No. 18-546

In The Supreme Court of the United States

BRIAN E. FROSH, Attorney General of Maryland, and ROBERT R. NEALL, Maryland Secretary of Health,

Petitioners,

v.

ASSOCIATION FOR ACCESSIBLE MEDICINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

BRIAN E. FROSH
Attorney General of Maryland

JULIA DOYLE BERNHARDT*
Chief of Litigation

JOSHUA N. AUERBACH
LEAH J. TULIN
JOHN R. GRIMM
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
jbernhardt@oag.state.md.us
(410) 576-7291

Attorneys for Petitioners

**Counsel of Record*

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR PETITIONERS

AAM's brief in opposition misses the broader point of this case: This Court has not yet addressed whether the Commerce Clause prohibits states from protecting their citizens from abusive commercial practices that are targeted at in-state consumers but originate out of state, and uncertainty over that question is now directly interfering with states' ability to address a current, well-documented public health risk. This case presents an important federalism question that only this Court can resolve.

ARGUMENT

I. This Case Presents an Important Question of States' Sovereign Power, Which the Court Has Never Addressed.

A. States' Ability to Regulate Harmful Commercial Conduct Originating Out of State Presents an Open Constitutional Question.

AAM does not dispute Maryland's central argument that the Court "has not squarely addressed whether states can pass laws that obligate out-of-state manufacturers to respect state-law requirements on the in-state sale of products." Pet. 14. As Maryland showed in its petition, *e.g.*, Pet. 15-21, in every case where this Court struck down laws with an extraterritorial reach, it did so because the statute at issue was motivated by a protectionist desire to advantage

in-state commerce. The Court's major extraterritoriality cases—*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989)—all involved laws that, unlike Maryland's Anti-Price-Gouging Act, were intended to artificially prop up in-state commercial interests by preventing commercial actors from being more competitive in other states. *See* 491 U.S. at 326; 476 U.S. at 577-80; 294 U.S. at 519.

In contrast to the discriminatory laws at issue in the *Baldwin* line of cases, the purpose behind Maryland's Anti-Price-Gouging Act was to combat a public-health threat resulting from essential prescription drugs becoming unavailable to Maryland consumers, not to give Maryland's industry an artificial competitive advantage—another fact AAM does not dispute. The Court's existing extraterritoriality cases do not address this situation.

Despite conceding that this Court has never held that "an extraterritorial effect, standing alone, is forbidden," Br. in Opp'n 25 (quoting Pet. 15), AAM argues that Maryland's law constitutes a *price control*, not an *out-of-state effect* on pricing. Although it is unclear where AAM draws the line between controlling a price and having an incidental effect on a price, it is clear that Maryland does not, as AAM suggests, "insist[] that manufacturers sell their drugs to a wholesaler *for a certain price*," Br. in Opp'n 25 (quoting *Pharmaceutical Research & Manufacturers of Am. v. Walsh*, 538 U.S.

664, 669 (2003)) (emphasis added);[1] rather, Maryland's Anti-Price-Gouging Act allows manufacturers to charge any price for a drug that will be sold to consumers in Maryland as long as the price does not shock the conscience,[2] and any price at all for a drug that will be sold in another state.

Maryland's Anti-Price-Gouging Act is therefore not proscribed by the *Baldwin* line of cases. The Fourth Circuit's contrary holding confirms the need for this Court to clarify the limits of the extraterritoriality rule those cases embody.

B. Maryland's Anti-Price-Gouging Act Does Not Regulate Purely Out-of-State Transactions.

Because Maryland's Anti-Price-Gouging Act applies only to drugs that will be sold to consumers in Maryland, the law has no applicability whatsoever to

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[1] As Maryland has already argued, *see* Pet. 17 n.2, *Walsh* does not suggest that a price *ceiling* suffers the same constitutional infirmity as a price-parity requirement.

[2] Moreover, an "[u]nconscionable [price] increase" is, by definition, "not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health." App. 117a. Thus, the price cap imposed by Maryland's Anti-Price-Gouging Act does not apply to any price increase that is commercially necessary. Preventing manufacturers from charging commercially unnecessary prices that shock the conscience for those drugs, and only those drugs, that will be sold in Maryland, is a far cry from requiring manufacturers to sell their drugs "for a certain price."

sales that will not become part of in-state commerce.[3] AAM fails to grapple with that fact, but it makes all the difference, because Maryland law does not regulate the prices drug manufacturers can charge for drugs that will be sold anywhere else in the country. The sales covered by the Anti-Price-Gouging Act are part of the stream of *in-state* commerce, and are properly subject to state regulations that ensure public safety.

In similar contexts, this Court has upheld state laws that place uniform conditions—that both in-state and out-of-state actors must follow—on the *in-state* sale of goods, even where those conditions require certain conduct to occur out of state. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458-59 (1981) (upholding law requiring in-state and out-of-state milk producers to use certain packaging in order to sell milk in state). Federal courts of appeals have done likewise. *See International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010) (upholding law placing labeling requirements on out-of-state manufacturers whose goods would be sold in the state);

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[3] AAM suggests that this is a new argument. Br. in Opp'n. 20. But at every stage of this litigation, Maryland has consistently explained that its Anti-Price-Gouging Act regulates only sales directed toward Maryland consumers. *See* Br. of Appellees 13, *AAM v. Frosh*, No. 17-2166 (4th Cir.) (ECF No. 39) (noting that the Act regulates "only sales to *consumers* in *Maryland*") (emphasis in original); Mem. in Supp. of Mot. to Dismiss 23, *AAM v. Frosh*, No. 17-cv-1860 (D. Md.) (ECF No. 29-1) ("[T]he Act does not reach, or purport to reach, any stream of commerce that does not end in Maryland.").

National Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 110 (2d Cir. 2001) (same).

AAM fails to address *Clover Leaf*—even though the petition highlighted how that decision supports Maryland's law, Pet. 20—and purports to distinguish *Sorrell* and *Boggs* on the ground that the Vermont and Ohio statutes at issue apply "only to sales *in Vermont*" and to "products sold *in Ohio*" and are "indifferent to whether [goods] sold anywhere else in the United States are labeled or not." Br. in Opp'n 13, 14 (quotation marks omitted). But Maryland is also indifferent to products sold "anywhere else in the United States." The Minnesota law at issue in *Clover Leaf*, the Vermont law at issue in *Sorrell*, the Ohio law at issue in *Boggs*, and Maryland's Anti-Price-Gouging Act all operate the same basic way: By requiring a manufacturer to take actions *out of state* if (but only if) it wants its products sold *in the state*.

The only difference between the Maryland Act and the laws at issue in *Clover Leaf*, *Sorrell*, and *Boggs* is that those cases involved labels and packaging while this case involves pricing. But AAM does not offer a single reason why a state may dictate the labelling and packaging an out-of-state manufacturer must use before its product may be sold into the state, but may not limit the prices a manufacturer may impose out of state before the product may be sold into the state. The closest analogues to Maryland's Anti-Price-Gouging Act that this Court and lower appellate courts have considered, therefore, support the Act's validity.

Nor is there any basis for concern that if multiple states passed similar laws, manufacturers could be subject to multiple different price-gouging standards. Br. in Opp'n 23. As an initial matter, it is unclear how two state laws limiting prescription drug prices could *conflict*. Even if one set a lower limit than the other, and even if manufacturers were forced to sell their drugs for one uniform price nationwide (which nothing suggests is the case), a manufacturer could comply with both laws as long as its prices were within the lower limit.[4] Although this may not be ideal to AAM's members, it does not present an irresolvable conflict as would, say, two states each requiring retailers to offer their residents better prices than any other state's residents.

AAM's attempts to force this case into the *Baldwin* line of decisions demonstrate only that the Court's existing extraterritoriality precedent is a poor fit to address legislation intended to solve a new threat to public wellbeing emerging in an inherently interstate market. The absence of clear guidance from this Court on how the Commerce Clause governs non-discriminatory statutes like Maryland's Anti-Price-Gouging Act now threatens legitimate exercises of state sovereignty.

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[4] AAM's hypothetical example, arising if "Pennsylvania officials have a different view as to what makes a price 'unconscionable'—which is entirely likely given the indeterminacy of the statutory standard," Br. in Opp'n 23, is really one about statutory vagueness, not extraterritoriality.

This Court's review is necessary to restore Maryland's sovereign power to address an emerging public-health risk.

II. Confusion Among the Circuits Warrants this Court's Review.

The Ninth Circuit has unambiguously stated that this Court's extraterritoriality cases "are not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices," *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013) (internal quotation marks and modifications omitted), and Justice Gorsuch, writing for the Tenth Circuit has explained that this Court's extraterritoriality jurisprudence concerns "only price control or price affirmation statutes." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (Gorsuch, J.). The Fourth Circuit disagreed with both the Ninth and Tenth Circuits' analyses, which the court found "too narrow." App. 12a. Thus, as the result of the decision below, the extraterritoriality doctrine is broader in the Fourth Circuit than in other circuits.[5]

Although AAM dismisses the Ninth and Tenth Circuits' Commerce Clause analysis as dictum, Br. in Opp'n 16, 17, this so-called dictum was integral to the

[5] In a passage AAM overlooks, at least one judge of the Sixth Circuit also suggested that the extraterritoriality doctrine "is a relic of the old world with no useful role to play in the new[.]" *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring).

courts' holdings. In *Harris*, the Ninth Circuit held that because the California statute at issue did "not impose any prices for duck liver products [or] tie prices for California liver products to out-of-state prices," "*Healy* and *Baldwin* are thus inapplicable in this case." 720 F.3d at 951. Likewise, in *Epel*, the Tenth Circuit held that *Baldwin*, *Healy*, and *Brown-Forman* did not require the Colorado statute at issue to be struck down for three specific reasons: The statute "isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters." 793 F.3d at 1173.

The Ninth Circuit also recently rejected an extraterritoriality challenge to a California statute that limited greenhouse gas emission based in part on a fuel's carbon content at out-of-state production stages. In doing so, it affirmed "the commonplace proposition that states may regulate to minimize the in-state harm caused by products sold in-state." *Rocky Mountain Farmers Union v. Corey*, ___ F.3d ___, Nos. 17-16881, 17-16882, 2019 WL 254686, at *8 (9th Cir. 2019). The court recognized that "subjecting both in and out-of-jurisdiction entities to the same regulatory scheme" "is not an extension of 'police power beyond [a state's] jurisdictional bounds.'" *Id.* at *8. In short, "[t]he Commerce Clause . . . does not treat regulations that have upstream effects on how sellers who sell to [in-state] buyers produce their goods as being necessarily extraterritorial." *Id.*[6]

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[6] Anticipating AAM's argument that Maryland's Anti-Price-Gouging Act would be anathema to the Founders, the court also

Thus, whereas the Ninth and Tenth Circuits have held that the *Baldwin* line of cases does not even *apply* to statutes that do not involve price tying,[7] the Fourth Circuit relied on those very same cases in striking down a statute that does not involve price tying. Doctrinally, those results are polar opposites. The decision below will inevitably lead to inconsistent results, as future litigants point to the Fourth Circuit's rejection of its sister circuits' analyses.

III. The Decision of the Fourth Circuit Does Serious Damage to the States' Police Powers.

Although AAM does not dispute the grave public-health risks caused by prescription-drug price gouging,[8] or deny that Maryland's motivation in passing its Anti-Price-Gouging Statute was to combat a threat to

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observed that "whatever else may be said of the revolutionary colonists who framed our Constitution, it cannot be doubted that they respected the rights of individual states to pass laws that protect human welfare." *Rocky Mountain*, 2019 WL 254686, at *2.

[7] AAM argues that the statutes in *Harris* and *Epel* were not really extraterritorial regulations, and *that* is why they were upheld. Br. in Opp'n 16, 17. It may be true that those statutes would have been upheld even if the *Baldwin* line of cases applied to them, but AAM cannot deny that the *Harris* and *Epel* courts specifically discussed the fact that the challenged statutes did not involve price tying as a basis for not applying the *Baldwin* line of cases.

[8] In addition to harming lower-income Americans whose medications become too expensive, prescription-drug price gouging also places economic strain on the health-care system and burdens governments and taxpayers. *See generally* Br. of Amici Curiae Nat'l Health Law Program, *et al.*

public welfare, it downplays the significant damage the Fourth Circuit dealt to Maryland's police powers. Instead, AAM argues that Maryland should attempt to limit harmful drug prices through alternate means.

But as a sovereign state, Maryland is entitled to pursue the policy preferences of its elected legislature to the fullest extent permitted by the Constitution. And when an erroneous constitutional interpretation interferes with Maryland's exercise of its sovereign power, it is a matter of great importance appropriate for this Court to resolve. *See Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428 (2014) (Thomas, J., statement respecting denial of stay application) ("We have recognized a strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding federal statutes unconstitutional. States deserve no less consideration.") (internal citations omitted). Maryland should not be forced to defer to Congress to regulate prescription drug prices, or adopt a regulatory scheme more agreeable to AAM, based on a lower court's unjustified expansion of the extraterritoriality doctrine.

The availability of alternative regulatory schemes is a red herring. States should not have to compromise on their policy objectives if the approach chosen by their elected lawmakers is constitutional. Maryland, and all states facing the threat of out-of-control drug prices, are entitled to know the constitutional limits of their power to protect their citizens. This case presents an ideal vehicle to resolve the confusion surrounding

the Court's extraterritoriality precedent, and the Court's review is necessary to do so.

IV. AAM's Alternative Theories Are Not Before the Court and Do Not Justify Denying the Petition.

As AAM itself explained in seeking immediate review of its dormant Commerce Clause claim, the question presented here "is entirely separate and distinct from the remaining vagueness claim" and "the legal inquiry necessary to resolve the former shares no overlap with the inquiry necessary to resolve the latter." AAM's Mot. for Entry of Partial Final J. and for Inj. Pending Appeal at 5, *AAM v. Frosh*, No. 17-cv-1860 (ECF No. 46). This case concerns the Fourth Circuit's unjustified restriction on Maryland's power to protect its citizens, not an imagined ruling on a wholly unrelated legal question—one that the district court has not even addressed, and which therefore provides no alternate basis for affirmance. The Court should grant the petition and reverse the Fourth Circuit, and allow the lower courts to resolve what to do with AAM's vagueness claims. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (remanding for lower court to decide appellee's alternative arguments that were not addressed below).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

JULIA DOYLE BERNHARDT*
Chief of Litigation

JOSHUA N. AUERBACH
LEAH J. TULIN
JOHN R. GRIMM
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
jbernhardt@oag.state.md.us
(410) 576-7291

Attorneys for Petitioners

**Counsel of Record*