No. 21-2936

United States Court of Appeals for the Eighth Circuit

Thomas John Styczinski, Tom "The Coin Guy", LLC, Treasure Island Coins, Inc., and Numismatist United Legal Defense,

Plaintiffs–Appellants,

v.

Grace Arnold, in her official capacity as Commissioner of the Minnesota Department of Commerce,

Defendant–Appellee.

On Appeal from the United States District Court
for the District of Minnesota

District Court No. 0:20−cv−02019−NEB−BRT

Appellants' Reply Brief

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Introduction

The commissioner of the Minnesota department of commerce continues to urge the extreme position that Minnesota may constitutionally punish its domiciliaries—including individual Minnesotans and businesses incorporated in Minnesota—for transactions in which they engage anywhere in the entire universe. Appellee's Br. 7-9, 12-15. The commissioner does this even though the Supreme Court, in a 9-0 opinion from 1935, struck down an attempt by New York state to regulate out-of-state transactions between two businesses incorporated in New York. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 518-28 (1935); Brief for Appellants (In No. 604; also for Respondents in No. 605.) at 3, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (Nos. 604 and 605), 1935 WL 32952, at *3 (describing the businesses as "New York State corporations").

Indeed, a unanimous Supreme Court decision requires this Court to reject the commissioner's contention that transactions by a regulating state's domiciliary are never really extraterritorial for purposes of the dormant Commerce Clause extraterritoriality doctrine although absent from the commissioner's brief. *See Seelig*, 294 U.S. at 518-28. The commissioner's brief fails to reference *Seelig*, even though Appellants relied on it in their opening brief, Appellants' Br. 2, 25, and in the district-court proceedings, *e.g.*, J.A. 77 R. Doc. 1, at 37; R. Doc. 21, at 27. It's also why the commissioner is unable to cite even one case holding that a state may regulate its domiciliaries' out-of-state transactions.

And even if the commissioner were correct that Minnesota can regulate Minnesotans wherever they go, this wouldn't do anything to save Minn. Stat. § 80G.02's registration requirement because the district court, in an order that the commissioner isn't appealing, held that the requirement applies to out-of-state dealers' out-of-state transactions. *See* J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. The only reason that the district court didn't strike down the registration requirement is that the court relied on a misguided distinction between, on the one hand, an extraterritorial licensing law and, on the other hand, an extraterritorial law that controls a transaction's terms. *See* J.A. 20 n.15 R. Doc. 38, at 20 n.15. The court implicitly held that the prohibition on extraterritorial laws applies to the latter but not the former. *See id.*

This distinction is misguided because "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another," *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989), and a state licensing requirement is a requirement for regulatory approval, *see, e.g.*, *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665-68 (7th Cir. 2010) (striking down an extraterritorial licensing requirement, among other extraterritorial provisions); *McLemore v. Gumucio*, No. 3:19-CV-00530, 2019 WL 3305131, at *4, *8-*9 (M.D. Tenn. July 23, 2019) (granting a preliminary injunction against enforcement of an extraterritorial licensing requirement).

The commissioner doesn't deny that the extraterritoriality doctrine applies to extraterritorial state licensing requirements—she thus never addresses the actual extraterritoriality issue presented by this appeal.

Argument

I. The commissioner misrepresents the district court's reason for upholding § 80G.02's registration requirement—the commissioner baselessly imputes her own flawed theory to the district court.

In the district court, the commissioner attempted to defeat Appellants' extraterritorial claim through two arguments. First, the commissioner, contradicting ch. 80G's plain meaning, denied that ch. 80G applies to the out-of-state transactions of out-of-state dealers. R. Doc. 29, at 6, 7, 8, 11, 12, 13. Second, the commissioner argued, without citation to any supporting authority, that a Minnesota dealer's out-of-state transaction can never be entirely out of state merely because of the dealer's connection to Minnesota. *Id.* at 13. Had the district court accepted these arguments, the court wouldn't have struck down Minn. Stat. § 80G.07—which applies to anybody who is a "dealer," regardless of where located—on extraterritoriality grounds. *See* J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20.

The district court refused to strike down § 80G.02's registration requirement, not because of agreement with the commissioner's statutory interpretation or constitutional argument, *see* J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20, but because of a misguided distinction between an extraterritorial licensing law and an extraterritorial

law that controls a transaction's terms, *see* J.A. 20 n.15 R. Doc. 38, at 20 n.15. Aside from this distinction, the district court offered no reason for upholding the registration requirement despite striking § 80G.07. Appellants explained this in their principal brief. Appellants' Br. 22-23, 23 n.2, 31-33.

The commissioner doesn't explicitly disagree with Appellants' reading of the district court opinion, but she misrepresents what the district court held: "The district court correctly concluded that chapter 80G's registration requirement does not regulate activities taking place wholly outside of Minnesota." Appellee's Br. 8; *see also id.* at 5, 10. The commissioner thus insinuates that the court held that the requirement doesn't apply to "wholly" out-of-state transactions. In fact, the district court correctly concluded that "once a person or entity 'does business with' a consumer located in Minnesota, they qualify as a dealer, *and the bullion dealer law applies to all of the dealer's transactions—whether in Minnesota or outside it.*" J.A. 19 R. Doc. 38, at 19 (emphasis added). Again, the district court upheld the registration requirement on the theory that the requirement "does not dictate *the terms* of out-of-state transactions," not on the rejected argument that the requirement doesn't apply out of state. J.A. 20 n.15 R. Doc. 38, at 20 n.15 (emphasis added).

So the ultimate extraterritoriality issue in this appeal is this: does the extraterritoriality doctrine apply to a state's requirement that a person have a state-issued license to conduct an out-of-state transaction? The answer is "yes." *E.g.*,

Midwest Title, 593 F.3d at 662, 665-68; *McLemore*, 2019 WL 3305131, at *8-*9; *see also Healy*, 491 U.S. at 336-7.

Notably, nowhere in her brief does the commissioner dispute that the doctrine applies to such a licensing requirement. The commissioner never even addresses the main issue in this appeal.

II. Minnesota Statutes § 80G.02's registration requirement is per se unconstitutional because it applies to out-of-state transactions of both in-state and out-of-state dealers.

A. Under *Seelig*, a state may not regulate the out-of-state transactions of a domestic corporation or other domiciliary—what matters in determining extraterritoriality is the location where a transaction is conducted, not a party's connection to the regulating state.

1. The Supreme Court, in Seelig*, has applied the extraterritoriality doctrine to strike down a state's attempt to regulate out-of-state transactions by a domestic corporation.*

In *Seelig*, the Supreme Court struck down a New York law that imposed a minimum purchase price for the out-of-state purchase of milk that was resold in New York state. 294 U.S. at 518-28. The law required milk-distributors to pay a minimum price to milk-producers (in practice, dairies), and the law prohibited the in-state sale of milk imported from out of state, unless the price paid to the out-of-state dairy that supplied it was at least as high as the minimum price that would have been required for purchase from an in-state dairy. *Id.* at 519-21. The company that successfully challenged the law, G.A.F. Seelig, Inc., bought milk in Vermont from a dairy operated

by a company called Seelig Creamery Corporation. *Id.* at 518. The Court declared the extraterritorial minimum-price requirement unconstitutional on extraterritoriality grounds: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521; *see also id.* at 522-28.

Although the Court's opinion doesn't say so, both G.A.F. Seelig, Inc. and Seelig Creamery Corporation were incorporated in New York, something that New York's brief called to the Court's attention. Brief for Appellants (In No. 604; also for Respondents in No. 605.) at 3, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (Nos. 604 and 605), 1935 WL 32952, at *3 ("G. A. F. Seelig, Inc. and Seelig Creamery Corporation are New York State corporations, closely affiliated in ownership and management."). So even though one New York corporation was buying milk from another New York corporation for import into and resale in New York, New York couldn't regulate the purchase—not even through regulating in-state resale—because the purchase from the dairy occurred in Vermont. *See Seelig*, 294 U.S. at 518-28.

The state of incorporation didn't matter, and neither did any other connection to the regulating state: the decisive fact was that "title [to the milk] passes from Seelig Creamery to G. A. F. Seelig, Inc., at Fair Haven, Vt." *Id.* at 518; *see also id.* at 521, 524, 528. It's hard to imagine a stronger case opposing the commissioner's claimed power to regulate transactions by Minnesotans and Minnesota corporations throughout the world.

Furthermore, the commissioner has, in this case, taken a vastly more aggressive stance than was taken by New York in *Seelig*. New York conceded that it couldn't directly control transactions in Vermont; New York contended only that it could do so indirectly by controlling the resale in New York of Vermont-sourced milk *Id.* at 521. The Court dismissed this argument 9-0 because the point remained that New York was seeking to control transactions consummated in Vermont, *id.* at 521, 524, 528, but New York's theory was quite modest compared to the commissioner's.

Minnesota, unlike New York, claims the power to regulate commerce in goods worldwide, even if the goods purchased have no connection to the regulating state, just as long as one of the parties to the transaction is domiciled in the regulating state. Appellee's Br. 7-9, 12-15. Once a person has become subject to Minn. Stat. § 80G.02's registration requirement, then an unlicensed bullion transaction with a consumer anywhere in the world will incur liability, even if the bullion involved has never been in and never will enter into Minnesota. A person subject to the registration requirement can violate the requirement through the out-of-state purchase of bullion that the person sells out of state without ever bringing the bullion into Minnesota. Minn. Stat. § 80G.02, subd. 1. Indeed, a person can violate the requirement through an out-of-state purchase of bullion that the person just leaves in an out-of-state safe-deposit box. *Id.*

The commissioner can't distinguish *Seelig*. In their opening brief, Appellants listed *Seelig* as an apposite case under their statement of the first issue and cited the

case for the crucial proposition that a state can't regulate extraterritorial transactions. Appellants' Br. 2, 25. But the commissioner still denied that Appellants have pointed to a case in which the Supreme Court applied the extraterritoriality doctrine to a state's attempt to regulate out-of-state transactions by a domestic corporation—a denial belied by Appellants' reliance on *Seelig*: "But the Court has never held that a state cannot regulate the activities of businesses based within the state. Unsurprisingly, the Coin Dealers do not identify any binding cases prohibiting such regulation." Appellee's Br. 14. The commissioner purported to distinguish several extraterritoriality cases on which Appellants rely, but scrupulously avoids any mention of *Seelig*. *Id.* at 13-15.

This is no oversight. In the district court, the commissioner urged that Minnesota-can-regulate-Minnesotans anywhere and takes the same stance here. *E.g.*, R. Doc. 32, at 4-5. At the hearing on the cross-motions, Appellants' lawyer explained to the court that *Seelig* rejected this approach, much as Appellants have explained things in this reply. Hr'g on Cross-Mot. for S.J. and Dismissal Tr. 5:18-7:17. When the commissioner's lawyer had the chance to address *Seelig*, he didn't deny that the case's plaintiff was incorporated in New York, but he was evasive:

> With respect to the *Baldwin* [i.e., *Seelig*] case that opposing counsel brought up, I haven't had a chance to look at it in detail because they brought up its application to extraterritoriality for the first time here. But looking at it, that case appears to be concerned, at least initially, with economic protectionism; that we don't want states to be setting price controls that are then applicable in other states. And if you look at all of the cases where extraterritoriality is generally held to apply, so the cases

> that the plaintiff cites, *Baldwin*, *Healey* [sic], *Brown-Forman*, those are all cases where there are price controls that are then applicable to other states. Here you have a statute saying if you are in Minnesota, either doing business here or, in your hypothetical, if you set up your business in Minnesota where you are paying Minnesota taxes, getting Minnesota tax benefits, where you are getting the benefits of however you've chosen to organize yourself under Minnesota law, that isn't economic protectionism. That is making sure that if you have set up here, that you are playing by the State's rules here.

Id. at 34:19-35:13.

In fact, Appellants had relied on *Seelig* as an extraterritoriality case in their complaint and their initial summary-judgment brief. J.A. 77 R. Doc. 1, at 37; R. Doc. 21, at 27. And the extraterritoriality doctrine isn't limited to price controls, *e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion), *cited approvingly by Healy*, 491 U.S. at 333 n.9, 336; indeed, the doctrine applies to licensing laws, *see, e.g.*, *Midwest Title*, 593 F.3d at 662, 665-68; *McLemore*, 2019 WL 3305131, at *8-*9.

Justice Cardozo's opinion in *Seelig* does discuss protectionism, 94 U.S. at 521-23, 527, but, as already explained, the Court struck down the New York law because it applied to transactions conducted in Vermont, *id.* at 521, 524, 528. Furthermore, the Supreme Court has subsequently characterized *Seelig* as standing for the proposition that a state can't regulate out-of-state transactions. *E.g.*, *Healy*, 491 U.S. at 332-33. Indeed, *Seelig* is the seminal case for the doctrine, and lower court opinions continue to rely on it: this Court characterized it as an extraterritoriality case in *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793-94 (8th Cir. 1995) (citing *Seelig*), and Judge Posner's opinion in *Midwest Title* cites it twice, 593 F.3d at 665 (citing *Seelig*, 294 U.S. at 521-23);

id. at 665-66 (citing *Seelig*, 294 U.S. at 521).

Seelig is a 9-0 super precedent, the extraterritoriality case from which all the other relevant extraterritoriality cases descend, and it's on point. The hearing on the cross-motions occurred on April 7, 2021, and, at the hearing, the commissioner's lawyer heard that *Seelig* invalidated an attempt by New York to regulate out-of-state transactions by a New York business. The commissioner filed her brief in this appeal on November 23, 2021. So the commissioner had more than seven months to concoct some way to distinguish *Seelig*. But the commissioner doesn't even attempt to distinguish *Seelig* in her brief because she knows that she can't.

2. *Post-*Seelig *Supreme Court opinions also prohibit regulation of a transaction outside a state's borders, despite some connection to the regulating state.*

The commissioner quotes the Supreme Court's opinion in *Healy* for the proposition "'that no State may force an *out-of-state* merchant to seek regulatory approval in one State before undertaking a transaction in another.'" Appellee's Br. 13-14 (quoting *Healy*, 491 U.S. at 337) (emphasis in original quotation). The commissioner uses italics to insinuate that, under *Healy*, the extraterritoriality doctrine poses no obstacle to a state regulating its in-state merchants' out-of-state transactions. *See id.* And the commissioner follows this quotation with her claim that Appellants lack an on-point Supreme Court case, *id.* at 14, a claim that *Seelig* belies. The commissioner doesn't argue that *Healy* limits *Seelig*—the commissioner refuses to

address *Seelig*—so *Seelig* continues to control, notwithstanding this snippet from *Healy*.

Furthermore, the extraterritoriality doctrine as articulated in *Healy* and other post-*Seelig* cases is broader than the rule laid down in the snippet, which is, in fact, the last of several restrictions that *Healy*'s articulation of the doctrine imposes on state regulation. 491 U.S. at 336-37. Under the first restriction, a state can't regulate any transaction that occurs "wholly outside" the state's territorial boundaries regardless of the transaction's connections to that state: "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 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)) (ellipsis in original quotation). This is also true under the second restriction: "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown–Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). So if a transaction occurs "wholly outside" a state's boundaries, then the state can't regulate it regardless of the parties' connections to that state.

3. Lower-court cases have followed Seelig *in holding that what matters in determining extraterritoriality is the physical location of the regulated activity or transaction, not a party's connection to the regulating state.*

Obedient to the Supreme Court, lower courts have used a transaction's physical location as the decisive criterion for applying the extraterritoriality doctrine and have almost unanimously rejected the notion that a state may regulate a transaction because of some other connection to the regulating state. *E.g.*, *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453, 478-83 (E.D.N.Y. 2012), *vacated and remanded on other grounds*, 796 F.3d 171 (2d Cir. 2015). The *Berman* court made a comprehensive, treatise-like review of extraterritoriality caselaw from the Supreme Court and lower courts and concluded:

> [This] Court looks to where the transaction being regulated was consummated to determine whether the application of a law impermissibly regulates extraterritorial commerce. Quite simply, if the transaction is consummated out of state, a state may not regulate it without violating the dormant Commerce Clause. This is the case regardless of whether some other aspect of the commercial activity occurs within the state….

Id. at 483 (internal citation and footnote omitted). The court then preceded to list various connections to the regulating state that other courts had treated as insufficient to allow regulation, and these included "the fact that one of the parties is a state resident," *id.* (citing *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308-09 (10th Cir. 2008) and *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489-90 (4th Cir. 2007)), and that a party is "a domestic corporation," *id.* (citing *S.K.I. Beer*

Corp. v. Baltika Brewery, 443 F. Supp. 2d 313, 319-20 (E.D.N.Y. 2006), *aff'd*, 612 F.3d 705 (2d Cir. 2010)).

The commissioner relies on two of this Court's opinions for the uncontroversial proposition that the extraterritoriality doctrine applies to attempts to regulate "conduct 'that takes place *wholly* outside of the state's borders,'" Appellee's Br. 8 (quoting *Cotto Waxo*, 46 F.3d at 793 (emphasis in original quotation); *see also id.* (citing *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1042 (8th Cir. 2016)). Neither of these cases support the commissioner's position that Minnesota can regulate any activity that is somehow connected to Minnesota. *See id.* at 7-9, 12-15. The law at issue in *Cotto Waxo* prohibited the sale of petroleum-based sweeping compounds in Minnesota and nowhere else. 46 F.3d 790, 792-94 (8th Cir. 1995). *Richland/Wilkin* concerned a construction project that spanned Minnesota and North Dakota, not a discrete purchase or sale, let alone one conducted entirely outside of Minnesota. 826 F.3d 1030, 1042.

The commissioner attempts to distinguish *Midwest Title* by pointing out that the title-loan company challenging the Indiana law was an Illinois corporation, not an Indiana corporation. Appellee's Br. 14 (citing *Midwest Title*, 593 F.3d at 667). But, as the commissioner acknowledges, the borrowers were Indiana residents. *Id.*; *see also Midwest Title*, 593 F.3d at 662, 663. If a state may, as the commissioner contends, regulate its residents' transactions anywhere, then the outcome in *Midwest Title* would have been different. Indiana could try to block its residents from entering into title

loans out of state by imposing civil or criminal liability on its residents for doing so, and this would, according to the commissioner's position, be permissible. But it would be impermissible under the reasoning of *Midwest Title* (and *Seelig* and *Healy*).

4. Minnesota's purported interests in regulating its domiciliaries' out-of-state transactions are irrelevant because extraterritorial laws are per se unconstitutional.

The commissioner acknowledges that extraterritorial laws are per se unconstitutional. Appellee's Br. 8. But she then attempts to smuggle in consideration of Minnesota's purported interests in the registration requirement in the course of arguing that the requirement's application to transactions conducted outside Minnesota's borders are somehow not really extraterritorial. *Id.* at 12-13. In particular, she argues for the first time that "Minnesota has the very specific concern that fraudulent out-of-state transactions could lead to in-state litigation regarding the transaction when a Minnesota domiciliary is involved." *Id.* at 12. But this purported interest has no bearing on where a transaction occurs and hence no bearing on whether the registration requirement applies extraterritorially; indeed, the commissioner's description of the regulated transactions as "out-of-state transactions," *id.*, gives away the game.

And because the extraterritoriality doctrine is a rule of per se invalidity, the strength of Minnesota's purported interests is irrelevant. Minnesota can't regulate out-

of-state commerce "whether or not the commerce has effects within" Minnesota. *Healy*, 491 U.S. at 336 (internal quotation marks omitted).

Finally, allowing a state to regulate out-of-state transactions on the theory that the state has an interest in doing so would end the extraterritoriality doctrine. *See, e.g.*, *Midwest Title*, 593 F.3d at 668 ("[I]f the presence of an interest that might support state jurisdiction ... dissolved the constitutional objection to extraterritorial regulation, there wouldn't be much left of *Healy* and its cognates."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 491 (4th Cir. 2007) ("If a state could leverage contacts within its borders to control a company's conduct elsewhere without being held to regulate extraterritorially, this would be the national market's undoing.").

B. The registration requirement is unconstitutional because it applies to out-of-state transactions by out-of-state dealers.

Even if the commissioner were correct that Minnesota can regulate its domiciliaries world-wide, this would do exactly nothing to save the registration requirement because, as the district court held in an order from which the commissioner isn't appealing, ch. 80G applies to out-of-state transactions by out-of-state dealers. J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. The requirement applies to out-of-state transactions by all dealers who reach § 80G.02, subd. 1's $25,000 registration threshold, including dealers who are not Minnesota domiciliaries. Minn. Stat. § 80G.02, subd. 1; J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. If a person is a "dealer" under any clause of § 80G.01, subd. 3(a), and if the person crosses § 80G.02,

subd. 1's registration threshold without registering, then the person will break Minnesota law by engaging in certain bullion transactions that takes place entirely outside Minnesota. Minn. Stat. § 80G.02, subd. 1; J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. This violates the categorical rule "that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337.

Even if the commissioner is correct that counting out-of-state transactions toward the registration threshold does not itself violate the extraterritoriality doctrine, Appellee's Br. 10-12, the point remains that, once the threshold is reached, certain out-of-state transactions will create liability, Minn. Stat. § 80G.02, subd. 1; J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. The commissioner fails to acknowledge that this is permissible—and it isn't under *Healy*.

Instead, the commissioner is evasive. In the district court, the commissioner argued that the registration requirement doesn't apply to an out-of-state dealer's out-of-state transactions. R. Doc. 29, at 6, 7, 8, 11, 12, 13. The commissioner implicitly acknowledges that she lost that argument: "the district court first concluded that a person was a dealer as that term is defined in chapter 80G for all transactions—not just Minnesota transactions—once the statute's criteria for dealer status are met." Appellee's Br. 4 (citing J.A. 7 R. Doc. 38, at 7). But the commissioner continues to insinuate that an out-of-state dealer who has reached the registration threshold and remained unregistered is safe engaging in out-of-state bullion transactions with

consumers, e.g.: "if enforcement occurred under chapter 80G against an out-of-state dealer, it would be on the basis that the dealer met the registration criteria and engaged in a Minnesota transaction without registering." *Id.* at 10. No: under the district court's interpretation, an out-of-state dealer who "met the registration criteria," *id.*, could be subject to enforcement for engaging in an out-of-Minnesota transaction without registering, Minn. Stat. § 80G.02, subd. 1; J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20.

The commissioner says repeatedly that Minnesota may regulate out-of-state dealers because they choose to do business in Minnesota, e.g.: "With respect to entities based outside Minnesota, such entities are required to register only if they come to Minnesota to conduct a transaction or if they send bullion products or payments for bullion products to Minnesota." Appellee's Br. 8; *see also id.* at i, 5, 6, 7, 10, 14-15. But this is evasive, and it misses the point: it's true that an out-of-state merchant must engage in at least one transaction in Minnesota to become subject to ch. 80G, Minn. Stat. § 80G.01, subd. 3(a)(3), but once that merchant has become subject to the registration requirement, the requirement will apply to the merchant's out-of-state transactions so that an out-of-state transaction can incur liability under Minnesota law, *id.* § 80G.02, subd. 1; J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20.

To say that Minnesota may regulate an out-of-state merchant's out-of-state transactions merely because the merchant has engaged in a transaction in Minnesota

contradicts the extraterritoriality doctrine's most emphatic component. *Healy* 491 U.S. at 337.

III. The owner of a share of a precious metal ETF has an ownership interest in the precious-metal bullion held by the ETF.

In their principal brief, Appellants explained that the applicability of the registration requirement to transactions in precious-metal exchange-traded funds (ETFs) is itself enough to make the requirement's burdens on interstate commerce so severe that no interest of Minnesota's can justify them. Appellants' Br. 37-41. Appellants explained that "[e]ach fund is organized as a trust that owns bars of the metal in which it invests, and the owner of a share in a fund has an undivided fractional beneficial interest in the precious-metal bars." *Id.* at 38. In support of this proposition, Appellants cited and quoted from the websites of two ETFs: a gold fund and a silver fund. *Id.* at 38 n.3.

The commissioner fails to recognize or even acknowledge the evidence provided by Appellants: "Purchasers of ETF shares only buy and sell shares of an entity that owns bullion products and do not receive any actual interest in bullion products." Appellee's Br. 16. But the commissioner provides not a single citation for this counterfactual proposition. *See id.*

The commissioner relies on legislative history and statutory context to argue that the term "investments in bullion products" somehow doesn't include an equitable interest in a precious-metal bar. *Id.* at 17-18. But even if the commissioner establishes

that the legislature was primarily concerned with something other than ETFs when it used the term "investments in bullion products," the point remains that the term's plain meaning embraces ETF shares. By buying a precious metal ETF share, a person acquires an equitable interest in the precious-metal bullion held by the ETF and thus invests in the bullion. Indeed, the purpose of precious-metal ETFs is to serve as a stock-market vehicle for investing in bullion.[1] And, in Minnesota, a statutory provision's plain meaning controls: "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16(para. 2); *see also id.* § 645.08(1) ("words and phrases are construed according to … their common and approved usage").

The commissioner doesn't deny that application of the registration requirement to stock-exchange transactions in ETF shares would have disastrous consequences for interstate commerce. Nor does she even bother to assert that Minnesota has some interest that would justify those consequences.

IV. The registration requirement is extraterritorially overbroad and hence facially unconstitutional; no appropriate remedy exists other than declaring ch. 80G unconstitutional.

The commissioner contends that Appellants haven't met the standard for a

[1] *See, e.g.*, Chris Markoch, *9 Precious Metals ETFs That Can Add Some Glitz To Your Portfolio*, InvestorPlace (Dec. 29, 2020), https://investorplace.com/2020/12/9-precious-metal-etfs-to-buy-for-adding-glitz-for-portfolio.

successful facial challenge because they haven't "show[n] that there is *no* set of circumstances in which chapter 80G could be constitutionally applied." Appellee's Br. 19. But "this standard does not apply to extraterritorial challenges under the Commerce Clause." *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (Loken, J. in part of opinion not joined by the panel's other members). If a provision of law is extraterritorially overbroad, then completely enjoining the provision's enforcement is appropriate. *Id.* at 922-23. Notably, the commissioner doesn't cite a case applying this onerous standard to an extraterritoriality challenge. *See* Appellee's Br. 18-21.

In *Heydinger*, this Court considered an extraterritoriality challenge and a federal statutory-preemption challenge to two provisions of Minnesota law that restricted the importation into Minnesota of electricity generated at certain types of powerplants located out of state. 825 F.3d at 913-23 (Loken, J. opinion joined in part by one member of the panel, and not by the third member); 825 F.3d at 923-27 (Murphy, J. concurring in part and concurring in the judgment); 825 F.3d at 927-29 (Colloton, J. concurring in the judgment). The district court completely enjoined the provisions' enforcement on extraterritoriality grounds. *See* 825 F.3d at 913-14, 922-23 (Loken, J. opinion, including part not joined by the panel's other members).

In his opinion announcing this Court's judgment, Judge Loken expressed the belief that the provisions were unconstitutional under the extraterritoriality doctrine because they regulated an activity—power-generation—that occurred beyond

Minnesota's borders. *Id.* at 919-22 (Loken, J. in part of opinion not joined by the panel's other members). The panel's other two members concurred on statutory-preemption grounds. 825 F.3d at 923-27 (Murphy, J. concurring in part and concurring in the judgment); 825 F.3d at 927-29 (Colloton, J. concurring in the judgment). But both judges who concurred with Judge Loken concurred in completely affirming the district court's complete injunction. 825 F.3d at 923, 927 (Murphy, J. concurring in part and concurring in the judgment); 825 F.3d at 929 (Colloton, J. concurring in the judgment).

The commissioner cites several cases for the proposition that an injunction or declaration should be no broader than needed, but none of them involved a dormant Commerce Clause case, let alone an extraterritoriality challenge. Appellee's Br. 19. One of the cases on which the Commissioner relies, *Madsen v. Women's Health Ctr., Inc.*, involved the constitutionality of an injunction against protesting, not the remedy for an unconstitutional statute. 512 U.S. 753, 757 (1994).

The commissioner proposes that the registration requirement's constitutional defects could be addressed through a declaration that only some applications are impermissible, such as a declaration that the requirement is invalid as applied to out-of-state transactions or ETF transactions. Appellee's Br. 20.

That won't do because it's improper "to speculate" as to how to cure extraterritorially overbroad provisions through enjoining some of those provisions' applications, but not others. *Heydinger*, 825 F.3d at 922-23 (Loken, J. in part of opinion

not joined by the panel's other members). Instead, this Court should "leav[e] Minnesota to craft an alternative." *Id.* at 923.

Declaring the registration requirement unconstitutional only as applied to out-of-state transactions would have a consequence that would probably be perverse from the Minnesota legislature's point of view: it would encourage persons to conduct business outside Minnesota to defeat the registration requirement—at least once they have reached the $25,000 threshold or would cross it through a contemplated transaction. Indeed, the legislature may have declined to limit the registration requirement to in-state transactions precisely to avoid this outcome. The commissioner offers no reason for thinking that, given the choice between keeping the registration requirement for only in-state transactions and scrapping it entirely, the legislature would prefer the former option.

Similarly, declaring the requirement unconstitutional only as applied to ETFs would have its own distortionary effect: it would encourage people to invest in ETFs rather than invest in coins or bars that they possess themselves. Again, the commissioner offers no reason for thinking that the legislature would prefer this option.

Moreover, adopting one of these approaches would be the equivalent of inserting limiting statutory language into ch. 80G, thus usurping the legislature's role. Appellants respectfully ask this Court to decline the commissioner's invitation to rewrite ch. 80G. In rejecting antitextual interpretations of a rule's provision that were

proposed to save the provision from unconstitutionality, Judge Posner wrote that "[I]t is not our proper business to patch up the rule—and it would be a patchwork job indeed, with the rule itself saying one thing and the judicial gloss on it another." *Buckley v. Illinois Jud. Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993). This is because a federal court of appeals isn't "a Council of Revision empowered to make such changes in a proposed enactment, state or federal, as might be necessary to render it constitutional." *Id.*

As already explained, the commissioner sought in the district court to save the registration requirement through the antitextual argument that ch. 80G doesn't apply to an out-of-state dealer's out-of-state transactions. Appellants' Br. 19 (citing R. Doc. 29, at 6, 7, 8, 11, 12-13). The district court properly rejected that argument. J.A. 6-10, 19-20 R. Doc. 38, at 6-10, 19-20. The commissioner is no more entitled to a judicial rewrite of ch. 80G through the mechanism of a limited declaration or injunction than she is through the mechanism of a text-defying interpretation. And the commissioner fails to cite a single successful extraterritoriality challenge that resulted in a judicial rewrite similar to what the commissioner requests. *See* Appellee's Br. 18-21.

It's true that the registration requirement isn't ch. 80G's only substantive provision. In their principal brief, Appellants explained that § 80G.06's surety-bond requirement can't be severed from the registration requirement. Appellants' Br. 35-36. And Appellants further explained that, with the registration requirement and

§§ 80G.06, 80G.07 all invalidated, ch. 80G will be effectively gutted of its substantive provisions. *Id.* at 37. The commissioner hasn't addressed these arguments.

Conclusion

That the registration requirement applies to out-of-state dealers' out-of-state transactions—a proposition confirmed by the district court—does itself make the requirement extraterritorially overbroad. That, under *Seelig*, the requirement is also impermissibly extraterritorial as it applies to in-state dealers' out-of-state transactions is gravy. And that the requirement's application to ETFs would cripple the stock exchanges is dessert.

Without rewriting ch. 80G, this Court has no way to remedy even one of the registration requirement's constitutional defects, except to direct the district court to declare ch. 80G unconstitutional in its entirety.

Dated December 16, 2021.

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