No. ___

IN THE

Supreme Court of the United States

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Commerce Clause permit a State to regulate consumer loans to its residents by a firm that advertises and conducts multiple loan-related activities in the State, but that requires all loan agreements to be signed in another State?

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PETITION FOR WRIT OF CERTIORARI

David H. Mills respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Indiana, is reported as *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897 (S.D. Ind. 2009), and is reprinted in the appendix at 21a. The Seventh Circuit's opinion is reported as *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010), and is reprinted in the appendix at 1a.

JURISDICTION

The Court of Appeals entered final judgment on January 28, 2010. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, Sec. 8, Cl. 3

The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes[.]

Indiana Code § 24-4.5-1-201
Territorial application; activities in other states by industrial loan and investment companies

Sec. 201. (1) Except as otherwise provided in this section, this article applies to sales, leases, and loans made in this state and to modifications, including refinancings, consolidations, and deferrals, made in this state, of sales, leases, and loans, wherever made. For purposes of this article, the following apply:

* * *

(d) Except as provided in subdivision (e), a sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor or a person acting on behalf of the creditor in another state and the creditor or the person acting on behalf of the creditor has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

STATEMENT

Regulatory Background

In 2007, the Indiana General Assembly amended the Indiana Uniform Consumer Credit Code ("IUCCC") to impose licensing and regulatory requirements on lenders from Indiana and other States "who are soliciting by any means and then making consumer loans to Indiana residents[.]" App. at 54a; Ind. Code § 24-4.5-1-201. Under this "Territorial Application Provision," a loan transaction occurs in the State of Indiana "if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor . . . in another state and the creditor . . . has advertised or solicited sales, leases, or loans in Indiana by any means," including mail, print and television. Ind. Code § 24-4.5-1-201(1)(d).

If a lender triggers the Territorial Application Provision by lending, advertising or soliciting in Indiana, the IUCCC applies to that lender's loans to Indiana residents. After obtaining the proper licenses from the Department of Financial Institutions, the lender, whether located in Indiana or elsewhere, may make loans to Indiana residents within Indiana's usury limits (capped at a maximum of 36% annually) and note its lien on the title of the consumer's motor vehicle as security for the loan. App. at 52a; Ind. Code § 24-4.5-3-508.

By way of comparison, Indiana also regulates other types of high-interest loans. "Payday" lenders are regulated by Indiana's Small Loan Act, where the lending limit is $550. *See* Ind. Code § 24-4.5-7-101 *et seq.*; § 24-4.5-7-201(4). With interest and fees, the annual rate may be as high as 391% for payday loans. *See Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 536 (Ind. Ct. App. 2006). However, pursuant to Indiana Code Section 24-4.5-7-403, lenders may not accept security for payday loans other than a customer's check or automated clearinghouse electronic debit. In addition, a lender may obtain a pawnbroker's license pursuant to Indiana Code Section 28-7-5-1 *et seq.*, and charge interest and fees resulting in an APR as high as 276%. Ind. Code § 28-7-5-28. A pawnbroker, however, must retain physical possession of the borrower's property as security.

Midwest Title's Business Model

Midwest Title Loans, Inc. is a consumer installment loan company incorporated in Illinois and licensed by the Illinois Division of Financial Institutions. App. at 48a. Midwest Title is known as a "title lender" because it operates stores (including 23 in Illinois) from which it provides "title loans"—loans secured by title to the borrower's motor vehicle. *Id.* at 48a-49a. Although there are no Midwest Title stores in Indiana, Midwest Title has made thousands of title loans to Indiana residents who have taken their motor vehicles and titles to one of Midwest Title's Illinois stores and applied in person for a loan. *Id.* at 50a. Approved applicants execute loan documents at Midwest Title's stores and provide Midwest Title with keys to the collateral vehicle in order to make self-help repossession easier in case of default. *Id.* at 50a-51a. Midwest Title submits the necessary documents to the Indiana Bureau of Motor Vehicles so that Midwest Title's lien will be noted on the title provided by the borrower. *Id.* at 52a. It provides the borrower with loan proceeds at its store in the form of a cashier's check drawn on an Illinois bank. *Id.* at 51a.

Midwest Title's title loans are payable in monthly installments over 12, 18, or 24 months, and the typical amount loaned is approximately 50% of the wholesale value of the vehicle securing the loan. *Id.* at 49a. Midwest Title charges an annual percentage interest rate of approximately 300%. *Id.* If permitted to apply, the Indiana Code would limit the per annum interest rate that Midwest Title could charge Indiana customers to 36%. *Id.*

Midwest Title requires Indiana borrowers to travel to Illinois to obtain a title loan, but with each such loan to an Indiana borrower, Midwest Title undertakes or anticipates several contacts with Indiana. For example, prior to this lawsuit, Midwest Title advertised on television stations in Indiana and bought listings in the Indiana Yellow Pages. *Id.* at 52a. Midwest Title sent annual mailings to past customers in Indiana in an attempt to solicit repeat business. *Id.* at 51a. And, as noted, Midwest Title has submitted necessary documents to the Indiana Bureau of Motor Vehicles to record its liens on borrowers' car titles. *Id.* at 52a.

Continuing the transaction, Indiana borrowers may cash loan checks and deposit loan proceeds at Indiana banks and make their payments through the mail or in other ways that cross state lines. Upon default, Midwest Title pays an unaffiliated third party repossession company in Indiana to repossess the vehicle and then obtains a new title from the Indiana Bureau of Motor Vehicles showing Midwest Title as the owner of the vehicle. *Id.* at 53a. Repossessed vehicles remain in Indiana until sold through an unaffiliated Indiana auction house. *Id.*

Background of this Lawsuit

In August 2007, shortly after Indiana's Territorial Application Provision became law, the Supervisor of the Division of Consumer Credit—a division of the Department of Financial Institutions—sent a letter to Midwest Title advising that Indiana law "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed[.]" *Id.* at 54a. The letter further explained that under Indiana law, "[i]f a creditor has violated [this provision], the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in [Section] 24-4.5-5-201." *Id.*

Midwest Title stopped offering loans to Indiana residents and charging or collecting interest on loans to Indiana borrowers made between July 1, 2007, and Midwest Title's receipt of the letter ("Covered Loans"). *Id.* at 55a. It also refunded all previous interest payments on the Covered Loans but continued to collect principal. *Id.*

On November 16, 2007, Midwest Title filed its complaint challenging Indiana's ability to enforce the IUCCC against it. The district court issued an Order on March 24, 2009, granting Midwest Title's motion for summary judgment and declaring the Territorial Application Provision "unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois[.]" *Id.* at 43a. The district court issued a permanent injunction forbidding the Department of Financial Institutions to apply the IUCCC to "loans made wholly in the state of Illinois to Indiana residents." *Id.*

The Seventh Circuit affirmed, holding that regulating a contract physically signed in another State violates the Commerce Clause, regardless of interstate contacts. The opinion listed several pros and cons for regulating high interest loans and various state interests for doing so, but the court's rationale boiled down to one sentence: "The contract was, in short, made and executed in Illinois, and that is enough to show that the territorial-application provision violates the commerce clause." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

States have a compelling interest in protecting their residents from predatory lending. Indeed they have always been permitted, even expected, to regulate lending through usury laws "despite the burden on commerce." *Aldens, Inc. v. Packel*, 524 F.2d 38, 48 (3d Cir. 1975). In the decision below, the Seventh Circuit acknowledged as much, App. at 8a, but ruled nonetheless that because Midwest Title's loan contracts are executed in Illinois, Indiana may not regulate Midwest Title's loans to Indiana residents.

This holding, which turns entirely on the location where the contract was executed rather than on the regulating State's overall interest in the transaction, conflicts with decisions of other circuits concerning state regulation of interstate consumer loan transactions and also causes unnecessary tension with due process doctrine. The decision is a problem not just for Indiana, but for many other States (and the District of Columbia) whose consumer protection laws could apply to contracts executed out of state. Particularly given the recent recession and the market it has created for high-interest loans, the Court should take this case to resolve whether States may regulate out-of-state loans to their citizens.

I. The Decision Below Conflicts With Decisions of Other Circuits Permitting States to Regulate Loans Issued in Other States to Their Citizens

In a series of Commerce Clause challenges brought by Illinois mail-order business Aldens, Inc., the Third and Tenth Circuits (as well as the Seventh Circuit) have permitted States to regulate credit terms of interstate purchases. *See Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978); *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 748 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38, 41 (3d Cir. 1975). Under the Aldens business model, customers would apply through the mail to make purchases on credit, and Aldens would accept or reject the contract in Chicago. *Packel*, 524 F.2d at 41. If Aldens accepted the contract, it was fully executed, and Aldens would ship the merchandise to the customer in a transaction governed by the contract's terms. *Id.*

In *Packel*, the Third Circuit upheld Pennsylvania's law imposing interest rate caps (and requiring specific disclosures in contracts and billing statements) on such transactions with Pennsylvania residents. The court thought "it clear beyond question that Pennsylvania has a substantial interest in the rates paid by its residents to foreign companies for the use of money and in the contracts setting those rates." *Id.* at 43. The court explained that the Pennsylvania law did not impose improper trade protectionism because it "place[d]

Pennsylvanians and Illini exactly on a par in selling to Pennsylvanians. No local interest is given an advantage within or without Pennsylvania. If Aldens wants to sell to a Pennsylvanian it can only do so on the same terms as a Pennsylvania mail order seller[.]" *Id.* at 47. In other words, the State "is not attempting to export obligations to its treasury, or to export its public policy on consumer credit interest rates. It merely seeks to afford uniform protection to all Pennsylvania residents with respect to such rates." *Id.* at 49.

Furthermore, the Pennsylvania law did not impose an undue burden on interstate commerce: "The burden on interstate commerce does not depend upon the happenstance of respective locations of buyer and seller. The fundamental issue is whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer 'loans'. . . ." *Id.* at 47-48. The court held that the local interest was stronger based on "the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws[.]" *Id.* at 48. In contrast, the Seventh Circuit in this case held that "nondiscriminatory local regulations [can be] invalidated without a balancing of local benefit against out-of-state burden [when] states actually attempt to regulate activities in other states." App. at 10a.

Like the Third Circuit, the Tenth Circuit upheld an Oklahoma statute setting maximum interest rates for credit sales, observing that "the subject matter and purpose of the state regulation is the present day starting place for a consideration of the issues before us; thus the degree of interest of the state in the subject matter regulated, and how fundamental is this local interest." *Ryan*, 571 F.2d at 1161. The court applied a balancing test and rejected "[t]he 'per se' approach . . . to the Commerce Clause. . . . The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits." *Id.* Further, the court noted that the Supreme Court had "'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of subject, and give way to the consequences of the contracts in the regulating states." *Id.* (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950)); *see also Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977) (upholding interstate application of a Wisconsin law setting a maximum permissible finance charge for extension of credit under open-end credit plans).

The Pennsylvania and Oklahoma usury laws upheld in the *Packel* and *Ryan* cases remain in force and would govern any loans from Midwest Title to residents of those states, regardless where made. *See* 69 Pa. Cons. Stat. Ann. § 1103 (West 2010);

Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents, 38 Pa. Bull. 3986, July 26, 2008, *available at* http://www.pabulletin.com/secure/data/vol38/38-30/1371.html (confirming that Pennsylvania law applies to lenders located in other States who lend money to Pennsylvania residents at rates greater than 6% per year); Okla. Stat. Ann. tit. 14 § 1-201(5) (West 2010) (requiring an Oklahoma license for any lender who issues a loan from another State to an Oklahoman, and precluding such lender from "collect[ing] charges through actions or other proceedings in excess of those permitted by" Oklahoma law or "enforce[ing] rights against the . . . debtor, with respect to the provisions of agreements which violate" Oklahoma law).

In fact, the Third Circuit just recently applied Pennsylvania law in adjudicating a dispute over a loan issued to a Pennsylvania citizen in Delaware, notwithstanding a Delaware choice-of-law clause in the loan contract. *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009). The court stated that because "Pennsylvania's interest in the dispute, particularly its antipathy to high interest rates such as the 300.01 percent interest charged in the contract at issue, represents such a fundamental policy[,] we must apply Pennsylvania law." *Id.*

So, while *Packel* and *Ryan* permit Pennsylvania and Oklahoma to regulate Midwest Title's loans to their citizens made in Illinois, the decision below precludes Indiana from doing so. The Seventh Circuit plainly parted ways with both cases when it ruled that the site of contract execution, rather than a State's degree of interest in the transaction, determined whether the State could regulate. App. at 18a.

What is more, the *Aldens* cases undergird a more recent Tenth Circuit decision that conflicts with the decision below. In *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009), the court applied the "degree of interest" principles from *Ryan* to hold that a Kansas consumer lending regulation could apply to loans offered by an out-of-state company over the internet. In *Quik Payday*, the Tenth Circuit was very clear that "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas[,]" such that "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." *Quik Payday*, 549 F.3d at 1308. Thus, the Tenth Circuit found Quik Payday's contacts with the State of Kansas and the impact of the loan in Kansas—not simply the location where the contract was signed—to be of paramount importance.

By way of comparison, Hoosiers who borrow money from Midwest Title receive a check in Illinois, but even if they cash it there, these borrowers will most likely spend the proceeds in Indiana, just as borrowers in *Quik Payday* were reasonably expected to spend their loan proceeds in Kansas. Yet the Seventh Circuit departed from the seemingly settled law exemplified by the *Aldens* and *Quik Payday* cases and looked only to where Midwest Title signs its contracts rather than to where the transactions begin (with advertisements in Indiana) and ultimately lead (back to Indiana). This conflict in result and reasoning justifies granting the Petition.

II. The Question Presented Warrants Review Because Many States Regulate Interstate Loans Amidst an Escalating Consumer Debt Crisis

All States regulate consumer loan interest rates, and at least *twenty* States plus the District of Columbia apply them to loans crossing state lines. *See* Small Dollar Loan Products Scorecard: Statutory Backup, *available at* http://www.consumerfed.org/elements/www.consumerfed.org/File/statutory_backup_08(3).pdf. The escalating consumer debt crisis underscores the significance of such State limits—and reinforces the need for review here.

1. Americans depend on credit now more than ever, and although "consumer over-indebtedness has been many years in the making, only recently has this crisis attracted widespread public attention." Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 Loy. U. Chi. L.J.

557, 557 (2009). The 2008 rescue of Bear Stearns and the collapse of Lehman Brothers, along with "the corresponding seizure of the financial markets in the United States, for the first time, have drawn widespread public attention to the operation of the financial system and its connection to and relationship with consumer debt." *Id.* at 558.

Debt levels have soared in the United States in part because increasingly innovative, higher-cost consumer debt products have expanded access to credit across economic classes. It is no secret that lower-income households are targeted by lenders because they are less likely to pay off their credit card debt or other high cost loans each month. *Id.* at 580. The resulting "debt treadmill" ensnares these consumers and makes more money for lenders.

Overall household consumer debt, even excluding mortgage debt, rose from $351 billion in 1980 to nearly $2,200 billion in 2006. *Id.* at 557 n.1. But since 2006, the situation has only become more urgent. The faltering economy has caused more people to resort to fringe banking as unemployment rates have increased and people have attempted to avoid foreclosure. In that environment, car title lending is one of the new innovations in high interest debt products. This industry "has grown tremendously in recent years in states that have failed to take adequate steps to protect borrowers." Amanda Quester and Jean Ann Fox, *Car Title*

Lending: Driving Borrowers to Financial Ruin, at 9, *available at* http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car_Title_Lending-0405.pdf. Sensing an opportunity to exploit a sour economy, the title lending industry has spent much time and money in recent years lobbying to charge high interest rates for such loans. *Id.* at 10.

High interest rate loans are particularly damaging because of possible long-term ramifications. Even apart from imposing difficult payments and high interest rates, these loans can have a negative impact on credit scores, particularly when borrowers initiate new loans seriatim to pay off prior loans, a practice that can cause borrowers to accumulate large amounts of debt. And because eligibility for low-interest mortgages, insurance, housing, and employment are often affected by credit history, temporary financial hardships that push the needy into the debt of predatory lenders can inflict financial scars lasting years into the future.

In this atmosphere of escalating debt and the resulting harm it causes, many States have ignored the pleas of industry lobbyists and, instead, passed laws to protect their citizen-borrowers. Indiana has concluded that permitting high interest rates for title loans is a bad idea, and if Indiana chooses to regulate lenders who solicit residents to take out 300% interest loans, it should be able to do so. If Indiana lacks that power, its citizens will go unprotected, for it is highly unlikely that other

States, no matter what regulations they impose on title lenders, will take action based on complaints by Indiana residents. Such a regulatory gap not only has implications for interest-rate caps, but also for more fundamental transgressions such as outright fraud. If Indiana cannot protect its citizens from unfair and deceptive trade practices, who will?

At the very least, States need to know just how far they can go when it comes to protecting their citizens from out-of-state predatory lending.

2. Indiana, Pennsylvania and Oklahoma are certainly not the only States to regulate loans to their residents where loan contracts are signed in other States. States have long controlled interest rates that lenders may offer their residents from across State borders. *See Packel*, 524 F.2d at 48.

In fact, at least twenty States and the District of Columbia have laws that can apply to loan contracts signed in other States. Some have statutes that, like Indiana's Territorial Application Provision, apply once a lender advertises in or directly solicits customers of the regulating State. *See, e.g.*, D.C. Code § 28-3301(h) (regulating consumer credit transactions involving a D.C. resident if the lender "has solicited or advertised in the District of Columbia by any means, including mail, brochure, telephone, print, radio, television, internet, or any other electronic means"); Kan. Stat. Ann. § 16a-1-

201[1] (controlling loans if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."); Me. Rev. Stat. Ann. tit. 9-A § 1-201 (applying if "[t]he creditor, wherever located, induces the consumer who is a resident of this State to enter into the transaction or open-end credit plan by face-to-face, mail, telephone or electronic mail solicitation in this State"); *see also* N.Y. Banking Law § 340 (triggered by solicitation within the State but including an exception for de minimis activity); N.C. Gen. Stat. § 53-190 (applying if any solicitation occurs inside North Carolina).

Other States' consumer loan regulations apply to loan contracts signed out-of-state based on the lender's number of transactions with the regulating State's residents, or the amount of the loan, or the rate of interest charged. *See, e.g.*, Ariz. Rev. Stat. Ann. § 6-1251 (applying to any lender who makes three or more payday or title loans to Arizona residents in a single calendar year); N.M. Stat. Ann. § 58-15-24 (applying to loans "made outside this state" for "the value of two thousand five hundred dollars ($2,500) or less . . . ."); Conn. Gen. Stat Ann. § 36a-555 (requiring licensing of any lender who loans

[1] Upheld in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2062 (2009).

less than $15,000 at an interest rate higher than 12% per annum).

Still other States' laws apply if the consumer makes payments from, or spends loan proceeds in, that State, or if a consumer in the State consummates the loan through the mail or over the internet. *See, e.g.*, 2010 Oregon Laws 1st Sp. Sess. Ch. 23 (S.B. 993) (applying to payday or title loans made to Oregon residents "if the consumer makes a payment on the loan from Oregon . . ."); W. Va. Code § 46A-1-104 (applying if payment on the loan is to be made from West Virginia); Vt. Stat. Ann. tit. 8 § 2238 (applying if the commercial loan is made "for use" in Vermont); Minn. Stat. Ann. § 47.601, sub. 3 (applying Minnesota law to out-of-state lenders that "make[] a consumer small loan electronically via the Internet"); Ohio Rev. Code Ann. § 1321.17 (precluding enforcement of loan contracts that exceed Ohio's allowable rate of interest, including those made by lenders from other States who primarily make loans by mail).

Virginia regulates *payday* loans regardless of the location of the lender, *see* Va. Code Ann. §§ 6.1-445, 6.1-469.1, and just this year enacted a statute requiring that all *title* loans involving a resident of Virginia be made in accordance with Virginia law "whether or not the [lender] has a location in the Commonwealth. . . ." *See* Va. Code § 6.1-481, *available at* http://leg1.state.va.us/cgibin/legp504.exe

?101+ful+CHAP0477. Similarly, South Carolina requires lenders to obtain a license if lending to a customer that resides in South Carolina "whether or not that person has a location in South Carolina[.]" S.C. Code Ann. § 34-39-130(C).

Furthermore, echoing the holding in *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009) (discussed in Part I, *supra*), several States effectively regulate cross-border lending to their citizens by limiting liability for loans made at rates higher than allowed by the State's law. *See* Cal. Fin. Code §§ 22322-22324; N.C. Gen. Stat. § 53-190; Ohio Rev. Code Ann. § 1321.17; Okla. Stat. Ann. tit. 14A § 1-201(5); 7 P.S. § 6203; R.I. Gen. Laws § 19-14.2-1(c); W. Va. Code § 46A-1-104; Wyo. Stat. § 40-14-120(e).

Extraterritorial application of consumer loan regulations is thus an important issue throughout the Nation, both for regulating lenders and for enforcing loan contracts. The Court's intervention is warranted so that all lenders, borrowers and regulators will be governed by the same rules of extraterritoriality.

III. The Court Below Erroneously Relied on Price-Affirmation Cases and Thereby Created New Tension Between Commerce Clause and Due Process Doctrine

In the decision below, the Seventh Circuit relied on *Healy v. Beer Institute*, 491 U.S. 324 (1989), and

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), to conclude that the Commerce Clause compels invalidation of any state statute that regulates commercial activity beyond the state's borders, regardless of the impact that activity has in the regulating State. These cases, however, stand only for the highly limited proposition that state laws are invalid where they (1) regulate wholly extraterritorial commercial activity and (2) protect the state's consumers at the expense of consumers in other States. This Court has announced other doctrines for evaluating legitimate State consumer-protection laws that apply to out-of-state commercial undertakings.

A. *Brown-Forman* and *Healy* Do Not Stand for the Rule Applied Below

Brown-Forman and Healy both addressed alcohol price-affirmation statutes that prevented consumers in other States from getting better prices than consumers in the regulating State. In *Brown-Forman*, 476 U.S. at 575, the Court invalidated a New York price-affirmation statute that required liquor distillers and producers to sell their wares to New York wholesalers at prices no higher than the prices they charge wholesalers anywhere else in the country. And because the statute required distillers and producers to affirm their prices in other States 10 days prior to the effective date, it both regulated commerce occurring wholly outside New York State *and* did so at the expense of businesses and consumers in other States. That is, once producers filed their price affirmations, they could lower their prices to New York wholesalers, but not wholesalers in other States. *Id.* at 577.

A few years later, in *Healy*, 491 U.S. at 329, the Court extended its producer-level holding from *Brown-Forman* to the wholesale level. In *Healy*, the Court invalidated a price-affirmation law precluding wholesalers from selling to retailers outside Connecticut for less than to retailers in Connecticut. In so doing, the Court stated that the "Commerce Clause . . . precludes 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." *Id.* at 336.

These price-affirmation laws had the effect of dictating prices that an out-of-state producer could charge to an out-of-state buyer—exactly the sort of extraterritorial application of laws that the Commerce Clause prohibits. While Connecticut had a legitimate interest in keeping absolute prices low for its residents, that interest was not implicated by the comparative prices charged to consumers in other States. *Id.* States do not, that is, have a legitimate interest in ensuring that their residents pay the lowest prices offered anywhere. Such an "attempt[] to give local consumers an advantage over consumers in other States" amounts to illegitimate economic protectionism. *Brown-Forman*, 476 U.S. at 580.

Accordingly, the Court's prohibition against "regulating commerce occurring wholly outside that State's borders" does not mean that States may not under any circumstances regulate transactions where the contract is signed outside the State. Rather, it means only that a State may not regulate extraterritorially where to do so benefits its own citizens only by burdening the citizens of other States.

Indiana's regulation of title loans, while seeking to limit the price of capital for Hoosiers, does not do so at the expense of residents of other States. Indiana imposes a determinate APR cap for title loans to Indiana residents, but it does not require Midwest Title to offer rates no higher than rates it offers to Illinois residents. Accordingly, there is no illegitimate economic protectionism. Rather, Indiana's stake is the traditional compelling interest in protecting consumers from predatory lending practices that ultimately have negative effects in Indiana.

Another critical distinction with *Brown-Forman* and *Healy* is the lack of any prospect that similar statutes in other States would lead to an interlocking web of regulations subjecting individual loans to multiple, and perhaps inconsistent, regulatory oversight. In *Healy*, the Court was troubled that "the practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. The Indiana statute creates no interlocking regulations: it has no effect on the interest rates Midwest Title charges borrowers outside of Indiana, and no loan that Midwest Title makes to an Indiana consumer subject to the Indiana APR caps will be stymied by conflicting laws of other States.

Indiana's title lending statute is not the kind of law that the Court rejected in *Brown-Forman* and *Healy*, and the Seventh Circuit erred in relying on those cases.

B. A more deferential standard applies to laws that affect commerce in other States while protecting against injuries at home

Because Indiana's title lending law vindicates compelling state consumer-protection interests, the Seventh Circuit should have applied a far more deferential standard. At most it should have subjected the Indiana law to some sort of balancing test such as the Court has historically used to evaluate laws having interstate effects while providing legitimate local protection. *See Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Edgar v.*

MITE Corp., 457 U.S. 624, 644 (1982); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); *but see Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (holding that rational-basis review is appropriate when statutes "do not give local firms any competitive advantage over those located elsewhere.").

Indiana's law would easily survive a balancing test. Indiana and other States historically have had a compelling interest in protecting their residents from predatory lending in all forms, including payday loans, pawn loans, title lending and revolving debt. Indeed, if Midwest Title's loans were secured by real property located in Indiana, there surely would be no question that Indiana could regulate them. An automobile owned by an Indiana resident, while not real property, has similarly strong ties to the State because it is registered in Indiana, is driven mostly on Indiana's roads, and embodies a significant amount of the Indiana resident's material wealth.

In contrast, the burden that the IUCCC imposes on interstate commerce—capping Midwest Title's APR—is light. It does not keep Midwest Title from lending to Indiana residents, and does not even cap Midwest Title's interest rates for Indiana residents if Midwest Title is willing to forgo advertising and soliciting in Indiana. Midwest Title has never even attempted to argue that Indiana's statute would fail a balancing test.[2]

C. Because due process plainly permits one State's law to apply to a financial contract signed in another State, the decision below creates tension in the law of extraterritorial application

The Commerce Clause is not the only constitutional limit on extraterritorial application of state law. The Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause also limit how far States may go in regulating activities that occur in other States. Scholars agree that the Court's decisions concerning constitutional limits on the extraterritorial application of State law have been "murky and contradictory," yielding "no clear answer" as to proper circumstances for applying Commerce Clause or due process doctrine. Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle In Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1061 (2009). Indeed, "constitutional doctrine to this day does not clearly tell us to what extent states may regulate people and things outside

[2] Balancing would also address the Seventh Circuit's concern about whether Indiana could regulate gambling by its citizens at Las Vegas casinos. App. at 12a. Gambling at an out-of-state casino does not imply the same sort of long-term ongoing transaction involving the borrower's home state as a 24-month title loan bearing 300% interest.

their borders." Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 Notre Dame L. Rev. 1133, 1154 (2010); *see also* Katherine Florey, *State Extraterritorial Powers Reconsidered: A Reply*, 85 Notre Dame L. Rev. 1157, 1157 (2010) (hereinafter, Florey, *Reply*) (describing multiple existing approaches to problems of extraterritorial application as "a haphazard assemblage of sometimes-inconsistent principles that courts have failed to justify or reconcile to any meaningful degree").

By treating *Healy* and *Brown-Forman* as it did, however, the Seventh Circuit in this case unnecessarily created *new* tension between due process doctrine and Commerce Clause doctrine in non-tax economic regulation cases.[3]

1. Due process analysis permits extraterritorial regulation based on a range of state connections

In due process cases, this Court has examined *all* relevant contacts with the regulating State, not simply the site of contract execution, to discern which State's laws can apply. A State's power to regulate is not "determined by a conceptualistic

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[3] Because Full Faith and Credit doctrine generally tracks due process doctrine or otherwise applies in a discrete set of cases not relevant here, *see Allstate Insurance Co. v. Hague,* 449 U.S. 302, 308 n.10 (1981), our discussion focuses only on tensions between the Commerce and Due Process Clauses.

discussion of theories of the place of contracting or of performance. Instead [the Court has] accorded great weight to the consequences of the contractual obligations in the state where the insured resided and the degree of interest that state had in seeing that those obligations were faithfully carried out." *Travelers Health Association v. Virginia*, 339 U.S. 643, 647-48 (1950) (internal citations omitted).

Accordingly, the Court has permitted, in response to due process objections, extraterritorial application of consumer protection statutes where multiple contacts of various types exist between the regulating State and the regulated business. In *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 72 (1954), the Court held that a Louisiana statute could constitutionally apply to a Massachusetts insurance contract because it "is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers." In fact, "[p]ersons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help." *Id.* Furthermore, "Louisiana courts in most instances provide the most convenient forum for trial of these cases." *Id.* Finally, because of "Louisiana's legitimate interest in safeguarding the rights of persons injured there[,] . . . the direct action provisions . . . do not violate due process." *Id.* at 73.

Similarly, in *Allstate Insurance Company v. Hague,* 449 U.S. 302 (1981), the Court upheld application of a Minnesota insurance stacking provision to policies issued in Wisconsin. Collecting prior authority (including *Watson*), the Court ruled that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. Again, what mattered was the aggregation of significant contacts, not the site of contract formation.

Even when the Court has rejected extraterritorial application of a consumer protection statute on due process grounds, it has done so based on lack of minimum contacts rather than the site of contract formation. In *Home Insurance Company v. Dick*, 281 U.S. 397, 408 (1930), the Supreme Court found that Texas did not have legislative jurisdiction to regulate an insurance policy that had been issued (1) in Mexico, (2) by a Mexican insurer, (3) to a Mexican citizen, and (4) covering a Mexican risk, when "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas." Again, the implication is not that site of contracting was determinative, but that some aggregation of minimum contacts, including reasonably foreseeable injury in the rule-of-decision state, be present.

Based on these precedents, lower federal courts resolve matters of legislative jurisdiction based on minimum significant contacts, not site of contracting. In *Gerling Global Reinsurance Corporation of America v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001), for example, the court, relying on *Hague*, held that legislative jurisdiction exists where there is "at least some minimal contact between a state and the regulated subject matter or transaction . . . ." *See also Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (concluding that "although not identical, judicial and legislative jurisdiction are determined pursuant to like guidelines").

Brown-Forman and *Healy* did not repudiate those cases. Indeed, the Court in *Healy* relied expressly on Justice White's plurality opinion in *Edgar v. MITE Corporation*, which stated that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643. Furthermore, the Court has made some efforts to reconcile Commerce Clause and due process doctrine as they relate to extraterritorial application of State law. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). As the decision below demonstrates, however, further guidance is plainly needed. *See* Florey, *supra*, at 1112 ("while the Supreme Court has suggested in cases like *Gore* and

Campbell that the two lines of cases may overlap, it has never fully reconciled them. As a result, the current doctrine lacks coherence, clear boundaries, and ease of application").

2. The Seventh Circuit acknowledged that it was diverging from standard choice-of-law principles

The Seventh Circuit expressly acknowledged that its ruling conflicts with traditional choice-of-law doctrine predicated on due process principles, but it dismissed the significance of that conflict. *Id.* at 16a-17a. In particular, it recognized that, if a borrower were to sue Midwest Title for violating the IUCCC, "an Indiana court might rule that Indiana had the 'most intimate contacts' with the transaction and therefore that its law applied even though the loan had been made in Illinois." *Id.* at 16a. One might think that a state interest enabling *choice-of-law jurisdiction* would also, by definition, enable *extraterritorial regulation.* Not so, according to the decision below: "the presence of an interest that might support state jurisdiction without violating the due process clause of the Fourteenth Amendment [does not] dissolve[] the constitutional objection to extraterritorial regulation[.]" *Id.*

To restate: according to the Seventh Circuit, the IUCCC, with its title loan contract rate caps and rescission rights, could constitutionally supply the rule of decision in a lawsuit between Midwest Title and an Indiana borrower over a contract signed in Illinois loaning money at 300% interest. Yet, Indiana may not constitutionally enforce prophylactic regulations against Midwest Title to prevent that injurious loan from ever being made. So, while the Department of Financial Institutions *cannot* prevent Midwest Title from making 300% loans, it *can* encourage Hoosier borrowers to sue under the IUCCC to cancel 300% loan contracts after spending the proceeds. Such an outcome would appear to be a win/win for Hoosier borrowers, but it would also yield an inefficient regulatory model, to say the least.

More to the point, the Seventh Circuit provided no explanation for how it can be constitutionally correct to treat prophylactic regulations differently from post-hoc liability laws. Different standards cannot be justified simply because "[t]he concerns behind the due process and commerce clauses are different." *Id.* at 17a. Presumably, *both* clauses apply to the extraterritorial application of *both* kinds of laws. This Court itself has long rejected any meaningful distinction between statutes and common law, or between prophylactic and post-hoc applications, when it comes to constitutional challenges to State law. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Gore*, 517 U.S. at 572 n.17; *see also* Florey, *Reply*, *supra*, at 1158 (observing that "a distinction between regulation by state legislatures and application of state law by state courts . . . simply cannot be maintained or justified").

Nor does the Seventh Circuit's citation to *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), resolve the tension. *Quill* confirmed the rule from *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), that a State can require an out-of-state business to collect and remit sales and use taxes only if the business has a "physical presence" in the taxing State—a standard more limiting than what the Due Process Clause would permit. *Quill*, 504 U.S. at 314. *Quill* held as it did, however, largely as a matter of *stare decisis* rather agreement with *Bellas Hess*. *Id.* at 311 (observing that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today").

And though it refused to overturn the *Bellas Hess* physical-presence rule in *Quill*, the Court repeatedly stated that the rule applies only to sales or use tax collection requirements. "The same physical-presence requirement that *Bellas Hess* established for sales and use taxes" does not even apply "to other types of taxes." *Quill*, 504 U.S. at 314; *see also id.* at 317 (noting that *Bellas Hess* rule does not apply in cases "concerning other types of taxes"). So, while due process and Commerce Clause analyses need not be identical, the Court has minimized any tension between them by making it clear that a regulating State's legitimate interests are relevant to both, *except* where sales and use taxes are at issue, in which case only physical presence counts under the Commerce Clause.

On its own, however, the Seventh Circuit has now effectively extended this limited Commerce Clause formalism to the larger regulatory context. Doing so creates palpable tension with due process doctrine across many regulatory sectors—tension that this Court apparently thought it had limited to the sales and use tax context in *Quill.*

One obvious consequence may be that large swaths of choice-of-law rules, arrived at incrementally over decades of highly factual litigation over forum-state regulatory interests, will now be open to question. In other words, despite its insouciant effort to confine Commerce Clause analysis to the actions of state regulators, the Seventh Circuit has effectively issued an invitation for litigants to argue choice-of-law issues based not only on which State has the greater regulatory interest (an argument that usually sounds in due process but that also fits the Commerce Clause balancing test), but also based on the formalistic question of where the contract was signed (an argument arising exclusively under the Commerce Clause).

In order to avoid unnecessary tension between due process and Commerce Clause doctrine—which the Seventh Circuit's ruling all but ensures—

extraterritorial application of a state consumer protection law should for all purposes turn not only on where the contract at issue was executed, but also on the State's overall interest in the transaction. The Seventh Circuit recognized Indiana's compelling interest in regulating Midwest Title's loans to its residents, but rejected the constitutional significance of that interest because of where the parties signed the formal contract. The Court should take this case to decide whether that was the proper analysis.

CONCLUSION

The petition should be granted.

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