

No. 21-468

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IN THE  
**Supreme Court of the United States**

NATIONAL PORK PRODUCERS COUNCIL, *et al.*,  
*Petitioners,*

v.

KAREN ROSS, IN HER OFFICIAL CAPACITY AS  
SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD  
& AGRICULTURE, *et al.*,  
*Respondents.*

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

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**BRIEF FOR THE NATIONAL ASSOCIATION OF  
MANUFACTURERS AND NATIONAL  
CATTLEMEN'S BEEF ASSOCIATION AS *AMICI  
CURIAE* IN SUPPORT OF PETITIONERS**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I.    THE NINTH CIRCUIT’S OPINION UPHOLDING CALIFORNIA’S EXTRATERRITORIAL AND UNDULY BURDENSOME PROHIBITION OF PORK SALES WARRANTS THIS COURT’S REVIEW .....	4
A.    The Ninth Circuit’s Opinion Conflicts With This Court’s And Other Circuits’ Extraterritoriality Cases .....	5
B.    The Court Of Appeals’ Opinion Guts This Court’s <i>Pike</i> Balancing Test.....	13
II.    ALLOWING PROPOSITION 12 TO TAKE EFFECT WOULD GREEN-LIGHT SIMILAR REGULATORY EFFORTS NATIONWIDE .....	18
CONCLUSION .....	21

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES:</b>	
<i>Association des Eleveurs de Canards et d’Oies du Quebec v. Harris,</i> 729 F.3d 937 (9th Cir. 2013).....	14
<i>Bibb v. Navajo Freight Lines, Inc.,</i> 359 U.S. 520 (1959).....	16
<i>BMW of N. Am., Inc. v. Gore,</i> 517 U.S. 559 (1996).....	6
<i>Bonaparte v. Tax Court,</i> 104 U.S. 592 (1881).....	6
<i>Boyle v. Zacharie,</i> 31 U.S. (6 Pet.) 635 (1832).....	7
<i>Brown-Forman Distillers Corp. v. New York State Liquor Auth.,</i> 476 U.S. 573 (1986).....	3, 13
<i>C &amp; A Carbone, Inc. v. Town of Clarkstown,</i> 511 U.S. 383 (1994).....	7
<i>Comptroller of Treasury of Md. v. Wynne,</i> 575 U.S. 542 (2015).....	12
<i>Conservation Force, Inc. v. Manning,</i> 301 F.3d 985 (9th Cir. 2002).....	4
<i>Coyle v. Smith,</i> 221 U.S. 559 (1911).....	6
<i>Crosby v. National Foreign Trade Council,</i> 530 U.S. 363 (2000).....	9
<i>Daniels Sharpsmart, Inc. v. Smith,</i> 889 F.3d 608 (9th Cir. 2018).....	6
<i>Exxon Corp. v. Governor of Md.,</i> 437 U.S. 117 (1978) .....	17

**TABLE OF AUTHORITIES—Continued**

	<u>Page</u>
<i>Franchise Tax Bd. of California v. Hyatt</i> , 139 S. Ct. 1485 (2019).....	6
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005).....	12
<i>Great Atl. &amp; Pacific Tea Co. v. Cottrell</i> , 424 U.S. 366 (1976).....	7
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989).....	<i>passim</i>
<i>Hohn v. United States</i> , 524 U.S. 236 (2016).....	12
<i>Hunt v. Washington State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977).....	5
<i>Kassel v. Consolidated Freightways Corp. of Del.</i> , 450 U.S. 662 (1981).....	20
<i>Legato Vapors, LLC v. Cook</i> , 847 F.3d 825 (7th Cir. 2017).....	9, 10, 11, 20
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986).....	5
<i>National Ass’n of Optometrists &amp; Opticians v. Harris</i> , 682 F.3d 1144 (9th Cir. 2012).....	17
<i>National Foreign Trade Council v. Natsios</i> , 181 F.3d 38 (1st Cir. 1999).....	9, 10
<i>National Meat Ass’n v. Brown</i> , No. CVF-08-1963 LJO DLB, 2009 WL 426213 (E.D. Cal. Feb. 19, 2009).....	14

**TABLE OF AUTHORITIES—Continued**

	<u>Page</u>
<i>National Meat Ass’n v. Harris</i> , 565 U.S. 452 (2012).....	14
<i>New York Life Ins. Co. v. Head</i> , 234 U.S. 149 (1914) .....	6
<i>Ogden v. Saunders</i> , 25 U.S. (12 Wheat.) 213 (1827).....	6, 7
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970).....	5, 13, 14, 15
<i>Rodriguez de Quijas v. Shearson / Am. Express, Inc.</i> , 490 U.S. 477 (1989).....	12
<i>Tennessee Wine &amp; Spirits Retailers Ass’n v. Thomas</i> , 139 S. Ct. 2449 (2019).....	5, 12, 18, 20
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	6
<b>CONSTITUTIONAL PROVISIONS:</b>	
U.S. Const. art. I, § 8, cl. 1 .....	4
U.S. Const. art. I, § 8, cl. 3 .....	4
<b>STATUTES:</b>	
42 U.S.C. § 7543(e)(2)(A).....	18
Cal. Health & Safety Code § 25991(a).....	11
<b>RULES:</b>	
Sup. Ct. R. 10(a) .....	8
Sup. Ct. R. 10(c).....	5
<b>OTHER AUTHORITIES:</b>	
The Federalist No. 22 (Alexander Hamilton).....	20

**TABLE OF AUTHORITIES—Continued**

	<u>Page</u>
Katherine Florey, <i>State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation</i> , 84 Notre Dame L. Rev. 1057 (2009) .....	11, 12
Barry Friedman & Daniel T. Deacon, <i>A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause</i> , 97 Va. L. Rev. 1877 (2011).....	20
Letter from James Monroe to James Madison (July 26, 1785), available at <a href="https://bit.ly/2SWWhGD">https://bit.ly/2SWWhGD</a> .....	20
Baylen J. Linnekin, <i>The “California Effect” &amp; the Future of American Food: How California’s Growing Crackdown on Food &amp; Agriculture Harms the State &amp; the Nation</i> , 13 Chap. L. Rev. 357 (2010).....	14, 17, 19
James Madison, <i>Vices of the Political System of the United States</i> , in 2 Writings of James Madison 361 (Gaillard Hunt ed., 1901) .....	20

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**STATEMENT OF INTEREST**

The National Association of Manufacturers and the National Cattlemen's Beef Association submit this brief as *amici curiae* in support of Petitioners.<sup>1</sup>

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received notice of this brief at least 10 days before it was due. Petitioners filed a notice of blanket consent with the Clerk. Respondents have consented to the filing of this brief.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs more than 12 million men and women, contributes \$2.32 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

*Amici* support the humane production of pork products and oppose animal cruelty. *Amici* have a strong interest in this case because Proposition 12 regulates the conduct of farmers, processors, wholesalers, and retailers nationwide. In addition, Proposition 12, if allowed to stand, may embolden other States to regulate beyond their borders, resulting in a complex web of inconsistent and competing extraterritorial regulations in the agriculture, food, and other industries. The Ninth Circuit's decision threatens to fragment these interstate markets, creating inefficiencies that



can impose significant costs on industry and consumers.

### SUMMARY OF THE ARGUMENT

“[T]he 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) (internal quotation marks omitted). State laws violate the Commerce Clause when they regulate extraterritorially or substantially burden out-of-state producers absent a sufficient and legitimate local interest. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578–579 (1986). Proposition 12 does both.

The Ninth Circuit nonetheless upheld the law by breaking with this Court’s cases and those of its sister circuits. The Ninth Circuit abandoned this Court’s extraterritorial-regulation cases by holding that Proposition 12—whose entire purpose is to force non-California entities to change how they produce pork—does not regulate commerce occurring outside of the State’s borders. The Ninth Circuit’s decision also split from other circuits’ decisions finding similar interstate-conduct-regulating state laws unconstitutional under the dormant Commerce Clause. And the Ninth Circuit gutted this Court’s balancing test for laws that incidentally burden interstate commerce by declaring that an additional cost on producers can never be a relevant burden on interstate commerce, even when the costs are the result of producers having to change interstate ways of doing business or end interstate business altogether. This Court’s review is essential to bring the Ninth Circuit in line with this Court and the other court of appeals’ precedent.

Further, allowing the Ninth Circuit’s erroneous decision to stand spells havoc for the Nation’s food supply. If California can enact laws controlling the production of out-of-state pork, Texas can dictate how California grows avocados and tomatoes. States and localities could also rely on the logic underlying California’s sales ban to justify setting nationwide standards for virtually any geographically favored industry that is disfavored elsewhere. Allowing States to impose their own policy preferences on farmers, processors, wholesalers, and retailers nationwide will fracture national markets into regional and local affairs. That future is precisely what the framers intended the Commerce Clause to prevent.

The petition should be granted and the court of appeals’ decision reversed.

## **ARGUMENT**

### **I. THE NINTH CIRCUIT’S OPINION UPHOLDING CALIFORNIA’S EXTRATERRITORIAL AND UNDULY BURDENSOME PROHIBITION OF PORK SALES WARRANTS THIS COURT’S REVIEW.**

The United States Constitution provides that “Congress,” and Congress alone, “shall have Power \* \* \* To regulate Commerce \* \* \* among the several States.” U.S. Const. art. I, § 8, cls. 1, 3. A core purpose of the Commerce Clause is “to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state’s represented citizens.” *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 998 (9th Cir. 2002). Although local regulation will often and inevitably have some effects on interstate commerce, the Clause limits States’ and localities’ ability to “erect barriers against interstate trade.” *Maine v. Taylor*, 477 U.S. 131, 137

(1986) (internal quotation marks omitted). The Commerce Clause thus “prevents the States from adopting protectionist measures” and “preserves a national market for goods and services.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

The Commerce Clause’s protections are not limited to state laws that discriminate against interstate commerce. The Commerce Clause also protects the “national ‘common market,’ ” *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 350 (1977), from state laws that, while not drawing distinctions between interstate and intrastate commerce, impose a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The court of appeals’ opinion runs roughshod over both aspects of the dormant Commerce Clause. The court of appeals’ judgment conflicts with this Court’s and other circuit’s cases holding that a state law violates the dormant Commerce Clause when it regulates conduct occurring in other States. And it guts this Court’s balancing test for facially neutral laws, refusing to recognize costs to out-of-state entities as a burden on interstate commerce, no matter how great and no matter how disruptive to national supply chains.

#### **A. The Ninth Circuit’s Opinion Conflicts With This Court’s And Other Circuits’ Extraterritoriality Cases.**

1. The court of appeals’ judgment conflicts with this Court’s cases limiting a State’s ability to regulate extraterritorially. *See* Sup. Ct. R. 10(c). The extraterritoriality doctrine prohibits States from “regulating

commerce occurring wholly outside [their] borders.” *Healy*, 491 U.S. at 332. No matter how wise California or New York or Texas or Vermont may believe a particular policy to be, “one State’s power to impose burdens on the interstate market \* \* \* is not only subordinate to the federal power over interstate commerce \* \* \* but is also constrained by the need to respect the interests of other States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–571 (1996); *see also Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615 (9th Cir. 2018) (“One state cannot be permitted to dictate what other states must do within their own borders.”)

This principle has deep roots in the Constitution’s structure and the Nation’s history. State sovereignty is a cornerstone of our constitutional compact and reflects our Country’s “union of States, equal in power, dignity and authority.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). “The sovereignty of each State \* \* \* implicate[s] a limitation on the sovereignty of all of its sister States”—a limitation that is inherent in “the original scheme of the Constitution.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); *see also Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1497–98 (2019). Thus “[n]o State can legislate except with reference to its own jurisdiction.” *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (calling this territorial limit an “obvious[ ]” and “necessary result of the Constitution”). When “States pass beyond their own [territorial] limits \* \* \* there arises a conflict of sovereign power \* \* \* which renders the exercise of such a power incompatible with the rights of other States, and with the [C]onstitution of the United States.” *Ogden v. Saunders*, 25 U.S. (12

Wheat.) 213, 369 (1827) (opinion of Johnson, J.); see also *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635, 643 (1832) (Story, J.) (confirming that Justice Johnson spoke for the *Ogden* majority).

Proposition 12's sales ban ignores these bounds on California's authority. That law is the latest—and most consequential—assertion of California's authority over its sister States' regulation of agriculture and food production: It requires out-of-state farmers, producers, and distributors to spend hundreds of millions of dollars to restructure their operations nationwide, simply because California voters decided to adopt a particular policy preference. Pet. 11-13. One State's power to regulate beyond its borders, directly or otherwise, simply does not stretch that far, for a State's power to address "local needs" does not override "the overriding requirement of freedom for the national commerce." *Great Atl. & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). In short, "States and localities may not attach restrictions to exports or imports in order to control commerce in other States." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); see *Healy*, 491 U.S. at 336.

Proposition 12 does just that. By regulating the manner in which pork farmers house and breed sows, Proposition 12 effectively controls every step of the national pork supply chain. It is common for a sow in, say, Iowa to give birth to piglets, which are then sold to a second facility for feeding, and to a third for finishing. Once they reach the appropriate weight, the pigs are sent to a fourth facility, often in another State—for instance, Illinois—for slaughter and butcher. That processing facility may divide the butchered pork among various wholesalers, retailers,

and secondary processors. For example, a wholesaler in Kansas might purchase the loin and sell it to a retailer in California; a retailer in Texas might purchase the pork belly; and a secondary processor in Wisconsin might purchase the shoulder butt to make sausages.

This particular supply chain is hypothetical, but the interstate transactions it describes are not uncommon. And as this supply chain demonstrates, by regulating the California-based retailer's purchase, Proposition 12 will inevitably affect multiple wholly out-of-California transactions. That violates the Commerce Clause. *See Healy*, 491 U.S. at 336. To comply with Proposition 12, the breeding farm in Iowa must alter how it houses the sow; the feeding and finishing facilities in Iowa must segregate Proposition 12-compliant pigs; the processing facility in Illinois must track the origins of each pig it butchers; and the wholesalers and retailers in Kansas and California must track the origins of each whole cut of pork. *See Pet. 12-13*.

These out-of-state impacts far exceed the kind of incidental requirements associated with labeling regimes and other facially neutral laws. Because the "practical effect of th[is] regulation is to control" commercial transactions that "take[ ] place wholly outside of the State's borders, whether or not the commerce has effects within the State," Proposition 12 "exceeds the inherent limits of [California's] authority." *Healy*, 491 U.S. at 336 (internal quotation marks omitted).

2. The Ninth Circuit's decision upholding Proposition 12 breaks from other circuits' decisions that have invalidated similar laws that sought to regulate beyond a State's borders. *See Sup. Ct. R. 10(a)*. The Seventh Circuit has rejected Indiana's attempt to "dictate[ ] how out-of-state manufacturers" of electronic

cigarettes and vaping devices that sold products in Indiana “must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers.” *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 830 (7th Cir. 2017). That law, like Proposition 12, reflected “direct regulation of out-of-state facilities and services,” and carried significant and costly consequences by requiring out-of-state manufacturers to restructure their operations. *Id.* at 834. Indiana, like California here, argued that the Act was “facially neutral,” regulated activities “not wholly outside Indiana,” and “applie[d] equally to in-state and out-of-state manufacturers.” *Id.* at 830. But the Seventh Circuit rejected those arguments because the practical effects of Indiana’s vaping regulations on out-of-state entities, like Kentucky-based Legato Vapors, went beyond the “mere incidental effects of a facially neutral law.” *Id.* at 830, 834. Although “reasonable and even-handed purity requirements on vaping products sold in Indiana” may well be constitutionally permissible, the State could “not try to achieve that goal by direct extraterritorial regulation of the manufacturing processes and facilities of out-of-state manufacturers.” *Id.* at 834.

The First Circuit similarly sustained a challenge to a Massachusetts law restricting the Commonwealth’s ability to purchase goods or services from companies that did business with Myanmar. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff’d sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The statute was enacted in response to human-rights violations committed by the Myanmar government based on “the historic concerns of the citizens of Massachusetts with supporting the rights of people around the world.” *Id.* at 47

(internal quotation marks omitted). Though the case arose under the Foreign Commerce Clause, the First Circuit recognized—and properly enforced—the same limits on Massachusetts’s assertion of extraterritorial authority as an independent ground for invalidating that sales ban. Because “both the intention and effect of the statute [was] to change conduct beyond Massachusetts’s borders,” the Commonwealth ran afoul of the constitutional principle that a State “may not regulate conduct wholly beyond its borders.” *Id.* at 69 (citing *Healy*, 491 U.S. at 336). The First Circuit critically rejected Massachusetts’s argument that “a company doing business with Burma can simply forgo contracts with Massachusetts,” because allowing “state laws to stand on this ground” would “read the Commerce Clause out of the Constitution.” *Id.* at 70; *see also id.* (“If Massachusetts can enact a Burma law, so too can California or Texas.”).

3. Proposition 12 also creates a significant risk that links in the out-of-state pork supply chain will face conflicting regulations, which reinforces the law’s impermissibly extraterritorial effect. *See Healy*, 491 U.S. at 336–337; *Legato Vapors*, 847 F.3d at 834; *NCAA*, 10 F.3d at 639–640. And the risk is more than hypothetical. Fifteen States explained in an amicus brief in support of Petitioners below, Proposition 12 is “a substantial departure from [their] current practices.” States C.A. Amicus Br. 2.

A sow can only be housed one way at a given time, so if a farmer, feeder, finisher, processor, wholesaler, or retailer is located in a State that imposes a conflicting mandate—perhaps that no pork processed or sold in that State may come from gilts bred before they are seven months old, and that gilts must be housed in



group pens until they are bred—it will be forced to choose between complying with its home-state regulation or Proposition 12. *Compare* Cal. Health & Safety Code § 25991(a), *and* C.A. ER 100 (explaining that to comply with Proposition 12, six-month-old gilts must be housed individually), *with* Petitioners C.A. Br. 9 n.4 (explaining that farmers typically house gilts in group pens until they are bred at seven months). Just as in *Legato Vapors*, the “risk of inconsistent obligations wrought by the extraterritorial effect of” Proposition 12 means that it violates the Commerce Clause. *Legato Vapors*, 847 F.3d at 834; *see also id.* (“[T]he threat of inconsistent regulation \* \* \* is enough to show why Indiana cannot impose these \* \* \* requirements on out-of-state manufacturers”).

California has no more power to regulate beyond its borders than Indiana or Massachusetts. If it did, California could freely subject people nationwide to regulations that conflict with the policies adopted by their own States. This Court should reiterate these straightforward constitutional truths, grant the petition, and reverse.

4. The Ninth Circuit admitted that this Court’s cases include “broad statements” indicating that 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 [regulating] State.” Pet. App. 7a. (quoting *Healy*, 491 U.S. at 336-337 and brackets in original). But the court of appeals dismissed this Court’s longstanding principles as “so sweeping” that they “cannot mean what they appear to say.” *Id.* (quoting Katherine Florey, *State Courts, State Territory, State Power: Reflections on the*

*Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1090 (2009)).

The court of appeals' reason for writing off this Court's holdings? Its apparent belief that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that direction." *Id.* at 19a. Yet reports of the Clause's death are greatly exaggerated. Although some individual justices have criticized the dormant Commerce Clause, the Court as an institution continues to apply it to find state laws unconstitutional. *See, e.g., Tennessee Wine & Spirits*, 139 S. Ct. at 2474-75 (Tennessee liquor-distribution regulation); *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 564-571 (2015) (Maryland taxation scheme); *Granholm v. Heald*, 544 U.S. 460, 484-493 (2005) (New York and Michigan wine direct-shipment regulations). The Court should do the same here and find Proposition 12 violates the dormant Commerce Clause.

This Court has also reminded lower courts time and again that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Hohn v. United States*, 524 U.S. 236, 252-253 (2016) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). It was not the court of appeals' role to pronounce the dormant Commerce Clause's demise. If this Court's extraterritoriality precedents are to be

curtailed—and they should not—this Court should be the one to do it.

**B. The Court Of Appeals’ Opinion Guts This Court’s *Pike* Balancing Test.**

The court of appeals’ decision upholding Proposition 12 also guts this Court’s test from *Pike v. Bruce Church*, 397 U.S. 137 (1970) for facially neutral regulations that incidentally effect interstate commerce. If Proposition 12—which imposes millions in costs in return for no benefits—can pass *Pike* balancing, then any law can. This Court should grant the petition to confirm that *Pike* balancing continues to have teeth and reject the Ninth Circuit’s rule that compliance costs on out-of-state parties do not qualify as burdens on interstate commerce.

1. Facially neutral regulations that incidentally burden interstate commerce are permissible only if the State has a “legitimate” interest in that regulation, and “the local benefits” of the regulation “clearly exceed[ ]” the “burden on interstate commerce.” *Brown-Forman*, 476 U.S. at 579; see *Pike*, 397 U.S. at 142 (1970). This standard is more forgiving than the strict scrutiny that applies to discriminatory laws, but Proposition 12 still cannot hurdle it.

Proposition 12 is not California’s first foray into America’s larder. The past 15 years have seen a dramatic uptick in far-reaching food regulation from a small group of States, California chief among them. Indeed, the regulatory impulse for “wealthy, powerful states” to exercise their “outsized influence” to adopt preferred regulatory regimes that are effectively binding not just “within the home state but also [o]n others who trade with that state” is so linked to the Golden State that scholars refer to it as the “California

Effect.” Baylen J. Linnekin, *The “California Effect” & the Future of American Food: How California’s Growing Crackdown on Food & Agriculture Harms the State & the Nation*, 13 Chap. L. Rev. 357, 373 (2010). To date, California’s increasingly ambitious efforts to reshape the nation’s food chain in the State’s own image have had mixed success, with some regulations enjoined and others allowed to go into effect. Compare, e.g., *National Meat Ass’n v. Harris*, 565 U.S. 452 (2012) (holding California meat-processing regulations designed to restructure slaughterhouse operations preempted by the Federal Meat Inspection Act), and *National Meat Ass’n v. Brown*, No. CVF-08-1963 LJO DLB, 2009 WL 426213, at \*11 (E.D. Cal. Feb. 19, 2009) (same, and declining to reach Commerce Clause argument in light of preemption holding), with *Association des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) (rejecting constitutional challenges to force-feeding ban in foie gras production).

The court of appeals here upheld Proposition 12 because, in its view, “cost increases to market participants and customers do not qualify as a substantial burden to interstate commerce for purposes of the dormant Commerce Clause.” Pet. App. 18a. But that is not consistent with this Court’s cases, including *Pike* itself. In *Pike*, the Court held unconstitutional an Arizona cantaloupe-packing regulation that would impose a \$200,000 burden on the plaintiff packer while not furthering much, if at all, the regulation’s goal of burnishing the reputation of Arizona’s cantaloupe growers. 397 U.S. at 145-146. That the plaintiff cantaloupe packer *could* comply with the Arizona regulation at great cost—as perhaps pork producers could comply with Proposition 12 at great cost to

themselves and to pork consumers—did not insulate Arizona’s regulation from review.

Proposition 12’s problem is not just that it costs market participants additional money—as much as 9.2% more money—to comply with. *See* Pet. App. 18a. Proposition 12 also “impose[s] \* \* \* a straitjacket on \* \* \* compan[ies] with respect to the allocation of [their] interstate resources.” *Pike*, 397 U.S. at 146. California’s demand for pork requires approximately 673,000 breeding sows, but California farms house only about 1,500 breeding sows. Petitioners C.A. Br. 7–8, 66; *see* C.A. ER 6 (acknowledging that “California’s in-state sow breeding does not supply the demand of pork consumption in the state”). In other words, 99.8% of sows affected by Proposition 12 are located out-of-state. And that eye-popping statistic does not account for the numerous *other* stages of the out-of-state supply chain that Proposition 12 will inevitably affect. *See* Petitioners C.A. Br. 35–45; C.A. ER 5–6. For example, even if only one-third of a farmer’s or packer’s products are sold in California, the farmer might have to—because of packers’ demands—restructure his entire production process to comply with Proposition 12. *See* Petitioners C.A. Br. 68; C.A. ER 250–251 (explaining that a farmer must ensure all of his sows are housed in compliance with Proposition 12, even though only about one-third will produce pork that is eventually sold in California). California has therefore used its regulatory power to effect the farmer’s allocation of resources outside of California and used in interstate commerce, forcing him to conform *all* of its product to the Golden State’s standards.

*Pike* does not stand alone. In *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 525–530 (1959), the Court found unconstitutional an Illinois law—unique in the Nation—requiring curved mudflaps on trucks and trailers traveling its roadways. To be sure, shippers could comply with the law at a cost of up to \$45,840 per shipper. *Id.* at 525. But the Court still weighed the putative safety benefits of the curved mudflaps against their burdens on interstate shippers and concluded that the “heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems \* \* \* to pass the permissible limits even for safety regulations.” *Id.* at 530. Under *Bibb*, too, the Ninth Circuit was wrong to say that a law whose burden is increased costs on out-of-state producers is categorically immune from dormant Commerce Clause scrutiny.

*Bibb*, like *Pike*, emphasized that courts should not view increased compliance costs in monetary terms. *Bibb* noted that Illinois mudguard law would curtail the practice of “interlining,” in which an originating carrier will transfer an entire trailer of goods to a new carrier’s tractor rather than loading the goods into a new trailer at the transfer point. *Id.* at 527–528. The Court explained that if the originating shipper never operates in Illinois, it would never place Illinois-compliant mudguards on its trailers. *Id.* But if the receiving interline shipper *does* operate in Illinois, it will need to stop doing business with the originating shipper because it “cannot compel the originating carriers to equip their trailers” with curved mudflaps. *Id.* The Court viewed that outcome as a “massive \* \* \* burden on interstate commerce.” *Id.*

Yet that is same kind of burden Proposition 12 imposes here. California pork sellers or distributors that wish to sell into California must remain Proposition 12 compliant. Sellers and distributors are therefore put to the untenable choice of either not doing business with farmers that cannot certify Proposition 12 compliance or somehow compelling farmers to bend to California's will. *See supra* pp. 7-8 (describing the supply chain for pork products). Proposition 12 thus imposes the same massive burden on interstate commerce that this Court found unconstitutional in *Bibb*.

It is no surprise that California's law will result in a restructuring of pork supply chains across the nation. That is, after all, the whole point of these paternalist, "California-knows-best" style laws. "The California effect has meant that the state's food regulations and bans extend far beyond its borders, either because its regulations or bans encourage other states or the federal government to adopt them, or because they force producers to change their offerings nationwide, or because they force the regulated industry to seek preemptive nationwide regulation." Linnekin, *supra*, at 384–385. That necessarily disrupts the "natural functioning of the interstate market," *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978) (internal quotation marks omitted), and "impair[s] the free flow of materials and products across state borders," *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154–55 (9th Cir. 2012).

The Ninth Circuit was wrong to hold that Proposition 12 passes *Pike* balancing because producers can comply by spending the cash and effort to change their processes and passing along those costs to consumers. Under the proper balancing test—which the Ninth

Circuit never performed—Proposition 12 imposes too great a burden relative to its dubious benefits to pass constitutional muster.

## **II. ALLOWING PROPOSITION 12 TO TAKE EFFECT WOULD GREEN-LIGHT SIMILAR REGULATORY EFFORTS NATIONWIDE.**

Allowing Proposition 12 to stand will be an invitation to States and localities across the country to engage in similar regulatory efforts in the agriculture and food sectors, and beyond. The resulting regulatory race to the bottom would be harmful to our national economy and leave us “with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.” *Tennessee Wine & Spirits*, 139 S. Ct. at 2460. This Court’s review is essential.

1. California has no inherent right to impose its preferred regulatory policies on the rest of the nation. Although the federal government sometimes expressly authorizes the State to adopt its own regulatory standards on certain topics of unique interest, *cf.* 42 U.S.C. § 7543(e)(2)(A) (“authoriz[ing] California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines” that are more stringent than “Federal standards”), California has no similar authority when it comes to pork production. And absent that authority, California—like every other State and locality—is bound by the Commerce Clause, which prohibits laws like Proposition 12 that regulate beyond its borders and unduly burden out-of-state producers.

That makes sense. If California can assert legal control over out-of-state meat production, then Indiana can do the same when it comes to Kentucky’s e-



cigarette manufacturers, and North Dakota can regulate New York's art transactions. As these examples demonstrate, this impulse is not limited to food. States could rely on a similar theory to regulate supply chains in virtually any industry. Under the Ninth Circuit's approach, the Commerce Clause would not stop New Jersey from asserting its say over how Michigan makes cars, simply because some of those cars are eventually sold by Garden State dealerships. Nor would it prevent Texas from laying claim to how the clothing supply chain must operate in North Carolina, because some of the clothing will be later sold by Lone Star retailers. Now multiply that disruption by 50, because if California or New Jersey or Texas is permitted to impose a prohibition, so can every other State.

These risks are not hypothetical. Proposition 12 will force out-of-state pork farmers, feeders, finishers, processors, wholesalers, and retailers to choose between spending significant sums of money to update their entire supply lines to conform with California's view of appropriate standards, creating separate production and distribution lines for this one State, or withdrawing from the highly lucrative California market. *See* Petitioners C.A. 36–40. There is a serious risk that other localities will follow California's suit, but not identically so, resulting in a patchwork of regulatory requirements that will effectively eliminate the national pork market. *See* Linnekin, *supra*, at 366–367, 385, 387 (explaining that, after California banned trans fats, “dozens of discordant state laws” followed).

2. These are precisely the fears that motivated the Commerce Clause's creation. As James Madison

explained, allowing States to restrict commerce and impose requirements on producers and suppliers beyond their borders “tends to beget retaliating regulations.” See James Madison, *Vices of the Political System of the United States*, in 2 Writings of James Madison 361, 363 (Gaillard Hunt ed., 1901). Alexander Hamilton likewise worried that, if allowed to “multip[y] and extend[ ],” “[t]he interfering and unneighborly regulations of some States” would become “serious sources of animosity and discord.” The Federalist No. 22 (Alexander Hamilton); see also Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1885–86 & n.29 (2011) (collecting other examples of the founders’ “references to the nation’s commercial woes, including discord among the states”); Letter from James Monroe to James Madison (July 26, 1785) (explaining that allowing the States to pursue separate commercial policies “establish’d deep-rooted jealousies & enmities between them” which, if allowed to persist, “will become instrumental in their hands to impede & defeat those of each other”).<sup>2</sup>

For nearly 200 years, this Court and courts of appeals have heeded the framers’ concerns and prevented States from regulating beyond their borders, and acting in a way that burdens interstate commerce absent a sufficiently strong and legitimate local interest. See *Tennessee Wine & Spirits*, 139 S. Ct. at 2459 (summarizing the origins of this Commerce Clause concept); see also, e.g., *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662 (1981); *Legato Vapors*, 847 F.3d 825. The Ninth Circuit’s decision

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<sup>2</sup> Available at <https://bit.ly/2SWWhGD>.

breaks with that long tradition, and the Court should grant the petition to reverse it.

**CONCLUSION**

For the foregoing reasons, as well as those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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