No. 18-1145

# In The
# Supreme Court of the United States

MINERVA DAIRY, INC., et al.,

*Petitioners,*

v.

BRAD PFAFF, In his Official Capacity as Secretary-Designee of the Wisconsin Department of Agriculture, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a challenged law violates the Dormant Commerce Clause whenever the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id*. at 142. To state a claim under *Pike*, must a plaintiff allege that the challenged law discriminates (or has a disparate impact on) out-of-state commerce, as the Second, Third, Fifth, and Seventh Circuits have held, or instead is it sufficient for a plaintiff to allege that the law's burdens on interstate commerce outweigh the putative local benefits as the Fourth, Eighth, Tenth, and Eleventh Circuits hold?

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## INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). SLF also often files *amici curiae* briefs with this Court about issues of overly burdensome and unconstitutional economic legislation. *See, e.g.*, *Sensational Smiles, LLC v. Mullen*, 136 S. Ct. 1160 (2016).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

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[1] *Amici curiae* notified the parties 10 days before the filing of this brief of its intent and request to file it. All parties consented to the filing of this brief in letters. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

*Amici* strive to protect individuals and businesses stymied by excessive government regulation and to help America work by supporting those who are simply trying to do their jobs, run their businesses, and raise their families. This case is of particular interest to *amici* not only because the decision below deepens an already existing circuit split, but also because the Seventh Circuit's approach eviscerates this Court's *Pike* balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* test applies to regulations that burden the national flow of goods. Without it, states could hide their goals of economic protectionism behind nondiscriminatory laws that unconstitutionally burden interstate commerce.

## SUMMARY OF ARGUMENT

The Dormant Commerce Clause, for better or worse, is a longstanding fixture of American economic law. After the failure of the Articles of Confederation, the Founding Fathers warned against protectionist tariffs, trade wars, and anything else that could drive a wedge between the young states that had a better chance of surviving when united. They designed the Commerce Clause to streamline economic regulations into one federal power. Jurisprudence that followed, which developed into the Dormant Commerce Clause doctrine, defended against protectionism and isolationism by giving states little room to regulate the market themselves.

Since then, this Court repeatedly refuses to tolerate state regulations which overtly discriminate against out-of-state competition. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). It also carved out an exception to the Dormant Commerce Clause through the state police power doctrine, where states may regulate local matters that are traditionally within their control provided they show legitimate means to that end. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

Although the police power and discrimination principles often control the outcome of Dormant Commerce Clause claims, there remains a large gap in economic regulation that continues to require judicial attention: nondiscriminatory state laws that appear neutral, yet have protectionist effects on interstate commerce. This gap shows where the *Pike* balancing test is necessary. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* balancing test applies to regulations that burden the national flow of goods. *See, e.g.*, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978). It defends against measures by erecting barriers to out-of-state commerce under the guise of protecting residents. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888 (1988). Finally, the *Pike* test reaches other areas of economic law such as taxation. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

Just last Term, this Court showed that *Pike* balancing is alive and well. *See id.* at 2091. The test serves an important and necessary role in Dormant Commerce Clause cases. Without this Court's guidance, the circuit split over *Pike* will continue to deepen. This will preclude businesses in the Second, Third, Fifth, and Seventh Circuits from asserting Dormant Commerce Clause challenges against nondiscriminatory laws that unduly burden interstate commerce and only serve economic protectionist purposes.

## ARGUMENT

### I. The Framers designed the Commerce Clause to reduce state-initiated protectionism.

The regulation of commercial interests featured heavily in the Framers' debates. Under the Articles of Confederation, disunion was a reality. The Federalist Papers noted that the states acted in self-interested, hostile ways when left to regulate their own affairs under the Articles. Alexander Hamilton observed,

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to

> the intercourse between the different parts of the Confederacy.

The Federalist No. 22, at 140 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003).

James Madison added that before the Constitutional Convention, states imposed excessive taxes upon other states to protect their internal trade; based on "a common knowledge of human affairs," the Framers knew that leaving states room to enact protectionist measures "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." The Federalist No. 42, at 264 (James Madison) (Clinton Rossiter ed., Signet Classics 2003).

The Framers wanted to eliminate the possibility of trade wars and protectionism through a federal commerce power because each state had unique goods to contribute to the flow of commerce. As Hamilton noted, "When the staple of one [state] fails from a bad harvest or unproductive crop, it can call to its aid the staple of another." The Federalist No. 11, at 84 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003). This, Hamilton reasoned, would strengthen our nation's economy and put our country on a competitive level in the global market.

Finally, our Founding Fathers feared that European competitors would exploit divisions among the states to destroy America's economy. *See generally id*. This, combined with their view that "active commerce" would lead to international power and legitimacy, led

them to recognize the need for one unified economy. *Id*. at 80. As a result, the Framers drafted the Commerce Clause. According to Hamilton, there was little "room to entertain a difference of opinion" when it came to placing the commerce power in Congress's hands. *Id.* at 79.

Following ratification, the Marshall Court set out to determine whether the power to regulate commerce belonged exclusively to Congress. It concluded that Congress possessed primary authority over interstate commerce through the Dormant Commerce Clause. But it also suggested that states reserved some powers to regulate local matters. *See Gibbons v. Ogden*, 22 U.S. 1, 20, 113-16 (1824) (writing that quarantine laws "may be considered as affecting commerce; yet they are, in their nature, health laws," and showing the history of judicial deference to local quarantine, health, and inspection laws); *Willson*, 27 U.S. 245 (finding that a state could erect a dam that would interfere with commerce because it would improve residential health); *Mayor, Aldermen & Commonalty of N.Y. v. Miln*, 36 U.S. 102, 132-33 (1837) (categorizing local health and safety laws that interfered with commerce under state police power).

The Supreme Court later looked to other aspects of commercial regulation when addressing state protectionism. The Court struck down state laws that overtly discriminated against other states. *See, e.g.*, *Dean Milk*, 340 U.S. at 354 (requiring sellers to produce milk within five miles of a city violated the Dormant Commerce Clause by "erecting an economic

barrier protecting a major local industry against competition from without the State"); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (unanimously striking down a statute imposing minimum prices on milk to deter cheaper imports from entering the state because the law would open "the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation"); *Woodruff v. Parham*, 75 U.S. 123, 140 (1868) (holding that a state law may survive the Commerce Clause when "[t]here is no attempt to discriminate injuriously against the products of other States").

The Court also began to consider whether state laws unduly burdened interstate commerce. It addressed statutes that equally affected residents and nonresidents and held, "[A] state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (holding that regulating air pollution was not a matter of national uniformity because it fell within local police power); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 773, 781 (1945) (holding that limiting the number of cars on a train went "beyond what is plainly essential to safety" and seriously burdened interstate commerce) (quoting *Kelly v. Washington*, 302 U.S. 1, 15 (1937)) (internal quotations omitted). Following these cases, it created a balancing test for the burdens neutral laws impose on interstate commerce: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its

effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. This test remains the law today for parties challenging nondiscriminatory state regulations affecting the national market.

## II. This Court consistently relies on *Pike* to expose state protectionism that violates the Dormant Commerce Clause.

A circuit split currently plagues the Dormant Commerce Clause. The Seventh Circuit and three other circuits require a showing of discrimination in any claim, including *Pike* balancing.[2] This means that where a neutral law exists, plaintiffs are barred from entering the courtroom. Two circuits apply heightened scrutiny to nondiscriminatory statutes, where they do not give much weight to "devastating economic consequences" and do give large deference to state legislatures.[3] This stops most claims against nondiscriminatory laws, unless litigants can show that a law is more than "devastating." Four circuits apply *Pike* balancing to neutral statutes as this Court has, weighing

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[2] *See, e.g.*, *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124 (7th Cir. 1995); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

[3] *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001) (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 827 (3d Cir. 1994)).

the burdens and benefits of each law.[4] Even so, many circuits—including those which faithfully apply *Pike*—have expressed confusion about the balancing test.

Despite the "quagmire" surrounding Dormant Commerce Clause jurisprudence, state laws affecting commerce generally follow three simple trends.[5] They touch on matters within traditional police power, they overtly discriminate against commerce from other states, or they are neutral in their application but have broader impacts on the national market.

The Court is "particularly hesitant to interfere with" traditional government functions. *United Haulers*, 550 U.S. at 344. This especially holds true when a state regulates matters of health and safety. *See id.* (finding that a flow control ordinance requiring private waste haulers to receive permits for disposal did not violate the Commerce Clause because of its health and environmental benefits); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (finding that regulating natural gas sales served important health and safety interests and thus did not violate the Commerce Clause).

Next, state laws that discriminate against interstate commerce are "per se invalid." *Or. Waste*, 511 U.S. at 99. These laws discriminate either on their face or

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[4] *See, e.g.*, *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230 (11th Cir. 2012); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005); *E. Ky. Res. v. Fiscal Court of Magoffin Cty., Ky.*, 127 F.3d 532 (6th Cir. 1997); *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992).

[5] *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring).

in their effects. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (invalidating an ordinance prohibiting other states from disposing waste in New Jersey because there was no reason "apart from their origin" to treat the articles of commerce differently); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350-51 (1977) (finding that a state labeling law had the "practical effect" of discriminating against out-of-state commerce because it increased production costs for out-of-state producers while leaving costs for in-state producers unchanged).

Just because discriminatory laws are per se unconstitutional, it does not follow that *nondiscriminatory* laws are *per se constitutional*. "Concluding that a state law does not amount to forbidden discrimination against interstate commerce is not the death knell of all Dormant Commerce Clause challenges, for we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*." *Dep't of Revenue v. Davis*, 553 U.S. 328, 353 (2008). For nearly fifty years, this Court has relied on the balancing test established in *Pike* to ask whether the burdens of nondiscriminatory laws exceed any purported benefits.

This Court consistently recognizes that laws which appear neutral but have protectionist effects on the interstate market violate the Dormant Commerce Clause. If a state law inhibits "the natural functioning of the interstate market," this Court will strike it down. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); *accord Exxon*, 437 U.S. 117. If a state law deters out-of-state businesses from participating in

in-state markets, this Court will strike it down. *See Bendix*, 486 U.S. 888. And if a state law imposes stringent standards to protect consumers when a similar federal law already exists, this Court will strike it down. *See Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

### A. *Pike* preserves the flow of goods in a national market and prohibits state regulations that disrupt uniformity.

Although this Court once suggested that the undue burden test is no different from discrimination,[6] it recently recognized that the *Pike* test "remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act." *Davis*, 553 U.S. at 365. Distinct from tests that apply to discriminatory laws or traditional state functions, *Pike* covers statutes that are neutral in appearance *and* application, yet still burden the commercial market as a whole. It protects against state laws that "impede the flow of interstate goods" across the nation, something only Congress has a right to regulate. *Exxon*, 437 U.S. at 128.

This Court's opinion in *Exxon* illustrates the point. During the Oil Crisis of the late 1970s, a Maryland law prohibited oil producers and refiners from operating

[6] "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

gas stations within the state. *Id.* at 119-21. This made prices more equitable and helped smaller gas stations stay afloat. *Id.* at 121. This law did not regulate citizen health or safety or fall within any other traditional state functions. It also did not discriminate against out-of-state oil sellers in favor of Maryland businesses because it prohibited *all* producers from selling gas in-state.

Yet a need to address whether the Maryland law unfairly affected the national oil market still existed. The Court therefore had to rely on the *Pike* balancing test to determine whether the regulation unduly burdened interstate commerce.[7] The Court found that the law did not adversely affect the national market. *Id.* at 127-29. It reasoned that the Dormant Commerce Clause does not protect businesses from laws they do not like; it merely protects them from laws disrupting national uniformity. *Id.* at 129.

Unlike the law in *Exxon* which did not deter oil sellers from entering the Maryland market altogether, the Wisconsin butter grading statute deters producers from entering its market and inhibits the flow of interstate goods. Any and every producer wishing to sell butter in Wisconsin must set aside the time and resources to create a separate label for each product it wishes to sell there. Sellers must also subject their products to a stringent, unusual taste test. Because

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[7] Although the Court did not explicitly reference *Pike*, it weighed whether the Maryland law "impermissibly burden[ed]" sellers. *See Exxon*, 437 U.S. at 126-29.

Wisconsin is the only state to impose these requirements, it deters butter makers from entering its market and thus puts national uniformity at risk.

### B. *Pike* forbids states from isolating themselves through regulations that, while neutral, make compliance difficult for out-of-state businesses.

This Court also applies *Pike* to strike down neutral-looking laws which deter out-of-state corporations from availing themselves of in-state markets. Enacted to inform consumer decisions, these laws ultimately bar outside competition. Compliance is often time-consuming and expensive.

For instance, Ohio imposed a four-year statute of limitations for cases involving breach of contracts and fraud. *Bendix*, 486 U.S. at 889. But to avail itself of the statute of limitations defense, an out-of-state corporation needed to appoint an Ohio agent and subject itself to Ohio jurisdiction. *Id.* An Ohio corporation filed a breach of contract claim against an Illinois company six years after the breach. *Id.* at 890. The Illinois company learned it could not assert a statute of limitations defense because it had not appointed an agent or consented to Ohio jurisdiction. *Id.* As a result, the Ohio corporation proceeded with the lawsuit long after the statute of limitations should have expired. The Illinois company claimed this procedural law violated the Dormant Commerce Clause. *Id.*

The lower courts reached the same conclusion but differed in their reasoning: the Ohio District Court held the law was an impermissible burden on interstate commerce, and the Sixth Circuit Court of Appeals held the law discriminated against other states. *Id.* at 890-91. The Supreme Court agreed that the law violated the Commerce Clause. Because it was "a disadvantageous rule against nonresidents for no valid state purpose," *id.* at 898 (Scalia, J., concurring), the Court admitted that it could have decided this case under the discrimination standard. *Id.* at 891. That said, Justice Kennedy wrote for the majority, "We choose . . . to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints." *Id.*

Although the Court admitted that Ohio likely would not have overcome the high burden of discrimination, it chose to apply *Pike* to show the state law could not even survive lower scrutiny. The Court's application shows that it sought to affirm *Pike* and provide additional guidance for its balancing test. On the one hand, the state had an interest in protecting domestic citizens from foreign corporations evading service of process. *Id.* at 893. On the other hand, appointing an agent for all cases and transactions would be difficult and costly. *Id.* Moreover, appointing an agent would subject the Illinois company to Ohio jurisdiction even in unrelated matters. *Id.* This long-arm statute would keep out-of-state companies "subject to suit in Ohio in perpetuity." *Id.*

The out-of-state business could not avail itself of a common procedural defense simply because a state created unusual hoops for compliance. Likewise, butter makers currently struggle to avail themselves of the Wisconsin market simply because that state created unfamiliar standards for compliance that no other state employs.

### C. *Pike* deters states from unnecessarily intensifying federal laws designed to protect consumers.

Although states often regulate matters of health and safety, federal laws also protect consumers from harm. For example, when one corporation takes over another, it must file disclosures about the sale with the Securities and Exchange Commission. *Edgar*, 457 U.S. at 627 n.2. In Illinois, a local statute created more stringent standards for sales when it required out-of-state companies taking over in-state businesses to register their offers with the Secretary of State. *Id.* at 626-27. This effectively subjected all sales to the Secretary's discretion. *Id.* A Delaware business offered to take over an Illinois corporation. *Id.* at 626. Only 27% of the shareholders lived in Illinois, enough to subject the entire transaction to the Secretary's arbitrary approval. *Id.* at 642.

The Supreme Court found the law violated the Commerce Clause. *Id.* at 640. First, it held the Illinois law directly regulated businesses outside the state's borders, rendering the law per se invalid. *Id.* at 642.

Even if the law did not directly regulate other states, the Court held it indirectly burdened commerce in violation of *Pike* balancing. *Id.* at 643. The act gave the Illinois Secretary of State far too much authority; only a few shareholders lived in Illinois, yet the state law could prevent a Florida shareholder from selling shares to a Delaware corporation. *Id.* The Court also weighed the more attenuated effects of the state law. If an Illinois official could stop a sale—presumably at the highest rate possible—a company's shareholders would have to settle for a lower rate. This would cut down on "efficiency and competition," and it would deter businesses from keeping stock prices high. *Id.*

Illinois's interest in "enhanc[ing] the shareholders' ability to make informed decisions" was not enough to outweigh these burdens. *Id.* at 645. Federal law already provided similar protection for shareholders through its disclosure requirements. *Id.* The more stringent standards of the Illinois law did not improve consumers' decision-making capacity. *Id.* at 644-45.

Likewise, Wisconsin's interest in informing consumers' decisions does not outweigh the costly and arbitrary effects of compliance with its butter statute. Subjecting butter to a taste test is not unlike submitting an offer for the sale of private businesses to a public official. The USDA already has regulations in place to ensure butter meets health and safety requirements; the Wisconsin standards do nothing to further the interests outlined in the federal law.

### D. Small businesses rely on *Pike* to challenge burdensome state taxes that generally do not fall within federal regulation.

A longstanding doctrine prohibits states from imposing taxes which "create any effect forbidden by the Commerce Clause." *Wayfair*, 138 S. Ct. at 2091 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977)). Generally, state taxes must survive a four-part test that differs slightly from the Dormant Commerce Clause tests.[8]

This Court recently overturned the physical presence rule, which required an out-of-state retailer to have contacts within a state for that state to tax its goods. *Id.* at 2091-92. The rule sought to prevent state overreach and the imposition of undue burdens on interstate commerce. *Id.* at 2092. In practice, however, it was a messy law with several loopholes.[9]

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[8] "The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Wayfair*, 138 S. Ct. at 2091.

[9] This Court pointed out:

> In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers – something that has become easier and more prevalent as technology has advanced. Worse still, the rule produces an incentive to avoid physical presence in multiple States."

*Wayfair*, 138 S. Ct. at 2094.

Addressing concerns that overturning the rule would leave room for state overreach, this Court declared, "[O]ther aspects of the Court's Commerce Clause doctrine can protect against any *undue burden* on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines." *Id.* at 2098 (emphasis added). Only one aspect of the Commerce Clause doctrine protects against undue burdens: the *Pike* balancing test.

This Court thus suggested just last Term that *Pike* is alive and well. If, however, this Court requires a showing of discrimination in all Dormant Commerce Clause claims, it would close the courtroom door to plaintiffs challenging nondiscriminatory but protectionist measures. In short, *Pike* would serve no purpose. But *Pike* does serve a purpose: it protects against laws that interrupt the market as a whole. It prevents states from engaging in protectionism under the guise of informing consumer decisions. It will now be essential to small businesses disputing state tax overreach. This case therefore provides this Court with an opportunity to reaffirm and clarify *Pike* as the test for neutral laws that burden interstate commerce.

## CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amici curiae* brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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