No. 21-468

IN THE

Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,

Petitioners,

v.

KAREN ROSS, ET AL.,

Respondents.

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

**BRIEF *AMICUS CURIAE* FOR
PROFESSOR LEA BRILMAYER
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*[1]

Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is a legal scholar and law professor with longstanding academic interests in the areas of conflict of laws, interstate relations, and jurisprudence. She has published dozens of articles on interstate relations, including on the Due Process Clause limits on personal jurisdiction, extraterritoriality, state sovereignty, and interstate cooperation, and is the author of a leading conflict of laws casebook, and of *Conflict of Laws: Foundation and Future Directions*. Although Professor Brilmayer takes no position on the proper outcome of this case, she has expertise and a strong interest in the questions of extraterritorial regulation and federalism it presents.

SUMMARY OF ARGUMENT

The first question presented asks whether the "extraterritoriality principle" in this Court's Dormant Commerce Clause jurisprudence is "now a dead letter." But this case is about a state regulation that regulates *in-state* conduct with indirect effects on commerce outside of the state. It does not present a question about the extraterritoriality principle's central concern: that

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this *amicus curiae* brief.

states cannot *directly* regulate commercial conduct that occurs wholly outside of their boundaries.

Whatever limits the Court concludes the Dormant Commerce Clause imposes on a state's ability to regulate commercial conduct within its own borders based on effects outside that state, it should preserve the key insight in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), that the Constitution does not tolerate a state's *direct* regulation of commercial conduct in another state. Whether or not California can regulate the pork that is imported into California, it certainly could not directly regulate pig farming in Nevada. This limitation on state power is critical to our federal system of government.

All 50 states in our federal system are coequal sovereigns, and with this sovereignty comes the right of each state to regulate commercial conduct that occurs wholly within its territory without interference from other states—a right the extraterritoriality principle both recognizes and preserves. Were this not so, the diversity of approaches to a wide range of local matters—from gambling to educational standards to minimum wages to guns, and more—found in the states, and the independent will of each state's citizenry reflected in this diversity, would be lost.

The Dormant Commerce Clause's presumption against extraterritorial regulation of commerce, moreover, is not an anomaly in the Constitution. The Fourteenth Amendment's guarantees of due process and the right to travel similarly reinforce the important principles of sovereignty and comity reflected in this Court's Dormant Commerce Clause jurisprudence. These doctrines and the Dormant Commerce Clause's extraterritoriality principle work together to advance the state individuality, consistency, reciprocity, and mutual respect that are foundational to our federalism.

ARGUMENT

I. The Extraterritoriality Principle's Central Concern Is Direct Regulation.

The Dormant Commerce Clause restrains states from burdening interstate commerce absent congressional action. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089-90 (2018). This Court has instructed that a state unconstitutionally burdens interstate commerce when it extends its regulations to "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quotation marks omitted).

The Dormant Commerce Clause's presumption against extraterritorial state regulation follows from the Court's longstanding recognition that the Clause forbids a state from "control[ling conduct] beyond the boundaries of the state exacting it." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945) (invalidating state law regulating train lengths in state, because compliance would require "breaking up and reassembling long trains ... before entering and after leaving" the regulating state); *see also Healy*, 491 U.S. at 336; *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality) (invalidating law that forced business to seek agency approval in regulating state before undertaking transaction in another state); *Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S. 573, 580, 583 (1986) (invalidating state law that "regulat[ed] the out-of-state transactions of distillers who sell" inside the regulating state); *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 520-22 (1935) (invalidating state law prohibiting businesses operating in regulating state from selling out-of-state milk purchased for less than price fixed by enacting state).

What unites the state laws at issue in this line of cases, and this Court's objection to them, is that they all attempt to *directly* regulate out-of-state conduct. *See Brown-Forman Distillers Corp.*, 476 U.S. at 579 ("When a state statute *directly* regulates ... interstate commerce ...we have generally struck down the statute without further inquiry." (emphasis added)); *see also Healy*, 491 U.S. at 336; *Edgar*, 457 U.S. at 640 ("[D]irect regulation" of interstate commerce by the states is "prohibited"); *Baldwin*, 294 U.S. at 522 ("It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." (quotation marks omitted)). A state directly regulates out-of-state commerce when it purports to control what commercial actors can, and cannot, do outside of the regulating state's boundaries. *See Brown-Forman Distillers Corp.*, 476 U.S. at 582-83.

States often regulate in-state conduct in a way that has indirect effects on commerce in another state. A law that has indirect effects outside the state does not necessarily run afoul of the Dormant Commerce Clause. As the Court explained in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

Under the extraterritoriality principle, however, a state law that directly regulates *out-of-state* conduct is an extraordinary projection of power that, in our federal system, is virtually always illegitimate absent Congressional authorization. Such laws are rare, and for good reason. If California could prohibit gambling or prostitution in Nevada, marijuana sales in Colorado, gun sales in Mississippi, or oil drilling in Texas, the purposes of the Commerce Clause in facilitating interstate commerce and reducing interstate friction and tension over economic regulation would be defeated. *See also infra* Section III.

Given the long line of cases recognizing that states have no power to directly regulate out-of-state commercial conduct in a variety of contexts, *see supra* at 4, the extraterritoriality principle is plainly not limited to price affirmation or control laws. *See Healy*, 491 U.S. at 333 n.9 (noting that *Edgar*—which did not concern a price control law—"significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"); *accord Association for Accessible Medicines v. Frosh*, 887 F.3d 664, 669-70 (4th Cir. 2018). And contra the Ninth Circuit decision below, this Court has not more recently "indicated that the extraterritoriality principle ... should be interpreted narrowly as applying only to state laws that are price control or price affirmation statutes." Pet. App. 8a. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), which the panel below cites, concerned a Maine law aimed at inducing drug manufacturers to enter into rebate agreements with the state. 538 U.S. at 649-50, 652-54. *Walsh*'s conclusion that the law did "not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect," simply recognized that the law at issue concerned prices, and that the law did not regulate extraterritorially. *Id.* at 669 (quotation marks omitted). It left the extraterritoriality principle, and its presumption against state regulation of out-of-state commercial conduct of all kinds, undisturbed. *See Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. 2013) ("Maine's hope to alter the decisions of the drug companies was permissible because Maine did not seek to control them" by "mandat[ing] compliance with [its] preferred policies in wholly out-of-state transactions").

Thus, whether the extraterritoriality principle applies to the law at issue in this case—which subjects pork sales in California to regulations that indirectly affect pig farming outside the state—may be a close question. But the question would not be close if California passed a law that attempted to control the sale of pork in *other* states, by, for instance, prohibiting out-of-state farmers from selling pork produced in a manner that violated California law to consumers *outside* of California, or prohibiting California residents from purchasing the same pork *outside* of California. The latter laws would plainly be a direct regulation of out-of-state commerce, and thus invalid under the extraterritoriality principle.[2]

II. The Extraterritoriality Principle Preserves State Sovereignty.

The extraterritoriality principle is an important safeguard of state sovereignty. In his classic and exhaustive study of interstate relations under the U.S. Constitution, Professor Douglas Laycock notes that state territory is the organizing principle of state sovereignty. "The fundamental allocation of authority among states is territorial," he emphasizes, adding that this principle "is largely implicit, so obvious that the Founders neglected to state it." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 251 (1992). As a result, "a state's claim to regulate behavior or to govern a dispute must be based on some thing or event within its territory." *Id.* Thus, *Healy* unsurprisingly recognizes that "a statute that directly controls commerce occurring wholly outside the

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[2] Because this amicus brief concerns a state's direct regulation of conduct occurring entirely outside of that state, the extraterritoriality principle at stake here is different from the principle at stake in choice of law, which by definition involves more than one state and implicates the claims of another private party. It is also different from the "extraterritoriality" principle under international law, because international disputes raise somewhat different concerns from domestic disputes. *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397, 410-11 (1930).

boundaries of [that] State exceeds the inherent limits of the enacting State's authority." 491 U.S. at 336; *see also Baldwin*, 294 U.S. at 521 (states have "no power to project" their regulations on commercial conduct into other states).

As the Court explained in *Edgar*, 457 U.S. at 643, "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *See also Bonaparte v. Appeal Tax Court of Baltimore*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction…. Each State is independent of all others in this particular.").

Conversely, states maintain a specific sovereign right to control commercial conduct that occurs wholly *inside* their boundaries. That right, given the equal sovereignty of states in our federalist system of government, is superior to any right another state might assert to regulate such conduct. Indeed, the extraterritoriality principle "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36 (footnote omitted).

Allowing states to directly regulate out-of-state commerce would be a serious affront to state sovereignty. If a state could displace another state's superior right to control and advance its own public interests within its own borders, each state would be subject to direct regulatory intrusion by 49 other states.

Such a regime would also directly undermine popular sovereignty and clear lines of accountability. *Cf. New York v. United States*, 505 U.S. 144, 161-66 (1992). If State A can directly regulate conduct in State B, then the citizens of State B will have no ability to determine policy for their own state, and no ability to hold government officials accountable for adopting policies that counter their desires. A representative democracy demands that the people have a voice in who regulates them. But Nevadans have no right to vote for California legislators. Accordingly, California legislators cannot, consistent with the basic premises of popular sovereignty, legitimately regulate conduct in Nevada, or any other state that is not their own.

As Judge Posner observed, allowing a state to impose its law on transactions its residents conduct in a different state that applies a different law "would be arbitrarily to exalt the public policy of one state over that of another." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 667-68 (7th Cir. 2010). Indiana could "require casinos in all other states, if they wanted to do business with residents of Indiana, to obtain a license from Indiana that would forbid their allowing a Hoosier to bet more than $10 a day in a casino." *Id.* at 666. New York could "forbid New Yorkers to eat in cities in other states that do not ban trans fats from their restaurants," *id.* at 669, or directly regulate out-of-state restaurants themselves. California could dictate the terms of out-of-state art sales. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323-24 (9th Cir. 2015).

Given the diversity of opinion in the states on many matters of local policy, other examples abound. Absent the extraterritoriality principle, what would stop Illinois from banning gun dealers in Missouri from selling guns without a background check to Illinois residents, or banning shooting ranges in Iowa from letting Illinois residents, or anyone else, conduct target practice at their facilities? What would stop Texas from banning its residents from buying liquor on Sundays in Louisiana, or Louisiana from forcing Texas package stores to sell liquor to its residents on Sundays? What would stop any one state from passing legislation that sets minimum wages for hourly employees working in other states, or licensing requirements for doctors, nurses, and lawyers practicing in other states, or education standards for schools in other states, or that otherwise imposes on any local concern? This Court recognized these dangers in *Baldwin*, when it admonished New York for attempting to fix the price of out-of-state milk, ostensibly to compel Vermont to improve the quality of its milk: "One state may not put pressure [in the form of direct extraterritorial regulation] to reform [other states'] economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, [then] the Legislature of Vermont and not that of New York must supply the fitting remedy." 294 U.S. at 524.

III. The Extraterritoriality Principle Preserves Both a National Economy and Our Federalist System of Government.

The relationship between the states as coequal sovereigns is as critical to our federalism as the states' collective relationship to the federal government. And just as the extraterritoriality principle preserves Congress' singular authority in this system over matters of national concern, *see S. Pac. Co.*, 325 U.S. at 782, so too does it protect each state's authority over its own local concerns. "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). If any of the 49 other states could directly regulate conduct in Texas, neither Texas nor its citizens would have that choice. The extraterritoriality principle protects every state's freedom from the direct regulatory interference of other states. In so doing, it also protects commercial actors in any one state from the multiplicity of overlapping and potentially contradictory laws they would otherwise be forced to navigate. *See Healy*, 491 U.S. at 336-37.

The extraterritoriality principle allows each state a monopoly over policymaking on matters of local concern and allows different states to pursue different regulatory paths. Each state can develop its own individual character, reflecting the preferences and beliefs of the people who live there. Our federalist system of government has produced a delicate network of diverse public and political interests, reflected in each state. Because states maintain autonomy over how to best advance these interests within their boundaries, they can act as laboratories of democracy and lawmaking. "The science of government ... is the science of experiment," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821). And "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Allowing every state to directly regulate commercial conduct in every other state would put an end to such experimentation. As a practical matter, people everywhere would have to comply with the most stringent of the various states' rules. *See, e.g.*, *Brown-Forman Distillers Corp.*, 476 U.S. at 583–84 ("By defining the 'effective price' of liquor differently from other States, New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States."). The extraterritoriality principle defends against the loss of experimentation and innovation in our federal system.

The extraterritoriality principle also helps foster a functional economy, at the national and state level, by creating consistency, transparency, and responsiveness in our laws. *See Healy*, 491 U.S. at 336–37 ("Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."). Commercial actors have notice and predictability about what laws they must follow in a given state when entering a transaction. They would lose this clarity if every state could directly regulate commercial conduct outside its borders; instead, businesses and consumers would be forced to navigate a confusing patchwork of inconsistent regulations. This Court has warned about the gridlock and other economic ills such inconsistency would cause—much of which animated the Constitution's drafters in the first place. *See, e.g.*, *Edgar*, 457 U.S. at 642 ("[I]f Illinois may impose such [extraterritorial] regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."); *Brown-Forman Distillers Corp.*, 476 U.S. at 583 ("[T]he proliferation of state affirmation laws … has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States."). Thus, courts reviewing whether a state law complies with the extraterritoriality principle must evaluate the law's practical effect "not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336–37.

Lastly, federalism relies on the mutual respect and comity between the states that the extraterritoriality principle engenders. The principle accomplishes this by protecting every state's right to make its own decisions about what is and is not lawful in its boundaries. "The Constitution was framed …. upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin*, 294 U.S. at 523. Allowing regulating states to supplant a territorial state's rules for commerce "would be to invite a speedy end of our national solidarity." *Id.* The extraterritoriality principle thus preserves the unity of the states by protecting against laws that would displace the regulatory prerogatives of the territorial state for those of the regulatory state, and in turn place the states at loggerheads. *Id.* at 522 ("[A] chief occasion of the commerce clauses was the mutual jealousies and aggressions of the States…. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." (internal quotation marks omitted)).

IV. Other Constitutional Doctrines Reinforce the Importance of the Extraterritoriality Principle to Preserving State Sovereignty and Federalism.

Through the Dormant Commerce Clause, the Constitution virtually prohibits direct state regulation of commerce outside the regulating state's boundaries. Other constitutional doctrines reflect a similar presumption against extraterritoriality that, in tandem with the Dormant Commerce Clause's presumption, reinforce our federal system's interests in state individuality, consistency, reciprocity, and mutual respect.

In the Due Process context, the Court has recognized that "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court considered whether an Alabama jury punitive damages award, intended, in part, to induce BMW to change a nationwide policy, violated the Due Process Clause, when the policy violated Alabama's deceptive trade practices law but was lawful in other states. 517 U.S. at 562-68. Noting the differing approaches states have adopted to protect their citizens from deceptive trade practices, the Court observed that a "patchwork of rules representing the diverse policy judgments of lawmakers in 50 States" existed, a diversity that "demonstrates that reasonable people may disagree" about which rule would best advance the interests of each states' citizens. *Id.* at 569-70. One state, however, could not "impose its own policy choice on neighboring States." *Id.* at 571. Moreover, with express reference to the extraterritoriality principle, the Court observed that a state's power to burden the interstate market for automobiles is "constrained by the need to respect the interests of other States." *Id.* "[F]rom these principles of state sovereignty and comity," the Court concluded that a state lacks the power to punish conduct "that was lawful where it occurred and that had no impact on [the punishing state] or its residents," nor can a state impose sanctions "to deter conduct that is lawful in other jurisdictions." *Id.* at 572-73.

The right to travel enshrined in the Fourteenth Amendment also supports the federalism principles the extraterritoriality principle protects, because it ensures that individuals can choose where to live based on each state's distinct legal and political regimes. The right to travel protects, *inter alia*, the rights of citizens to be "treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500-04 (1999). By limiting states' ability to treat travelers differently from their citizens, the right to travel promotes the Court's insight, in *Baldwin*, that "in the long run prosperity and salvation are in union and not division." 294 U.S. at 523. As this Court explained long ago, "without some provision ... removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 280 (1868), *overruled on other grounds by United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944). Moreover, implicit in travelers' right to receive the same "privileges and immunities" as the state's own citizens is the right of the visited state to impose its laws on travelers—a right superior to any right the travelers' state of origin might claim it has over its citizens when they travel. *See Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

CONCLUSION

For the foregoing reasons, although *amicus* takes no position on how this particular dispute should be resolved, the Court should reaffirm the continuing vitality of the extraterritoriality principle's rule against a state's direct regulation of wholly out-of-state conduct.

Respectfully submitted,

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