No. 15-471

In the Supreme Court of the United States

ENERGY AND ENVIRONMENT LEGAL INSTITUTE, ET AL.,
PETITIONERS

v.

JOSHUA EPEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FUEL & PETROLEUM MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

RICHARD S. MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION
1667 K Street, NW
Washington, DC 20006
(202) 552-8474

JASON A. LEVINE
JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street
Houston, TX 77002
(713) 758-2222

Attorneys for Amici Curiae

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the Chamber of Commerce of the United States of America ("Chamber") and the American Fuel & Petrochemical Manufacturers ("AFPM") respectfully move for leave to file the accompanying brief as *amici curiae*. All parties were timely notified of the *amici*'s intent to file the attached brief, as required by Rule 37.2(a). Petitioners and Respondents Joshua Epel, James Tarpey, and Pamela Patton have consented to the filing of the accompanying brief. Respondents Environment Colorado, Conservation Colorado Education Fund, Sierra Club, the Wilderness Society, Solar Energy Industries Association, and Interwest Energy Alliance, however, denied consent, necessitating this motion. The notice letters have been lodged with the Clerk of this Court.

The brief is appropriate and will assist the Court in considering this important petition for a writ of certiorari. The *amici* have a strong interest in the subject matter of the petition and have a perspective on the legal and policy matters involved that it believes will aid the Court. The *amici* therefore request that their brief be accepted.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files

amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members, including both companies in the energy and electricity sectors that are directly regulated by the renewable portfolio standard at issue and all companies that support or depend on access to affordable, reliable electricity, have a strong interest in this petition. The panel's decision refusing to strike down an extraterritorial state law has an immediate impact on the energy and electric power industries nationwide, and threatens broader adverse effects on numerous other industries.

AFPM is a national trade association that represents corporations that own and operate over 95 percent of the United States' domestic petroleum refining capacity and virtually all of our nation's petrochemical production capacity. AFPM members are large energy consumers who would be impacted directly by the outcome of this litigation. AFPM member companies manufacture gasoline, diesel fuel, home heating oil, jet fuel, asphalt, and the petrochemicals that serve as "building blocks" in thousands of products used every day by consumers and businesses, including plastics, clothing, medicine and computers.

For these reasons, the Chamber and AFPM respectfully request leave to file the accompanying brief as *amici curiae*.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

RICHARD S. MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ASSOCIATION
1667 K Street, NW
Washington, DC 20006
(202) 552-8474

JASON A. LEVINE
JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street
Houston, TX 77002
(713) 758-2222

Attorneys for Amici Curiae

NOVEMBER 2015

TABLE OF CONTENTS

Table of Authorities II

Interests of *Amici Curiae* 1

Summary of Argument 2

Argument 3

I. The Panel Decision Cannot Be Reconciled With The Constitutional Prohibition On Extraterritorial State Laws 3

A. Colorado's RPS Has The Practical Effect Of Regulating Commerce Wholly Outside The State's Borders 4

B. The Panel Erred In Placing An Arbitrary Limitation On The Extraterritoriality Inquiry 7

C. Colorado's RPS Conflicts With Other States' Regulations, Fragmenting The Interstate Market For Renewable Energy 11

II. The Panel's Lax Test Improperly Permits Discrimination Against Out-of-State Retail Utilities.. 18

A. On Its Face, Colorado's RPS Places Disproportionate Burdens On Out-of-State Retail Utilities................................. 18

B. The "Market Participant" Doctrine Does Not Save Colorado's RPS................. 23

Conclusion 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ass'n des Eleveurs de Canards et D'Oies du Quebec v. *Harris*,
79 F. Supp. 3d 1136 (C.D. Cal. 2015).................. 16

Atlantic Coast Demolition & Recycling, Inc. v. *Bd. of Chosen Freeholders of Atl. Cty.*,
48 F.3d 701 (3d Cir. 1995)................................... 23

Baldwin v. *G.A.F. Seelig, Inc.*,
294 U.S. 511 (1935) ....*passim*

Brown-Forman Distillers Corp. v. *N.Y. State Liquor Auth.*,
476 U.S. 573 (1986) ....*passim*

C & A Carbone, Inc. v. *Town of Clarkstown*,
511 U.S. 383 (1994) 4, 5, 8

Dean Milk Co. v. *City of Madison*,
340 U.S. 349 (1951) 14

General Motors Corp. v. *Tracy*,
519 U.S. 278 (1997) 18, 19

Granholm v. *Heald*,
544 U.S. 460 (2005) 14

Healy v. *Beer Inst.*,
491 U.S. 324 (1989) ....*passim*

Lewis v. *BT Inv. Managers, Inc.*,
447 U.S. 27 (1980) 19

Missouri v. *Harris*,
58 F. Supp. 3d 1059 (E.D. Cal. 2014).................. 16

National Solid Wastes Mgmt. Ass'n v. *Meyer*,
63 F.3d 652 (7th Cir. 1995) 6, 7

Cases—Continued: **Page(s)**

New Energy Co. of Indiana v. *Limbach*,
486 U.S. 269 (1988) 6

North Dakota v. *Heydinger*,
15 F. Supp. 3d 891 (D. Minn. 2014) 5

Oregon Waste Sys., Inc. v. *Dep't of Envtl. Quality*,
511 U.S. 93 (1994) 3

Pharmaceutical Research & Manufacturers of America v. *Walsh*,
538 U.S. 644 (2003) 8, 9

Reeves, Inc. v. *Stake*,
447 U.S. 429 (1980) 23

Rocky Mountain Farmers Union v. *Corey*,
730 F.3d 1070 (9th Cir. 2013) 16

Sam Francis Found. v. Christies, Inc.,
784 F.3d 1320 (9th Cir. 2015) (en banc) 7

Wyoming v. *Oklahoma*,
502 U.S. 437 (1992) 23

Statutes and Regulation:

20 Ill. Comp. Stat. § 3855/1-56 15

73 Pa. Stat. and Cons. Stat. Ann. § 1648.4 15

Ariz. Admin. Code § R14-2-1802 .... 11, 13

Cal. Pub. Res. Code § 25741 .... 11, 13

Colo. Rev. Stat. § 40-12-124 ....*passim*

Md. Code Pub. Utils. § 7-701 15

Mont. Code Ann. § 69-3-2003 .... 11, 13

N.C. Gen. Stat. § 62-133.8 14

Statutes and Regulation—Continued: **Page(s)**

N.J. Stat. § 48:3-87 15

N.M. Stat. § 62-15-37... 11, 13

Nev. Rev. Stat. § 704.7811 .... 11, 13

Ohio Rev. Code § 4928.64 15

Or. Rev. Stat. § 469A.005 11

Or. Rev. Stat. § 469A.025(1)(c)......................11, 12, 13

Wash. Rev. Code § 19.285.030............................ 11, 13

Miscellaneous:

About Black Hills Corporation, BLACK HILLS CORP., http://goo.gl/TNhwSp (last visited Nov. 2, 2015) 18

Brief for Chamber of Commerce and American Petroleum Institute as Amici Curiae Supporting Petitioners, *American Fuel & Petrochemical Assoc. v. Corey*, 134 S. Ct. 2875 (No. 13-1149) 2

Brief for Chamber of Commerce et al. as Amici Curiae Supporting Appellees, *North Dakota v. Heydinger*, Nos. 14-2156 & 14-2251 (8th Cir. argued Oct. 21, 2015) 2

Robert Bryce, *The High Cost of Renewable-Electricity Mandates*, Energy Policy & the Environment Report, No. 10, Feb. 2012, http://goo.gl/D88bx0... 20

Colorado Dep't of Regulatory Agencies, *Deregulated Electric Cooperatives in Colorado* (July 2, 2015) 22

Miscellaneous—Continued: **Page(s)**

Colorado Governor's Energy Office, *2010 Colorado Utilities Report* (Aug. 2010), https://goo.gl/xFIPkY.................................... 18, 19

Database of Incentives for Renewables & Efficiency (DSIRE), *Renewable Portfolio Standard Policies* (June 2015), http://perma.cc/24FF-6KS9?type=live 11, 13

Carolyn Elefant & Edward A. Holt, Clean Energy States Alliance, *The Commerce Clause and Implications for State Renewable Portfolio Standard Programs* (Mar. 2011) 14, 15

David W. Kreutzer et al., Heritage Foundation Center for Data Analysis Report No. CDA10-03, *A Renewable Electricity Standard: What It Will Really Cost Americans* (May 5, 2010), http://goo.gl/cDdsNl 20

Harvey Reiter, *Removing Unconstitutional Barriers to Out-of-State and Foreign Competition from State Renewable Portfolio Standards: Why the Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 36 Energy L.J. 45 (2015) 14, 15, 16

Benjamin K. Sovacool & Christopher Cooper, *Congress Got It Wrong: The Case for a National Renewable Portfolio Standard and Implications for Policy*, 3 Envtl. & Energy L. & Pol'y J. 85 (2008) 14, 16

Miscellaneous—Continued: **Page(s)**

Operations at a Glance, XCEL ENERGY, http://goo.gl/1e1q86 (last visited Nov. 2, 2015)... 18

INTERESTS OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represents its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association that represents corporations that own and operate over 95 percent of the United States' domestic petroleum refining capacity and virtually all of our nation's petrochemical production capacity. AFPM members are large energy consumers who would be impacted directly by the outcome of this litigation. AFPM member companies manufacture gasoline, diesel fuel, home heating oil, jet fuel, asphalt, and the petrochemicals that serve as "building blocks" in thousands of products used every day by consumers and businesses, including plastics, clothing, medicine and computers.

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund its preparation or submission. No person other than *amici*, their members, and their counsel made any monetary contribution to its preparation and submission. All parties received timely notice of this filing.

Reflecting the interests of their members, *amici* have participated in several cases involving Commerce Clause challenges to other extraterritorial environmental regulations affecting the energy industry. For example, AFPM was a petitioner in the case challenging California's Low Carbon Fuel Standard, and the Chamber filed an amicus brief in support of AFPM's petition for certiorari. *See* Petition for Writ of Certiorari, *American Fuel & Petrochemical Assoc. v. Corey*, 134 S. Ct. 2875 (No. 13-1149); Brief for Chamber of Commerce and American Petroleum Institute as Amici Curiae Supporting Petitioners, *Corey*, 134 S. Ct. 2875 (No. 13-1149). And both *amici* recently filed an amicus brief in the Eighth Circuit supporting a challenge to a Minnesota law that effectively bans power generated from coal-fired power plants from entering the state. *See* Brief for Chamber of Commerce et al. as Amici Curiae Supporting Appellees, *North Dakota v. Heydinger*, Nos. 14-2156 & 14-2251 (8th Cir. argued Oct. 21, 2015). The participation of the Chamber and AFPM in this case is consistent with their involvement in both cases.

SUMMARY OF ARGUMENT

The Tenth Circuit departed from well-settled constitutional jurisprudence by upholding Colorado's renewable portfolio standard ("RPS"). The RPS imposes quotas on Colorado's retail utilities, requiring that certain percentages of the electricity they sell be generated or purchased from sources that meet Colorado's definition of "renewable energy resources."

The panel held that a state may enact extraterritorial legislation so long as it does not impose "price-control[s]" or tie in-state prices to out-of-state prices.

That holding is contrary to the well-established principle that a state may not exert power beyond its jurisdictional boundaries by regulating out-of-state conduct. It also ignores the many ways that Colorado's RPS, and the twenty-nine *other* statewide, mandatory RPS policies adopted across the country, inhibit the flow of commerce in the interstate electricity and renewable energy markets. Furthermore, the panel decision invites similar extraterritorial laws in other economic arenas, such as California's law banning foie gras and all other goods produced by force feeding birds.

The panel's lax test also led it to overlook the ways that Colorado's RPS discriminates against out-of-state utilities. By permitting Colorado to impose more burdensome quotas on out-of-state utilities than on in-state utilities, the panel sanctioned the kind of local protectionism that Commerce Clause jurisprudence was meant to eliminate.

ARGUMENT

I. The Panel Decision Cannot Be Reconciled With The Constitutional Prohibition On Extraterritorial State Laws

The panel failed to apply the longstanding prohibition on extraterritorial state laws, thereby conflicting with precedents of this Court and others.

The Constitution prohibits states from "regulating commerce occurring wholly outside [their] borders." *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989). That prohibition applies not only where state laws explicitly regulate extraterritorial conduct, but also where

"the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 332, 336 (emphasis added); see also *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 583-584 (1986). Courts ask how a challenged statute "may interact" with other states' regulatory regimes, and prospectively consider "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336-337. Those inquiries are crucial "to avoid[ing] the tendencies toward economic Balkanization that * * * plagued relations among the Colonies and later among the States under the Articles of Confederation." *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

A. Colorado's RPS Has The Practical Effect Of Regulating Commerce Wholly Outside The State's Borders

In both design and "practical effect," Colorado's RPS regulates conduct "wholly outside [of Colorado's] boundaries." *Healy*, 491 U.S. at 336. The RPS is designed to regulate the means of production for electricity consumed in Colorado but produced elsewhere. As the panel noted, "Colorado is a net importer of electricity," Pet. App. 2a, meaning that it imports much of its electricity from out-of-state producers. Colorado's RPS sets aside a portion of that importation business by requiring retail utilities to generate or purchase a certain amount of their electricity from sources that meet Colorado's definition of "renewable energy resources." See Colo. Rev. Stat. § 40-2-124(1)(a)(VII), (c)(I). By requiring that a certain portion of electricity must come from "eligible energy resources," the RPS caps the amount of electricity that

utilities can import from non-eligible resources. See *ibid.* In effect, the RPS places a limit on the amount of electricity out-of-state producers can import without conforming to Colorado's definition of renewable energy.

This limit is a quintessential example of a state "projecting its legislation into other States." *Healy*, 491 U.S. at 334 (alterations omitted) (quoting *Brown-Forman*, 476 U.S. at 583). The RPS restricts the importation of electricity based on its manner of production, which takes place "wholly outside [of Colorado's] boundaries." *Id.* at 336. And under the Commerce Clause, "States * * * may not attach restrictions to * * * imports in order to control commerce in other States." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994).

Moreover, the inevitable "practical effect," *Brown-Forman*, 476 U.S. at 583, of creating a set-aside for electricity from qualifying sources, and restricting the importation of electricity from non-qualifying sources, is to shift out-of-state production toward qualifying sources. Such "pressure" constitutes extraterritorial regulation of commerce. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935) (holding that "[o]ne state may not put pressure * * * upon others to reform their economic standards" by "obstruct[ing] the normal flow of commerce in its movement between states"). The RPS thus "extend[s Colorado's] police powers beyond its jurisdictional bounds." *Carbone*, 511 U.S. at 393.

If Colorado banned the importation of electricity from non-qualifying energy sources based on risks or harms *in Colorado* from the electricity *being consumed there*, then the RPS would be within the

state's police power. As the Court noted in *Baldwin*, a state may (for example) ban the importation of out-of-state milk "if necessary safeguards have been omitted" and consumption of the milk is a threat to public health within the state. 294 U.S. at 524. Such a ban would be within the state's police power (and not be extraterritorial regulation) because it addresses an *in-state* harm to its citizens by regulating the *in-state* commerce that is the direct cause of that harm—namely, the milk being both bought *and* consumed in the state. But a state may not impose such a ban based solely on how the milk was produced out of state. See *id.* at 523-524.

Here, Colorado's RPS is not based on concerns about in-state consumption because—unlike the tainted milk in *Baldwin*—electricity from Colorado-approved renewable resources "is indistinguishable from the rest of the electricity in the grid." *North Dakota* v. *Heydinger*, 15 F. Supp. 3d 891, 918 (D. Minn. 2014), appeal filed, Nos. 14-2156 & 14-2251 (8th Cir. argued Oct. 21, 2015). So its consumption does not implicate Colorado's police powers. See *Baldwin*, 294 U.S. at 523-524.[2]

Further, it is irrelevant that the out-of-state means of production (rather than the electricity itself)

[2] The panel erred in characterizing Colorado's RPS as a measure that "regulates the quality of a good sold to in-state residents." Pet. App. 9a. The quality of the *electricity*—which is the "good" sold—is, at worst, the same regardless whether it is produced from renewable or non-renewable sources; and, in fact, electricity from controllable non-renewable sources may offer superior reliability compared to intermittent renewable sources. At root, Colorado was not seeking to regulate quality; it was seeking to penalize the use of non-renewable sources outside the state's boundaries.

might produce pollution or other negative effects for Coloradoans. It is well-established 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*." *Healy*, 491 U.S. at 336 (emphasis added, alterations omitted).

Moreover, it is unavailing to argue that Colorado's RPS involves only "an incentive to purchase" electricity from renewable resources. Pet. App. 37a. Courts have often struck down analogous state "incentives" based on their extraterritorial overreach. See, *e.g.*, *Brown-Forman*, 476 U.S. at 575-576 (invalidating a New York law giving distillers an incentive to charge in-state residents the lowest possible prices in exchange for the right to do business there); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 272 (1988) (same for an Ohio law incentivizing other States to grant Ohio reciprocal tax credit); *National Solid Wastes Mgmt. Ass'n* v. *Meyer*, 63 F.3d 652, 654-655, 659 (7th Cir. 1995) (similar for a Wisconsin law conditioning access to its landfills on out-of-state compliance with Wisconsin recycling standards).

B. The Panel Erred In Placing An Arbitrary Limitation On The Extraterritoriality Inquiry

The panel determined that the prohibition on extraterritorial legislation should be limited to the common facts from the three prior cases in which this Court has struck down a state regulation based on extraterritoriality. Pet. App. 7a-9a. The panel identified three common facts from those cases: (1) a price-control or price-affirmation regulation was at

issue; (2) it linked in-state prices to out-of-state prices; and (3) it raised costs for out-of-state consumers or competitors. *Ibid.* Because Colorado's RPS did not meet all three criteria, the panel concluded that the extraterritoriality prohibition did not apply. *Ibid.*[3]

The panel's narrow approach placed too much emphasis on coincidental facts from the prior extraterritoriality cases. As the Court observed in *Baldwin*, states are rarely so brazen as to "project [their] legislation" into other states by restricting imports.[4] 294 U.S. at 521. The doctrine is not so limited to price-control or price-affirmation regulations simply because those are the circumstances in which the Court previously has had occasion to apply the doctrine.

Furthermore, the Court's decisions applying the extraterritoriality principle have resisted the kind of formal limitation adopted by the panel. *Baldwin* insisted that the "form" or "guise" of a law does not matter if it imposes "obstructions to the normal flow of commerce" between the states. 294 U.S. at 522, 524. Similarly, *Healy* stressed that the "critical inquiry" concerns "the practical effect of the regulation," not its form. 491 U.S. at 336. *Brown-Forman*

---

[3] The panel decision thus conflicts with a recent Ninth Circuit decision that struck down California's Resale Royalties Act on extraterritoriality grounds *without* reference to these three criteria. *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir.) (en banc), pet. for cert. pending, No. 15-280 (filed Sept. 2, 2015).

[4] Although the Court's observation was true when made, in recent years, twenty-nine states and the District of Columbia have adopted mandatory RPS policies, and other states have passed extraterritorial laws in other economic arenas. *See* pp. 10–17, *infra*.

likewise focused on "the practical effect of the law." 476 U.S. at 583. The emphasis on effect instead of form follows from the fact that the extraterritoriality principle exists to limit a state's police power to "its jurisdictional bounds." See *Carbone*, 511 U.S. at 393. It would be arbitrary to say that a state exceeds its jurisdictional bounds *only* by using price-control or price-affirmation regulations, but it is free to exert its influence over its neighbors, however severe or onerous the effects, so long as its regulations avoid that form. Rather, what matters is the intrusion upon the "respective spheres" of other states, not the form of the intrusion. *Healy*, 491 U.S. at 336. The panel therefore erred by imposing an overly formalistic limit on the extraterritoriality doctrine.

Similarly, the panel erred by relying on dicta from *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644, 669 (2003). See Pet. App. 12a-13a. To be sure, *Walsh* noted that this Court's holdings in *Baldwin* and *Healy* involved "price control [and] price affirmation statutes." *Walsh*, 538 U.S. at 669. But *Walsh* never said that the holdings of *Baldwin* and *Healy* apply *exclusively* to such statutes. Moreover, *Walsh* did not provide occasion for this Court to address whether *Baldwin* and *Healy* apply to the kind of law at issue here. The law at issue in *Walsh* sought to influence companies' *in-state* conduct by inducing drug manufacturers to pay rebates to the state; it did not attempt to change companies' *out-of-state* conduct by restricting their imports into the state. See 538 U.S. at 669. The one paragraph of dicta in *Walsh* should not trump the three decisions actually applying the extraterritoriality principle.

Finally, the panel wrongly concluded that striking down Colorado's RPS would mean there is "no limiting principle" to the extraterritoriality doctrine. Pet. App. 13a-14a. *Baldwin* itself identified the relevant limit: when assessing state laws that restrict out-of-state imports, the extraterritoriality principle does not apply where the law addresses risks or harms from the good being consumed inside the state because such in-state commerce is within the state's police power. The Court in *Baldwin* noted that New York could "exclud[e]" milk produced in other states "if necessary safeguards have been omitted" so that the milk is unfit for consumption in New York. 294 U.S. at 524. Such a ban is not extraterritorial regulation because it addresses *in-state* commerce with harmful *in-state* effects: buying and consuming unsafe milk. In contrast, Colorado's concern with out-of-state electricity being sold in Colorado is not the effect of its consumption (*i.e.*, in-state commerce) but the perceived effects of its production (*i.e.*, out-of-state commerce). See *Healy*, 491 U.S. at 336 (states cannot regulate out-of-state commerce because it merely "has effects within the State"). The panel's concerns about an unbounded extraterritoriality principle are therefore unfounded.

The Tenth Circuit's errors reflect the fact that this case implicates what remains, as the panel recognized, "the least understood of the Court's" strands of Commerce Clause jurisprudence. Pet. App. 6a. This Court's review is warranted to provide further guidance and clarity on this important and recurring issue.

C. Colorado's RPS Conflicts With Other States' Regulations, Fragmenting The Interstate Market For Renewable Energy

The extraterritoriality inquiry requires courts to consider "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. Because of the formalistic limit it imposed on the extraterritoriality doctrine, the panel did not undertake this analysis. Pet. App. 3a-14a. If it had, the panel would have realized that Colorado's RPS creates conflicts with the seven other state RPS policies in the Western Interconnection, that those conflicts burden interstate commerce in the region, and that the conflicts in the Western Interconnection are a microcosm of the nationwide conflicts between the current thirty different state-level RPS policies. This case presents the Court with an opportunity to address these urgent issues.

1. Colorado's RPS Conflicts With The Seven Other State RPS Policies In The Western Interconnection

Of the eleven states in the Western Interconnection, eight have adopted mandatory RPS policies. See Database of Incentives for Renewables & Efficiency (DSIRE), *Renewable Portfolio Standard Policies* (June 2015), http://perma.cc/24FF-6KS9?type=live. Colorado's RPS recognizes five categories of renewable energy resources: "solar, wind, geothermal, biomass, [and certain] hydroelectricity." Colo. Rev. Stat. § 40-2-124(1)(a)(VII). Its choice to limit renewable energy to those five categories, and its standards for recognizing resources within those categories, create

numerous conflicts with the other seven states' RPS policies. That conflict is only emblematic of more widespread conflict among the RPS standards adopted by states nationwide, aggravated by widespread confusion over the application of Commerce Clause jurisprudence to such laws.

To begin, Colorado does not recognize several categories of renewable resources that other states recognize. The major conflict is over ocean-based resources. The coastal states in the Western Interconnection—California, Oregon, and Washington—all define renewable energy to include tidal, wave, and ocean thermal energy. See Cal. Pub. Res. Code § 25741(a)(1); Or. Rev. Stat. §§ 469A.025(1)(c), 469A.005(10); Wash. Rev. Code § 19.285.030(21)(f). But Colorado and the other four inland states exclude those ocean-based resources from their definitions of renewable energy. See Colo. Rev. Stat. § 40-2-124(1)(a)(VII); see also Ariz. Admin. Code § R14-2-1802; Mont. Code Ann. § 69-3-2003(10); N.M. Stat. § 62-15-37.B; Nev. Rev. Stat. § 704.7811.

By thus excluding ocean-based resources, Colorado and the other inland states favor their own in-state resources and industries to the detriment of out-of-state companies trying to develop and expand ocean-based renewable energy in the coastal states. They also frustrate the coastal states' efforts to foster a competitive market for such ocean-based renewables. That exclusion not only hurts out-of-state businesses, but also hurts both in-state and out-of-state consumers by stymying competition to provide the most efficient and affordable forms of renewable resources.

Furthermore, Colorado defines hydroelectricity in a way that excludes many hydroelectricity facilities in the other seven states in the Western Interconnection with RPS policies. See Colo. Rev. Stat. § 40-2-124(1)(a)(VII). As a result, many out-of-state facilities that qualify as "renewable" under their home state's RPS do not qualify under Colorado's RPS. Colorado defines hydroelectricity as a renewable resource based on the age and capacity of the facility. *Ibid.* Facilities built after January 1, 2005, must have a ten megawatt capacity or less, while facilities built earlier must have a thirty megawatt capacity or less. *Ibid.* Otherwise, the electricity is not "renewable energy." *Ibid.* In contrast, Oregon imposes no limit on the size of the hydroelectric generator. It requires that the facility be located outside certain conservation areas and that the electricity be "attributable to efficiency upgrades made to the facility on or after January 1, 1995." Or. Rev. Stat. § 469A.025(4). New Mexico also has no megawatt limit. It requires only that the "hydropower facilit[y be] brought in service after July 1, 2007." N.M. Stat. § 62-15-37.B(1)(b). Thus, many dams in Oregon and New Mexico that fit those states' definitions of a renewable energy resource cannot sell their electricity in the renewable energy market that Colorado created.

Of course, the same is true of New Mexico, Oregon, and all the other states in the Western Interconnection. New Mexico excludes dams in Colorado and Oregon that were in service before July 1, 2007, while Oregon excludes electricity from dams in Colorado that is not specifically attributable to an efficiency upgrade made after January 1, 1995. See N.M. Stat. § 62-15-37.B(1)(b); Or. Rev. Stat. § 469A.025(4). In-

deed, all the states in the Western Interconnection adopt their own unique standards for recognizing hydroelectricity as a "renewable energy resource" by using different dates, megawatt capacities, and other criteria. See Ariz. Admin. Code § R14-2-1802(A)(4), (9); Cal. Pub. Res. Code § 25741(a)(1); Mont. Code Ann. § 69-3-2003(10)(d); Nev. Rev. Stat. § 704.7811.3; Wash. Rev. Code § 19.285.030(12)(b), (c). So each state in the Western Interconnection refuses to recognize electricity from an out-of-state hydroelectric facility that qualifies as a renewable energy resource in its home state. The conflicting RPS standards inhibit the flow of interstate commerce. Colorado's RPS reflects and further exacerbates this problem.

2. Twenty-Eight Other States And The District of Columbia Also Have Mandatory RPS Policies, And They All Are In Tension

Currently, twenty-eight other states and the District of Columbia also have mandatory RPS policies. See DSIRE, *Renewable Portfolio Standard Policies*, *supra*. None of those RPS policies is the same as any other. See Benjamin K. Sovacool & Christopher Cooper, *Congress Got It Wrong: The Case for a National Renewable Portfolio Standard and Implications for Policy*, 3 Envtl. & Energy L. & Pol'y J. 85, 92 (2008). The result is "a patchwork of inconsistent, often conflicting mandates that distort the market for renewable energy technologies and unintentionally inflate electricity prices." *Id.* at 88.

These states have developed their RPS policies to serve their own interests, leading to the "multiplication of preferential trade areas" that the Commerce Clause prohibits. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 356 (1951); *Granholm* v. *Heald*,

544 U.S. 460, 472-473 (2005) (explaining that "a proliferation of trade zones is prevented" by the constitutional prohibition on extraterritorial regulation).

Indeed, in approximately 75% of the states with RPS policies, "resources developed within the state are given various forms of preference over out-of-state resources." Harvey Reiter, *Removing Unconstitutional Barriers to Out-of-State and Foreign Competition from State Renewable Portfolio Standards: Why the Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 36 Energy L.J. 45, 46 (2015). Many states with RPS policies define renewable resources or set their quotas in ways that favor their in-state interests. *Ibid.* For example: North Carolina, which produces about ten million hogs annually, favors its industry by requiring that 0.2% of retail utilities' electricity be generated using "swine waste." See Carolyn Elefant & Edward A. Holt, Clean Energy States Alliance, *The Commerce Clause and Implications for State Renewable Portfolio Standard Programs* 14-15 & n.38 (Mar. 2011) (citing N.C. Gen. Stat. § 62-133.8). Maryland, which produces about 325,000 tons of chicken manure annually, classifies poultry litter as a "Tier 1 resource[]" in its RPS policy. See *id.* at 14 & n.37 (citing Md. Code Pub. Utils. § 7-701(r)(9)). And New Jersey, which has invested heavily in offshore wind, specifies that a certain percentage of utilities' electricity must come from not just any wind power, but *offshore* wind power. See *id.* at 14 & n.36 (citing S.B. 2036, 214th Leg. (N.J. 2010) (codified at N.J. Stat. § 48:3-87.d(4)).

Other states do not favor a particular form of renewable energy, but instead require that the renewa-

ble energy come from in-state or regional generating sources. *See* Reiter, *supra*, at 46. Ohio requires that "qualifying renewable energy resources" come from "facilities located in this state" or from "resources that can be shown to be deliverable into this state." Ohio Rev. Code § 4928.64(B)(3). Illinois mandates that utilities must initially attempt to procure renewable energy "from facilities located in Illinois," and then "in states that adjoin Illinois," before looking further afield. 20 Ill. Comp. Stat. § 3855/1-56(b). And Pennsylvania specifies that the only "alternative energy sources" that can satisfy its RPS are either "inside the geographical boundaries of this Commonwealth" or "within the service territory of a regional transmission organization that manages the transmission system in any part of this Commonwealth." 73 Pa. Stat. and Cons. Stat. Ann. § 1648.4.

This national patchwork of RPS policies inhibits the interstate market for renewable energy. The mosaic of standards, and the states' tendency to alter their RPS policies in response to one another, creates substantial uncertainty that "discourages long-term investments and, in some cases, encourages utilities to exploit the inconsistencies." Sovacool & Cooper, *supra*, at 88. And the tendency of state RPS policies to discourage companies operating in-state from investing in out-of-state renewable resources means that companies often choose the locally favored renewable resource over another option that would be more efficient but for the locally slanted RPS policy. See Reiter, *supra*, at 61-63.

3. The Panel Decision Encourages Conflict In Other Interstate Markets

The effects of the panel decision are not limited to the renewable energy context. By restricting the extraterritoriality principle to price-control or price-affirmation regulations, the panel decision permits states to prohibit the importation of goods based solely on their objections to a completely out-of-state production process. See Pet. App. 9a. California has already passed such laws. It penalizes imported fuels based on out-of-state carbon dioxide emissions created by their out-of-state production and transportation. See *Rocky Mountain Farmers Union* v. *Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013). And it bans the importation of eggs from out-of-state farms that do not comply with California's animal-care standards. See *Missouri* v. *Harris*, 58 F. Supp. 3d 1059 (E.D. Cal.), appeal filed, No. 14-17111 (9th Cir. Oct. 28, 2014). Similarly, it bans foie gras and other goods produced by force feeding birds. See *Ass'n des Eleveurs de Canards et D'Oies du Quebec* v. *Harris*, 79 F. Supp. 3d 1136, 1138-1139 (C.D. Cal. 2015), appeal filed, No. 15-55192 (9th Cir. filed Feb. 5, 2015). Such laws cannot be reconciled with the Court's holding in *Baldwin*. See 294 U.S. at 524 (rejecting the notion that a state could "condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business"). The Court's review of Colorado's RPS standards provides it with a much-needed opportunity to address—and prevent the further proliferation of—such extraterritorial state laws.

II. The Panel's Lax Test Improperly Permits Discrimination Against Out-of-State Retail Utilities

This Court's review is also warranted because the panel decision, which upholds a regulatory scheme that disproportionately disadvantages out-of-state-owned retail utilities, conflicts with precedents of this Court and others regarding discrimination against interstate commerce. The panel proclaimed that Colorado's RPS "does not discriminate against out-of-staters." Pet. App. 9a. Because of the lax nature of the panel's formalistic three-criteria test, it made that proclamation without analyzing the provisions of the statute. The panel therefore overlooked several provisions containing "the sort of simple economic protectionism that this Court has routinely forbidden." *Brown-Forman*, 476 U.S. at 580.

A. On Its Face, Colorado's RPS Places Disproportionate Burdens On Out-of-State Retail Utilities

Colorado's RPS places different burdens on a retail utility based on who owns it. There are three kinds of retail utilities in Colorado: investor-owned utilities ("IOUs"), electrical cooperatives, and municipal utilities. Colorado Governor's Energy Office, *2010 Colorado Utilities Report* 11-13 (Aug. 2010), https://goo.gl/xFIPkY. IOUs are privately held companies; cooperatives are owned by their members; and municipal utilities are owned by city governments. *Ibid.* There are currently two IOUs in Colorado. *Id.* at 11. Both are owned by out-of-state companies. See *ibid.*; *About Black Hills Corporation*, BLACK HILLS CORP., http://goo.gl/TNhwSp (last visited

Nov. 2, 2015); *Operations at a Glance*, XCEL ENERGY, http://goo.gl/1e1q86 (last visited Nov. 2, 2015). The RPS creates different quota requirements for all three forms of utilities. See Colo. Rev. Stat. § 40-2-124(1).

As explained below, the RPS imposes more burdensome quotas on the IOUs—both owned by out-of-state entities—than it does on utilities with in-state owners.[5] Those greater burdens hinder the IOUs' ability to compete with the in-state utilities. That amounts to discrimination in fact and in theory. It is discrimination in fact because the only two IOUs that bear those heavier burdens are owned by out-of-staters, while the only utilities that benefit from the lighter burdens are owned by in-staters. It is dis-

---

[5] Respondents may assert that such discrimination is permissible under *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 312 (1997), which rejected a Commerce Clause challenge to a state tax scheme that taxed out-of-state private utilities and exempted local public utilities. But *Tracy* does not apply here. *Tracy* held that the Commerce Clause was not implicated because the public and private utilities were not "similarly situated for constitutional purposes." *Id.* at 299. The Court pointed out that the differences between the "bundled" gas that the local public utilities sold to residents and the "unbundled" gas that the out-of-state private utilities sold to industrial users meant that "the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Ibid.* Striking down the tax scheme would not have served "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Ibid.* Here, in contrast, all three forms of retail utilities provide the same good (electricity) to the same customers (residents) and therefore can (and do) compete for the same markets. See *2010 Colorado Utilities Report*, *supra*, at 11-13.

crimination in theory because it prevents additional out-of-staters from competing on an equal footing. By definition, the local nature of cooperatives and municipal utilities necessarily means they are owned by in-staters. The only way out-of-staters can compete in the Colorado electric-power market is through an IOU and under heavier quotas than the in-staters must bear. The RPS "thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980).

1. Colorado's RPS Imposes Higher Renewable Energy Quotas On Out-of-Staters

Colorado's RPS imposes quotas on the amount of electricity a utility produces or purchases from renewable energy sources. It provides that retail utilities must "generate, or cause to be generated, electricity from eligible energy resources" in certain "minimum amounts." See Colo. Rev. Stat. § 40-2-124(1)(c)(I), (V), (V.5). The minimum amounts are percentages of the utility's retail electricity sales in Colorado. See *ibid.* The quotas rise incrementally every few years, until reaching a final level in 2020. See *ibid.*

Colorado's RPS imposes much higher quotas on out-of-state-owned IOUs than on cooperatives or municipal utilities. IOUs currently have a 20% quota and beginning in 2020 will have a 30% quota. See Colo. Rev. Stat. § 40-12-124(1)(c)(I)(D)–(E). In contrast, cooperatives currently have a 6% quota. See *id.* § 40-2-124(1)(c)(V)(C) Starting in 2020, cooperatives servicing fewer than 100,000 meters must meet a 10% quota, and cooperatives servicing more than 100,000 meters must meet a 20% quota. See *id.* § 40-

2-124(1)(c)(V)(D), (V.5). Similarly, municipal utilities have quotas of 6% currently and 10% starting in 2020. See *id.* § 40-2-124(1)(c)(V)(C)–(D).

These divergent quotas place a greater economic burden on the out-of-state-owned IOUs because it is more expensive to generate or purchase electricity from renewable energy resources. The additional cost of renewable energy comes from the additional equipment and infrastructure that is required to generate and transmit the electricity, as well as the logistical difficulties of fluctuating resources such as wind and solar power. See Robert Bryce, *The High Cost of Renewable-Electricity Mandates*, Energy Policy & the Environment Report, No. 10, Feb. 2012, at 2, http://goo.gl/D88bx0; David W. Kreutzer et al., Heritage Foundation Center for Data Analysis Report No. CDA10-03, *A Renewable Electricity Standard: What It Will Really Cost Americans* 2-6 (May 5, 2010), http://goo.gl/cDdsNl. The renewable quotas thus favor in-state utilities over out-of-state utilities.

2. Colorado's RPS Also Imposes Higher Distributed-Generation Quotas On Out-of-Staters

Colorado's RPS specifies that a certain portion of the electricity that a retail utility generates or purchases from renewable sources must be "distributed generation." See*, e.g.*, Colo. Rev. Stat. § 40-2-124(1)(c)(I)(D)–(E). Distributed generation refers to electricity produced at or near the place where it is consumed—i.e, power generation that is "distributed" among the consumers, not at a central source. The RPS specifies that distributed generation may be either: (1) "[r]etail distributed generation," which is "located on the site of a customer's facilities," such as solar panels on a customer's roof; or (2) "[w]holesale

distributed generation," which it defines as a source not on a customer's facilities with a capacity of "thirty megawatts or less." See *id.* § 40-2-124(1)(a)(III), (VIII), (IX).

Like the renewable energy quotas, the distributed-generation quotas are more burdensome for the out-of-state-owned IOUs than for the in-state utilities. IOUs have a 1.75% quota currently, a 2% quota from 2017 to 2019, and a 3% quota from 2020 onward. See Colo. Rev. Stat. § 40-2-124(1)(c)(I)(D)–(E). In meeting those quotas, half of the distributed generation must be retail distributed generation. *Id.* § 40-2-124(1)(c)(II)(A). In contrast, cooperatives currently have no quota. Starting in 2020, cooperatives servicing 10,000 or more meters have a 1% quota, and cooperatives servicing less than 10,000 meters have a 0.75% quota. See *id.* § 40-2-124(1)(c)(X). In meeting those quotas, half of the cooperatives' distributed generation must come from retail distributed generation. But the cooperatives are allowed to subtract their "industrial retail sales" from their "total retail sales" when calculating their "minimum retail distributed generation requirement," which means their retail-distributed-generation quota is not the same proportion of their sales as it is for IOUs. See *id.* § 40-2-124(1)(c)(II)(A), (A.5). Municipalities have no current or future quotas for distributed generation. See *id.* § 40-2-124(1)(c)(II)(A), (X)(B).

The more burdensome quotas disproportionately raise operating costs for out-of-state-owned IOUs. Distributed generation is more expensive than centralized generation because it requires more capital to develop the additional facilities and more resources to maintain them. And retail distributed generation

is even more expensive than wholesale distributed generation because the retail utility must not only fund the installation of all the generating equipment on the customers' properties, but also must oversee all of its maintenance.

3. Colorado's RPS Provides Cooperatives Only With The Opportunity For A Total Quota Exemption

Colorado's RPS not only gives cooperatives lighter quotas, but also gives them the option of totally exempting themselves from all quotas. See Colo. Rev. Stat. § 40-2-124(1). As of July 2015, "nearly all of the cooperatives in Colorado have removed themselves from * * * regulation." Colorado Dep't of Regulatory Agencies, *Deregulated Electric Cooperatives in Colorado* 1 (July 2, 2015). So nearly all of the cooperatives actually have *no* obligation under the RPS, while the out-of-state owned IOUs must meet all applicable quotas. Accordingly, the field is tilted even more severely against the out-of-state-owned IOUs than the quotas themselves indicate.

B. The "Market Participant" Doctrine Does Not Save Colorado's RPS

Respondents cannot claim that the favoritism Colorado shows to in-state cooperatives and municipal utilities falls under the so-called "market participant" doctrine. See *Wyoming* v. *Oklahoma*, 502 U.S. 437, 459 (1992). That doctrine holds that "the Commerce Clause does not restrict the State's action as a free market participant." *Ibid.* It thus distinguishes between "States as market participants and States as market regulators." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436 (1980). The Court has found the market-participant doctrine applicable only where: (1) the

government was participating directly in the market as a purchaser, seller, or producer; and (2) the allegedly discriminatory effect on interstate commerce flowed from those market actions. See *Atlantic Coast Demolition & Recycling, Inc.* v. *Bd. of Chosen Freeholders of Atl. Cty.*, 48 F.3d 701, 715-716 (3d Cir. 1995).

Here, the market-participant doctrine does not apply because the State of Colorado is not a purchaser, seller, or producer. Although some municipalities operating an in-state utility might act as market participants, the Colorado Legislature was only regulating market participants, not acting as one itself. See *Wyoming*, 502 U.S. at 459-461 (a state agency's participation in the coal market did not permit the state legislature to pass a law requiring all coal-fired electric utilities to burn at least 10% in-state coal); *Atlantic Coast Demolition*, 48 F.3d at 715-717 (in a challenge to the state's laws regulating waste disposal facilities, the fact that some disposal facilities were run by local governments did not mean the exception applied).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

RICHARD S. MOSKOWITZ
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
ASSOCIATION
1667 K Street, NW
Washington, DC 20006
(202) 552-8474

JASON A. LEVINE
JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street
Houston, TX 77002
(713) 758-2222

Attorneys for Amici Curiae

NOVEMBER 2015