

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.*

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

**BRIEF OF NORTH CAROLINA CHAMBER
LEGAL INSTITUTE, NORTH CAROLINA PORK
COUNCIL, NORTH CAROLINA FARM
BUREAU, AND 11 OTHER STATE FARM
BUREAUS, PORK COUNCILS, AND BUSINESS
GROUPS AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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INTERESTS OF *AMICI*¹

Amici business groups, pork councils, and farm bureaus are interested in this case because it is their members and constituents that will face the costs imposed by California's attempt to regulate nationwide pork production. Proposition 12 will raise the cost of pork production, disrupt the food supply chain from farm to grocery shelf to table, and raise costs to consumers throughout the nation. *Amici* maintain that such a costly and ill-conceived attempt to impose uniform national standards regulating the quintessentially local activity of raising livestock is not the role of a single State, no matter how large its consumer market.

Amicus the North Carolina Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber, the leading business advocacy organization in North Carolina, and provides a medium through which North Carolina persons and companies can promote their common business interests by, *inter alia*, advocating for job providers on precedent-setting legal issues with broad business climate, workforce development, and quality of life implications before state and federal courts.

¹ All parties have consented to the filing of this brief and were given at least 10 day's notice of its filing. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission. *Amici* are not publicly traded and have no parent corporations, and no publicly traded corporation owns 10% or more of any *Amici*.

Amicus the North Carolina Pork Council is a non-profit North Carolina corporation established in 1962. The organization is a 501(c)(5) trade association with the mission to promote and educate to ensure a socially responsible and profitable North Carolina pork industry. The North Carolina Pork Council engages in public policy and advocacy efforts as well as research, producer education, promotion, and consumer information programs and services. In addition to members directly engaged in the pork industry, the Board of Directors has members representing allied industry and meat processors, state officers, representatives of NC State University, NC State University College of Veterinary Medicine, and the NC Department of Agriculture. No single member of the North Carolina Pork Council funds or controls its activities.

Amicus the North Carolina Farm Bureau Federation is the State's largest general farm organization, representing approximately 35,000 farm families in every county of North Carolina. NCFBF's volunteer-farmer members raise livestock and poultry and produce myriad crops throughout the State, including tobacco, sweet potatoes, melons, cotton, soybeans, corn, and wheat. Established in 1936, NCFBF primarily advocates for its members before Congress, the North Carolina General Assembly, and federal and state regulatory agencies.

Amicus the North Carolina Retail Merchants Association was founded in 1902 and serves as the voice of the retail industry in North Carolina and is comprised of over 2,500 members representing over 25,000 store locations throughout the State. NCRMA's membership includes chain and independent retailers of all

trade lines including, but not limited to, grocery, pharmacy, home improvement, department, clothing, jewelry, electronics, restaurants, furniture, shopping centers and distribution centers. NCRMA's grocery members sell the overwhelming majority of pork products to North Carolina consumers. Higher pork production costs will result in higher food prices for North Carolina consumers including many low-income consumers who purchase pork products through the Supplemental Nutrition Assistance Program (SNAP).

Amicus the North Carolina Cattlemen's Association is an organization which coordinates the promotion of beef and the beef industry. The NCCA, through its membership dues, assists cattlemen in legislative, regulatory, and production issues. The leadership of NCCA is made up of cattlemen and women elected by their peers, and are NC cattle producers who represent all cattle producers across the state. North Carolina has 800,000 head of cattle on 18,413 farms and command cash receipts of \$228,926,000 annually.

Amicus the Arizona Farm Bureau Federation is Arizona's largest general agricultural advocacy organization. AZFB serves as the voice for more than 25,000 members across the state, about 2,400 of whom are active farmers or ranchers. Arizona's agricultural industry contributes \$23.3 billion to Arizona's economy. Arizona farmers and ranchers raise a variety of livestock including pork, eggs, dairy, and beef. In six of the state's fifteen counties, livestock production accounts for 70 percent or more of the total market value of the county's agriculture, and much of that

production is sold across state lines – including to buyers in California. As a result, AZFB members would be directly impacted by the housing requirements and commerce restrictions outlined in Proposition 12.

Amicus the Arizona Pork Council is an educational and advocacy organization dedicated to promoting Arizona's pork industry. In addition to providing public outreach encouraging the consumption of pork products, it also engages in advocacy on behalf of pork producers and research support to Arizona's pork industry. Northern Arizona is home to a significant commercial pork production industry, and the vast majority of the pork produced in Arizona is sold into California. APC's members have a direct and compelling interest in whether Proposition 12 will be allowed to require animal housing standards above and beyond those already imposed by Arizona's prohibition on cruel or inhumane confinement. See Ariz. Rev. Stat. § 13-2910.07.

Amicus the Illinois Agricultural Association (a/k/a the Illinois Farm Bureau) is an Illinois not-for-profit membership organization that is directed by farmers. Its mission is to improve the economic wellbeing of agriculture and to enrich the quality of farm family life. The Illinois Agricultural Association represents 75% of all Illinois farmers and has 77,453 voting members whose livelihoods are all tied to agriculture. The Illinois Agricultural Association works actively in the furtherance of its mission and has filed *amicus* briefs in other important cases affecting agriculture. *Amicus* and its members have a vital and direct interest in the outcome of this case. Many members raise livestock themselves. Others grow crops that end up

feeding livestock that may be raised both in Illinois and elsewhere.

Amicus the Illinois Pork Producers Association is a vital part of Illinois' vibrant agricultural economy and has served pork producers in Illinois for more than 50 years. The IPPA represents more than 1,600 pork producers throughout Illinois who collectively employ more than 57,000 Illinois citizens, contribute more than \$13.8 billion to the Illinois economy through hog production and processing, and have various upstream and downstream business partners, including other farms and enterprises. For example, Illinois hogs consume approximately 210 million bushels of corn and 63 million bushels of soybeans a year.

Amicus the Kansas Farm Bureau is the largest grass-roots general farm organization in the state of Kansas, representing over 105,000 members, including more than 30,000 farmer and rancher member families. The Kansas Farm Bureau advocates on behalf of its membership in legislative, regulatory, and litigation matters. Agriculture represents over 43% of the economy of the state (approximately \$70.3 billion). The pork industry in Kansas has a direct output of \$456.6 million and creates 3,270 jobs in the state. Roughly half of that output can be attributed to Kansas Farm Bureau members.

Amicus the Michigan Farm Bureau was established in 1919 and is Michigan's largest general farm organization with approximately 200,000 members operating in 65 county Farm Bureaus. Its mission is to represent, protect, and enhance the business, economic, social, and educational interests of its members. As a general farm organization, *Amicus*

represents the full spectrum of Michigan's agricultural diversity, from crops and livestock to fruits and vegetables, greenhouses, forestry, and more.

Amicus the Oklahoma Farm Bureau Legal Foundation is a nonprofit foundation incorporated in 2001, that supports the rights and freedoms of farmers and ranchers by promoting individual liberties, private property rights, and free enterprise. Its sole member is Oklahoma Farm Bureau, Inc. ("OKFB"), an independent, nongovernmental, voluntary organization of farm and ranch families. OKFB was founded in 1942 and currently has 83,985 member families statewide, united for the purpose of taking action to achieve educational improvement, economic opportunity and social advancement. OKFB members produce many types of livestock, primarily cattle, swine, and poultry.

Amicus the Tennessee Farm Bureau Federation represents over 680,000 families through its mission to "develop, foster, promote and protect programs for the general welfare, including economic, social, educational and political well-being of farm people of the great state of Tennessee." Its members include beef, pork, and poultry producers and associated businesses such as veterinarians, processors and others that serve the livestock industries. Tennessee ranks in the top 5 states for beef production and top 16 states for broiler production.

Amicus the Texas Farm Bureau was established in 1933 as a non-profit, grassroots, agricultural association representing family farmers and ranchers in Texas. Texas Farm Bureau is committed to the advancement of agriculture and prosperity for rural Texas, has over 530,000 member families, and is

associated with 205 member county Farm Bureau organizations across the state. Texas Farm Bureau's mission is to be the Voice of Texas Agriculture, to benefit all Texans through promotion of a prosperous agriculture for a viable, long-term domestic source of food, fiber and fuel. Its member farmers, ranchers, and producers believe the preservation of certainty in the application of rules and statutes and the autonomy to manage and care for their livestock and farms is of critical importance to the strength of the agricultural economy in Texas.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California's Proposition 12 seeks to dictate local methods of producing pork throughout the nation. Enforced by the threat of California denying pork producers access to its market, it both regulates interstate commerce and imposes extraterritorial requirements that violate the constitutional structure of horizontal federalism.

1. This case presents important questions having tremendous economic and jurisprudential impact that are worthy of review by this Court. California's attempt to use the size of its consumer market and its economic clout to dictate the internal agricultural affairs of all other States would impose massive costs on farmers, businesses, and consumers that do not live or operate in California and have no say in California's political and electoral processes. Yet with only parochial interests taken into account, California seeks to impose conversion and maintenance costs that will burden livestock producers throughout the United

States, virtually none of whom currently meets California’s idiosyncratic standards. Those standards are more costly, less efficient, and will have billions of dollars in direct and indirect economic consequences.

2. *Amici* agree with Petitioners that California’s Proposition 12 violates the dormant Commerce Clause under any sensible interpretation of current jurisprudence. Pet. 2-5. *Amici* also recognize that many Justices have expressed concerns, if not outright disapproval, of the Court-created and malleable tests sometimes applied in dormant Commerce Clause cases. But such concerns do not justify throwing out the baby with the bathwater, and this case is an excellent vehicle for considering some textual and structural approaches, based on the notion of horizontal federalism, that would provide a more solid basis for rejecting California’s extraterritorial regulation of interstate commerce.

As this Court has recognized, “removing state trade barriers was a principal reason for the adoption of the Constitution.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). That purpose was served by a collection of interlocking provisions designed to maintain not only vertical federalism (federal/state relations), but also horizontal federalism (state/state relations). Under that original design, no State had the authority to regulate beyond its territory, either directly or through trade barriers against imports from other States. Returning to earlier understandings of the text and structure of the Constitution would provide a sounder basis for enforcing territorial limits on state power and a properly

exclusive delegation of a limited power to regulate interstate commerce.

Rather than merely reject the dormant Commerce Clause wholesale without restoring the protections it replaced, a principled result can be reached by tracking earlier and correct understandings of the Constitution's text, history, and structure, even if done under, or incorporated into, the nominal rubric of dormant Commerce Clause doctrine.

ADDITIONAL REASONS FOR GRANTING THE PETITION

Amici join the Petitioners' explanation of why the Ninth Circuit erred when applying this Court's dormant-commerce-clause jurisprudence. Pet. 20-33. They will not repeat those arguments here. *Amici* instead expand upon the economic importance of the petition and suggest a jurisprudential approach to overcoming any potential hesitation to applying the dormant Commerce Clause in this case.

I. The Questions Presented Involve Matters of Tremendous Economic Consequence.

As Petitioners note, Pet. 2-5, California's attempt to regulate pork production will have tremendous nationwide economic impact. *Amici* represent individuals and businesses that will bear the brunt of that economic cost and write to elaborate upon the importance of this case to many thousands of farmers, businesses, and ultimately consumers with often limited budgets.

In the United States, pork production is a \$23 billion industry.² At any given time, tens of millions of hogs and pigs are held in States around the country.³

Amici are particularly invested in pork production and exports of pork to other States. In North Carolina, which is consistently among the top 5 pork-producing States, pork production directly and indirectly makes up more than 20 percent “of cash receipts from farming” statewide and brings in billions of dollars to the state economy.⁴ Proposition 12 is expected to have a “significant and wide ranging” effect on North Carolina farmers and pork production.⁵

Other States where *Amici* operate similarly produce an enormous amount of pork. In Arizona, pork production is a nearly \$50 million industry.⁶ Its 372 pork-producing farms include many “small, direct-market pork producers” who—because of their size—

² See Natasha Daly, *California Voted to Improve Pig Welfare. The Pork Industry is Facing a Reckoning.*, National Geographic (Aug. 13, 2021), <https://tinyurl.com/bk9u9v5s>.

³ See M. Shahbandeh, *Top U.S. States by Number of Hogs and Pigs 2021*, Statista (Apr. 20, 2021), <https://tinyurl.com/PorkStats>.

⁴ Kelly Zering, *Economic Impacts of the Pigs and Pork Sector In North Carolina and Selected Counties* 6 (2019), <https://tinyurl.com/NCPorkReport>.

⁵ Allen N. Trask III & Amy Wooten, *United States: In the Agribusiness Industry? Don't Miss These Three Legal Developments to Keep an Eye On*, Mondaq (Sept. 2, 2021), <https://tinyurl.com/hetvxx8k>.

⁶ Julie Murphree, *Pigging Out on the Arizona Pork Industry Story*, Arizona Farm Bureau (Apr. 4, 2021), <https://tinyurl.com/6pf8u374>.

are unlikely to be able to afford the massive costs necessary to allow their pork to be sold in California, their neighboring State.⁷ Michigan has nearly 11,000 Michiganders working to raise its 2.5 million hogs, with an additional 700 jobs “directly attributable to exports of Michigan pork.”⁸ Oklahoma reports similar job numbers: “The production and processing segments of Oklahoma’s pork industry provide over 12,000 jobs and are worth \$473.3 million.”⁹ Texas, “one of the pork industry’s new hog growth areas,” has a robust and growing pork economy.¹⁰ Its farmers produced 1.15 million hogs in 2019. And in Illinois, more than 2,000 hog farms produced 2.1 billion pounds of pork from around 11 million pigs in 2017 alone.¹¹ Proposition 12 will have untold negative effects on Illinois’s nearly \$14 billion pork industry.¹²

Beyond the farmers and businesses represented by *Amici* here, pork production in other States generates billions of dollars and hundreds of thousands of jobs. In Iowa, the State with the highest pork production,

⁷ *Id.*; Valorie Rice, *Arizona Agriculture: Not Your Average Farmers* (Sept. 25, 2019), <https://tinyurl.com/y75678by>.

⁸ Michigan Pork Producers Ass’n, *Farmer Resources*, <https://www.mipork.org/farmer-resources/>.

⁹ Oklahoma Pork Council, *Pork Production in Oklahoma*, <https://www.okpork.org/pork-production-in-oklahoma>.

¹⁰ Karen McMahan et al., *Texas*, Nat’l Hog Farmer (May 1, 1998), https://www.nationalhogfarmer.com/mag/farming_texas_3.

¹¹ Illinois Pork Producers Ass’n, *Illinois Pork Industry Facts*, <https://ilpork.com/ippa/about-us/il-pork-facts>.

¹² *Id.*

nearly 150,000 jobs have some link to the Iowa pork industry, and nearly one in ten “working Iowans has a job tied to the pork industry.”¹³ Iowa farmers own an average of 800 sows, and it would cost them 2.5 to 2.8 million dollars to renovate each farm.¹⁴ And subsequent compliance costs in Iowa will be in the tens of millions per year.¹⁵ One Iowa farmer explained that Proposition 12 will decrease the amount of pigs he can house by nearly 17 percent and cost him \$3 million total.¹⁶ Similar harms will affect farmers in Minnesota, often the second-largest producer of pork in the United States.¹⁷ For farmers nationwide, the requirement to house their hogs in group pens rather than sow barns is estimated to cost \$1.9 to \$3.2 billion, according to a University of Minnesota study.¹⁸ The cost of operating

¹³ Iowa Pork Producers Ass’n, *Iowa Pork Facts*, <https://tinyurl.com/IAPorkFacts>.

¹⁴ See Mary Stroka, *Iowa Ag Leaders Sound Off on California’s Prop 12, EATS Act*, *The Iowa Torch* (Aug. 14, 2021), <https://tinyurl.com/59hbf6mw>.

¹⁵ See Clark Kauffman, *Iowa Lawsuit Over California’s Hog-Confinement Law Headed for a Hearing*, *Iowa Capital Dispatch* (July 20, 2021), <https://tinyurl.com/3y2y7whe>.

¹⁶ See Scott McFetridge, *Could You Live Without Bacon? Bacon may Disappear in California as Pig Rules Take Effect*, *USA Today* (Aug. 1, 2021, 11:07 AM), <https://tinyurl.com/unus3ahm>.

¹⁷ See Greta Kaul, *Why California’s New Pork Rules Could Mean Big Changes for Minnesota Hog Farmers*, *MinnPost* (Aug. 6, 2021), <https://tinyurl.com/3mnatjmw>.

¹⁸ See Nat’l Pork Producers Council, *Issues & Insights: California’s Proposition 12*, *Iowa Agribusiness Radio Network* (2020), <https://tinyurl.com/n69t7rh3>.

larger farms likely will increase 15 percent.¹⁹ One estimate is that farmers will each spend \$100,000 per year just to remain compliant.²⁰ Another study puts the national costs at a colossal \$3,500 per sow.²¹ But that’s only for larger farms, and “smaller operations will pay considerably more per animal.”²² Adding insult to injury, California itself only accounts for a trivial amount of pork production, and hence its regulations have minimal impact on in-state farmers, despite the extreme expense imposed on out-of-state farmers.²³

Furthermore, it is not only pork producers that will suffer from California’s nationwide regulation and suppression of pork production. As farmers lose the ability to house the pre-Proposition 12 number of pigs,

¹⁹ See Pan Demetrakakes, *Pork Producers Sound Alarm on California’s Proposition 12*, Food Processing (Aug. 2, 2021), <https://tinyurl.com/dt5mpxrx>; see also Ian Spiegelman, *People are Panicking About a Potential Pork Crisis in California*, L.A. Mag. (Aug. 3, 2021), <https://tinyurl.com/239b8d42>.

²⁰ See *NAMI to Supreme Court: Prop 12 Not Beneficial to Consumers and Increases Sow Morality*, The Fence Post (June 8, 2021), <https://tinyurl.com/kx96pcn>.

²¹ See Michael Formica, *Hog Farmers’ Catastrophic Costs to Implement Prop 12*, Farm Journal’s Pork (June 22, 2021), <https://tinyurl.com/8hvukz6x>.

²² Barry K. Goodwin, *California’s Proposition 12 and its Impacts on the Pork Industry* 7 (May 13, 2021).

²³ California is “only responsible for approximately 2 percent of pork production” nationwide. *Comments Submitted by Farmers for Free Trade to the California Department of Food and Agriculture Regarding Proposed Regulations Implementing Proposition 12*, at 1 (July 12, 2021).

their need for supplies will decline. Pork farms annually feed their pigs large amounts of grain and other products. Kansas pork farms, for example, consume 30 million bushels of grain and 8 million bushels of soybeans annually.²⁴ Collectively, pork farms throughout the country can consume upwards of a billion bushels of corn and 400 million bushels of soybeans.²⁵ The grain and soybean industries too will feel the effects of Proposition 12.

Finally, consumers throughout the country, including many with limited incomes or receiving grocery assistance through the Supplemental Nutrition Assistance Program (SNAP), will see the cost of pork products rise and feel their budgets stretched even thinner. While California consumers may be willing to accept such tradeoffs for themselves, they certainly do not speak for consumers in other States.

That California is seeking to impose such massive costs on farmers, businesses, and consumers throughout the country is more than sufficient to make this case important and worthy of this Court's attention. That California is doing so in a manner that reaches beyond its territorial jurisdiction and interferes with interstate commerce calls for this Court's plenary review of whether California's actions violate the Constitution.

²⁴ Kansas Pork Ass'n, *Kansas Pork Stats*, <http://www.kspork.org/kansas-pork-stats/>.

²⁵ Pork Checkoff, *Quick Facts: The Pork Industry at a Glance* 116, <https://tinyurl.com/mwk54745>.

II. The Petition Should Be Granted Because Proposition 12 Violates the Horizontal Separation of Powers.

Whether under the much-maligned dormant Commerce Clause or otherwise, California's attempt at extraterritorial regulation of nationwide animal husbandry practices violates the Constitution. *Amici* recognize, however, that there is some skepticism at the Court towards the dormant Commerce Clause in general, and hence a potential reluctance to apply it in some circumstances. *Amici* thus suggest that this case is an excellent vehicle for considering an alternative approach that could provide a more reliable basis for giving content to (or substituting for) dormant Commerce Clause jurisprudence.

Proposition 12 is unconstitutional because it conflicts with the structure of the Constitution, which organizes horizontal relations among States on principles of (partial) state autonomy, equality, territoriality, non-aggression, and mutual recognition. It also conflicts with a properly exclusive textual reading of the Commerce Clause and the Tenth Amendment. Properly understood, the Constitution forbids any State from doing what California has done here: upending the national economy by attempting to dictate extraterritorial local activities through regulations of interstate commerce.

A. Horizontal Federalism Requires State Territoriality and the Free Movement of Persons and Goods Among the States.

While the concept of vertical federalism—the relationship between the States and the federal

government—is familiar to many jurists and lawyers, the concept of “horizontal” federalism—the relationship between the States themselves—is often overlooked. But there are many elements of the Constitution that reflect horizontal federalism. It is seen in basic territorial principles on which the States are founded, have political power, and may resist encroachment by sister States. It also is reflected in limits on state interference with the free movement of people and goods between the States, including a properly limited but exclusive delegation to the federal government of the power to regulate interstate commerce.

Horizontal federalism begins with a recognition that States, for constitutional purposes, are *equal* and *territorial*. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250-251 (1992). Territoriality, in particular, runs through the entire constitutional structure, including residency requirements for Senators and Representatives, limits on merging or severing parts of States, and even protection against invasion. U.S. Const. art. I, §§ 2 & 3, art. IV, §§ 3 & 4.

Given such territorial foundations and limits, each State’s right to regulate its own citizens entails the right of sister-States to do likewise. A necessary corollary is that States may not regulate or otherwise exercise authority over the citizens and activities in other States. “[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are

restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.” *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The limits on extraterritorial regulation are reflected in a variety of constitutional provisions that limit how States may exercise power over other States and their citizens. The Import-Export Clause, correctly understood, prohibits extraterritorial imposts or duties. See *Brown v. Maryland*, 25 U.S. 419, 437-438 (1827); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621-636 (1997) (Thomas, J., dissenting) (discriminatory taxes on interstate commerce would be covered by a correct reading of the Export-Import Clause rather than the dormant commerce clause). The Tonnage Clause serves the same purpose. *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 6-7 (2009).

While the Constitution imposes territorial limits on States, it simultaneously ensures national mobility of persons, goods (including pork), and capital among the States. Through various structural and textual means, it guarantees each citizen free entry and exit to and from different States, and access to a national commercial market. See, e.g., U.S. Const. amend. XIV, § 1 (citizens of the United States are citizens of any State in which they choose to reside, ensuring free exit and entry between and among the States); U.S. Const. art. I, § 10, cl. 2 (States may not, absent congressional consent, “lay any imposts or duties on imports and exports” except for the narrow purpose of funding inspection laws); U.S. Const. art. I, § 10, cl. 3 (States may not enter into any Agreement or Compact with

one another or with a foreign power without congressional consent). These provisions, and various others, help reduce barriers to interstate commerce, prevent collusion among States that might undermine effective exit or interstate market access, and generally limit a State's authority to its own territory.

One of the most meaningful checks created by horizontal federalism is state competition for freely mobile citizens and businesses that can exit and escape any State or States that seek to overreach. Using the familiar approach of arranging government relations such that "rival institutions can be made to check one another," Michael S. Greve, *The Upside-Down Constitution* 40 (2012), and the means and motives "to resist encroachments of the others," States compete with each other, but may not collude or encroach, *The Federalist* NO. 51, 322 (Clinton Rossiter ed., 1961) (James Madison)). While such an approach is oft-celebrated at the national level in the separation-of-powers context, it is also reflected in the horizontal limits on State power designed to maintain such competition and prevent encroachment.

Given the horizontal structures of federalism – territorial constraints on state power, mobility, and access to the national market – "voting with one's feet" becomes a more viable option. Mobile citizens and businesses thus become "consumers" of State government and States must compete for their presence and citizenship. Greve, *supra*, at 6. If one State overreaches or abuses those within its territory, citizens and businesses will relocate to more appealing States without having to forfeit access to commerce with the market in their former State or in other States. The

“principal constitutional advantage” of such citizen mobility “is to discipline governments.” *Id.* at 7; see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (structure of federalism “makes government more responsive by putting the States in competition for a mobile citizenry”).²⁶

Most relevant to this case, however, the Commerce Clause commits to Congress, rather than to the States, the power “to regulate Commerce * * * among the several States.” U.S. Const. art. I, § 8. The text of the Tenth Amendment confirms that such delegation was exclusive, providing that “[t]he powers *not* delegated to the United States by the Constitution, nor prohibited by it to the States” remain with the states (or their people). U.S. Const. amend. X (emphasis added). By such wording the Tenth Amendment necessarily recognizes that powers that *are* delegated to the United States belong not to the States, but to the federal government. At a minimum, it establishes a default rule of exclusive national authority, not endless state authority to regulate interstate commerce unless and until Congress affirmatively says otherwise.

This Court originally shared the view that the power to regulate interstate and foreign commerce was exclusive to the national government, but

²⁶ Promoting horizontal competition among the States is a constitutional safeguard comparable to Madison’s solution for political factionalism. The solution to factionalism was to have multiple competing factions that would rival and check each other, thereby making more difficult any dangerous combination or exercise of power. The Federalist No. 10, 80-83 (Clinton Rossiter ed., 1961) (James Madison). Horizontal state competition operates in an analogous manner.

subsequent cases retrenched on that view. As early as *Gibbons v. Ogden*, Daniel Webster argued that it would be “insidious and dangerous” for the States to have a “*general* concurrent power” with Congress that would allow the States to “do whatever Congress has left undone[.]” 22 U.S. (9 Wheat.) 1, 8 (1824) (emphasis in original). This Court did not need to reach that question in *Gibbons*, but did address it in the *Passenger Cases* regarding fees imposed by New York on ships carrying people traveling into the State. *Smith v. Turner* (“*Passenger Cases*”), 48 U.S. 283 (1849). Justice McLean extensively reviewed the various powers delegated to Congress, the necessity of their exclusiveness within the narrow confines of such delegations, and then concluded that

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons v. Ogden*, reiterated in *Brown v. The State of Maryland*, and often reasserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion, that the power ‘to regulate commerce with foreign nations, and among the several States,’ by the Constitution, is exclusively vested in Congress.

Id. at 400. While later cases moved away from that earlier understanding and discovered a supposed “residuum of power” in the States to act in “the absence of conflicting legislation by Congress,” *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 766-767 (1945), those cases were poorly reasoned in their broader strokes, and often involved matters that only

had an *effect* on commerce or, at best, debatably regulated commerce.

The concern that an expansive reading of the power over interstate commerce would foreclose too many state laws regulating local matters that might affect commerce is understandable, but it is merely another symptom of earlier error. Under an original and narrower view of the commerce power (apart from the contingent gloss of the Necessary and Proper Clause), such problems would have been limited. *Cf.* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 493 (1941) (“On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority *pari passu* from the states.”).

Although past errors disrupted the Constitution’s original safeguards of horizontal federalism, alternative jurisprudence often compensated, albeit imperfectly, for the problem. As relevant here, the dormant Commerce Clause filled the vacuum created by the removal of textual and structural checks to state interference with interstate commerce and mobility. While the theory has well-rehearsed flaws, it was ultimately necessary to shore up the overall structure and function of the Constitution’s horizontal federalism by placing territorial limits on a State’s ability to regulate interstate commerce.

Indeed, this Court has noted that “removing state trade barriers was a principal reason for the adoption of the Constitution.” *Tenn. Wine & Spirits Retailers*

Ass'n, 139 S. Ct. at 2460. At the time when the Founders gathered to draft the Constitution, “[i]nterference with the arteries of commerce was cutting off the very lifeblood of the nation.” *Id.* (quoting Max Farrand, *The Framing of the Constitution of the United States* 7 (1913)). Hamilton and Madison recognized that state protectionism could breed interstate conflict, and that a national market would be a preferable alternative. *Id.* (citation omitted). Little if anything would be left of federalism’s “numerous advantages,” *Gregory*, 501 U.S. at 458, if States could erect trade barriers, export the costs of their experiments, and escape accountability for the results. “[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.” *Southern Pac. Co.*, 325 U.S. at 767 n.2.

B. California’s Effort to Regulate Pork Production Beyond its Borders Violates a Proper Understanding of the Commerce Clause and the Structure of Horizontal Federalism.

A properly exclusive reading of the limited original understanding of what it means to regulate interstate commerce would provide an alternative path for reversing the decision below and rejecting California’s attempt to regulate beyond its borders by threatening to close off interstate commerce. California’s actions do not merely affect interstate commerce, they are directly targeted at such commerce and enforced with roving California inspections on local activities far beyond California’s borders. That California’s rules

nominally apply to California pork producers as well is particularly cheeky given that California is home to less than .2 percent of the nation’s national breeding herd, App. 80a, while the brunt of the burden of complying with its regulations falls on farmers in the 49 States that raise the other 99.87% of the sows.²⁷ Furthermore, “[t]he mere fact that the effects of [California’s law] are triggered only by sales of [pork] within the State * * * does not validate the law if it regulates the out-of-state transactions” or activities “of [the farmers] who sell in-state.” *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986).

If California is correct that it can regulate the production of goods in other states through the device of threatening to close off its market, there is little it could not do absent express congressional prohibition. For example, pro-labor States could block the import or sale of any goods from States deemed hostile to workers because of a low minimum wage. The inverse is also true—a pro-business State could refuse to trade with States deemed hostile to business due to a *high* minimum wage. States seeking to break into an established business area could require all out-of-state

²⁷ Admittedly, “formalistic” distinctions—between interstate commerce and the States’ internal affairs or between “direct” and “indirect” imposition on interstate commerce—can sometimes prove difficult. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 309-310 (1992) (describing the difficulties in the context of the dormant Commerce Clause), overruled by *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). But whatever line-drawing challenges may arise, they stem from the distinctions and limits drawn in the Constitution, which may not simply be abandoned because they are difficult or inconvenient.

manufacturers to adopt new manufacturing techniques—whether using renewable energy, recycled or other preferred materials, or any other approach supplanting prior investments—in order to remove the competitive value of prior substantial investments in other States.

And the underlying conditions on imports and sales need not even relate to commerce at all. It is not much of a stretch in the current climate to imagine a State on one or the other side of the abortion debate getting creative by blocking the import of goods from States deemed too permissive or too restrictive in their abortion policies. Moral qualms about the source of goods could similarly be used to reject goods from States with disfavored policies on immigration, gun rights, voting rights, vaccine mandates, or any other contentious issue on which state legislatures desire exercise leverage (or just make a statement) via conditional boycotts. And larger States like California could, by virtue of their larger economies, effectively exercise sovereignty over their smaller sister States, thus improperly assuming the role of national morality police or, where the larger States disagree, balkanizing the economy and the country.²⁸

In sum, if California can do what it has done here by imposing moral demands on the local activities of other States, then there is nothing that would prohibit

²⁸ Notably, it was not even the legislature that adopted the restriction in this case, but California voters via the initiative process. Whether most such voters even considered, or cared about, the details of the law or its ramifications for farmers, businesses, and consumers in other States is doubtful, and yet they alone have dictated nationwide regulations on the pork industry.

it, or the other 49 states, from simply boycotting any States based on varying, and inevitably conflicting, moral objections to virtually *any* local policies or practices of the exporting States. Whatever one's views of the dormant Commerce Clause, the structure of the Constitution, properly understood, prevents any one State from so crippling interstate commerce.

CONCLUSION

California has attempted to impose its preferences regarding local animal husbandry matters on the nation as a whole, using restrictions on interstate commerce into California as a cudgel to enforce its demands. That extraterritorial regulation violates basic principles of horizontal federalism, whether enforced through current dormant Commerce Clause jurisprudence or through a reinvigorated understanding of the text, history, and structure of the Constitution. This Court should grant certiorari to consider these economically and jurisprudentially important issues and thereafter should reverse the decision below.

Respectfully submitted,

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