

No. 21-468

IN THE
Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL &
AMERICAN FARM BUREAU FEDERATION,
Petitioners,

v.

KAREN ROSS, ET AL.,
Respondents.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

November 12, 2021

QUESTION PRESENTED

Whether California may regulate the conduct of pork farmers that occurs wholly out-of-state.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
I. PROPOSITION 12 VIOLATES THE DORMANT COMMERCE CLAUSE	3
A. Prop 12 Severely Burdens Interstate Commerce	4
B. California’s Purported Local Interests Do Not Justify the Burdens Prop 12 Places on Interstate Commerce	6
II. CALIFORNIA’S ONEROUS REGULATION OF THE NATION’S PORK INDUSTRY VIOLATES THE PRINCIPLE OF TERRITORIALITY	11
CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993)	9
<i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824).....	3, 7
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005)	3, 8, 10
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989).....	11, 13
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)....	3, 10, 14
<i>Minnesota v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	13
<i>Nat’l Pork Prods. Council v. Ross</i> , 6 F.4th 1021 (2021)	12
<i>The Slaughter-House Cases</i> , 83 U.S. 36 (1872).....	7, 8
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	9
<i>West Lynn Creamery, Inc. v. Healy</i> , 512 U.S. 186 (1994)	12, 13
<i>Wilson v. Black Bird Creek Marsh</i> , 27 U.S. 245 (1829)	3
Statutes	
Cal. Health & Safety Code § 25990	1
Cal. Health & Safety Code § 25993	5
Other Authorities	
Answering Br. of St. Defendants at 38–39, <i>Nat’l Pork Prods. Council v. Ross</i> , 6 F.4th 1021 (9th Cir. 2021) (20-55631)	9

Brannon P. Denning, <i>Confederation-era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine</i> , 94 Ky. L.J. 37 (2005).....	12
Brief for Nat'l Ass'n of Mfrs., et al. as <i>Amici Curiae</i> Supporting Appellant, <i>Nat'l Pork Prods. Council. v. Ross</i> , 6 F.4th 1021 (9th Cir. Jul. 28, 2021) (No. 20-55631).....	15
Cal. Dep't of Food & Agric., "Proposition 12 Implementation," July 22, 2020.....	6
Cal. Dep't of Food & Agric., Draft Article 5, Certification and Accredited Certifiers § 1326(d) (July 22, 2020)	6
Cal. Prop. 12, <i>as approved by voters</i> (Gen. Elec. Nov. 6, 2018)	7
Cal. Sec'y of St., "Statement of Vote," (Nov. 6, 2018).....	11
James Madison, "Journal" (Sept. 15, 1787), <i>in 2 The Records of the Federal Convention of 1787</i> (Max Farrand ed., rev. ed. 1937) (1911)	7
James Madison, "Vices of the Political System of the U. States," <i>in The Writings of James Madison</i> (Gaillard Hunt ed., 1900) (1789)	10
John Fiske, <i>The Critical Period of American History</i> (1888)	3
Letter from Jen Sorenson, President, Nat'l Pork Prods. Council, to Thomas J. Vilsack, Secretary, U.S. Dep't of Agric. (May 27, 2021).....	4, 5

Robert H. Bork & Daniel E. Troy, <i>Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce</i> , 25 Harv. J.L. & Pub. Pol'y 849 (2002)	12
Constitutional Provisions	
U.S. Const. amend. X.....	7

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case is of interest to Cato because it raises important questions about the regulation of interstate commerce in our federal system.

SUMMARY OF ARGUMENT

In 2018, California voters ratified Proposition 12, which bans any business from “knowingly” selling whole veal or pork meat that the business owner “knows or should know is the meat of a[n] . . . animal . . . confined in a cruel manner.” Cal. Health & Safety Code § 25990(b). Notably, this law applies nationwide to all covered meat products, regardless of where the animal was raised. Proposed Regulations, Livestock Confinement Standards, California Dep’t of Food & Agric. (2020) (“Confinement Standards”). The proposed regulations would require out-of-state pork producers who “sell whole pork meat into California for purposes of human food use in the state” to

¹ Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party’s counsel authored this brief in any part and *amici* alone funded its preparation and submission.

“register with the Department.” *Id.* Additionally, the regulations would require businesses in any state wishing to sell pork products in California to be certified by the state Department of Food and Agriculture (CDFA), a process that includes onerous recordkeeping requirements and regular on-site inspection. The CDFA and its agents would visit pig farms nationwide to ensure Prop 12 compliance.

Prop 12 and the Confinement Standards are inconsistent with the federalist structure of the United States. Specifically, Prop 12 violates the Dormant Commerce Clause by imposing a significant burden on interstate commerce that is disproportionate to the claimed local benefits. That burden on interstate commerce is being illegitimately carried out at the behest of a fraction of California voters rather than by the nationwide representation manifested in Congress.

While *amicus* joins members of this Court in objecting to the scope of Congress’s positive authority under the Commerce Clause, invalidating Proposition 12 under the Dormant Commerce Clause would not implicate the extra-constitutional expansion of the Commerce Clause. The American pork market is truly interstate commerce under a constitutionally faithful meaning of the term. Moreover, while Californians consume about 13 percent of the country’s pork, the state only has about 0.2 percent of the nation’s breeding sows. In other words, California has placed burdensome regulations on an interstate market that has only a small connection to the state.

The Commerce Clause was intended to prevent schismatic regulatory regimes by vesting exclusive

jurisdiction in Congress. The Dormant Commerce Clause is implied by the concept of exclusive jurisdiction. If the commerce is truly interstate, as here, then states cannot unduly burden it.

ARGUMENT

I. PROPOSITION 12 VIOLATES THE DORMANT COMMERCE CLAUSE

Courts have long recognized that the Constitution places limits on the power of individual states to regulate interstate commerce. Chief Justice John Marshall recognized such a limit in the landmark case of *Gibbons v. Ogden*, in which the Court invalidated a New York steamship-monopoly law as impeding Congress’s power to regulate interstate commerce. 22 U.S. (9 Wheat.) 1 (1824). Seven years later, in *Willson v. Black Bird Creek Marsh*, Marshall referred to Congress’s power under Article I, Section 8 to “regulate commerce in its dormant state.” 27 U.S. 245, 252 (1829). *See generally* John Fiske, *The Critical Period of American History* 134–37 (1888) (describing the plethora of conflicting state restrictions on commerce during the Articles of Confederation era that prompted the Constitutional Convention).

Today, this principle is known as the Dormant Commerce Clause. This Court has often used the Dormant Commerce Clause to set aside state laws and regulations that facially discriminate against interstate commerce. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (holding state restrictions on the direct shipment of wine unconstitutional because they discriminated against out-of-state producers); *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)

(invalidating an Oklahoma law for “[o]vertly discriminat[ing] against interstate commerce”).

Yet even facially nondiscriminatory state laws, like Prop 12, must fall if they unduly burden interstate commerce. *Pike v. Bruce Church*, 397 U.S. 137 (1970). The *Pike* balancing test evaluates whether the purported local interest can justify the burden placed on interstate commerce. A state regulation will be enjoined if it fails to “regulate[] evenhandedly to effectuate a legitimate local public interest,” or if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 142. Prop 12 unduly burdens interstate commerce without providing sufficient local benefits.

A. Prop 12 Severely Burdens Interstate Commerce

Prop 12 will cause serious harm to the interstate pork industry. A study by a North Carolina state economist found that only four percent of pork producers meet the law’s high space requirements. Letter from Jen Sorenson, President, Nat’l Pork Prods. Council, to Thomas J. Vilsack, Sec’y, U.S. Dep’t of Agric. (May 27, 2021) (hereinafter NPPC Letter), <https://bit.ly/3C97xmd>. Prop 12-compliant producers will need to spend “an estimated \$293,894,455 to \$347,733,205 of additional capital in order to reconstruct their sow housing and overcome the productivity loss that Proposition 12 imposes.” ER114 (¶342). Prop 12 will lead to materially higher prices and significant economic disruption, not just for one firm or area but throughout the United States. *Compare Pike*, 397 U.S. at 144–45 (enjoining an order that would have forced a single Arizona cantaloupe

grower to pack its cantaloupes in-state at significant additional cost), *with* NPPC Letter, *supra* (describing how compliance with Prop 12’s requirements will cause exorbitant nationwide renovation costs that will likely fall most heavily on smaller producers that lack the economies of scale to absorb the shock).

Under Prop 12, out-of-state pork producers must present written certification that the “whole pork meat . . . was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner.” Cal. Health & Safety Code § 25993.1. Because of the interstate pork industry’s highly integrated and complex nature, the entire pork supply chain throughout the country—sow pig farmers (responsible for the piglets at birth), feeder pig farmers (responsible for raising the piglet to adulthood), slaughterhouse operators, and pork distributors—must comply with California law. *See* Complaint at 28–31, 48–50 (describing the structure of the U.S. pork supply chain and the significant burden Prop 12 will impose). If a California pork purchaser is unable to certify out-of-state compliance with Prop 12 in each link of the supply chain, it could be subjected to a \$1,000 fine and possibly 180 days in prison. Cal. Health & Safety Code § 25993(b).

But California has gone even further. Prop 12 mandates that the California Department of Food and Agriculture (CDFA) promulgate rules for the inspection requirements contained in the law, and CDFA agents will be traveling nationwide to enforce those restrictions. Although CDFA has not finalized a rule, its draft rule details the compliance steps the pork industry must take. CDFA, “Proposition 12

Implementation,” July 22, 2020, <https://bit.ly/3D6KLN9>. These include proposals to certify “California compliant operation[s].” CDFA, Draft Article 5, Certification and Accredited Certifiers § 1326(d) (July 22, 2020), <https://bit.ly/3C632sK>. For instance, Section 1326.1 requires an “authorized representative of [CDFA]” be given inspection “access to the production and/or handling operation,” “office,” and “pastures, fields, equipment, structures, and houses where covered animals and covered animal products may be kept, produced processed, handled, stored or transported, including . . . all enclosures for covered animals,” and be allowed “to examine all covered products that are sold or intended, held, segregated, stored, packaged, labeled, or represented for sale or distribution,” and all “containers, labels, labeling, invoices, and bills of lading used in the handling, storage, packaging, sale, transportation or distribution of covered products,” as well as access “for review and copying of records.” *Id.*

If allowed to go into effect, Prop 12 and its pursuant regulations would cause extreme economic distortion in the nationwide pork market that could carry cascading economic consequences.

B. California’s Purported Local Interests Do Not Justify the Burdens Prop 12 Places on Interstate Commerce

Prop 12 lists two public interests to justify its 24 square feet enclosure requirement for sow pigs: (1) ending animal cruelty by “phasing out extreme methods of farm animal confinement,” and (2) protecting Californians from the “risk of foodborne illness and associated negative fiscal impacts on the

State of California.” Cal. Prop. 12 at § 1, *as approved by voters* (Gen. Elec. Nov. 6, 2018). California has not provided any evidence that the 24 square feet per sow requirement will advance animal welfare or reduce the risk of foodborne illnesses. ER104 (¶269). On the other hand, there is already ample evidence of Prop 12’s onerous economic burdens on the pork industry. Under the *Pike* balancing test, California’s purported local interests cannot justify the severe burdens that these regulations place on interstate commerce.

1. *Preventing animal cruelty nationwide is not a legitimate state interest.*

It is well within California’s reserved powers under the Tenth Amendment to prevent what it sees as animal cruelty within its jurisdiction. U.S. Const. amend. X; *see also The Slaughter-House Cases*, 83 U.S. 36, 62–63 (1872). However, the power to set *nationwide* regulations on commerce is one exclusively granted to Congress. *See* James Madison, “Journal” (Sept. 15, 1787), in 2 *The Records of the Federal Convention of 1787*, 625 (Max Farrand ed., rev. ed. 1937) (1911) (hereinafter *Records of the Convention*); *see also Gibbons*, 22 U.S. (9 Wheat) at 199–200 (opining that regulation of interstate commerce could not plausibly be shared between the states and the federal government but instead belonged to the federal government alone). This includes the power to set nationwide standards on the treatment of livestock. Yet Prop 12 does not limit itself to ending animal cruelty in California; its purpose is simply “to end animal cruelty.” Letter from Cheri Shankar, Proponent of Initiative Statute, to Ashley Johansson, Cal. Att’y Gen. Off. Initiative Coordinator (Aug. 29, 2017), <https://bit.ly/30dpanA>.

The 24-square-foot-per-sow requirement is an arbitrary number that has not been scientifically shown to improve sow welfare. ER119 (¶¶376–77). In purpose and effect, Proposition 12 goes beyond any legitimate *intrastate* regulatory interest and instead attempts to further a *nationwide* regulatory goal.

2. *California has not shown that Prop 12 is necessary to ensure food safety.*

Health and safety standards are the quintessential manifestation of state police powers. *See, e.g., The Slaughter-House Cases*, 83 U.S. at 62–63. However, when evaluating laws under the Dormant Commerce Clause doctrine, this Court will not simply accept a claimed interest on its face. *See Granholm*, 544 U.S. at 490–91 (finding that New York and Michigan presented insufficient evidence of minors’ direct-ordering alcohol to justify their bans on direct-ordering from out-of-state suppliers).

Prop 12 does not reduce foodborne illnesses. Under the Federal Meat Inspection Act, the U.S. Department of Agriculture’s inspectors ensure that meat shipped into California is safe—and has exclusive jurisdiction over inspections for wholesomeness. ER123–24 (¶420). Prop 12 does not add additional protections against foodborne illnesses because the proposition only impacts the housing of sows, not their piglets, which are the animals that will become pork cuts. ER124 (¶¶423–424). No evidence is presented to prove that the square footage available to a sow pig prevents or reduces foodborne illnesses from the meat of their offspring. ER124, 126 (¶¶425, 438).

While the text of Prop 12 claims that part of its purpose is to reduce the incidence of foodborne illness caused by inadequate containment, California did not argue this claim in the Ninth Circuit. Instead, California relied on a flawed reading of precedent to claim that ending animal cruelty nationwide is a legitimate *state* interest. See Answering Br. of St. Defendants at 38–39, *Nat'l Pork Prods. Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021) (20-55631). California cited *United States v. Stevens*—which dealt with a *federal* law concerning depictions of cruelty to animals—for the idea that governments have a significant interest in preventing cruelty to animals. 559 U.S. 460, 469–70 (2010). That interest is not disputed here, but *amicus* does dispute the *scope* of the interest. Nowhere in *Stevens* did the Court suggest that states can freely regulate to curtail animal cruelty outside their borders. Likewise, the passage from *Church of Lukumi Babalu Aye v. City of Hialeah* cited by California is from a discussion emphasizing how the city's regulation was overbroad apropos of the Constitution's religion clauses, despite the legitimate interest motivating it. 508 U.S. 520, 538 (1993) (“The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.”) Again, California's interest is not disputed, merely its extraterritorial scope.

Extending legitimate state interests into sister states by severely burdening interstate commerce is antithetical to our federal system. As early as 1785, a committee led by James Monroe recommended amending Article IX of the Articles of Confederation

to grant the national Congress “sole and *exclusive*” power to regulate commerce and trade among the states (emphasis added). “Report of the Committee on the Regulation of Trade” (1785), *reprinted in* Library of Cong., *Continental Congress Broadside Collection* (last accessed Oct. 25, 2021), <https://bit.ly/3n6tLRr>. In 1789, James Madison enumerated among the vices of the Articles of Confederation, “[t]he practice of many States in restricting the commercial intercourse with other States, . . . [which] tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony.” James Madison, “Vices of the Political System of the U. States,” *in The Writings of James Madison* (Gaillard Hunt ed., 1900) (1789). The Framers rightly recognized that the regulation of interstate conduct was a concerning practice which the Constitution should rightly curtail.

3. *Even if Prop 12 furthers a legitimate state interest, it could be accomplished through less restrictive means.*

It would not offend the Commerce Clause if California were to declare that all sows, chickens, or calves raised in the state must be kept in conditions compliant with the standards of Prop 12. See *Granholm*, 544 U.S. at 490–91 (noting that New York and Michigan could have used less restrictive policies to prevent minors from drinking alcohol); *Hughes*, 441 U.S. at 337–38 (“Far from choosing the least discriminatory alternative, Oklahoma has chosen to ‘conserve’ its minnows in the way that most overtly discriminates against interstate commerce.”); *Pike*, 397 U.S. at 143–44 (noting that safety has long been recognized as legitimate subject of state legislation).

California could certify that in-state pork producers have raised their stock in a humane fashion and let California consumers put their money where their mouths are by choosing between humane in-state pork and pork imported through interstate commerce. Such regulations would achieve California's interest in regulating intrastate pork production without excessively burdening interstate commerce. What California may not do is presume to prescribe agricultural practices for the entire United States. The Constitution vests that power in the U.S. Congress, not the people of California.

II. CALIFORNIA'S ONEROUS REGULATION OF THE NATION'S PORK INDUSTRY VIOLATES THE PRINCIPLE OF TERRITORIALITY

The Dormant Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Prop 12 violates the principle of territoriality by enforcing a burdensome state law nationwide without the input of the American people, which violates the principles of federalism.

In 2018, 62.66 percent of participating Californians voted for Prop 12, about 7.5 million voters. Cal. Sec’y of St., “Statement of Vote,” 100 (Nov. 6, 2018), <https://bit.ly/3n6ZXUS>. While Californians voted on it, Prop 12 will be enforced nationwide. If Prop 12 is upheld, those 7.5 million California voters

will have successfully projected their moral standards onto the entire American populace.

Far from being “overbroad dicta,” *Nat’l Pork Prods. Council v. Ross*, 6 F.4th 1021, 1027 (2021), the doctrine of extraterritoriality is an important safeguard of our federalist structure. Onerous extraterritorial regulations like Prop 12 were among the major factors that doomed the Articles of Confederation and precipitated the Constitutional Convention. See Brannon P. Denning, *Confederation-era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 46–48, 59–68 (2005) (cataloging the many state regulations that burdened interstate commerce during the Articles era). With the Continental Congress incapable of setting uniform regulations over interstate commerce, states passed legislation to protect themselves, often at the expense of their neighbors. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol’y 849, 855–59 (2002) (describing the plethora of burdensome and retaliatory state laws that precipitated the Convention). Local regulations harmed commerce throughout the states and prompted a destructive cycle of commercial retaliation that sapped the Union’s economy. *Id.*

When a state regulates its own commerce, even onerously, its political processes will generally be sufficient to prevent abuse, because local constituents will bear the regulatory burden. See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (noting that “[n]ondiscriminatory measures . . . are

generally upheld, in spite of any adverse effects on interstate commerce, in part because ‘the existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.’”) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)). Conversely, when an ostensibly neutral regulation falls predominantly on out-of-state parties, the local political process will not protect those parties to the same degree, and thus courts should treat those regulations with more suspicion. *See id.*; *Beer Inst.*, 491 U.S. at 336.

As this Court made clear in *West Lynn Creamery*, formalistic distinctions and structural contrivances should not obscure “purposes and effects” on commerce. 512 U.S. at 202. The Massachusetts law at issue there was structured as a tax on in-state milk dealers, but the Court found that the tax burden fell almost entirely on out-of-state dairy farmers. *Id.* at 203. The Court further rejected Massachusetts’s contention that any price increase would be borne only by in-state consumers. *Id.*

As in *West Lynn Creamery*, here California is trying to subject parties outside its jurisdiction to its authority. Unlike *West Lynn Creamery*, however, California is not merely taxing out-of-state pork producers; it’s attempting to regulate the minutiae of their operations without regard for their location.

Fifteen states opposed Prop 12, explaining that the law impinges on their sovereignty; Ohio expressly stated that its sow farmers may use breeding pens Prop 12 bars. ER269. The Constitution tries to

mitigate such disputes between the states by granting Congress exclusive authority over interstate commerce in “the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” *Hughes*, 441 U.S. at 325–326.

If it allows California to enforce Prop 12, the Court would essentially be granting California similar powers as Congress. Yet those powers will not be checked by the nationwide representation that legitimizes Congress’s power over national interests. The Confinement Standards would require a North Carolina pig farmer who sells his stock to an Illinois meatpacker, which in turn sells some cuts to California grocery stores, to comply with Prop 12’s enclosure standards or risk losing a substantial portion of their sales.

The proper place for setting nationwide standards for the raising of pork is in the U.S. Congress.

CONCLUSION

With Proposition 12, California is engaged in the sort of regulatory mischief that nearly proved the undoing of the Union under the Articles of Confederation. As various industry *amici* noted below, Prop 12's upstream effects create serious economic consequences, not to mention the likelihood of retaliatory action from other states. *See* Brief for Nat'l Ass'n of Mfrs., et al. as *Amici Curiae* Supporting Appellant, *Nat'l Pork Prods. Council. v. Ross*, 6 F.4th 1021 (9th Cir. Jul. 28, 2021) (No. 20-55631).

Accordingly, the Court should grant the writ of certiorari and reverse the judgment below.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

November 12, 2021