No. 21-468

# In the Supreme Court of the United States

NATIONAL PORK PRODUCERS COUNCIL, *et al.*,

*Petitioners*,

v.

KAREN ROSS, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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December 8, 2021

## QUESTION PRESENTED

In Proposition 12, California's voters imposed a restriction on the in-state sale of certain types of pork, veal, and eggs, regardless of whether the products originate in-state or out-of-state. The question presented is:

Whether that in-state sales restriction violates the dormant Commerce Clause, either because it has impermissible extraterritorial effects or because it imposes a burden on interstate commerce clearly excessive in relation to its putative local benefits.

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## STATEMENT

### A. Legal Framework

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," this Court has "interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008).

As a general matter, "two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018). First, "state regulations may not discriminate against interstate commerce" unless they satisfy a form of heightened scrutiny. *Id.*; *see Davis*, 553 U.S. at 338. Second, state laws that "regulate[] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This *Pike* inquiry, in other words, does not resemble "judicial review of statutory wisdom [in] the fashion of *Lochner*." *Nat'l Paint Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (Easterbrook, J.). Indeed, "[s]tate laws frequently survive . . . *Pike*

scrutiny." *Davis*, 553 U.S. at 339; *see Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997).

A third principle this Court has occasionally articulated is that the dormant Commerce Clause renders a state law per se invalid if the law "controls commerce occurring wholly outside the boundaries" of the enacting State. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The Court has "used [this] extraterritoriality principle to strike down state laws only three times." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1172 (10th Cir. 2015) (Gorsuch, J.). Each time, the Court invalidated price-control or price-affirmation statutes that regulated sales in other States. *See id.* at 1172-1173. In *Brown–Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), for example, "New York law required liquor merchants to list their prices once a month and affirm that the prices they charged in New York were no higher than those they charged in other states." *Epel*, 793 F.3d at 1172. That scheme had an impermissible extraterritorial reach because "a seller couldn't lower price[s] elsewhere without first doing so in New York." *Id.*; *see also Healy*, 491 U.S. at 339 (similar); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (invalidating State's attempt to establish a "scale of [milk] prices for use in other states").

The Court has cautioned, however, against application of its "Commerce Clause decisions [to] prohibit the States from exercising their lawful sovereign powers in our federal system." *Wayfair*, 138 S. Ct. at 2096. In particular, the Court has recognized that a regulation of in-state conduct does not become "impermissibl[y] extraterritorial" merely because it produces "effects" beyond a State's borders. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). In

light of that principle, lower courts have consistently rejected extraterritoriality challenges to state "standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety)"—including where such standards have "ripple effects . . . both in-state and elsewhere." *E.g.*, *Epel*, 793 F.3d at 1173; *see infra* pp. 13-14 & n.12.

### B. Factual and Procedural Background

1. Section 25990(a) of the California Health and Safety Code, adopted by the State's voters as Proposition 12 in November 2018, directs that farm owners and operators in California must not "knowingly cause" certain animals "to be confined in a cruel manner." In-state owners and operators must ensure, for example, that the approximately 8,000 breeding pigs raised in California are not "prevent[ed] . . . from lying down, standing up, fully extending [their] limbs, or turning around freely." Cal. Health & Safety Code § 25991(e)(1); *see* Pet. App. 25a. That standard took effect in 2018. Beginning on January 1, 2022, in-state owners and operators must provide breeding pigs with at least "24 square feet of usable floorspace." Cal. Health & Safety Code § 25991(e)(3). A stall or enclosure with internal dimensions of six feet by four feet, for example, would satisfy that standard. A typical breeding pig is about six feet long and 23 inches wide when lying down.[1]

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[1] McClone, Nat'l Pork Bd., *Gestation Stall Design and Space: Care of Pregnant Sows in Individual Gestation Housing* 2 & tbl. 1 (2013), https://porkcdn.s3.amazonaws.com/sites/all/files/documents/2013SowHousingWebinars/Gesatation%20Stall%20Design%20and%20Space.pdf (last visited Dec. 7, 2021).

Proposition 12 also prohibits "the sale within the state" of certain pork, veal, and egg products, including pork from breeding pigs that were confined with inadequate floorspace, as well as meat from their "immediate offspring." Cal. Health & Safety Code § 25990(b)(2). Since 2018, that restriction has barred the in-state sale of meat from breeding pigs that lacked sufficient space to lie down, stand up, fully extend their limbs, or turn around freely, as well as meat from the offspring of such pigs. *Id.*; *see id.* § 25991(e)(1). As of January 1, 2022, it will likewise bar the in-state sale of meat from breeding pigs (and their offspring) denied at least 24 square feet of usable floorspace. *Id.* § 25990(b)(2); *see id.* § 25991(e)(3). These sales restrictions apply to all "whole pork meat" sold to purchasers in California, no matter its origin. *Id.* § 25990(b)(2).[2]

The ballot arguments submitted in support of Proposition 12 explained that the statute would address especially "inhumane and unsafe" meat production practices. Voter Information Guide: Arguments and Rebuttals 70 (Nov. 6, 2018).[3] One such practice, according to those ballot materials, is the use of "tiny, metal cage[s]" to house breeding pigs. *Id.* Called "gestation crates" or "gestation stalls," these structures are often so small that a breeding pig "can barely move." *Id.*[4] The ballot materials also explained

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[2] Under the statute's exceptions, breeding pigs may be provided less space for purposes of medical research, veterinary care, transportation, slaughter, or animal husbandry, among other things. *See id.* § 25992.

[3] *Available at* https://vigarchive.sos.ca.gov/2018/general/pdf/ (last visited Dec. 7, 2021).

[4] Because many "sows are wider" than the 24 inch width of a

that Proposition 12 would "likely result in an increase in prices for . . . pork" for California consumers. Voter Information Guide: Analysis by the Legislative Analyst 69 (Nov. 6, 2018).[5] Nearly 63 percent of voters nonetheless approved the measure. Pet. App. 196a.

While most breeding pigs in the United States are currently housed in gestation crates for almost their "entire [lives] . . . produc[ing] litter after litter," industry practice is rapidly changing in response to market demands. Jackson & Marx, *Pork Producers Defend Gestation Crates, But Consumers Demand Change*, Chicago Tribune, Aug. 3, 2016.[6] Many businesses have vowed "to stop buying pork from producers that hold breeding sows in crates." *Id.* The corporate parent of Burger King, for example, recently announced that it is "committed to eliminating the use of gestation crates for housing pregnant sows" in Burger King's global supply chain, and will achieve compliance "in the US . . . by 2022."[7] McDonald's, Kmart, Safeway, and other large retailers have made similar commitments.[8] And a number of States have

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typical gestation crate, sows' "teats, udder, and legs" will often "extend into the neighbor's space," and their "bod[ies] will be compressed while [they are] lying down"—if they can lie down at all. McClone, Nat'l Pork Bd., *supra*, at 2.

[5] *Available at* https://vigarchive.sos.ca.gov/2018/general/pdf/ (last visited Dec. 7, 2021).

[6] *Available at* https://www.chicagotribune.com/investigations/ct-pig-farms-gestation-crates-met-20160802-story.html (last visited Dec. 7, 2021).

[7] Restaurant Brands Int'l, *Animal Welfare Policies: Sow Housing*, https://www.rbi.com/sustainability/responsible-sourcing/animal-welfares/ (last visited Dec. 7, 2021).

[8] Jackson & Marx, *supra*; *see also* U.S. Humane Society, *Food*

also taken steps to phase out the use of gestation crates by pork producers within their borders. *See, e.g.*, Fla. Const. art. X, § 21 ("It shall be unlawful for any person to confine a pig during pregnancy in an enclosure . . . in such a way that she is prevented from turning around freely.").

2. In October 2019, nearly a year after the voters enacted Proposition 12, the North American Meat Institute (a trade group representing meat packers and processors) sought a preliminary injunction barring enforcement of the in-state sales restriction on dormant Commerce Clause grounds. The district court denied the requested relief, emphasizing that the "in-state sales prohibition applies equally to animals raised and slaughtered in California as . . . to animals raised and slaughtered in any other state." *N. Am. Meat Inst. v. Becerra*, 420 F. Supp. 3d 1014, 1025 (C.D. Cal. 2019). The court also held that Proposition 12 lacks any impermissible extraterritorial reach because its "in-state sales prohibition only applies to 'in-state conduct'—sales of meat in California—not conduct that takes place 'wholly outside' California." *Id.* at 1031. And the plaintiff failed to show that the in-state sales restriction imposes a "burden . . . on interstate commerce [that] is clearly excessive in relation to the putative local benefits." *Id.* at 1032 (quoting *Pike*, 397 U.S. at 142) (brackets omitted). The court of appeals affirmed, *see* 825 F. App'x 518, 519 (9th Cir. 2020), and this Court denied certiorari, *see* No. 20-1215 (June 28, 2021).

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*Company Policies on Gestation Crates*, https://www.humanesociety.org/sites/default/files/archive/assets/pdfs/farm/gestation-crate-policies.pdf (last visited Dec. 7, 2021).

3. In December 2019, not long after the complaint in *North American Meat* was filed, the petitioners here (the National Pork Producers Council and the American Farm Bureau Federation) brought a similar dormant Commerce Clause challenge to Proposition 12's in-state sales restriction on pork.

Dismissing petitioners' complaint, the district court explained that "Proposition 12 applies to . . . California producers just the same as out-of-state producers" and "does not regulate extraterritorially." Pet. App. 31. It "precludes the sale within California of products produced by hogs not raised in conformity with the requirements of Proposition 12, regardless of where the hogs are raised." *Id.* at 29a. The court also held that the petitioners failed to adequately allege a *Pike* claim. *Id.* at 31a-35a.

The court of appeals affirmed. In an opinion authored by Judge Ikuta, the court stressed that petitioners have "not allege[d] that Proposition 12 has a discriminatory effect," Pet. App. 17a, or that it "discriminates against out-of-state interests," *id.* at 5a. The court also concluded that Proposition 12 "regulate[s] only conduct in the state, including the sale of products in the state." *Id.* at 10a. While acknowledging petitioners' allegation that, "as a practical matter," certain pork producers will opt to make changes to their out-of-state production or distribution methods in response to Proposition 12, *id.* at 9a, the court explained that such "indirect," "upstream effects" cannot, on their own, render a law invalid under the dormant Commerce Clause, *id.* at 10a; *see id.* at 14a.

The court made clear, however, that it was "not . . . narrow[ing] the extraterritoriality principle to only price-control and price-affirmation cases." Pet. App. 9a. As the court explained, its precedents "have

recognized a 'broad[er] understanding of the extraterritoriality principle.'" *Id.* at 9a-10a. The court pointed, for example, to the en banc decision in *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015), which struck down a "law that required California residents to pay [a five percent royalty on] out-of-state art sale transactions to the artists." Pet. App. 13a. The court also referenced *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615-616 (9th Cir. 2018), which enjoined "a California law requiring a company . . . to [meet] California requirements" when disposing of medical waste in other States, Pet. App. 13a, and *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993), which invalidated a Nevada law that had the practical effect of regulating NCAA disciplinary proceedings in other States, *see* Pet. App. 13a. Unlike those laws, Proposition 12's sales restriction "regulates only the in-state sales of 'products that are brought into or are otherwise within the borders of California.'" *Id.* at 14a (brackets omitted).

The court also affirmed the dismissal of petitioners' *Pike* claim. Petitioners' allegation that "Proposition 12 makes pork production more expensive" was insufficient, on its own, to state a claim that the measure imposes a clearly excessive burden on interstate commerce. Pet. App. 18a; *see id.* at 16a-19a.

## ARGUMENT

In 2018, nearly two-thirds of California voters approved Proposition 12, adopting certain minimum standards for pork and other animal products sold within the State. Most of those standards have already gone into effect, including the restriction on the sale of pork derived from breeding pigs not provided enough space to stand up or turn around freely.

The remaining standards will become effective on January 1, 2022. Every lower court to consider a dormant Commerce Clause challenge to Proposition 12 has rejected it; and this Court recently denied a petition arising from the lower courts' refusal to preliminarily enjoin the measure. *N. Am. Meat Inst. v. Bonta*, No. 20-1215 (June 28, 2021). The petition here presents the same core legal issues and alleges the same circuit conflicts. Here again, the allegations of a circuit conflict are unpersuasive, and petitioners identify no other persuasive reason for the Court to grant review. Indeed, the Court has repeatedly denied petitions raising similar dormant Commerce Clause questions. *Infra* p. 16. The same result is warranted here.

## I. PETITIONERS' EXTRATERRITORIALITY CHALLENGE DOES NOT WARRANT REVIEW

Petitioners principally contend that the decision below "illustrates a split among the circuits" on the scope of the dormant Commerce Clause extraterritoriality doctrine, Pet. 26, and that the court of appeals effectively rendered the doctrine "dead letter" by refusing to "consider the 'practical effect' of a regulation," *id.* at i, 24. Both contentions are wrong. Neither of the circuit conflicts alleged by petitioners is actually presented here; in any event, both are illusory. And while the court of appeals plainly recognized that state laws may, in some circumstances, have impermissibly extraterritorial "'practical effect[s],'" *e.g.*, Pet. App. 7a, the court properly concluded that the specific features of Proposition 12 do not have any such effects or otherwise pose extraterritoriality concerns.

1. Petitioners allege two circuit conflicts, but fail to identify any genuine division of authority implicated by this case.

a. This case provides no occasion to consider petitioners' allegation that the Tenth Circuit has split with its sister circuits and "limit[ed] application of the extraterritoriality doctrine" to "price-control and price-affirmation cases." Pet. 26 (citing *Energy & Env. Legal Inst. v. Epel*, 793 F.3d 1169, 1174-1175 (10th Cir. 2015) (Gorsuch, J.)). The Ninth Circuit has decidedly "*not* . . . narrowed the extraterritoriality principle" in that way. Pet. App. 9a (emphasis added). To the contrary, the court below rejected petitioners' dormant Commerce Clause challenge even under the "'broad[er] understanding of the extraterritoriality principle'" that petitioners urge—an understanding that the court has likewise applied in a series of published decisions that petitioners fail to cite. *Id.* at 9a-10a; *see id.* at 13a (collecting cases).

In *Sam Francis Foundation v. Christie's, Inc.*, 784 F.3d 1320 (9th Cir. 2015), for example, the en banc court struck down a California statute that was not a price-control or price-affirmation law. The statute at issue required a "seller of fine art to pay the artist a five percent royalty if 'the seller resides in California.'" *Id.* at 1322. The court "easily conclude[d] that the royalty requirement, as applied to out-of-state sales by California residents, violate[d] the dormant Commerce Clause" to the extent it governed "sales [with] no necessary connection with the state other than the residency of the seller." *Id.* at 1323. "For example," the court explained, "if a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the Act requires the payment of a royalty to the North Dakota artist—even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California." *Id.* The court held that

application of the statute to such out-of-state sales would impermissibly regulate "wholly out-of-state conduct." *Id.* at 1324.

Similarly, in *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 615-616 (9th Cir. 2018), the court affirmed an injunction blocking California's application of waste disposal standards to medical waste disposed in other States. The court stressed that "[t]here is nothing to indicate" that such disposal "had any effect whatsoever in California." *Id.* at 616. And in *NCAA v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993), the court held that Nevada could not validly require the NCAA to apply heightened procedural requirements to disciplinary proceedings involving Nevada players and institutions because the "practical effect" would be that the "NCAA would have to use [Nevada's procedural rules] in enforcement proceedings in every state in the union." The court explained that, if it were more difficult for the NCAA to discipline Nevada-based players and institutions than players and institutions in other States, the NCAA could not "accomplish its fundamental goal[]" of providing uniform rules under which teams can compete on a fair, equal basis. *Id.*; *see id.* at 635, 638-640 (discussing the NCAA's unique need for "national uniformity" in light of its goal of promoting fairness and sportsmanship in college athletics). If the Ninth Circuit had "limit[ed] application of the extraterritoriality doctrine" to "price-control and price-affirmation cases," Pet. 26, then *Sam Francis*, *Sharpsmart*, and *NCAA* would have each turned out differently.

Petitioners nonetheless suggest that there is "intra-circuit confusion" in the Ninth Circuit on the question whether the extraterritoriality doctrine is limited to "price-control and price-affirmation cases." Pet. 26.

But even if the court intended to impose such a limit in the single decision cited by petitioners, *see Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013), no such limit could have survived the en banc ruling in *Sam Francis*, 784 F.3d at 1322-1324, where the court made clear that the doctrine is *not* limited to price-control and price-affirmation cases.[9] In any event, it is "the task of [the] Court of Appeals," not this Court, to reconcile any intra-circuit disagreements. *E.g.*, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).[10]

b. Petitioners also contend that the court of appeals created a circuit conflict by treating the extraterritoriality doctrine as "inapplicable when a state law indirectly regulates wholly out-of-state conduct, regardless of the law's practical effect." Pet. 27; *see id.* at 16. But the decision below did no such thing. It expressly acknowledged this Court's recognition that a law *could* violate the dormant Commerce Clause if it had the "'practical effect'" of regulating commerce

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[9] The *Éleveurs* court emphasized that the challenged statute was not a "'price control or price affirmation statute[].'" 729 F.3d at 951 (quoting *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)). But the court also discussed other ways that a law can have impermissible "extraterritorial effects." *Id.* at 950 (citing *NCAA*, 10 F.3d at 638-639); *see* Pet. App. 10a-11a.

[10] For much the same reason, the alleged circuit conflict would not merit review even in a case arising from the Tenth Circuit. While the court suggested in *Epel*, 793 F.3d at 1174-1175, that the extraterritoriality doctrine is limited to pricing regulations, Tenth Circuit precedent is not entirely consistent on that score. *See*, *e.g.*, *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999); *see also* Br. of Indiana *et al.* as Amici Curiae 8 ("even the Tenth Circuit has applied the extraterritoriality doctrine outside the price-control context"); *N. Am. Meat* Pet. 18-19 (similar).

occurring wholly out-of-state. Pet. App. 7a (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986)); *see id.* (citing *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337-339 (1989)). It likewise reaffirmed the Ninth Circuit's decision in *NCAA*, 10 F.3d at 639, which (as discussed above, *supra* p. 11) struck down a Nevada statute based on its "practical effect" of regulating wholly out-of-state conduct. *See* Pet. App. 13a.[11]

What the court of appeals instead recognized is that an in-state sales restriction (such as Proposition 12) does not have impermissible extraterritorial reach merely because some out-of-state businesses will opt to modify their production or distribution practices in order to serve the enacting State's market. *See* Pet. App. 7a-8a, 10a-14a. That determination closely tracks this Court's analysis in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 669 (2003). *Supra* pp. 2-3.

It also makes good sense. As then-Judge Gorsuch explained, a rule providing that such indirect, upstream effects are sufficient to render a state law invalid under the dormant Commerce Clause would "risk serious problems of overinclusion." *Epel*, 793 F.3d at 1175. The "reality is that the States frequently

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[11] *See also Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) ("focus[ing] . . . on the 'practical effect' of [a] statute" in conducting extraterritoriality inquiry); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1101 (9th Cir. 2013) ("'critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state'"); *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 469 (9th Cir. 2001) ("we must determine the 'practical effect' of the Ordinance" for purposes of the extraterritoriality doctrine).

regulate activities that occur entirely within one State but that have effects in many." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring). States routinely adopt "standards for products sold in-state (standards concerning, for example, quality, labeling, health, or safety)" that have "ripple effects . . . both in-state and elsewhere"—including, at times, effects on how out-of-state businesses opt to structure their production or distribution practices with respect to products sold in the enacting State's market. *Epel*, 793 F.3d at 1173; *see* Pet. App. 7a-8a, 14a. As courts throughout the Nation have recognized, that kind of upstream, "practical effect" does not render a state law invalid under the dormant Commerce Clause extraterritoriality doctrine.[12]

Petitioners suggest that the Seventh Circuit stands alone in holding otherwise. *See* Pet. 27-28. But the Seventh Circuit has repeatedly rejected dormant Commerce Clause challenges to in-state sales restrictions. Most recently, it upheld an Indiana law

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[12] *See, e.g.*, *Epel*, 793 F.3d at 1170 (in-state sales restriction "requir[ing] electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources"); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 632, 647 (6th Cir. 2010) ("regulation prohibit[ing] dairy processors from making claims about the absence of artificial hormones in their milk products" on labels of products sold in-state); *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 41 (1st Cir. 2005) (Maine statute barring manufacturers from imposing certain surcharges on in-state sale of automobiles); *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001) (statute that "only regulates the sale of livestock sold in Missouri"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) (in-state sales restriction requiring lightbulbs sold in-state to bear certain labels); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 791, 794 (8th Cir. 1995) ("Minnesota law prohibiting the sale of petroleum-based sweeping compounds" within the State).

barring the in-state sale of aborted fetal tissue, even though "much of the tissue [the plaintiff researchers sought] to use [came] from other states" and the statute was plainly motivated by ethical considerations about the source of the tissue. *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 542-543 (7th Cir. 2019). Similarly, in *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 503 (7th Cir. 2017), the court held that "Chicago ha[d] not attempted to regulate beyond its borders" by enacting an ordinance barring the sale of dogs bred at puppy mills, whether bred in- or out-of-state. *See also Nat'l Paint Coatings v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (upholding Chicago ban on the sale of spray paint, even though "[m]ost of the spray paint sold in Chicago comes from outside Illinois").

The sole Seventh Circuit decision cited by petitioners, *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 833 (7th Cir. 2017), is not to the contrary. Far from invalidating an in-state sales restriction based on impermissible out-of-state "practical effect[s]," Pet. 27, the court struck down a statute "impos[ing] *truly direct* and burdensome state regulation of commerce beyond the state's boundaries," 847 F.3d at 829 (emphasis added). The Indiana law at issue, which was "obvious[ly]" motivated by "protectionist purposes," *id.* at 833, imposed "astoundingly specific" requirements directly regulating the operations of out-of-state vaping manufacturers—including rules "go[ing] so far as to require [each] manufacturer to contract with an independent security firm rather than provide the security services in-house," *id.* at 828. The court expressly distinguished state laws that—like Proposition 12—merely impose "requirements for in-state sales." *Id.* at 832. And it recognized that an in-state

sales regulation is not invalid simply because an "indirect effect[]" of the law is that out-of-state businesses opt "to modify their production and distribution systems" to supply the enacting State's market. *Id.* (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001)). That is precisely what the court of appeals recognized in this case. *See, e.g.*, Pet. App. 10a-11a, 14a.

And while petitioners nonetheless perceive a need for "this Court's intervention" to address the application of the dormant Commerce Clause extraterritoriality doctrine to "laws like Proposition 12," Pet. 20, this Court has recently and repeatedly denied certiorari when asked to consider whether various types of state sales restrictions violate that doctrine—including Proposition 12 itself. *See, e.g.*, *N. Am. Meat Inst. v. Bonta*, No. 20-1215 (2021); *Frosh v. Ass'n for Accessible Medicines*, No. 18-546 (2019); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, No. 18-881 (2019); *Sam Francis Found. v. Christie's, Inc.*, No. 15-280 (2016); *Energy & Env't Legal Inst. v. Epel*, No. 15-471 (2015); *Rocky Mountain Farmers Union v. Corey*, No. 13-1148 (2014); *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, No. 13-1313 (2014); *Snyder v. Am. Beverage Ass'n*, No. 12-1221 (2013); *cf. Missouri v. California*, No. 148, Original (2019); *Indiana v. Massachusetts*, No. 149, Original (2019).[13]

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[13] The petition in *North American Meat* came to this Court "in an interlocutory posture" following the affirmance of a preliminary injunction, *N. Am. Meat* Br. in Opp. 7, but the petitioner emphasized that its challenge to the extraterritoriality rulings of the courts below "turned purely on the legal standards that apply in the Ninth Circuit, and not on any factual disputes or discretionary considerations," *N. Am. Meat* Reply Br. 10 n.3.

2. Petitioners contend that, even if no circuit conflict exists, the Court should nonetheless grant plenary review because "the Ninth Circuit's decision eviscerates . . . the extraterritoriality doctrine" and renders it "dead letter." Pet. 20, 26. That too is wrong. The decision below identified a number of examples of laws that were invalid for either "directly regulat[ing] transactions conducted entirely out of state," Pet. App. 13a, or having the "'practical effect'" of doing so, *id.* at 7a.

As to direct extraterritorial regulation, the court cited the laws struck down in *Legato*, 847 F.3d at 833, *Sam Francis*, 784 F.3d at 1323, and *Sharpsmart*, 889 F.3d at 612-613. *Supra* pp. 10-11, 15-16; Pet. App. 13a. As to impermissible "practical" effects beyond the borders of the regulating State, the court pointed to this Court's decisions in *Brown-Forman* and *Healy*, as well as its own prior decision in *NCAA*. *See* Pet. App. 6a-7a, 13a. In *Brown-Forman* and *Healy*, this Court invalidated statutes barring certain in-state sales if the seller offered cheaper prices in other States—that is, statutes tying prices for in-state sales to prices for out-of-state sales in a way that had the "undeniable effect of controlling" out-of-state prices. *Healy*, 491 U.S. at 337; *see id.* at 337-338; *Brown-Forman*, 476 U.S. at 580; Pet. App. 6a-7a. In *NCAA*, the court of appeals invalidated a Nevada statute that, due to the NCAA's unique need for "national uniformity in . . . regulation," 10 F.3d at 640, effectively "force[d] the NCAA to regulate [its disciplinary proceedings] in every state according to Nevada's procedural rules," *id.* at 639; *see supra* p. 11.

Proposition 12 does nothing of the kind. Its in-state sales restriction does not "directly regulate transactions conducted entirely out of state." Pet. App.

13a. Nor does it have any impermissible "practical" effects: Unlike the laws invalidated in *Brown-Forman* and *Healy*, Proposition 12 "regulates only the in-state sales of 'products that are brought into or are otherwise within the borders of California.'" *Id.* at 14a (brackets omitted). It is entirely indifferent to the ways products sold in other States are priced or produced. *Id.* at 10a-14a. And unlike the NCAA, *supra* pp. 11, 17, the pork industry is no more dependent on "national uniformity in regulation" than the many other industries that distribute their products nationwide, Pet. App. 14a (internal quotation marks omitted); *see id.* at 14a-16a.

Petitioners suggest otherwise, asserting that it will be "impossible" for pork producers to segregate their operations and produce California-specific products that comply with Proposition 12. Pet. 17; *see id.* at 2-3, 7, 24-26. But petitioners have not made any plausible allegation to that effect. They argued below that "'new' tracing methods would need to be developed" to serve California's market—not that such methods would be infeasible or even cost-prohibitive. C.A. Reply 26; *see* C.A. Excerpts of Record 85, 87-88. And a number of large businesses—including McDonald's, Burger King, and Safeway—have recently demanded that producers devise similar specialized supply chains. *See supra* p. 5.

Indeed, a number of pork producers and suppliers have publicly announced that they have taken steps to ensure that their products will continue to be sold lawfully in California when Proposition 12's last remaining restrictions take effect on January 1, 2022. The CEO of Tyson Foods, for example, recently assured its shareholders that the company will not

have difficulty "align[ing] suppliers" to produce Proposition 12-compliant pork and pork for other States "simultaneously." [14] Hormel Foods has similarly pledged to "continue to meet the needs of [its] consumers and customers throughout the state [of California]" without facing any "risk of material losses" from Proposition 12. [15] And other producers have reported that they are already "fully compliant with California's Proposition 12," *e.g.*, Niman Ranch, Release (Aug 19, 2020), https://www.nimanranch.com/press-releases/proposition-12-compliance/ (last visited Dec. 7, 2021), or even "exceed[ing] Proposition 12 standards," DuBreton, Release (Oct. 27, 2021), https://www.dubreton.com/en-us/news/dubreton-fully-compliant-with-the-california-proposition-12-requirements (last visited Dec. 7, 2021). [16]

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[14] Tyson Foods, *Third Quarter 2021 Earnings* 15 (Aug. 21, 2021), https://s22.q4cdn.com/104708849/files/doc_financials/2021/q3/08-11-21_Tyson-Foods-080921.pdf (last visited Dec. 7, 2021).

[15] Hormel Foods, *Hormel Foods Company Information About California Proposition 12* (Oct. 6, 2020), https://www.hormelfoods.com/newsroom/in-the-news/hormel-foods-company-information-about-california-proposition-12/ (last visited Dec. 7, 2021)

[16] *See also* Hatfield, *Our Pledge*, https://simplyhatfield.com/our-pledge (last visited Dec. 7, 2021) ("Hatfield plans to offer a variety of pork products across our portfolio of bacon, marinated, and fresh pork items that meet the 'Prop 12' . . . statutory requirements. Sows will be housed in pens that allow them to get up and turn around freely at all times, and have 24+ sq. ft. of usable floor space per sow."); Coleman, *Frequently Asked Questions: Claims and Certifications*, https://www.colemannatural.com/faqs/ (last visited Dec. 7, 2021) (under drop-down "Is Coleman Natural Pork Proposition 12 . . . Compliant?": Coleman "has product available that meets, and in some cases, exceeds

Petitioners' final extraterritoriality-related objection is that "California plans to send its agents out to inspect and certify" out-of-state pork operations. Pet. 17. As petitioners acknowledge, however, Proposition 12 does not expressly provide for such inspections; they are instead part of a tentative implementation regime discussed in "proposed regulations" released by the California Departments of Food and Agriculture and Public Health in May 2021. Pet. 6; *see* Pet. App. 12a n.2. If the final version of the regulations provides for similar inspections, petitioners will have an opportunity to bring a separate challenge to that (or any other) aspect of the regulations.[17] But the scope of this suit is limited to Proposition 12 alone.

## II. PETITIONERS' *PIKE* CLAIM DOES NOT WARRANT REVIEW

Petitioners also ask the Court to grant certiorari based on their contention that the court of appeals' *Pike* balancing analysis "was error." Pet. 29; *see id.* at 28-32. But they do not argue that the lower court's case-specific application of *Pike* implicates any circuit conflict. Nor do they provide any other basis for the Court to review this issue—which, in petitioners' view, turns on a number of fact-intensive allegations concerning the "complex, multi-stage pork production process." Pet. 13; *see, e.g.*, *id.* at 7-13, 31.

Petitioners contend that Proposition 12 will cause "dramatic economic effects" through "disruptions to an

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California's Proposition 12.")

[17] Any such challenge would likely fail in any event because "out-of-state inspection[s]" provide a valid means of enforcing a State's standards for products sold in-state. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 378 n.11 (1976); *see id.* at 373 (citing *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-355 (1951)).

economically and nutritionally important national industry." Pet. i, 32; *see id.* at 28-29. But as the court of appeals correctly recognized, Pet. App. 16a-19a, Proposition 12 does not resemble the laws at issue in the "small number of . . . cases" invalidating legislation on *Pike* grounds, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997). Moreover, this Court has refused to "accept . . . [the] notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." *E.g.*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978). If *Pike* invited constitutional challenges based merely on concerns that a law would be economically disruptive to a particular industry, the *Pike* balancing inquiry would resemble "judicial review of statutory wisdom [in] the fashion of *Lochner*." *Nat'l Paint*, 45 F.3d at 1131 (Easterbrook, J.). Such inquiries are "ill suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 92 (majority).

In any event, petitioners overstate the practical economic effects of Proposition 12. The sales restriction on products derived from breeding pigs unable to "turn[] around freely," Cal. Health & Safety Code § 25991(e)(1), became effective in 2018—over a year before petitioners filed this suit. *Supra* p. 3. Petitioners have not alleged that compliance with that restriction has caused "massive and costly alteration[s]" or "disrupt[ed] supply and demand nationwide." Pet. 2, 17. As to the rule requiring breeding pigs to receive 24 square feet of space before their meat (or the meat of their offspring) may be sold within California, the industry was already moving in that general direction well ahead of Proposition 12's

passage. As petitioner National Pork Producers Council explained in a 2012 statement and reiterated in the complaint here, "'[p]ork industry customers have expressed a desire to see changes in how pigs are raised'"—a desire that, by 2019, had already led 28 percent of the industry to convert from individual gestation stalls to group housing. Strom, *McDonald's Set to Phase Out Suppliers' Use of Sow Crates*, N.Y. Times, Feb. 14, 2012, at B2; *see* C.A. Excerpts of Record 91.[18] Moreover, as discussed above, a number of pork producers and suppliers have already publicly announced steps to ensure that their products may be lawfully sold in California after the upcoming January 1, 2022 effective date. *Supra* pp. 18-19.

Petitioners also assert that "Proposition 12 does not offer *any* legitimate justification to counterbalance [its] burdens" on interstate commerce. Pet. 30. There is nothing illegitimate or insubstantial, however, about the voters' expressed purpose of addressing "extreme methods of farm animal confinement" and potential "threat[s] [to] the health and safety of California consumers" (such as "risk[s] of foodborne illness"). Pet. App. 37a. States have long restricted the sale of certain animal products to "discourage [their] consumption" and "prevent complicity in a practice that [the State has] deemed cruel." *Éleveurs*, 729 F.3d

[18] Petitioners suggest group pens "generally provide 16 to 18 square feet of space per sow," rather than 24 square feet. Pet. 8. But petitioners have not plausibly alleged that the burden of providing an additional 6 to 8 square feet of space to certain breeding pigs (whose meat will be sold in California or whose offspring will produce meat sold in California) would be "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

at 952; *see United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty . . . has a long history in American law, starting with the early settlement of the Colonies.").[19]

And contrary to petitioners' suggestion (Pet. 30), the State has not declined to argue that Proposition 12 has a local health-related justification. Of course, this case was decided on a motion to dismiss and the briefing has focused on the sufficiency of the allegations in the complaint. *Supra* pp. 7-8. But the State has made clear that the voters acted reasonably in adopting Proposition 12 as a precautionary measure addressing any potential "threat[s] [to] the health and safety of California consumers." Pet. App. 37a; *see, e.g.*, C.A. Dkt. 68 at 2.[20] As Judge Wilkinson recently observed

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[19] *See, e.g.*, *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326, 330 (5th Cir. 2007) (discussing Texas statute barring "sale [of] horsemeat" for human consumption, regardless of where the meat was produced); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 553 (7th Cir. 2007) (discussing similar statute in Illinois); Ga. Code Ann. § 26-2-160 (barring "sale for human consumption [of] any dog meat," whether produced in- or out-of-state).

[20] *See also* Cal. Dep't of Food and Agriculture, Addendum to Initial Statement of Reasons 2 (Dec. 2, 2021), https://www.cdfa.ca.gov/ahfss/pdfs/regulations/ACP15day-CommentPeriodDocuments.pdf (making clear that nothing in the Department's proposed rulemaking documents was intended to "suggest . . . that it was unreasonable for California's voters to pass the Proposition 12 initiative as a precautionary measure to address any potential threats to the health and safety of California consumers"); *cf. id.* at 3 (clarifying that the Department's prior statement about the effects of Proposition 12 on pig mortality—a statement quoted at Pet. 13—was "written in the context of estimating 'potential' economic impacts, not as a definitive statement on breeding pig health impacts of Proposition 12 implementation").

in a case involving cruel confinement practices at a hog production facility, "it is past time to acknowledge the full harms that the unreformed practices of hog farming are inflicting." *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 977 (4th Cir. 2020) (Wilkinson, J., concurring). Close confinement may, for example, "lead[] to the 'increased risk of the spread of disease' between hogs," which can in turn create threats to human health. *Id.* at 980. The voters did not offend the Constitution by addressing those and other concerns through an evenhanded restriction on the in-state sale of pork products.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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December 8, 2021