No. 15-471

In the

Supreme Court of the United States

ENERGY & ENVIRONMENT LEGAL INSTITUTE, et al.,

Petitioners,

v.

JOSHUA EPEL, et al.,

Respondents.

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

MOTION FOR LEAVE TO FILE AND AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation (PLF), Cato Institute (Cato), National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), and Reason Foundation (Reason) respectfully request leave to file this amicus brief in support of Petitioners Energy and Environment Legal Institute and Rod Lueck.

Written consent to the filing of this brief has been given by counsel for the Petitioners and all but one of the Respondents. Counsel for Respondent Interwest Energy Alliance, Defendant-Intervenor below, has declined to consent to the filing of this brief, thus necessitating this motion.

Amici believe that this petition raises an important question about the scope of the Dormant Commerce Clause. At issue is a Colorado law that regulates emissions from the production of electricity that occurs wholly outside of its borders. If this motion is granted, Amici will argue that the Dormant Commerce Clause forbids all extraterritorial regulations, not just price-control regulations, and

that this protection is necessary to the Constitution's system of competitive federalism.

DATED: November, 2015.

Respectfully submitted,

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QUESTION PRESENTED

Was the Tenth Circuit wrong to conclude that the Constitution's prohibition against extraterritorial state legislation and regulation is limited to price-control statutes?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Cato Institute (Cato), National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), and Reason Foundation (Reason) respectfully submit this amicus brief in support of the Petitioners Energy and Environment Legal Institute and Rod Lueck.[1]

PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. It defends limited government, property rights, and a balanced approach to environmental protection in courts nationwide. PLF has extensive experience litigating environmental and constitutional issues. It has represented parties or participated as amicus curiae in numerous cases relevant to the disposition of this case. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Pursuant to this Court's Rule 37.2(a), Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Its Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files amicus briefs. This case is of central concern to Cato because it implicates the basic principles of federalism as a safeguard for liberty.

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. According to NFIB's Research Foundation, rising energy costs are a top concern for small business owners nationally.

Reason is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Its mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. It advances its mission by publishing REASON magazine, as well as commentary on its websites, www.reason.com, and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

SUMMARY OF REASONS FOR GRANTING THE PETITION

In holding that Colorado's regulation of electricity generation in neighboring states does not offend the Dormant Commerce Clause's ban on extraterritorial regulations, the Tenth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. *See Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169 (10th Cir. 2015); Rule 10. The Tenth Circuit's opinion limits this Court's Dormant Commerce Clause decisions that ban extraterritorial regulations to their facts. *See* 793 F.3d at 1172-73; *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In doing so, the lower court has sanctioned any state's adoption of extraterritorial regulations, provided that the state is savvy enough to craft its regulation as something other

than a price-control regulation. *See Energy and Environment Legal Institute*, 793 F.3d at 1172-73.

The petition raises an important question of federal law for several reasons. First, states are increasing regulation of emissions, including those generated beyond state borders, with substantial economic and political consequences. This Court has already been asked to review a case challenging California's attempt to regulate out-of-state emissions. *See Corey v. Rocky Mountain Farmers Union*, 134 S. Ct. 2884 (*cert. denied* June 30, 2014). This same question is also at issue in a case before the Eighth Circuit, where North Dakota is suing Minnesota for attempting to regulate its neighbors' emissions. *See North Dakota v. Heydinger*, Nos. 14-2156, 14-2251 (8th Cir. argued Oct. 21, 2015); *see also North Dakota v. Heydinger*, 15 F. Supp. 3d 891 (D. Minn. 2014) (striking down Minnesota's extraterritorial regulation). State regulations of emissions, particularly greenhouse gases, are almost certain to continue to proliferate, spawning further interstate conflict.

Aside from the practical consequences, the petition raises an extremely important constitutional question. One of the Founders' chief concerns underlying the Commerce Clause was reducing interstate trade barriers. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 132-46 (2001); The Federalist No. 11 (Alexander Hamilton). Toward that end, this Court has interpreted the provision as both an affirmative grant of power to Congress and an implicit limit on state power. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824); *see also New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). One aspect of this limit on state

power is a ban on extraterritorial regulations. *See Healy*, 491 U.S. at 335-36.

This ban is essential to preserving the competitive federalism enshrined in the Constitution and this Court's precedents. Competition for voters, taxpayers, and industries forces states to be accountable to those they govern and innovative in their search for solutions to vexing public policy problems. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This competition is what causes the states to function as laboratories of democracy. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If a state finds a cheaper, more efficient way to solve a public problem, people and businesses will flock to it. But if states can impose the costs of their regulations on their neighbors—by requiring out-of-state activity to be conducted according to in-state rules—they could blunt this interstate competition.

Because of the practical and doctrinal importance of this issue, the Court should grant the petition for certiorari and resolve the extent to which the Dormant Commerce Clause's ban on extraterritorial regulations restricts state authority.

REASONS FOR GRANTING THE PETITION

I

THE COURT SHOULD GRANT THE PETITION TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

A. The Question Presented Has Significant, Practical Consequences for the Nation Because of the Nature of the Electric Grid and the Growth of Extraterritorial State Regulations

Colorado gets its electricity from a grid that services eleven states, Canada, and Mexico. *See Energy and Environment Legal Institute*, 793 F.3d at 1171; *see also* 16 U.S.C. § 824(a) (encouraging regional grids to foster interstate transmission of electricity). Electricity used anywhere within this grid can come from any source that services it. And, once loaded onto the grid, the electricity is identical, regardless of how it was produced or the fuel used to generate it. *See North Dakota*, 15 F. Supp. 3d at 917-18. Because electricity is produced and distributed on a regional basis, allowing individual states to regulate out-of-state production would render electricity generators simultaneously subject to regulation by several—perhaps dozens of—states.

In fact, we are already seeing the beginning of that proliferation of extraterritorial state regulation and the lawsuits that inevitably ensue. Last year, this Court was asked to review a challenge to California's Low Carbon Fuel Standard. *See Rocky Mountain*

Farmers Union, 134 S. Ct. 2884.[2] Under that standard, California regulates greenhouse gas emissions attributable to California's fuel consumption. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013). Not content to regulate emissions occurring within the state, California adopted a "lifecycle analysis" to account for the greenhouse gas emissions occurring anywhere in the world during the production and distribution of those fuels. *See id.* at 1080-81. As a consequence, fuels produced outside of California are disfavored, based on their distance from the state, and California gets to influence the out-of-state production and distribution of fuels. This is no small matter, as California's market for these fuels equals 9.2% of the national market. *See* U.S. Energy Info. Admin., *State Profiles and Energy Estimates*, Table C11, Energy Consumption by Source, Ranked by State (2013).[3]

As this case demonstrates, Colorado has entered the fray too. The challenged regulations presently require 20% of the electricity sold in the state to be generated from renewable sources, with this percentage rising over time. *See Energy and Environment Legal Institute*, 793 F.3d at 1170. Like California, Colorado was not content to regulate emissions occurring within the state. It requires electricity imported from neighboring states to be generated according to the standards that would apply

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[2] Ironically, that challenge was brought on behalf of Coloradans (among others) who objected to being regulated by California. *See Rocky Mountain Farmers Union*, 134 S. Ct. 2884.

[3] http://www.eia.gov/state/seds/data.cfm?incfile=/state/seds/sep_sum/html/rank_use_source.html&sid=US.

if it had been generated within the state. *See id.* at 1174.

Soon this Court may be presented with North Dakota's Dormant Commerce Clause challenge to Minnesota's regulation of its neighbors' emissions. *See North Dakota*, Nos. 14-2156, 14-2251. Minnesota forbids the importation of any electricity into the state unless it would reduce "statewide power sector carbon dioxide emissions." *See* Minn. Stat. § 216H.03, subd. 3. The Orwellian definition of "statewide" emissions includes "the total annual emissions . . . within the state *and* all emissions . . . from the generation of electricity imported from outside the state . . . ." *See* Minn. Stat. § 216H.03, subd. 2 (emphasis added). Like California and Colorado, Minnesota presumes to regulate electricity generation in neighboring states. *See North Dakota*, 15 F. Supp. 3d at 910-19 (Minnesota's extraterritorial regulation of emissions is unconstitutional).

The problems caused by extraterritorial regulations like these compound as more states adopt them. To see why, consider a power plant that feeds electricity into one of the interconnected regional grids. A North Dakota power plant's emissions can certainly be regulated by North Dakota. But, under the logic of the decision below, it could also be regulated by all of the other states serviced by the regional transmission organization that it sells power to, including Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, South Dakota, and Wisconsin. *See North Dakota*, 15 F. Supp. 3d at 896 (describing the MISO regional transmission organization). Since that regional transmission organization connects to a grid that covers nearly all of the country east of the

Rockies, it could potentially be regulated by dozens of other states as well.[4]

The Constitution requires courts to consider how one state's regulation "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." *See Healy*, 491 U.S. at 336. A rule that allows all of these states to impose their own design standard on a North Dakota power plant, *i.e.* requiring it to use particular methods to reduce emissions, would result in redundant regulations with little to no benefit, and much higher costs. *See* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 267-68 (1996) (criticizing design standards). The only way to avoid this problem—if the decision below is allowed to stand—would be to balkanize the interstate electricity market by preventing electricity generated within a state from leaving its borders. *Cf. American Booksellers Foundation v. Dean*, 342 F.3d 96, 103-04 (2d Cir. 2003) (state regulation would conflict with the internet's "boundary-less nature" and is thus unconstitutional).

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[4] For a description of this interconnected grid, *see* Erin R. Pierce, *Top 9 Things You Didn't Know About America's Power Grid*, Energy.gov (Nov. 20, 2014), http://energy.gov/articles/top-9-things-you-didnt-know-about-americas-power-grid.

B. The Dormant Commerce Clause's Ban on Extraterritorial Regulations Is Essential To Maintaining Interstate Competition and Preserving Federalism

Federalism leads to most policy questions being decided by states that must compete for voters, taxpayers, and industry. *See Gregory*, 501 U.S. at 458. This competitive pressure forces the states to be more responsive to the wishes of those they govern and, ultimately, leads to better, smarter, regulation. The Dormant Commerce Clause forbids states from frustrating interstate competition by regulating beyond their borders. *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) ("[A] statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms.").

The decision below upsets this regime by sanctioning state regulations of conduct occurring beyond their borders, despite no in-state effects,[5] so long as the state is not imposing a "price-control"

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[5] The Dormant Commerce Clause permits states to regulate the domestic sale of out-of-state products based on the products' characteristics and local effects. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981) (state may prohibit sale of milk in nonreturnable, nonrefillable containers because of local disposal concerns). But even this limited type of regulation is unconstitutional if the burden on interstate commerce clearly outweighs the local interest. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008). The statute challenged in this case, however, is not regulating an imported product based on its characteristics and local effects. Electricity produced according to Colorado's requirements is indistinguishable from that which is not.

regulation. *See Energy and Environment Legal Institute*, 793 F.3d at 1173. This narrow construction of this Court's decisions allows any state to easily circumvent the Constitution and impose its regulations on its neighbors, thwarting interstate competition and undermining federalism's positive effects on government accountability and innovation.

1. The Dormant Commerce Clause Forbids State Laws That Frustrate Interstate Competition

Although the Commerce Clause is primarily a positive grant of power to the federal government, courts have recognized for nearly two centuries that it also implicitly limits state power. *See Gibbons,* 22 U.S. at 189; *see also New Energy Co.*, 486 U.S. at 273. In particular, it prohibits state restrictions that frustrate the movement of persons and goods across state lines. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390-91 (1994).

Because such barriers were a chief concern of the Constitution's architects, *see* Barnett, *supra*, at 132-46, this Court's Dormant Commerce Clause jurisprudence reflects a special concern for maintaining a national economic union free of state-imposed limits on interstate commerce. *See Healy*, 491 U.S. at 335-36. According to this jurisprudence, state laws that expressly discriminate against interstate commerce and extraterritorial regulations—those that have the practical effect of regulating conduct beyond the state's border—are so odious to the federal system that they are *per se* invalid. *Id.* at 332 ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."); *City of Philadelphia v.*

New Jersey, 437 U.S. 617, 626-27 (1978) (forbidding laws that expressly discriminate against interstate commerce).

One type of extraterritorial regulation that has been repeatedly struck down by this Court is price-control regulations. *See Brown-Forman Distillers Corp.*, 476 U.S. at 575; *Healy*, 491 U.S. at 326; *Baldwin*, 294 U.S. at 519. These price-control statutes regulate conduct beyond the state's borders by forbidding out-of-state producers from charging different prices to reflect each state's regulatory burden. *See Brown-Forman*, 476 U.S. at 575-76 (noting the extensive state regulation of the production, sale, and distribution of alcohol); *Healy*, 491 U.S. at 326. If states could impose such a requirement, they could shift the cost of their regulations from their own citizens to residents of surrounding states—to whom they are not politically accountable. *See* Timothy Sandefur, *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* 139-45 (2014) (rent-seeking causes politicians to benefit favor-currying discrete special interests, while broadly distributing the resulting costs among those groups to which the politicians are not accountable).[6]

[6] *See also* Alfred C. Pigou, *The Economics of Welfare* 172 (1920) (explaining the problem of externalities, or spillover effects).

For similar reasons, the Dormant Commerce Clause bars state laws that directly attempt to prevent commercial activity from fleeing to other states where costs are lower. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-45 (1970) (local processing requirements "have been consistently invalidated").[7] Such laws do not attempt to mitigate local effects, but instead promote or protect local industry at the expense of out-of-state competition. *See id.* at 144-45. They are " 'basically a protectionist measure' " and offend the Commerce Clause. *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385 (8th Cir. 1993) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. at 624).

Allowing states to adopt extraterritorial laws would trample interstate competition by letting them impose their regulations on their neighbors and shield themselves from competition from states that impose fewer regulatory burdens or regulate more efficiently. As explained below, this competition is essential to achieving the values underlying the Constitution's protection for federalism.

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[7] *See also Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948) (state cannot require shrimp to be unloaded, packed, and marked within the state before exporting); *Johnson v. Haydel*, 278 U.S. 16, 16-17 (1928) (state cannot forbid oysters from being exported to other states for processing); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11-14 (1928) (state cannot forbid shrimp from being exported to other states for processing).

2. Extraterritorial Laws Undermine the Interstate Competition Essential to Federalism

By barring states from frustrating interstate competition, the Dormant Commerce Clause promotes federalism, one of the cornerstones of the United States Constitution. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 89 (2004). Although the term is most commonly invoked as a limit on federal power, it also concerns similar excesses by states. *See* Clint Bolick, *Grassroots Tyranny: The Limits of Federalism* 13-36 (1993). By protecting against the risk that *any* government will exceed its power, federalism "'secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). "When government acts in excess of its lawful powers, that liberty is at stake." *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

One of the principal means by which federalism achieves this aim is through competition amongst state governments. Because of the relative ease of migrating within the United States, states must be responsive to the preferences of voters, taxpayers, and industries, all of whom may choose to leave for greener pastures. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 416-18 (1956) (government power should be decentralized to allow people to "vote with their feet"); *see also* Geoffrey Brennan & James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* 173-86

(1980). As a result of this interstate competition, states are under constant pressure to find new and better ways to address public problems. That is, federalism

> assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458.

These competitive pressures ultimately lead to better results for all by aligning government with the preferences of the governed. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-1500 (1987). Because it is dependent on these preferences, federalism is nonpartisan and does not necessarily favor conservative or progressive results. *See* Heather K. Gerken, *A New Progressive Federalism*, Democracy (2012);[8] Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 Harv. L. Rev. 4, 44-55 (2010); Robert D. Alt, *Is Federalism Conservative?*, National Review Online (Apr. 29, 2003).[9] For example, in the twentieth century, African-Americans took

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[8] http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all.

[9] http://global.nationalreview.com/article/206732/federalism-conservative-robert-d-alt?target=author&tid=901132.

advantage of their ability to "vote with their feet" to escape the brutality of the Jim Crow South.[10] More recently, residents of liberal, high-tax states, like California, have been migrating to economically freer states, like Texas.[11]

For this intergovernmental competition to work, however, courts must enforce the Constitution's structural protections for federalism. They must limit the federal government's power, lest voters be subjected to unpopular or ineffective federal policies with no means to escape. *See Gregory*, 501 U.S. at 458. They must invalidate state laws that attempt to squelch these competitive pressures, including restrictions on the right to enter or exit the state, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (the Privileges and Immunities Clause protects freedom of movement among the states); attempts to appropriate immobile assets, *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-48 (2005) (Due Process Clause protects against uncompensated takings and takings that do not substantially advance a legitimate public purpose); restrictions targeting vulnerable minorities, *see United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938); and extraterritorial regulations. *See* 1 Laurence H. Tribe, *American Constitutional Law*, § 6-5 (3d ed. 2000) ("The checks on which we frequently rely to curb the abuse of legislative power—election and recall—are simply unavailable to those who have no

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[10] *See* Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* 128-35 (2013).

[11] *See* Sherry Bebitch Jeffe & Douglas Jeffe, *California v. Texas in fight for the future*, Reuters (Mar. 8, 2013), http://blogs.reuters.com/great-debate/2013/03/08/california-v-texas-in-fight-for-the-future/.

effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state's borders.").

The federal government regulates emissions under the Clean Air Act, but leaves the primary responsibility for determining how to reduce those emissions to the state where they occur. *See* 42 U.S.C. § 7401(a)(3) ("[A]ir pollution control at its source is the primary responsibility of States . . . ."); 42 U.S.C. § 7410 (emissions reductions should be achieved through state-created implementation plans). The reason it takes this approach—called "cooperative federalism"—is out of respect for federalism, particularly states' greater accountability to their constituents and ability to experiment. *See New York*, 505 U.S. at 167-69; *see also United States v. Morrison*, 529 U.S. 598, 660-61 (2000) (Breyer, J., dissenting) (arguing that cooperative federalism is a key safeguard for state autonomy); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813, 858-71 (1998) (arguing for cooperative federalism from a pro-federalism perspective).

3. The Decision Below Permits States To Adopt All Sorts of Mischievous Regimes

According to the decision below, the ban on extraterritorial state regulations applies only to "(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses." *See Energy and Environmental Law Institute*, 793 F.3d at 1172-73. According to the decision, states are otherwise free to regulate conduct occurring beyond their borders. *See id.* This is far broader than this Court's exception allowing states to regulate the quality and in-state effects of imported goods. *See Clover Leaf Creamery Co.*, 449 U.S. at 473-74.

Suppose, for example, New York—which has a minimum wage higher than the federal standard[12]—became concerned that higher labor costs cause its citizens and businesses to leave the state.[13] It might pass a law forbidding importation of goods produced elsewhere using labor that is paid less than New York's minimum wage. Since this would not be a price-control regulation, it would be constitutional according to the decision below.

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[12] *See* U.S. Dep't of Labor, *Minimum Wage Laws in the States – January 1, 2015*, http://www.dol.gov/whd/minwage/america.htm.

[13] *See, e.g.*, Debra Burke, et al., *Minimum Wage and Unemployment Rates: A Study of Contiguous Counties*, 46 Gonz. L. Rev. 661, 678-80 (2011) (describing employment effects of different minimum wage laws in state border areas of Washington and Idaho).

Or suppose that a state that favors unionization became concerned that "right to work" states[14] threaten its economy by offering lower costs to industry and consumers.[15] To prevent this competition, could the state ban importation of goods produced in states that do not allow "closed" shop agreements[16] or from businesses that do not have such agreements? This would not be a price-control regulation. Thus, under the decision below, it would not raise constitutional concerns.[17]

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[14] *See* Matthew Dolan & Kris Maher, *Unions Dealt Blow in UAW's Home State*, Wall St. J., Dec. 12, 2012, *available at* http://online.wsj.com/public/resources/documents/print/WSJ_-A001-20121212.pdf; Nicole Pasulka, *Right-to-Work Laws, Explained*, Mother Jones (Mar. 16, 2012), *available at* http://www.motherjones.com/politics/2012/03/what-are-right-to-work-laws (providing more detail about right to work laws generally, and their possible consequences).

[15] *See* Richard Vedder & Jonathan Robe, *The High Cost of Big Labor: An Interstate Analysis of Right to Work Laws*, Competitive Enterprise Institute (2014), *available at* http://cei.org/sites/default/files/Richard%20Vedder%20and%20Jonathan%20Robe%20-%20An%20Interstate%20Analysis%20of%20Right%20to%20Work%20Laws.pdf (reporting that right-to-work states experience higher population and job growth).

[16] A "closed" shop agreement is an agreement between an employer and a labor union to require membership in the union as a condition of employment. *See* 29 U.S.C. § 158(a)(3) (authorizing such agreements).

[17] There are an endless variety of similar regulations that states could impose on their neighbors under the decision below, including employment benefits, hour and wage laws, workers compensation, and anti-discrimination programs.

A state's policies may cause adverse consequences to its own industries and economy. So be it. But a state may not address the resulting competitive disadvantage by extending its regulation to commerce occurring beyond its borders. Colorado is free to adopt whatever emissions regulations that it wishes; so may its neighbors. If states choose differently and interstate competition leads to voters, taxpayers, or industry moving from one state to the other, losing states may not frustrate the other's choice by extending its regulatory hand into commercial activity occurring there. *See Healy*, 491 U.S. at 336. Extraterritorial regulations of emissions have precisely this effect. *See* Thomas Braun, *The Border Battle: North Dakota's Suit Against Minnesota and the Future of the Next Generation Energy Act*, 36 Hamline L. Rev. 479, 493-94 (2013) (if a state only regulates emissions occurring within it, "leakage" may occur as production shifts to other states); *see also* Cal. Health & Safety Code §§ 38505, 38562 (defining "leakage" and declaring a policy to minimize this emigration).

CONCLUSION

The decision below narrowly interprets the Dormant Commerce Clause's ban on extraterritorial regulations in a way that threatens to increase interstate conflict and undermine competitive federalism. For the foregoing reasons, Amici

respectfully request that the Court grant the petition and settle this important question of federal law.

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Respectfully submitted,

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