separate analysis for extraterritoriality challenges).

Taken together, these observations support concerns about the existence of a truly free-standing extraterritoriality doctrine. Accordingly, the Court should address whether the extraterritoriality doctrine plays a separate role outside of the traditional protectionist, discrimination, and *Pike* aspects of the Dormant Commerce Clause.

II. Should the Extraterritoriality Doctrine Be Scrapped?

Even if the extraterritoriality doctrine can be separated from the other prongs of the Dormant Commerce Clause, its continued vitality has been questioned for at least two reasons: first, it lacks textual and structural support, and has questionable historical support; and second, it is out of step with modern cases and economic circumstances.

A. The Doctrine Lacks Textual and Structural Support, and Has Questionable Historical Support.

The extraterritoriality doctrine cannot be squared with the text or structure of the Constitution, and its historical support is mixed at best. While these points also may apply to the Dormant Commerce Clause in general, the Fourth Circuit predicated its decision on the extraterritoriality doctrine in particular and thus only the vitality of this specific doctrine should be on the table.

The textual argument against the extraterritoriality doctrine is as follows: Article I, Section 8, Clause 3, the ostensible textual source of the Dormant Commerce Clause, refers only to the power of Congress to regulate "Commerce . . . among the several States[.]" U.S. CONST. art. I, § 8, cl. 3. The Clause mentions only an affirmative authority vested in the Congress and says nothing at all about the States, let alone restricting the power of the States to act. *See Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 202 (1990) (Scalia, J., concurring) ("The text from which we take our authority to act in this field . . . is nothing more than a grant of power to Congress[.]"). It is because of this textual flaw that some have suggested grafting the Clause onto other express provisions of the Constitution. *See*, *e.g.*, Mark D. Rosen, *State Territorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1141-42 (2010) (Full Faith and Credit Clause); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982) (Article IV Privileges and Immunities Clause); *Am. Beverage Ass'n v. Snyder,* 735 F.3d 362, 380 (6th Cir. 2013) (Sutton, J., concurring) (Due Process Clause).

The structural argument against the extraterritoriality doctrine is as follows: Article I, Section 8 enumerates the specific things that Congress can do, while Article I, Section 9 lists specific things that Congress cannot do. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1395 (1987) ("Article I, section 8, contains an extensive list of separate, discrete, and enumerated

powers granted to Congress, whereas article I, section 9, contains a comparable list of powers specifically denied to it."). Article I, Section 10 lists specific things that the States cannot do. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343 (1816) ("[Section 10 is] a long list of disabilities and prohibitions imposed upon the states").

The Dormant Commerce Clause does not fit in Section 8, as that section defines what Congress has the power to do—not what the States cannot do. As an apparent restriction on the authority of the States, the Dormant Commerce Clause most naturally would be situated in Section 10. But Section 10 contains no such prohibition. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) ("[T]here is no correlative denial of power over commerce to the States in Art. I, § 10[.]"). Accordingly, the Dormant Commerce Clause is an anomaly in the otherwise straightforward constitutional design of Article I. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571 ("there is no dormant commerce clause to be found within the text or textual structure of the Constitution.").

The historical argument against the extraterritoriality doctrine is as follows: At the time of the founding, Madison expressed concern about the ability of States to tax goods imported from other States. He thus believed that the Commerce Clause contained a

dormant dimension "that was intended as a negative and preventative provision against injustice among the States themselves, rather than [just] as a power to be used for the positive purposes of the General Government." *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 193 (1994) (quoting 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (1911)). Justice Scalia pointed out, however, Madison's comment was offered in the context of Article I, Section 10, not Article I, Section 8, the ostensible textual home for the Dormant Commerce Clause. *Tyler Pipe*, 483 U.S. at 263 (Scalia, J., concurring in part and dissenting in part). Justice Scalia concluded ultimately that the "historical record provides no grounds for reading the Commerce Clause to be other than . . . an authorization for Congress to regulate commerce." *Id*.

This Court subsequently countered, claiming that the Dormant Commerce Clause has "deep roots" in that it is responsive to the Framers' concerns about the impact of state taxes on a healthy national economy. *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). But the only founding-era source cited in *Wynne* is *dicta* from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *Gibbons* involved an actual conflict or "collision" between a license issued pursuant to a federal statute, on one hand, and a state-issued license, on the other. *See id*. at 2. The Dormant Commerce Clause applies, however, when Congress has stayed its hand, and the Commerce Clause is "unexercised." *Wardair Canada, Inc. v. Fla. Dep't of Rev*., 477 U.S. 1, 8 (1986). As this Court has repeatedly stressed, *dicta* is

owed no allegiance. *See*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("We adhere . . . not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions."); *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("invoking our customary refusal to be bound by *dicta*"). Accordingly, *Gibbons* may be a weak foundation on which to rest an entire constitutional doctrine.

In the other oldest "root" cited in *Wynne*, the Court apparently embraced the Dormant Commerce Clause, but in doing so acknowledged that the "question had never been decided by this court" or "come before this court." *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. (12 How.) 299, 318 (1852). In the overall span of our constitutional republic, the Dormant Commerce Clause is of relatively recent vintage. What can be said with any certainty is that the historical support for a dormant or negative Commerce Clause is far from definitive. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (extended "debate" and "speculation" about what the Framers envisioned "largely cancel each other").

These textual and structural deficiencies, and this questionable historical lineage, serve as sufficient reasons to revisit the extraterritoriality doctrine.

B. The Doctrine May Be at Odds with *Wayfair* and Modern Economic Realities.

Doubts as to whether the extraterritoriality doctrine should be part of positive law have increased in light of this Court's decision in *Wayfair* and modern economic realities.

In *Wayfair*, the Court held that, consistent with the Dormant Commerce Clause, States may impose taxes on out-of-state online merchants regardless of the merchants' lack of physical presence in the State. In several respects, *Wayfair* cuts against the vitality of the extraterritoriality doctrine.

First, according to some surveys of constitutional history, the Dormant Commerce Clause served the important role of patrolling the exclusive power of Congress over commerce and thereby of preventing the States from stepping into that same sphere of power. *See Byrd v. Tenn. Wine and Spirits Retailers Ass'n*, 883 F.3d 608, 629 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part) ("If Congress had authority over a form of commerce, the States usually did not."). Today, however, "the National Government and States largely have *overlapping* power over most sectors of commerce[.]" *Id*. at 631 (emphasis in original). With this shift, federal exclusivity over commerce diminished, so too did the purpose of the extraterritoriality doctrine. As one prominent jurist pointed out, "the original function of the extraterritoriality doctrine has been lost to time." *Snyder*, 735 F.3d at 378-79 (Sutton, J., concurring); *see also id.* at 378 (concluding that the

doctrine is a "relic of the old world"). *Wayfair* clarifies that, as a historical matter, "the power to regulate commerce in some circumstances was held by the States and Congress concurrently," *Wayfair*, 138 S. Ct. at 2090, suggesting that the justification for the Dormant Commerce Clause as a safeguard of federal power over economic matters is lacking *both* historically and presently.

Second, *Wayfair* eschews the formalistic fixation on geographic location (*e.g.*, whether the regulated drugs are manufactured out-of-state). Instead, *Wayfair* instructs that, for purposes of the Dormant Commerce Clause, attention should be paid to the nature of the regulated transaction (*e.g.*, whether goods are directed in-state) and to the nature of today's economy (*e.g.*, that regulated entities easily can reach and advertise to consumers from across the country). *See Wayfair*, 138 S. Ct. at 2092-93 (emphasizing the regulated entity's affirmative decision to enter an in-state market, not the initial location of the inventory); *Ass'n for Accessible Meds. v. Frosh*, No. 17-2166, 117-cv-01860-MJG, 2018 WL 3574755, *3 (4th Cir. July 24, 2018) (Wynn, J., dissenting from the denial of rehearing en banc) ("The majority's myopic focus on the *location* of the transaction is precisely the 'physical presence' approach *Wayfair* rejected as 'artificial in its entirety.'") (quoting *Wayfair*, 138 S. Ct. at 2095; emphasis in original).

Indeed, sophisticated commercial realities served as the critical context for the Court's understanding of the meaning and scope of the Dormant Commerce

Clause. "The Internet's prevalence and power have changed the dynamics of the national economy," the Court recognized. *Wayfair*, 138 S. Ct. at 2097. The Court took note of "[t]he dramatic technological and social changes of our increasingly interconnected economy," the "continuous and pervasive virtual presence of retailers today," which "mean that buyers are closer to most major retailers than ever before—regardless of how close or far the nearest storefront." *Id.* at 2095 (internal citations and quotes omitted). In light of these economic conditions, the Court determined that "[m]odern e-commerce does not align analytically with a test that relies on . . . physical presence[.]" *Id.*; *see also Frosh*, 2018 WL 3574755, at *3 (Wynn, J., dissenting from the denial of rehearing en banc) ("e-commerce and nationwide distribution chains rendered the physical presence rule outmoded"). In the modern economy, territorial limits are meaningless. *Cf. Snyder*, 735 F.3d at 378 (Sutton, J., concurring) ("that line has come and gone").

Third, some courts weigh the impact of multiple, interlocking regulations in the context of Dormant Commerce Clause challenges. *See Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 673 (2018); *Snyder,* 735 F.3d at 375-76. Similarly, the Court in *Wayfair* acknowledged that "State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase" and that "[t]hese burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States."

Wayfair, 138 S. Ct. at 2098. But the Court asserted that "software that is available at a reasonable cost may make it easier for small businesses to cope with these [compliance] problems." *Id*. Put differently, modern economic conditions have enabled merchants to be able to navigate successfully these various regulatory systems, and have made it less likely that in-state regulations will adversely impact interstate commerce necessitating judicial involvement. Thus, a major justification for the extraterritoriality doctrine—to mitigate the impact of diverse regulatory policies—is less applicable in today's sophisticated economy.

Fourth, under *Wayfair*, the Dormant Commerce Clause and the requirements of the Due Process Clause converge. This suggests that the work of the latter may be sufficient to encompass the considerations of the former, and that the former is not needed. *Accord Snyder*, 735 F.3d at 380 (Sutton, J., concurring). An out-of-state entity that claims that it is subject to an impermissible tax may turn, therefore, to the Due Process Clause for potential relief.

Fifth, in *Wayfair*, the Court wrote that, at the end of the day, "Congress may legislate to address these problems if it deems it necessary and fit to do so." *Id.*; *accord Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 424-25 (1946). The Court therefore placed renewed focus on Congress to negate State laws through affirmative legislation (*e.g.*, knocking out state laws by way of preemption), and not on the courts invoking the Dormant Commerce Clause (*e.g.*, negating state laws

even in the absence of congressional action).[2] This would seem to signal the Court's movement away from the Dormant Commerce Clause as a means of dealing with actual or potential regulations that may impact or implicate interstate commerce.

There is ample reason to suspect that, as Judge Sutton suggested, the extraterritoriality doctrine's time has come and gone. Should the doctrine be scrapped, nothing may be lost. The concerns underlying it still may be served by other constitutional principles. As noted above, scholars and others have sought to find alternative textual homes, such as the Due Process Clause, for the extraterritoriality doctrine. Moreover, the work of the extraterritoriality doctrine may be accomplished by way of the core protectionist, discrimination, and balancing concepts without resort to an independent extraterritoriality analysis. *See Snyder*, 735 F.3d at 381 (Sutton, J., concurring) ("I am not aware of a single Supreme Court dormant Commerce Clause holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law.").

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[2] The preference for Congress to remove the physical presence rule, *see Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting), may not apply to *amici's* suggestion that the extraterritoriality doctrine be revisited as a whole. While it is up to Congress to develop economic policy, *amici* are placing before the Court an issue of constitutional interpretation. Congress cannot revisit the Court's construction of Article I, Section 8. That responsibility lies with this Court's and this Court's alone.

This Court should take the opportunity to determine whether, especially in light of *Wayfair*, the extraterritoriality doctrine is worth retaining.

III. What Does the Extraterritoriality Doctrine Mean?

Even if the doctrine is to play a role in today's sophisticated borderless economy, the courts' ongoing confusion with respect to the doctrine suggests that the doctrine seems incapable of precise definition or reasoned application.

The incoherence of the Dormant Commerce Clause has been well-established by this Court and leading scholars alike.[3] The extraterritoriality doctrine, "the least understood" aspect of the Dormant

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[3] *See*, *e.g.*, *N.W. States Portland Cement Co. v. Minn.,* 358 U.S. 450, 458 (1959) (acknowledging past Dormant Commerce Clause decisions are a "quagmire"); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) ("[T]he jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused."); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) ("our applications of the [Dormant Commerce Clause] doctrine, not to put too fine a point on the matter, made no sense"); *Byrd*, 883 F.3d at 631 (Sutton, J., concurring in part and dissenting in part) (in the modern era, the Dormant Commerce Clause "is much more difficult to articulate and police"); *see also* Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125 (1979) (describing the "incoherence," "confusion," and "conceptual muddle" of the Supreme Court's Dormant Commerce Clause jurisprudence); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 445 (4th ed. 2011) (observing that the Court's Dormant Commerce Clause cases are "inconsistent").

Commerce Clause, *Epel*, 793 F.3d at 1172 (Gorsuch, J.), is even less coherent.[4]

A cursory examination of recent extraterritoriality cases uncovers the depth of the confusion inherent in the extraterritoriality context. For example, to give meaning to the doctrine, courts may probe whether the reviewed statute precludes an out-of-state regulated entity from complying with out-of-state laws, *Ass'n des Éleveurs de Canards et D'Oies du Québec v. Harris*, No. 2:12-cv-05735-SVW-RZ, 2012 WL 12842942, at *8 (N.D. Cal. Sept. 18, 2012), or whether it precludes an out-of-state entity from participating in an in-state commercial activity partially or completely, *see Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013). Or, the relevant inquiry may be whether the in-state statute precludes or frustrates federal policy. *See Byrd*, 883 F.3d at 629 (Sutton, J., concurring in part and dissenting in part)

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[4] *See*, *e.g.*, Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009) (observing that the scope of the extraterritoriality doctrine "remains notoriously unclear"); Daniel Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 899 (2008) ("the ban on extraterritoriality is logically incoherent"); Regan, 85 MICH. L. REV. at 1884 ("[W]e have no acceptable account of the constitutional underpinnings of the principle."); *id*. at 1896 ("For the most part, states may not legislate extraterritorially, whatever exactly that means."); Jeffrey M. Schmitt, *Making Sense of Extraterritoriality: Why California's Progressive Global Warming and Animal Welfare Legislation Does Not Violate the Dormant Commerce Clause*, 39 HARV. ENV'T L. REV. 423, 424 n.3 (2015) (collecting cases and articles suggesting that the extraterritoriality jurisprudence is "confusing and seemingly inconsistent").

("Whatever else this [state] requirement does, it does not purport to displace or contradict congressional regulation of commerce among the States."). Perhaps it may be, as in the case below, whether the regulated activity is situated "upstream" and therefore located out-of-state, *Frosh*, 887 F.3d at 671, or whether it is in the "stream of commerce" and therefore construed to be in state, *id*. at 680 (Wynn, J., dissenting). Another possibility is whether a statute is no longer extraterritorial because the regulated entity voluntarily enters into the in-state market. *See Epel*, 43 F. Supp. 3d at 1179, 1181; *Ass'n for Accessible Meds. v. Frosh*, No. MJG-17-1860, 2017 WL 4347818, at *6 (D. Md. Sept. 29, 2017). Courts also have concerned themselves with hypothetical situations in which other states adopt statutes similar or identical to the one under consideration. *See Frosh*, 887 F.3d at 673; *Snyder*, 735 F.3d at 375-76. Yet a further consideration is whether the state considered other alternative solutions to the issue giving rise to the law in question. *See Snyder*, 735 F.3d at 375. There may even be industry-specific rules, as courts have asked whether the statute implicates a commercial sector that requires a uniform or national regulatory standard. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013).

This small universe of cases demonstrates that the courts are unclear as to what extraterritoriality means in the first place. That these federal courts launched various, conflicting inquiries in reviewing extraterritoriality challenges raises many questions: Which of these considerations, individually or collectively,

should courts apply? Which considerations, if any, should be given greater or determinative weight compared to the others? Do the relevant considerations change depending on the industry involved? Given the diversity of approaches invoked across the country to give meaning to the extraterritoriality doctrine, the single approach utilized by the Fourth Circuit to invalidate Maryland's anti-price-gouging statute may not be correct. Worse, this area of law as a whole may be incapable of any reasoned application.

This Court should address the widespread incoherence of the extraterritoriality doctrine, and either identify the proper touchstone of extraterritoriality cases or admit that the extraterritoriality doctrine is not susceptible to consistent or principled application.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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