

No. 21-1262

In The
Supreme Court of the United States

TITLEMAX OF DELAWARE, INC., et al.,
Petitioners,

v.

ROBIN L. WEISSMANN,
Respondent.

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

**BRIEF OF *AMICUS CURIAE*
AMERICAN FINANCIAL SERVICES ASSOCIATION,
IN SUPPORT OF PETITIONERS**

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The American Financial Services Association (“AFSA”) respectfully submits this brief as *amicus curiae* in support of TitleMax of Delaware, Inc.’s (“TitleMax’s”) Petition for a Writ of Certiorari.¹



INTEREST OF *AMICUS CURIAE*

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 100 years, AFSA has represented financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA supports financial education for consumers of all

¹ Counsel of record for all parties received notice at least 10 days before the due date of *amicus curiae*'s intention to file this amicus brief. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party other than AFSA, its members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ages. AFSA advocates before legislative, executive, and judicial bodies on issues affecting its members' interests.

AFSA has a vital interest in the outcome of this case. AFSA members expend considerable effort and expense in assuring that they comply with applicable State and local laws in extending direct loans to consumers and in assuring similar compliance by sellers from whom they purchase retail installment sales contracts. As described below, that task is made infinitely more difficult, if not impossible, if the State where a consumer resides may extend its laws to govern loans or sales made to its residents in other States.



SUMMARY OF ARGUMENT

TitleMax's petition raises an important, recurrent dormant Commerce Clause issue. Like Pennsylvania, many other States have enacted statutes that purport to have extraterritorial effect, applying to transactions their residents enter into in other States. These laws transgress two key principles developed in this Court's dormant Commerce Clause decisions, applying one State's laws to transactions occurring wholly outside its borders and forcing other States' merchants to seek that State's regulatory approval for those transactions.

These laws that purport to follow a State's residents to other States create intractable difficulties for merchants in those other States and erect serious barriers to the free flow of interstate commerce. They also

deny the State's residents the ability to travel to other States to obtain goods or services they need or desire, but their home State restricts or prohibits.

The vehicle sales and financing sector illustrates how laws that follow a State's residents elsewhere obstruct interstate commerce. Only by settling its dormant Commerce Clause suit against Michigan officials has Tesla been able to sell its cars to Michiganders, so long as they consummate their purchases in other States. If Michigan law followed its residents out of that State, it would prohibit those sales as it bars a manufacturer from selling cars directly to consumers and from obtaining a dealer's license. Extraterritorial application of either California or Nevada statutes prescribing the contents of motor vehicle credit sales contracts would inhibit or prevent car sales in one of these States to the other State's residents because it is impossible to comply simultaneously with each State's laws.

In this case, the Third Circuit declined to apply this Court's dormant Commerce Clause precedents because, in its view, the loans Pennsylvania citizens obtained from TitleMax's stores in other States were not made "wholly outside" Pennsylvania's borders as the loans had consequences in Pennsylvania such as a security interest in a car registered in Pennsylvania and payments from or collection efforts in Pennsylvania. The Court should grant TitleMax's petition to clarify that its dormant Commerce Clause jurisprudence is not a technicality to be so readily evaded. All commercial transactions have antecedents (such as

advertising) and consequences (such as collections or warranties). Those precursors and effects are likely to occur in the State where a consumer resides even if the consumer travels outside the State to enter into a transaction. Hence, the Third Circuit's reasoning would exempt from Commerce Clause scrutiny almost any State statute that applies to transactions the State's residents enter into in other States.

This case should be reviewed alongside *National Pork Producers Council v. Ross*, No. 21-468, in which the Court recently granted certiorari. Each case stems from a State's effort to give its statutes extraterritorial effect. California's Proposition 12 does so indirectly by banning sale in California of food products from animals not treated as California deems appropriate. Pennsylvania does so directly by applying its laws to loans its residents obtain in Delaware, Ohio or Virginia. While this Court has ruled many times on State embargoes or boycotts, like Proposition 12, it has yet to rule on resident-following statutes, and should grant review to do so in this case. Deciding the two cases together is particularly appropriate because the two types of laws can so easily be combined to amplify the extraterritorial projection of a State's authority.



ARGUMENT

I. The Petition Raises An Important And Recurrent Dormant Commerce Clause Issue

TitleMax's petition raises an important issue; namely, whether the dormant Commerce Clause bars a State (here, Pennsylvania) from applying its usury law to loans its residents obtain in other States. The Court should grant review to answer that question in the affirmative.

Pennsylvania's challenged acts offend two core dormant Commerce Clause principles that this Court distilled in *Healey v. Beer Inst.*, 491 U.S. 324, 336 (1989). *See* Pet., 20-21. Pennsylvania applies its usury statute to commerce that takes place wholly outside of its borders. *Id.*; *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion). It also forces other States' merchants to seek Pennsylvania's regulatory approval before making a loan in another State to a Pennsylvania resident at over 6% interest. *Healey*, 491 U.S. at 336; *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986).

Pennsylvania is not alone in thus transgressing dormant Commerce Clause limits. Other States also apply their usury statutes to loans their residents obtain elsewhere and require out-of-State lenders to obtain in-State licenses and regulatory approval for those loans.² States have also applied their statutes to

² *See, e.g.*, Colo. Rev. Stat. § 5-1-201(4); Idaho Code § 28-41-201(4); Ind. Code § 24-4.5-1-201(1)(d); Iowa Code § 537.1201(2)(a); Me. Rev. Stat. tit. 9-A, § 1-201(1), (4);

a wide variety of other transactions their residents enter into in other States. *See* Pet., 17 (citing cases).

These Joe Btfsplk³ laws, hovering over a State's resident, like a personal rain cloud, wherever he or she travels, create intractable difficulties for other States' merchants, erecting serious obstacles to the free flow of interstate commerce. Part II of this brief illustrates the importance and severity of these obstacles to interstate commerce in vehicle sales and financing, a major, heavily regulated sector of the nation's economy.

In addition to obstructing interstate commerce, extraterritorial application of a State's laws may harm its residents by denying them the chance to travel elsewhere to obtain goods or services that are unavailable or forbidden in their home State. Here, Pennsylvania justifies the extraterritorial application of its usury law to its residents' out-of-State loans as necessary to protect Pennsylvanians from being overcharged for credit. But that "protection" comes at a high price, barring Pennsylvanians from crossing State lines to borrow funds they may desperately need for urgent medical treatment, to avoid repossession of a car or to

Okla. Stat. tit. 14A, §§ 1-201(5), (11), 1-201A; Tex. Fin. Code § 348.007(a); W. Va. Code § 46A-1-104; Wis. Stat. § 421.201(2)(b) & (6); Wyo. Stat. § 40-14-120 (a)(iv) & (e).

³ A character in the Li'l Abner cartoon strip, which ran from 1934 to 1977, Joe Btfsplk was "[t]he world's worst jinx. [He] had a perpetually dark rain cloud over his head. Instantaneous bad luck befell anyone unfortunate enough to be in his vicinity. . . . Joe's personal storm cloud became one of the most iconic images in the strip." https://en.wikipedia.org/wiki/Li%27l_Abner.

rescue a home from foreclosure. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 664 (7th Cir. 2010).

If freed of dormant Commerce Clause constraints, Joe Btfsplk laws could deny a State’s residents a wide variety of other products or services they need or desire, but their home State restricts or prohibits. A State could ban its residents from gambling even in States where it is otherwise legal. *See Midwest Title Loans*, 593 F.3d at 666. States that prohibit sale of marijuana could deny their residents the ability to obtain in other States a cannabinoid treatment for cancer chemotherapy-induced nausea or other medical conditions.⁴ Texas could apply its restrictive anti-abortion laws to bar its female residents from leaving the State to have an operation it deems illegal but other States freely allow.⁵ *See Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484, 490 (4th Cir. 2007) (Application of “South Carolina’s statute [to truck sales in other States] would inhibit entrepreneurial activity nationwide and undermine the ability of South Carolina consumers to purchase trucks at competitive prices even outside the state’s borders.”).

TitleMax’s petition presents an excellent vehicle for reaffirming that the dormant Commerce Clause prevents a State from applying its laws to commerce with its residents when conducted wholly outside its

⁴ *See* Franjo Grotenhermen, M.D. & Kirsten Müller-Vahl, Medicinal Uses of Marijuana and Cannabinoids, 35 *Critical Reviews in Plant Sciences* 378 (2017).

⁵ *Compare* Tex. Health & Saf. Code §§ 171.044, 171.204 with Cal. Health & Saf. Code § 123462(c), 123466.

borders. The pertinent facts are clear and undisputed. The parties stipulated to them. Pet. App. 22a n. 9. Pennsylvanians traveled to other States to obtain loans at TitleMax’s brick-and-mortar stores. Pet. App. 3a. The borrowers signed the loan agreement and received the loan proceeds outside Pennsylvania. Pet. App. 3a. Unlike Internet sales, these facts leave no uncertainty about where the transaction occurs. It is wholly outside Pennsylvania.

II. Extraterritorial Application Of State Law Thwarts Interstate Commerce In Vehicle Sales And Finance

By any measure, vehicle sales and finance constitute a major sector of the United States economy. For the year ending in June 2021, sales of new cars and light trucks by the nation’s 16,658 franchised dealers totaled \$600.4 billion.⁶ New and used motor vehicles accounted for about 11% of total Personal Consumption Expenditures on goods in 2021.⁷ About 85% of new automobile purchases are financed directly through

⁶ Nat’l Auto. Dealers Ass’n, NADA Data 2021, pp. 3, 5, 8, publicly available at <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474864928> (last visited April 9, 2022).

⁷ U.S. Bureau of Economic Analysis, Personal Consumption Expenditures, Personal Consumption Expenditures: Durable goods: New motor vehicles, Personal Consumption Expenditures: Durable goods: Net purchases of used motor vehicles retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/PCECA>, <https://fred.stlouisfed.org/series/DNMVRC1A027NBEA>, <https://fred.stlouisfed.org/series/DNPVRC1A027NBEA> (last visited April 12, 2022).

loans or leases or indirectly through retail installment sales contracts (“RISCs”).⁸ In the fourth quarter of 2021 alone, there were \$181 billion in newly originated automobile RISCs, loans, and leases, while total consumer automobile debt totaled \$1.45 trillion, or approximately 9.3% of total consumer debt.⁹ New and used car dealers employed about 1.9 million workers in March 2022,¹⁰ with an additional 90,585 jobs in sales finance.¹¹

Vehicle sales and finance is also one of the most heavily regulated sectors of the economy. Every State licenses and regulates automobile dealers. In some States, dealers are also separately licensed to originate RISCs.¹² Almost every State also licenses consumer

⁸ John Egan, *Are More Drivers Financing New or Used Cars?* (October 29, 2020), publicly available at <https://www.experian.com/blogs/ask-experian/new-vs-used-auto-loans-what-are-drivers-financing-more/#:~:text=In%20Q2%202020%2C%20used%20cars,with%2036.8%25%20of%20used%20cars> (last visited April 12, 2022).

⁹ Fed. Reserve Bank of New York, *Research & Statistic Group, Household Debt and Credit (2021—Q4; released February 2022)*, pp. 1, 3 (underlying data).

¹⁰ U.S. Bureau of Labor Statistics, *All Employees, Motor Vehicle and Parts Dealers [CES4244100001]*, retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/CES4244100001> (last visited April 13, 2022).

¹¹ U.S. Bureau of Labor Statistics, *Quarterly Census of Employment and Wages. Private, NAICS 522220 Sales Financing, All States and U.S. 2020 Annual Averages, All establishment sizes.*

¹² *See, e.g.*, Fla. Stat. § 520.03; Mich. Comp. Laws § 492.103; 12 Pa. Cons. Stat. § 6211(a)(1); Tex. Fin. Code §§ 348.001(3), (8), 348.501(a).

lenders. Some also license assignees of RISCs.¹³ Most States also regulate automobile RISCs, loans, and leases, often capping allowable finance charges, other fees and/or interest rates,¹⁴ specifying required disclosures,¹⁵ permitting or prohibiting various non-price terms,¹⁶ specifying warranty terms and remedies,¹⁷ and regulating creditors' remedies for a buyer's default.¹⁸

At each layer of this multi-level scheme of regulation, State laws differ markedly, making it difficult, expensive, or impossible for a merchant to comply simultaneously with the law of its own State and the

¹³ *See, e.g.*, Mich. Comp. Laws §§ 492.103; 12 Pa. Cons. Stat. § 6211(a)(2); Tex. Fin. Code § 348.501(a).

¹⁴ *See, e.g.*, Cal. Civ. Code § 2982(j), (o); Fla. Stat. §§ 520.08, 520.085; Mich. Comp. Laws §§ 492.117-492.120; 12 Pa. Cons. Stat. § 6243(d), (e); Tex. Fin. Code §§ 348.006, 348.104-348.108.

¹⁵ *See, e.g.*, Cal. Civ. Code §§ 2982(a)-(i), (q), (r), 2982.2, 2982.11, 2984.1; Fla. Stat. § 520.07; Mich. Comp. Laws §§ 492.112, 492.113; N.Y. Pers. Prop. Law § 302(1)-(6); 12 Pa. Cons. Stat. §§ 6222-6225; Tex. Fin. Code §§ 348.009, 348.0091, 348.102.

¹⁶ *See, e.g.*, Cal. Civ. Code §§ 2982(l), 2983.7, 2984.2; Mich. Comp. Laws §§ 492.114; N.Y. Pers. Prop. Law § 302(9), (13); 12 Pa. Cons. Stat. § 6228; Tex. Fin. Code §§ 348.014, 348.1015.

¹⁷ *See, e.g.*, Cal. Civ. Code §§ 1793.1-1793.26, Fla. Stat. §§ 681.103-681.115; Mich. Comp. Laws §§ 257.1402-257.1408; N.Y. Gen. Bus. Law § 198-a; 73 Pa. Stat. §§ 1953-1963; Tex. Occ. Code §§ 2301.603-2301.610.

¹⁸ *See, e.g.*, Cal. Civ. Code §§ 2983.2, 2983.3, 2983.8; Cal. Com. Code §§ 9611, 9614-9616; Fla. Stat. §§ 679.611, 679.614-616; Mich. Comp. Laws §§ 440.9611, 440.9614-9616; N.Y. Pers. Prop. Law §§ 315, 316; N.Y. U.C.C. Law §§ 9-611, 9-614-9-616; 12 Pa. Cons. Stat. §§ 6251-6261; Tex. Bus. & Com. Code §§ 9.611, 9.614-9.616.

law of another State in which the purchaser resides. Conflicting State laws will thwart, or put at great risk, interstate car sales or leases if the buyer's State law applies extraterritorially to the transaction.

For example, California allows a car manufacturer to obtain a dealer's license or sell directly to consumers so long as it does not compete with its own franchised dealers. *See* Cal. Veh. Code § 11713.3(o). Under Michigan law, a manufacturer cannot obtain a dealer's license or sell directly to a consumer. Mich. Comp. Laws Ann. §§ 257.248(5), 445.1574(1)(h), (i).¹⁹

Tesla sells its cars directly to consumers. To avoid violating Michigan's dealer licensing laws, Tesla requires Michigan purchasers to buy their Tesla in California or another state where Tesla is appropriately licensed, take title to the car there, and drive it or have it shipped to Michigan. Tesla was allowed that work-around only by a settlement of its suit under the dormant Commerce Clause against Michigan officials.²⁰ But, if given *Joe Btfsplk* effect, Michigan law would completely bar Tesla sales to Michiganders, closing the Michigan market to this new rival of Michigan's established automobile manufacturers.

¹⁹ *See also Ford Motor Co. v. Tex. Dept. of Transportation*, 106 F. Supp. 2d 905 (W.D. Tex. 2000), *aff'd*, 264 F.3d 493 (5th Cir. 2001) (Texas law bans manufacturers from Internet sales of cars directly to Texas consumers).

²⁰ *See Tesla Motors, Inc. v. Johnson*, No. 16-cv-1158, ECF No. 267 (W.D. Mich. January 22, 2020) (Jt. Stipulation & Motion for Entry of Dismissal).

If given extraterritorial effect, a State's dealer licensing statute would also effectively block many out-of-state dealers from selling automobiles to the State's residents. Most automobile dealerships are comparatively small businesses. Over 90% of new vehicle dealerships operate five or fewer stores.²¹ Used car dealerships tend to be even smaller. Many dealers lack the managerial and financial means to acquire licenses from multiple States. The problem would be particularly acute for dealers in States like Florida who are likely to sell cars to residents of a wide variety of other States who routinely vacation or have second homes in the State.

Additional obstacles to interstate commerce arise if a State's statutes regulating RISCs apply to its residents' car purchases in other States. For example, it is impossible to comply with both California and Nevada law on RISCs. California statutes set out detailed requirements for the information and disclosures a RISC must contain. Cal. Civ. Code § 2982. Under Nevada law, a RISC must be in the form prescribed by that State's Commissioner of Financial Institutions. Nev. Rev. Stat. §§ 97.299, 97.301; Nev. Admin. Code § 97.050.²² Nevada's required form does not comply with California's required disclosures. It does not itemize the amount financed in the way California law requires. Cal. Civ. Code § 2982(a). It lacks

²¹ Nat'l Auto. Dealers Ass'n, NADA Data 2021, p. 4.

²² Adopted by the Commissioner's May 24, 2012 order, the required RISC forms are publicly available at https://fid.nv.gov/Licensing/NAC_97/NAC_97/.

the “no cooling off period” warning that California law requires immediately above the contract signature line. Cal. Civ. Code § 2982(r). Both States require a RISC to be a single document, so a dealer cannot have a buyer sign both a California-compliant contract and a Nevada form RISC. Cal. Civ. Code § 2981.9; Nev. Rev. Stat. § 97.165(1).

Penalties for non-compliance are severe. No finance charge or official fees may be recovered if a dealer does not use the Nevada form RISC for a Nevada car sale. Nev. Rev. Stat. §§ 97.301, 97.305. A RISC that does not itemize the amount financed in the manner California requires may be rescinded by the buyer without compensating the seller for any decrease in the car’s value that results from the passage of time from sale to rescission. Cal. Civ. Code §§ 2983(a), 2983.1(d).

At least one decision has given California’s RISC statute Joe Btfsplk effect, holding a Nevada dealer liable for not complying with California law in selling a motor vehicle in Nevada to a California resident. *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App. 3d 964, 969-73, 122 Cal. Rptr. 202, 206-08 (1975), *disapproved on other grounds*, *Bullis v. Sec. Pac. Nat. Bank*, 21 Cal. 3d 801, 582 P.2d 109 (1978).

Even less stark differences between States’ statutes regulating aspects of vehicle sales and financing may pose obstacles to interstate car sales if the dealer or finance company must comply with the law of the buyer’s State of residence even when the sale and its

financing are consummated in another State.²³ A dealer in a State like Florida would face an almost insurmountable practical burden in stocking required contract forms and training personnel in their use if it were required to comply with the different, often-changing disclosure requirements of the many States from which visiting buyers come. Joe Btfsplk laws also deny both in-State residents and out-of-State merchants with whom they deal the right to choose applicable law and the certainty that choice of law clauses provide in ordering the parties' transactional relationship.

The Court should grant TitleMax's petition to reaffirm the dormant Commerce Clause principles stated in *Healey*, freeing interstate vehicle sales and financing from the threat of extraterritorial application of State laws to their residents' out-of-State car purchases.

²³ For example, California limits the amount of so-called "dealer participation" that an assignee may pay a dealer for assignment of a RISC. Cal. Civ. Code § 2982.10. Other States do not. Application of California's statute to out-of-State sales of cars to California residents would directly regulate the transaction between non-California assignees and dealers which occurs wholly outside California's borders, interfering with the interstate finance of vehicle purchases.

III. A Transaction Remains “Wholly Outside” A State’s Borders And The Application Of Its Laws Despite Its In-State Effects

TitleMax’s petition should also be granted to clarify that a transaction remains “wholly outside” a State’s borders and beyond the reach of its laws even when the transaction has in-State precursors or consequences. The Third Circuit’s contrary holding in this case reduces this Court’s dormant Commerce Clause decisions to hollow husks devoid of practical force. *See* Pet. App. 13a-15a.

Commercial transactions do not exist in isolation. All transactions have precursors. Even sale-of-goods transactions are preceded by manufacture, distribution, finance, and advertising. These precursors often occur in States other than where the sale is transacted. Advertising, in particular, is likely to be viewed by a buyer in his or her State of residence even if he or she makes the purchase elsewhere. These days, a buyer can view the seller’s website and Yelp! review from the comfort of his or her own home or office.

Commercial transactions also have continuing effects. Even cash sales are followed by warranties, arbitration, and other consequences. Credit sales entail continuing security interests, payments, collections, and possible repossession or other default remedies.

In Judge Posner’s well-chosen words: “The consequences of a commercial transaction can be felt anywhere. But that does not permit New York City to forbid New Yorkers to eat in cities in other States that

do not ban trans fats from their restaurants.” *Midwest Title Loans*, 593 F.3d at 669. Nor does the presence of collateral in the Pennsylvania give that State constitutional authority to regulate a transaction otherwise transacted wholly outside its borders. “It just illustrates that a transaction made in one state can have repercussions in another. . . . A contract can always go wrong and if it does the consequences will often be felt in a different state from the one in which the contract was made and executed.” *Id.*

The Third Circuit’s contrary conclusion in this case rests on a formalism foreign to this Court’s dormant Commerce Clause jurisprudence. *See W. Lynn Creamery, Inc. v. Healey*, 512 U.S. 186, 201 (1994). Instead, in deciding whether a State exceeds the inherent limits of its authority by controlling commerce wholly outside its boundaries, “[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Healey*, 491 U.S. at 336.

Under the Third Circuit’s reasoning, most, if not all, Joe Btfsplk laws would be exempt from dormant Commerce Clause scrutiny since a State resident’s transactions elsewhere almost inevitably have precursors or consequences in the resident’s home State. In particular, under its rationale, Pennsylvania could constitutionally apply its Motor Vehicle Sales Finance Act to a Florida dealer’s credit sale of a car in Florida to a Pennsylvania resident because the credit sale “creates a creditor-debtor relationship that imposes obligations on both the [buyer] and [seller or holder] until the debt

is fully paid.” Pet. App. 13a. The Pennsylvania buyer might make payments from (or be subject to collection efforts in) Pennsylvania, even if he or she registers the car in Florida for use in connection with his or her winter home there. As pointed out in Part II above, such an extraterritorial application of Pennsylvania law would create the sort of obstacles to interstate commerce that this Court’s dormant Commerce Clause cases forbid.

The Third Circuit’s distinction of the *Healey* line of cases on the ground that they “largely involved transactions in goods that ended at the point of sale,” Pet. App. 14a, falls flat for two reasons. First, as just pointed out, even cash sale-of-goods transactions do not “end[] at the point of sale,” but, like loans and credit sales, involve continuing obligations and consequences. To take Judge Posner’s example, even a transaction as seemingly “final” as a New Jersey restaurant’s sale of a meal can have effects in New York, if the restaurant serves unwholesome food to a New York patron. *See, e.g., Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 85 Cal. Rptr. 3d 506 (2008); *Arboursgh v. Sweet Basil Bistro, Inc.*, 740 So. 2d 186, 193 (La. App. 4 Cir.), writ den., 751 So. 2d 883 (La. 1999).

Second, the *Healey* line of cases recognize the interconnectedness of commercial transactions and refuse to allow a State to regulate a transaction that occurs outside that State solely because it has in-State consequences. In *Baldwin*, which began the *Healey* line of cases, this Court held that farmers’ sales of milk to a creamery in Vermont were transactions wholly outside

New York and beyond the reach of its minimum price law even though those sales had clear effects in New York, as the creamery sold the milk to a New York firm that, in turn, sold the milk to New York hotels, restaurants and consumers. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 520-21 (1935).

Similarly, in *Healey*, the Court struck down Connecticut’s price-affirmation statute because, in effect, it regulated the price of beer sales in adjoining states, and hence, transactions “wholly outside” Connecticut—even though it noted that Connecticut enacted the statute largely to stop its residents from crossing State lines to buy cheaper beer in the neighboring States. 491 U.S. at 326, 336. And, the dormant Commerce Clause principle initially framed in *Edgar* and reiterated in *Healey*, expressly recognizes the interconnected nature of commercial transactions in prohibiting “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.*” *Edgar*, 457 U.S. at 642-43; *Healey*, 491 U.S. at 336 (emphasis added).

Pennsylvania may, of course, regulate an out-of-State transaction’s precursors or consequences that occur in Pennsylvania. For example, it may, and does, regulate in-State advertising and repossessions.²⁴ But it may not use those in-State effects as a justification for applying its dealer licensing and RISC regulation statutes to car purchase transactions its residents

²⁴ 12 Pa. Cons. Stat. §§ 6251-6261; 37 Pa. Code § 301.2.

enter into in other States or for applying its usury statute to the loans TitleMax makes to Pennsylvanians in Delaware or Virginia.

The Court should grant review and reaffirm that “the rule against extraterritorial application of state law is not a technicality to be so readily evaded.” *Carolina Trucks & Equipment, Inc.*, 492 F.3d at 491.

IV. The Dormant Commerce Clause Issue In This Case Should Be Reviewed In Tandem With The Related Issue Which The Court Will Review In *National Pork*

Review of the issue raised by TitleMax’s petition is particularly appropriate now that the Court has granted certiorari in *National Pork Producers Council v. Ross*, No. 21-468 (“*National Pork*”). The two cases raise similar, though distinctly different, dormant Commerce Clause issues. In both cases, a State has attempted to regulate wholly out-of-State commerce. In *National Pork*, California has done so *indirectly* by prohibiting sale in California of food not produced in accord with California’s standards for humane treatment of animals. In this case, Pennsylvania does so *directly* by applying its law to its residents’ transactions that are consummated in other States.

Joe Btfsplk laws, like Pennsylvania’s usury statute, present a stronger case for invalidation under the dormant Commerce Clause in that they directly apply a State’s statutes to commerce that takes place outside

its borders. See *Healey*, 491 U.S. at 336; *Midwest Title Loans*, 593 F.3d at 666. Also, as shown in Part II above, the application of a State's laws to its residents' transactions in another State can create severe obstacles to the free flow of interstate commerce.

Embargoes and boycotts, like California's Proposition 12, have a long history. See, e.g., 2 Stat. 451 (Embargo Act of 1807). The Court's dormant Commerce Clause cases have dealt with that type of trade restraint repeatedly. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951); *Baldwin*, 295 U.S. at 521.

Joe Btfsplk laws appear to be a newer form of extraterritorial projection of State law which thus far has escaped the Court's review under the dormant Commerce Clause. It is time to address that increasingly common form of trade restraint. TitleMax's petition offers the Court an excellent opportunity to judge the impact of this type of State law on interstate commerce in contrast to the more traditional embargo or boycott law it will assess in *National Pork*.

It is also appropriate to review these two types of trade restraints together since they may be so easily combined to amplify the extraterritorial effect of a State's laws.²⁵ For example, if Pennsylvania's

²⁵ Tesla's above-described tussle with Michigan's dealer-licensing laws also illustrates the trade-stopping potential of a

projection of its usury law onto loans its residents obtain in other States passes constitutional muster, California could easily add a similar provision to its Proposition 12, so as to bar not only in-State sales of food products from animals not treated as California deems appropriate, but also to ban out-of-State sales of those products to Californians.

Under such a Joe Btfsplk-enhanced version of California's Proposition 12, restaurants throughout the country would be forced to deny their California customers any dish containing foie gras, pork, veal, or egg products from animals not kept in Proposition 12-compliant conditions. Upper-end restaurants, like Restaurant August in New Orleans, might be able to afford to print a special menu for Californians, omitting the torchon of foie gras—or to annotate its current menu: “this item not offered to California residents.” But Piggy Park Restaurant in Columbia, South Carolina, probably could only shut its doors to Californians.

◆

CONCLUSION

For the reasons stated above, the Court should grant TitleMax's petition, reverse the Third Circuit's judgment, and hold that a State may not exercise

combined boycott and Joe Btfsplk. If Michigan gave its dealer-licensing laws extraterritorial effect, it could deny Tesla the entire Michigan market, banning Tesla sales to Michiganders anywhere in the country.

extraterritorial power by applying its law to transactions its residents consummate out-of-State.

Respectfully submitted,

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