No. 24-1019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ASSOCIATION FOR ACCESSIBLE MEDICINES,

Plaintiff-Appellee,

vs.

KEITH ELLISON, in his official capacity as Attorney General of the State of Minnesota,

Defendant-Appellant.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
No. 23-2024 (PJS/JFD)

PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 40 STATEMENT

The Panel's opinion merits panel rehearing or en banc review because it conflicts with the Supreme Court's decision in *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023), this Court's decision in *Entergy Arkansas, LLC v. Webb*, 122 F.4th 705 (8th Cir. 2024), and the decisions of other United States Courts of Appeal in *New Jersey Staffing Alliance v. Fais*, 110 F.4th 201 (3rd Cir. 2024) and *Flynt v. Bonta*, 131 F.4th 918 (9th Cir. 2025). Fed. R. App. 40(b)(1) and (2)(A-C).

This case also involves three exceptionally important questions requiring en banc consideration: (1) whether a standalone extraterritoriality doctrine under the dormant Commerce Clause survives *Ross* and if not, does this Court's pre-*Ross* decision in *Styczinski v. Arnold*, 46 F.4th 907 (8th Cir. 2022) remain good law; (2) whether a nondiscriminatory, non-protectionist state law with extraterritorial effects can be struck down under the dormant Commerce Clause without engaging in *Pike*-balancing; and (3) whether the dormant Commerce Clause prevents state regulations on in-state sales that have upstream pricing impacts simply because they upset the preferences of national firms for particular market structures, such as uniform pricing and distribution methods. Fed. R. App. 40(b)(2)(D); 8th Cir. R. 35A, 40A.

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INTRODUCTION

The Panel's decision grants Appellees ("AAM") a constitutional shield against Minnesota's nondiscriminatory regulation of in-state generic drug sales—simply because they prefer to distribute their products through out-of-state intermediaries. That result rests on a misreading of Supreme Court precedent, a mistaken view of how Minnesota's price-gouging law ("Act") operates, and a sweeping rule that invites any national manufacturer to evade state regulation by structuring their distribution scheme around it.

The Panel did not find that the Act discriminates in purpose or effect. Yet it held the law violates the dormant Commerce Clause because it has a "specific impermissible extraterritorial effect" on prices beyond Minnesota. Slip Op. 4. In doing so, the Panel revived a standalone extraterritoriality doctrine under the dormant Commerce Clause that *Nat'l Pork Producers Council v. Ross,* 598 U.S. 356 (2023), laid to rest. *Ross* clarified that the dormant Commerce Clause targets economic protectionism—not every state law that affects upstream pricing. *Id*. at 374–75. The Panel's contrary rule clashes with *Ross*, splits from the Third and Ninth Circuits, and conflicts with this Court's first post-*Ross* decision in *Entergy Arkansas*.

A doctrinal outlier, the decision threatens laws long understood to fall within core state police powers. *Ross* reaffirmed that states may "exclude from its territory, or prohibit the sale therein of any articles which, in [their] judgment . . . are

prejudicial to" public health and welfare. *Ross*, 598 U.S. at 369 (citation omitted). A revived extraterritoriality rule, untethered from economic protectionism, "would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers" and provides "no meaningful guidance" in resolving such disputes. *Id.* at 375. As the Court cautioned, "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior." *Id.* at 374.

Rehearing—by the Panel or en banc—is necessary to correct a decision that defies Ross, creates a circuit split, and sows confusion over whether the dormant Commerce Clause permits two types of challenges or three. Left uncorrected, it leaves district courts to divine the correct path to address sweeping constitutional attacks on routine state regulations it is likely to encourage.

ARGUMENT

I. THE PANEL'S OPINION CONFLICTS WITH *NAT'L PORK PRODUCERS COUNCIL* V. *ROSS* AND REVIVES A DOCTRINE THE SUPREME COURT REJECTED.

The Panel begins by summarizing its key takeaways from *Ross*. First, the Panel correctly recognizes that the dormant Commerce Clause can be violated in two ways: "(1) clearly discriminat[ing] against interstate commerce in favor of in-state commerce, [and] (2) impos[ing] a burden on interstate commerce that outweighs any benefits received." Slip Op. 4. The Panel also correctly acknowledges that *Ross* did not overrule *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), *Brown-Forman*

Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986), or *Healy v. Beer Inst.*, 491 U.S. 324 (1989). Those decisions remain good law. But beyond that, the Panel strays from *Ross*.

Pointing to *Ross*, the Panel found that Minnesota's Act had the "specific impermissible extraterritorial effect" of controlling prices outside of Minnesota. Slip Op. 4. Thus, the Panel found Minnesota's Act violated the dormant Commerce Clause under a "third way"—the extraterritoriality doctrine—because it supposedly has "the practical effect of extraterritorial control on interstate commerce." Slip Op. 4-6 ("The third way of violating the dormant Commerce Clause—the extraterritoriality doctrine—is at issue here."). This was wrong.

A. The Panel Revived an Extraterritoriality Doctrine *Ross* Rejected.

Ross clarified that the laws in *Baldwin*, *Brown-Forman*, and *Healy* did not violate the dormant Commerce Clause solely because they had extraterritorial effects, but because they had a "*specific* impermissible extraterritorial effect" of "purposeful discrimination against out-of-state economic interests." *Ross*, 598 U.S. at 371-74 (emphasis in original) *see also id.* at 394 (Roberts, C.J., concurring in part and dissenting in part) (agreeing on this point). The Panel omits this context and never describes what the prohibited "effect" is: discriminatory economic protectionism. *Ross* explains that the "specific impermissible extraterritorial effect" of the laws in *Baldwin*, *Brown-Forman*, and *Healy* was not that they regulated out-

of-state transactions, but because they effected discriminatory economic protectionism.

Here, the Act does not discriminate (facially or in effect) against out-of-state economic interests or consumers. The Act does not dictate uniform prices nationwide, it does not tie in-state sales to out-of-state conduct, and manufacturers do not violate it by engaging in transactions wholly outside Minnesota. The Act's impact on out-of-state upstream pricing decisions (limited to Minnesota-bound products) is not an inevitable effect, but a consequence of how particular manufacturers may choose to structure their operations within the national economy. Consequently, the Panel's decision upholds the preliminary injunction of Minnesota's Act without finding any discriminatory purpose or effects.

The proposition that a standalone extraterritoriality provision survived *Ross* is hard to square with Justice Alito's explanation just a few weeks after *Ross* was decided that state laws offend the recently "refined" dormant Commerce Clause "in two circumstances: when the law discriminates against interstate commerce or when it imposes 'undue burdens' on interstate commerce." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 160-61 (2023) (concurring). If a third way remains post-*Ross*, as the Panel held, that would appear to be news to the Supreme Court. As *Ross* stated, "courts must sometimes referee disputes about where one State's authority ends and another's begins," but that does not mean that "*any* question about the ability of a

State to project its power extraterritorially must yield to an 'almost *per se*' rule under the dormant Commerce Clause." *Id*. at 376. But the Panel decision uses the per se rule in just that all-purpose way; trampling on Minnesota's core police powers, and steamrolling the Supreme Court's directive that lower courts apply the dormant Commerce Clause with caution and restraint. *Ross*, 598 U.S. at 380 (declaring that the Court "expressly cautioned against judges using the dormant Commerce Clause as 'a roving license for federal courts to decide what activities are appropriate for state and local government to undertake.'"); *Id*. at 390 (warning that "preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,'" and "extreme caution is warranted before a court deploys this implied authority," and only "where the infraction is clear.").

The dormant Commerce Clause is not an all-purpose tool to evaluate any state law that happens to regulate extraterritorially, but a scalpel designed for a solitary purpose: snuffing out in-state discrimination against out-of-state commerce. *Id*. at 371, 376. By failing to confine "specific impermissible extraterritorial effects" to the discriminatory economic protectionism prohibited by the dormant Commerce Clause, the Panel revives a freestanding extraterritoriality doctrine—divorced from economic protectionism—that *Ross* rejected. *Id.* at 373.

B. *Ross* Did Not Limit the Extraterritoriality Doctrine to Pricing Regulations.

The Panel also asserts *Ross* preserves the rule in *Baldwin*, *Healy*, and *Pharm. Rsch. and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) that a nondiscriminatory, non-protectionist state law "violates the extraterritoriality principle when it enacts 'price control or price affirmation statutes that tie[] the price of in-state products to out-of-state-prices.'" Slip Op. 4-5. But that is simply wrong.

As *Ross* clarified, the laws in *Baldwin* and *Healy* were unconstitutional because they had "an impermissible discriminatory purpose," not because of their effects on out-of-state pricing decisions. *Id*. at 373. Similarly, the Maine law considered in *Walsh* did not violate the dormant Commerce Clause because it was not discriminatory or protectionist, even though its extraterritorial effects *did* impact out-of-state transactions between drug manufacturers and wholesale distributors. *Walsh*, 538 U.S. at 669 (noting petitioners' allegation that "Maine's regulation of the terms of transactions that occur elsewhere.") And *Walsh* explained that "the lower court correctly stated" the "rule that was applied in *Baldwin* and *Healy* . . . is not applicable to this case." *Id*. Thus, *Walsh* endorsed this description of *Baldwin* and *Healy*:

> The statutes in these cases involved regulating the prices charged in the home state and those charged in other states *in order to benefit* the buyers and sellers in *the home state*, resulting in a *direct burden* on the buyers and sellers *in the other states*.

Pharm. Rsch. & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81 (1st Cir. 2001) (emphasis added). Because Maine's law did not discriminate against interstate commerce (intentionally or in effect), there was no dormant Commerce Clause violation. Far from "confirming" that laws like Minnesota's are unconstitutional, *Walsh* is precedent rejecting a dormant Commerce Clause challenge to a nondiscriminatory state law affecting upstream prescription drug pricing outside the regulating state.

Absent such discriminatory purpose or effects, "innumerable valid state laws affect pricing decisions in other states—even so rudimentary a law as a maximum price regulation." *Healy*, 491 U.S. at 345 (Scalia, J. concurring). Pricing laws are not constitutionally forbidden, they were simply legislative tools used by states in *Baldwin*, *Brown-Forman*, and *Healy* to unconstitutionally enact discriminatory protectionism. Moreover, if *Ross* simply carved out extraterritorial pricing regulations from its clarification that no standalone extraterritoriality doctrine exists under the dormant Commerce Clause, the Panel's reliance on the plurality in *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982),[1] is even more precarious because the

[1] Without deciding the question, the *Ross* Court raised significant doubts that an extraterritoriality doctrine, as described in *Edgar*'s plurality, is a dormant Commerce Clause problem at all, rather than a doctrine best housed in some other constitutional provision. *Ross*, 598 U.S. at 375-76, n. 1.

Illinois law at issue regulated corporate tender offers, and had nothing to do with pricing at all. These fundamental errors drove the Panel's result.

C. The Panel Decision Renders *Pike*-Balancing Superfluous.

The Panel's decision conflicts with the standard of review for nondiscriminatory laws with extraterritorial effects. Under the dormant Commerce Clause, when a "statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is 'clearly excessive in relation to the putative local benefits.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472 (1981) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

And here, AAM's *Pike*-balancing claim was not before the Panel. It remains, stayed, before the district court.[2] With no evidence of the law's discriminatory purpose or effect, the Panel should have reversed and remanded to the district court for consideration of AAM's *Pike*-balancing claims. But even *Edgar v. MITE Corp.*, which the Panel relies on, Slip Op. 6, does not go that far. Agreeing with the *Ross* majority, Chief Justice Roberts explained that "only a plurality of the Court in *Edgar* concluded that the Illinois corporate takeover statute constituted a *per se* violation of the dormant Commerce Clause. *Ross*, 598 U.S. at 400. "But a majority in *Edgar* analyzed those same extraterritorial effects under our approach in *Pike*" to conclude

[2] R. Doc. 54.

that the law imposed an unconstitutional burden on interstate commerce. *Id.* Rather than strike down Minnesota's Act over its alleged extraterritorial effects, the Panel should have reversed the district court and remanded the case for consideration of the Act under AAM's *Pike*-balancing claim.

Instead, the Panel's decision moots AAM's pending *Pike*-balancing clam and effectively renders the *Pike*-balancing standard superfluous. Indeed, who would ever choose to bring (or even need to bring) a *Pike*-balancing claim, with its necessary evidentiary findings and balancing of interests, if they could (as here) simply point to a nondiscriminatory state law they disfavored, allege it has extraterritorial effects, and have a court strike it down as a matter of law. But that is what the Panel does here.

II. THE DECISION CONFLICTS WITH EIGHTH CIRCUIT AND SISTER-CIRCUIT PRECEDENT.

A. The Eighth Circuit's Post-*Ross* Precedent.

This Court first applied *Ross* in *Entergy Arkansas, LLC v. Webb*, 122 F.4th 705, 711 (8th Cir. 2024). There, the Court identified only two types of valid dormant Commerce Clause claims available post-*Ross*: (1) discrimination, and (2) burdens clearly excessive under *Pike*. Unlike the Panel here, *Entergy Arkansas* recognized no "third way" that a law could be found to violate the dormant Commerce Clause under the extraterritoriality doctrine.

The Panel cites a pre-*Ross* decision, *Styczinski v. Arnold*, 46 F.4th 907, 912 (8th Cir. 2022), but makes no mention of *Entergy Arkansas*, to justify departing from the two valid paths for dormant Commerce Clause challenges. The Panel relied on *Styczinski*'s articulation of a standalone extraterritoriality prohibition to strike down the Act absent discrimination and without any *Pike* analysis. The Panel's recognition of this pre-*Ross* standalone prohibition cannot be reconciled with *Entergy Arkansas*.

District courts in the Eighth Circuit are now left to choose between two competing frameworks for dormant Commerce Clause claims. One follows *Ross*, *Mallory*, and *Entergy Arkansas* and permits only two paths: discrimination or undue burdens under *Pike*. The other—adopted by the Panel—adds a third, freestanding extraterritoriality theory. This Court has given no guidance as to which governs.

B. The Panel Created a Circuit-Split with the Courts of Appeals for the Third and Ninth Circuits.

Two other circuits have read *Ross* the right way. This Panel did not.

First, in *New Jersey Staffing Alliance v. Fais*, 110 F.4th 201 (3rd Cir. 2024), plaintiffs challenged New Jersey's Temporary Workers' Bill of Rights on the ground that it imposed extraterritorial price effects— wage floors pegged to in-state comparators. Quoting *Ross*, Judge Hardiman emphasized that the "extraterritoriality cases were animated by the antidiscrimination principle"—and that "the dormant Commerce Clause does not prohibit laws solely because they have extraterritorial reach absent protectionist intent or effect." *Id*. at 207 (citations omitted).

Attempts to shoehorn the case into *Healy* and *Baldwin*, the court held, miss *Ross*'s core teaching: those cases invalidated laws that functioned like tariffs, hoarding economic advantage for in-state interests. New Jersey's law, by contrast, applied evenhandedly to all staffing firms operating in the state—whether based in Camden or Kansas City. The court left no room for doubt: *Ross* foreclosed plaintiffs' extraterritoriality theory.

Second, the Ninth Circuit reached the same conclusion in *Flynt v. Bonta*, 131 F.4th 918 (9th Cir. 2025), where plaintiffs challenged a California licensing law restricting financial ties between cardroom operators and out-of-state casinos. Plaintiffs again invoked *Healy* and *Baldwin*, arguing that California's law unconstitutionally controlled transactions beyond its borders. But as Judge Bress explained, *Ross* rejected any rule invalidating state laws merely because they have the "practical effect of controlling commerce outside the state, even when those laws do not purposely discriminate against out-of-state economic interests." 131 F.4th at 929. Any upstream "extraterritorial spillover effects on what plaintiffs may do outside the state…are simply a function of California's non-discriminatory 'terms of doing business … in the state.'" *Id.* The contrary view, Judge Bress noted, would prevent states from attaching neutral conditions to licensure (i.e., no price-gouging), an outcome that "would be a significant expansion of the dormant Commerce Clause

and . . . a serious intrusion on states' traditional ability to regulate gambling activity." *Id*. at 930.

The Third and Ninth Circuits correctly understand that *Ross* forecloses dormant Commerce Clause challenges to state laws with incidental out-of-state effects, unless those laws are explicitly protectionist or protectionist in effect. The Panel, in contrast, believes *Ross* kept alive a robust prohibition on any law that might influence conduct beyond the state line without regard to discriminatory intent or effect. They cannot both be right.

III. THE PANEL DECISION MISINTERPRETS THE ACT AND INVITES SWEEPING CHALLENGES TO STATE LAWS REGULATING IN-STATE SALES OF NATIONALLY DISTRIBUTED PRODUCTS.

As the Panel describes it, Minnesota's Act:

> regulates the price of out-of-state transactions, insists that out-of-state manufacturers sell their drugs to wholesalers for a certain price, and ties the price of in-state products—prescription drugs—to the price that out-of-state manufacturers charge their wholesalers.

Slip Op. 5. But this description of Minnesota's Act exposes two fundamental legal errors that impacted the Panel's analysis.

A. The Act Only Regulates Manufacturers of Generic Drugs Who Take Affirmative Steps to Market and Sell Their Drugs to Consumers in Minnesota.

First, the Panel's conclusion that Minnesota's law regulates "wholly out-of-state transactions" misstates the statute's scope. Slip Op. 4. Minnesota's Act regulates the rate that manufacturers can increase wholesale acquisition cost of

essential generic and off-patent drugs *into Minnesota*. *See* Minn. Stat. § 62J.842, subds. 1–2. The Act is only violated if a manufacturer who voluntarily chose to obtain a license from the state of Minnesota and then sends its price-gouged drugs into Minnesota directly or has them delivered, distributed, or dispensed indirectly into Minnesota by another Minnesota-licensed entity. Minnesota's Act only targets excessive price increases by Minnesota-licensed entities who sell drugs for distribution in Minnesota—an unremarkable exercise of its sovereign authority. The Act does not regulate any transaction without some in-state connection to Minnesota; indeed, transactions that result in drugs being distributed in Minnesota must include one (or more) Minnesota licensed entities.

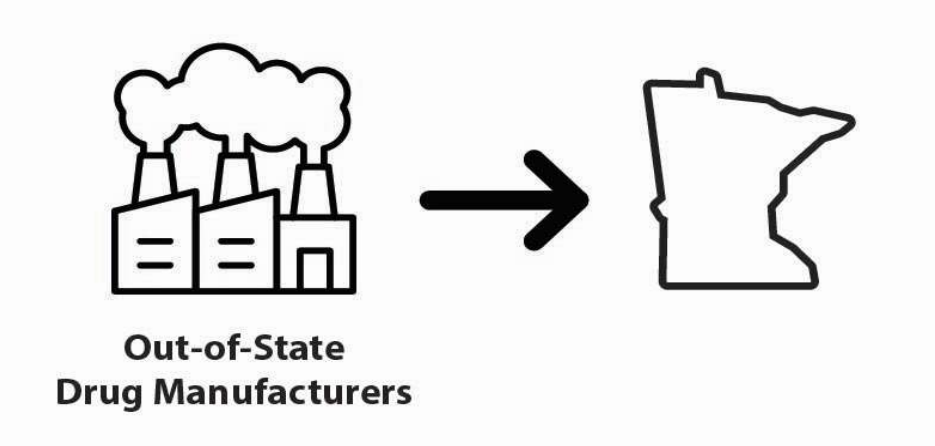
Under Section I, *supra*, the Panel invalidated Minnesota's democratically-adopted law because it has indirect economic effects on out-of-state pricing, a theory the Supreme Court rejected in *Ross*. Left uncorrected, the decision clouds dormant Commerce Clause jurisprudence that the Supreme Court recently clarified and expands the scope of similar challenges to state health, consumer protection, and economic regulation laws. Rehearing by the panel or en banc is necessary to ensure that this Court's dormant Commerce Clause jurisprudence reflects the Supreme Court's instruction in *Ross*: focus on state laws evincing discriminatory economic protectionism—not those with ripple effects in a national economy.

B. Supply Chain and Business Preferences Do Not Insulate Manufacturers from State Police Powers.

Second, the Panel's analysis fails to distinguish how the preliminary injunction it upheld applies differently to out-of-state manufacturers that send their drugs *directly* into Minnesota (Scenario 1), and manufacturers who send their drugs into Minnesota *indirectly*, through out-of-state distributors before entering Minnesota (Scenario 2).[3] In both scenarios all the out-of-state entities obtained licenses from the State of Minnesota to engage in precisely this conduct. It is undisputed that Minnesota can constitutionally enforce its Act in Scenario 1. But the preliminary injunction the Panel upheld only bars Minnesota from applying its Act in Scenario 2. The factual distinction between these two scenarios has no material difference, much less one of constitutional magnitude.

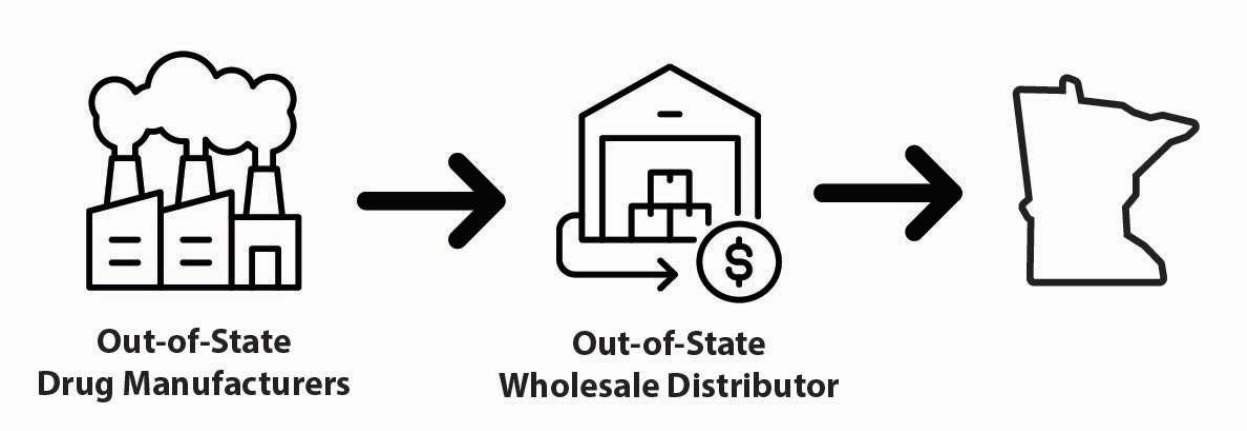
In Scenario 1, Minnesota's Act equally regulates in- and out-of-state manufacturers that sell, dispense, or deliver their products to consumers in Minnesota:

[3] To be clear, Minnesota's Act does *not* apply to any manufacturer who directly or indirectly sells, delivers, or dispenses products in any other state.



It is undisputed that applying Minnesota's Act in Scenario 1 is **constitutional** under the dormant Commerce Clause. *Ross*, 598 U.S. at 364 (explaining that so long as States do not use their "laws to discriminate purposefully against out-of-state economic interests…companies that choose to sell products in various States must normally comply with the laws of those various States.").

In Scenario 2, Minnesota applies its Act to the same out-of-state manufacturer in Scenario 1, but this time, rather than handle distribution on its own, the manufacturer contracts with an out-of-state third-party (often a wholesale distributor) to sell, dispense, or deliver their products to consumers in Minnesota:



But, under the Panel's decision, applying Minnesota's Act in Scenario 2 is **unconstitutional** under the dormant Commerce Clause. The Panel's decision endorses this constitutional dichotomy between Scenario 1 and 2, effectively severing Minnesota's sovereign power to regulate the very same out-of-state drug (or any other product) when the same manufacturer chooses to outsource Minnesota distribution, delivery, or direct sales to an out-of-state third party.

Accordingly, the Panel decision effectively grants constitutional protection to AAM's preferred distribution method. But as the Supreme Court aptly stated, "We cannot... accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). The dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id*. at 127–28. Its doctrine is animated by "concern about economic protectionism" or those measures "designed to benefit in-state economic interests by burdening out-of-state competitors"—not laws that primarily regulate firms operating across state lines. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008).

In short, the Panel created an arbitrary constitutional line based on AAM's distribution preferences. It creates a roadmap for any manufacturer to evade any number of state consumer protection regulations, encourages a perverse incentive

for out-of-state intermediaries to encourage manufacturers to use their services to evade public health and safety regulations, and transforms a currently-favored market structure into binding Eighth Circuit precedent. State police powers should not be so easily cast aside.

CONCLUSION

For all these reasons, the Panel's decision should be vacated and the Panel should grant rehearing. In the alternative, the Court should grant rehearing en banc.

Dated: July 10, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,661 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 pt Times New Roman font.

3. The undersigned, on behalf of the party filing and serving this petition, certifies that the petition has been scanned for viruses and that it is virus-free.

Dated: July 10, 2025

s/ **Nick Pladson**
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